TEXAS REGISTER

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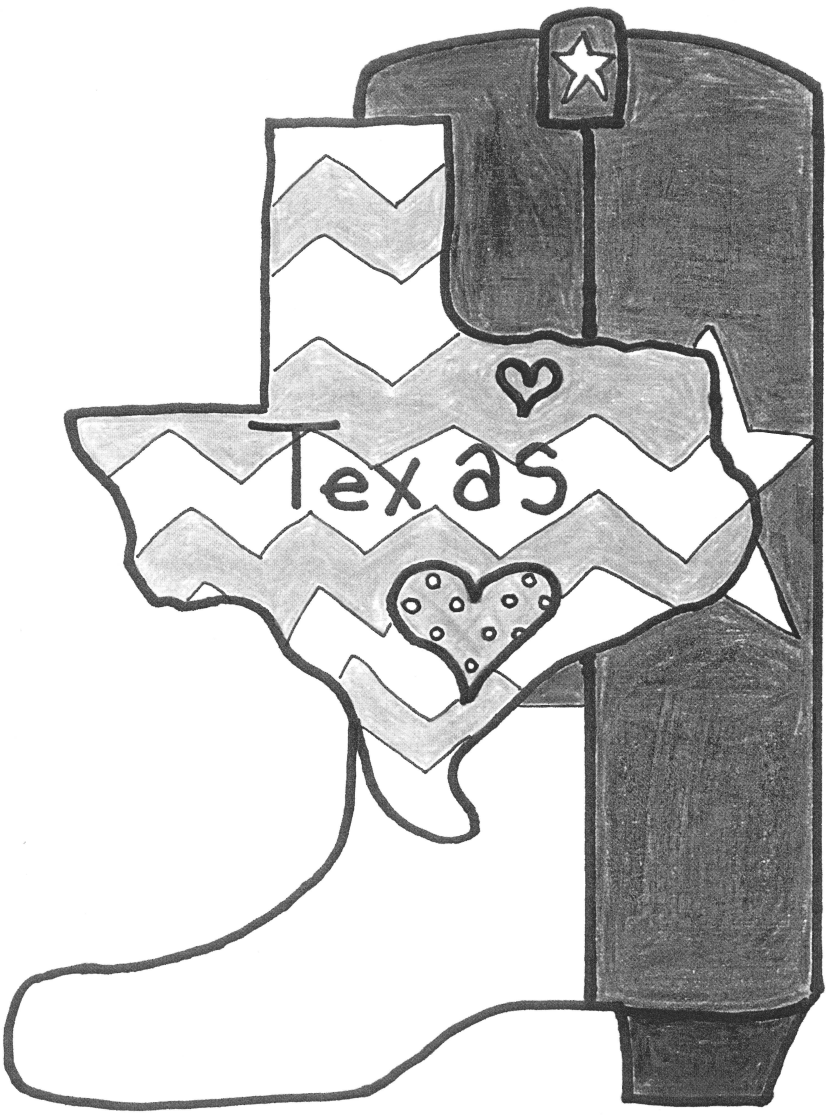
In This Issue

WITHDRAWN RULES

ADOPTED RULES


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 December 7, 2022

Appointed to be the Chief Executive and Public Counsel of the Office of Public Utility Counsel effective December 19, 2022, for a term to expire February 1, 2023, Courtney K. Hjaltman of Austin, Texas (replacing Lori A. Cobos of Austin, who resigned).

Appointments for December 8, 2022

Appointed to the Texas Commission of Licensing and Regulation for a term to expire February 1, 2027, Sujeeth Draksharam of Sugar Land, Texas (replacing Helen L. Callier of Kingwood, whose term expired).

Appointments for December 9, 2022

Appointed to the Texas School Safety Center Board for a term to expire February 1, 2023, Noe E. Perez of Laguna Vista, Texas (replacing Lizeth Cuellar Olivarez of Laredo, who resigned).

Appointments for December 12, 2022

Appointed to the Texas Water Development Board effective January 2, 2023, for a term to expire February 1, 2023, L'Oreal Stepney of Pflugerville, Texas (replacing Kathleen T. Jackson of Beaumont, who resigned).

Appointments for December 13, 2022

Appointed to the Southern Regional Education Board for a term to expire June 30, 2023, Kendall L. Baker, D.D. (replacing Pedro Martinez of San Antonio).

Appointed to the Southern Regional Education Board for a term to expire June 30, 2026, Michael H. "Mike" Morath of Austin, Texas (Mr. Morath is being reappointed).

Greg Abbott, Governor

TRD-202205014

♦ ♦ ♦

Proclamation 41-3944

TO ALL TO WHOM THESE PRESENTS SHALL COME:

WHEREAS, I, GREG ABBOTT, Governor of the State of Texas, issued a disaster proclamation on March 18, 2022, as amended and renewed in a number of subsequent proclamations, certifying that the wildfires which began on February 23, 2022, posed an imminent threat of widespread or severe damage, injury, or loss of life or property in Andrews, Aransas, Archer, Bee, Bell, Blanco, Borden, Bosque, Brewster, Brooks, Brown, Cameron, Coke, Coleman, Comanche, Concho, Cooke, Crane, Crockett, Culberson, Dawson, Dimmit, Duval, Eastland, Ector, Edwards, Erath, Gaines, Garza, Grayson, Hemphill, Hidalgo, Hood, Howard, Hudspeth, Jeff Davis, Jim Hogg, Jim Wells, Kenedy, Kimble, Kleberg, Live Oak, Martin, Mason, Maverick, McCulloch, Medina, Menard, Midland, Nueces, Palo Pinto, Parker, Pecos, Potter, Presidio, Randall, Reagan, Real, Refugio, Roberts, Runnels, Starr, Taylor, Terrell, Tom Green, Upton, Wichita, Willacy, Williamson, Winkler, Wise, Zapata, and Zavala counties; and

WHEREAS, those same conditions continue to exist in these 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 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.

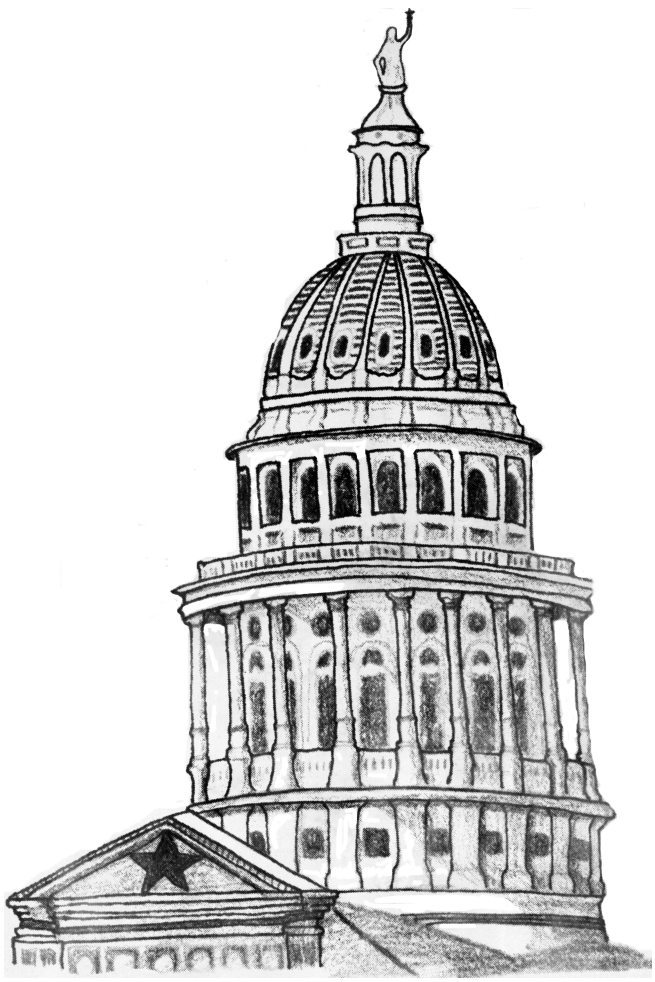
In accordance with the statutory requirements, copies of this proclamation shall be filed with the applicable authorities.

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 13th day of December, 2022.

Greg Abbott, Governor

TRD-202205015

♦ ♦ ♦



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.)

Request for Opinions

RQ-0489-KP

Requestor:

The Honorable Wes Mau

Hays County Criminal District Attorney

712 South Stagecoach Trail, Suite 2057

San Marcos, Texas 78666

Re: Questions related to the enactment of a municipal ordinance purporting to eliminate the enforcement of certain drug laws within the municipality (RQ-0489-KP)

Briefs requested by January 9, 2023

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

TRD-202205011

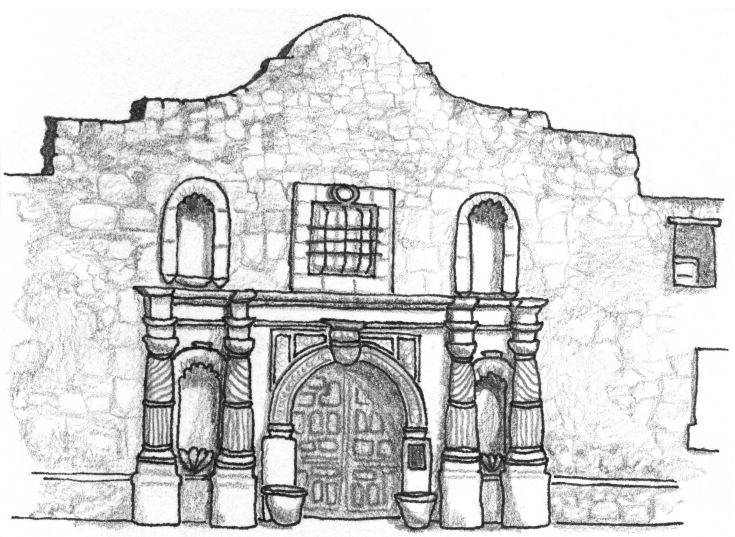
Austin Kinghorn

General Counsel

Office of the Attorney General

Filed: December 13, 2022

♦ ♦ ♦



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

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

TITLE 4. AGRICULTURE

PART 1. TEXAS DEPARTMENT OF AGRICULTURE

CHAPTER 8. AGRICULTURAL HAZARD COMMUNICATION REGULATIONS

4 TAC §§8.1 - 8.12

The Texas Department of Agriculture (Department) proposes amendments to 4 Texas Administrative Code, Chapter 8 (Agricultural Hazard Communication Regulations), §8.1, General Provisions; §8.2, Definitions; §8.3, Agricultural Laborer; §8.4, Covered Employer; §8.5, Designated Representative; §8.6, Material Safety Data Sheet (MSDS); §8.7, Workplace Chemical List; §8.8, Crop Sheets; §8.9, Providing Protective Clothing, Equipment, and Devices; §8.10, Retaliation; §8.11, Training Program; and §8.12, Emergency Response.

The Department identified the need for the proposed amendments during its rule review of this chapter conducted pursuant to Section 2001.039 of the Texas Government Code, the adoption of which can be found in the Review of Agency Rules section of this issue.

The proposed amendments to §8.1 update a reference to legal authority to reflect codification, change references to the federal Worker Protection Standard and Code of Federal Regulations to be similar to their definitions in §8.2, remove an unnecessary abbreviation for Workplace Chemical List, update a reference to §8.6 to account for a proposed amendment to its title, update a reference to §8.11 on hiring requirements for covered employers, and change the term "title" to "chapter" as the term "chapter" is mainly used throughout Title 4, Part 1.

The proposed amendments to §8.2 remove an outdated reference to Chapter 125 of the Texas Agriculture Code (Code); update references to Chapter 76 of the Code, the federal Worker Protection Standard, and Texas A&M AgriLife Extension Service (AgriLife); remove unnecessary definitions for "distributor" and "workplace" as those terms are already defined in the Code, §125.002; remove an unnecessary definition for the Department as it is included in the general definitions for Title 4, Part 1, Chapter 1 of the Texas Administrative Code; correct spelling and grammatical errors, clarify internal references to this chapter; and update outdated language.

The proposed amendments to §8.3 revise outdated language, correct grammatical errors, and make editorial changes to language to improve the rule's readability.

The proposed amendments to §8.4 replaces specific references to quantities, such as "55 gallons or 500 pounds" of covered pesticide chemicals, to "threshold amount" as that phrase is already defined in this chapter, update outdated language, and correct spelling and grammatical errors.

The proposed amendments to §8.5 update and supplement language to clarify references for the public and stakeholders.

The proposed amendments to §8.6 add the phrase, "safety data sheet," and a corresponding acronym, "SDS," to refer to a material safety data sheet, make a conforming change to the rule's heading, and update outdated language.

The proposed amendments to §8.7 update references to the Code, §76.114, and §7.33 of Title 4, Part 1 of the Texas Administrative Code; replace references to material safety data sheets and associated acronym, MSDS, with the term, "safety data sheet," and associated acronym, "SDS," to reflect the most prevalent references used for the term; clarify references to the "Occupational Health and Safety Administration"; add language allowing covered employers to obtain workplace chemical list forms from the Department's website; clarify internal references to this chapter; update outdated language; correct grammatical errors; and make editorial changes to language to improve the rule's readability.

The proposed amendments to §8.8 revise language to reflect terms, which are defined in this chapter; update outdated language; correct grammatical errors; and make non-substantive editorial changes to language to improve the rule's readability.

The proposed amendments to §8.9 incorporate conforming changes to the replacement of the term, "material safety data sheets," with the term, "safety data sheet," and update outdated language.

The proposed amendments to §8.10 update outdated language and correct a typographical error.

The proposed amendments to §8.11 remove references to specific counties described as containing a hired farm labor work force of 2,000 or more to account for all counties that now meet this description; revise language to reflect terms, which are defined in this chapter; and update outdated language.

The proposed amendments to §8.12 incorporate conforming changes to reflect use of defined term, "threshold amount," correct grammatical errors, and update outdated language.

LOCAL EMPLOYMENT IMPACT STATEMENT: Mr. Perry Cervantes, Director of Environmental and Biosecurity Programs, has determined that the proposed amendments will not affect a local economy, so the Department is not required to prepare a local employment impact statement under Texas Government Code, §2001.022.

GOVERNMENT GROWTH IMPACT STATEMENT: Pursuant to Texas Government Code §2001.0221, Mr. Cervantes has pro-

vided the following Government Growth Impact Statement for the proposed amendments. For each year of the first five years the proposed amendments will be in effect:

1. the proposed amendments will not create or eliminate a government program;

2. implementation of the proposed amendments will not require the creation or elimination of existing employee positions;

3. implementation of the proposed amendments will not require an increase or decrease in future legislative appropriations to the Department;

4. the proposed amendments will not require an increase or decrease in fees paid to the Department;

5. the proposed amendments do not create a new regulation;

6. the proposed amendments will not expand, limit, or repeal an existing regulation;

7. the proposed amendments will not increase or decrease the number of individuals subject to the rules; and

8. the proposed amendments will not affect this state's economy.

FISCAL IMPACT ON STATE AND LOCAL GOVERNMENT: Mr. Cervantes has determined that for the first five-year period the proposed amendments are in effect, there will be no fiscal implications for the state or local governments as a result of enforcing or administering them.

PUBLIC BENEFITS AND PROBABLE ECONOMIC COST: Mr. Cervantes has further determined that for each year of the first five-year period the proposed amendments are in effect, the public benefit will be increased consumer protection through the improved readability and clarity of the rules. Mr. Cervantes has also determined that for each year of the first five-year period the proposed amendments are in effect, there will be no cost to persons who are required to comply with the proposed amendments.

FISCAL IMPACT ON SMALL BUSINESSES, MICRO-BUSINESSES, AND RURAL COMMUNITIES: The Department has determined there will be no adverse economic effect on small businesses, micro-businesses, or rural communities as a result of the proposed amendments, therefore preparation of an economic impact statement and a regulatory flexibility analysis, as detailed under Texas Government Code, §2006.002, is not required.

Written comments on the proposed amendments may be submitted by mail to Mr. Morris Karam, Assistant General Counsel, Texas Department of Agriculture, P.O. Box 12847, Austin, Texas 78711, or by email to morris.karam@texasagriculture.gov. Comments must be received no later than 30 days from the date of publication of the proposal in the *Texas Register.*

The amendments are proposed pursuant to Code, Section 125.002 (conferring rulemaking authority to the department to determine who falls under the definition of an agricultural laborer); Code, Section 125.006 (authorizing the department to promulgate rules to require chemical manufacturers to submit material safety data sheets for chemicals covered by Chapter 125 of the Code); Code, Section 125.009 (authorizing the Department by rule to determine to provide a pesticide training program for agricultural laborers in certain counties); Code, Section 125.010 (authorizing the Department by rule to determine certain groupings of crops constituting a single crop for the purpose of developing crop sheets); and Code, Section 125.014 (authorizing the Department to adopt rules and administrative procedures to carry out the purposes of Chapter 125).

The code affected by the proposed amendments is Texas Agriculture Code, Chapter 125.

§8.1. General Provisions.

(a) Purpose. The purpose of this chapter is to: [~~Purposes. The purposes of these regulations are:~~]

(1) [~~to~~] provide agricultural workers and their designated representatives with access to information regarding certain hazardous chemicals to which they may be exposed during their normal employment activities, during reasonably foreseeable emergency situations, or as a result of their close proximity to areas where those chemicals are used;

(2) [~~to~~] provide access to information regarding hazardous chemicals to certain emergency service organizations responsible for dealing with chemical hazards during emergency situations in close proximity to residential areas, to provide the department with access to information regarding chemicals covered by the Act and this chapter [~~these regulations~~], and to provide members of the community with information about hazardous chemicals used or stored in close proximity to their residences; and

(3) [~~to~~] provide treating medical personnel and authorized persons, including persons conducting epidemiological research, with access to information regarding chemicals covered by the Act and this chapter [~~these regulations~~].

(b) Compliance with the Hazard Communication Act. A covered employer shall comply with the requirements of the Act and this chapter except insofar as the Hazard Communication Act, Texas Health and Safety Code, Chapter 502 [~~Civil Statutes, Article 5182b~~], provides equivalent requirements and the covered employer is in compliance with those requirements.

(c) Compliance with WPS [~~the Federal Worker Protection Standard (WPS)~~]. The department, after review and comparison of the Act, this chapter [~~these regulations~~], and the WPS [~~Federal Worker Protection Standard, 40 Code of Federal Regulations (CFR), Part 170 (WPS)~~], has determined that the purpose of all these standards is to protect and communicate possible hazards to which agricultural laborers may be exposed in the workplace [~~work place~~]. A covered employer shall comply with the requirements of the Act and this chapter [~~these regulations~~]. However, if an employer covered by the Act and this chapter [~~these regulations~~] complies with applicable provisions of WPS and the following additional and more stringent requirements of this chapter [~~these regulations~~], the employer [~~they~~] will be considered to be in compliance with the Act and this chapter [~~these regulations~~]:

(1) recognizing the use of a designated representative by an agricultural laborer as provided for in the Act and §8.5 of this chapter [~~title~~] (relating to Designated Representative);

(2) complying with requirements regarding the compilation, maintenance, and provision of the Workplace Chemical List [~~(WCL)~~] and attachments as provided in §8.7 of this chapter [~~title~~] (relating to Workplace Chemical List);

(3) obtaining a Material Safety Data Sheet from manufacturers and distributors in accordance with §8.6 of this chapter [~~title~~] (relating to Material Safety Data Sheet [~~(MSDS)~~]);

(4) complying with §8.11(f)(3) [~~§8.11(e)(3)~~] of this chapter [~~title~~] (relating to Training Program) which provides that a covered employer may not refuse to hire a laborer solely because the laborer has not completed a training program or cannot produce a training card;

(5) providing and reading crop sheets to agricultural laborers in accordance with §8.8(b) of this chapter [~~title~~] (relating to Crop Sheets) in absence of training and if they do not have a training card or they request it; and

(6) complying with notification requirements to the local fire chief about chemicals stored for more than 72 hours as provided in §8.12 of this chapter [~~title~~] (relating to Emergency Response).

§8.2. Definitions.

In addition to the statutory definitions in the Act and general definitions for Title 4, Part 1 contained within Rule 1.1, the following words and terms, when used in this chapter, shall have the following meanings, unless the context clearly indicates otherwise.

(1) Act--The Agricultural Hazard Communication [~~Communications~~] Act, Texas [~~the~~] Agriculture Code, [~~Title 5, Subtitle G,~~] Chapter 125. [~~(Also known as the Agricultural Right To Know Act.)~~]

(2) - (4) (No change.)

[~~(5) Department--The Texas Department of Agriculture.~~]

(5) [~~(6)~~] Distribute--Offer for sale, hold for sale, sell, barter, or supply.

[~~(7) Distributor--Any business, other than a chemical manufacturer that supplies covered pesticide chemicals to other distributors or to purchasers.~~]

(6) [~~(8)~~] Employer--

(A) Any person who:

(i) operates an agricultural establishment;

(ii) contracts with the operator of an agricultural establishment in advance of, during, or after production to control or purchase a crop and uses a covered pesticide chemical on an agricultural or horticultural commodity in its unmanufactured state; or

(iii) either directly or indirectly recruits, solicits, hires, employs, utilizes, furnishes, or supervises agricultural laborers.

(B) The term "agricultural establishment" as used in this chapter means a business operation that uses paid agricultural laborers in the production of an agricultural or horticultural commodity in its unmanufactured state.

(C) In no event is a labor agent, crew leader [~~crewleader~~], or labor contractor considered to be an employer for purposes of [~~these regulations or~~] the Act or this chapter. Where a labor agent, crew leader [~~crewleader~~], or labor contractor is used, the employer is the person who uses or engages the services of the labor agent, crew leader [~~crewleader~~], or labor contractor.

(7) [~~(9)~~] EPA--United States Environmental Protection Agency.

(8) [~~(10)~~] Farm operator--The person responsible for the overall control and management of the crop.

(9) [~~(11)~~] Livestock--Beef and dairy cattle, hogs, sheep, goats, poultry of all kinds, horses, rabbits, bees, exotic game animals, and fur-bearing animals in captivity.

(10) [~~(12)~~] Medical emergency--Any health or safety related occurrence in which information concerning a covered pesticide chemical is needed for immediate treatment or diagnosis of an injury or illness that appears to have been caused or aggravated by exposure to agricultural chemicals.

(11) [~~(13)~~] Member of the community--Any individual who resides, is employed, attends school, or is a parent of a child attending school, is treated in a hospital, or resides, or is treated in a nursing home within a one-quarter of a mile [~~1/4-mile~~] radius of a covered employer's work area.

(12) [~~(14)~~] Migrant work--Work performed by an individual who is required to be absent overnight from that individual's [~~his~~] permanent place of residence.

(13) [~~(15)~~] Nursery worker--

(A) A laborer employed in a nursery operation, whether licensed or unlicensed, who is engaged in the following activities:

(i) sowing seeds and otherwise propagating shrubs, vines, flowers, and fruit, nut, shade, vegetable, and ornamental plants or trees;

(ii) handling such plants to and from fields; or

(iii) planting, cultivating, watering, spraying, fertilizing, pruning, bracing, and feeding the growing crop.

(B) A worker involved solely in the retail aspect of a nursery operation or solely in a lawn care service is not considered a nursery worker for purposes of this chapter [~~these regulations~~].

(14) [~~(16)~~] Person--Any individual, partnership, association, joint stock company, trust, cooperative, corporation, or other business entity.

(15) [~~(17)~~] Produce--The act of performing any of the activities specified in the definition of agricultural laborer found in §8.3 of this chapter [~~title~~] (relating to Agricultural Laborer).

(16) [~~(18)~~] Registrant--Any person who has submitted an application for registration of a pesticide under the Texas Agriculture Code, Chapter 76, Subchapter C [~~Title 7, §§76.041 - 76.048~~].

(17) [~~(19)~~] Safety emergency--Any health or safety related occurrence designated as a safety emergency by a fire chief or the fire chief's [~~his~~] representative.

(18) [~~(20)~~] Seasonal work--Work of a seasonal or temporary nature. A worker who moves from one seasonal activity to another is employed on a seasonal basis even though the worker [~~he~~] may continue to be employed during a major portion of the year. Work is other than seasonal if it is performed for a single employer essentially on a year-round [~~year round~~] basis.

(19) [~~(21)~~] Service--The Texas A&M AgriLife Extension Service.

(20) [~~(22)~~] Store (or storage) [~~Store, storage~~]--To have at the work area for a period of time greater than 72 hours.

(21) [~~(23)~~] Threshold amount--55 [~~Fifty-five~~] gallons or 500 pounds as packaged by the registrant or an amount that the department determines by rule for certain highly toxic or dangerous chemicals.

(22) [~~(24)~~] Trained trainers--Anyone who has completed an EPA-approved WPS train-the-trainer program or a WPS-trained handler who may train workers only.

(23) [~~(25)~~] Treating medical personnel--Doctor, nurse, emergency technician, clinic personnel, or hospital personnel treating an individual in connection with a possible exposure to a covered pesticide chemical.

(24) [~~(26)~~] Uses--Uses or causes to be used covered pesticide chemicals, or causes agricultural laborers to be present in a workplace where covered pesticide chemicals are used or stored.

(25) [~~(27)~~] Work area--A room, defined space, field, section, or farm where covered pesticide chemicals are stored or used and where agricultural laborers may be present. In a nursery or greenhouse, the work area is the defined treated or storage area within the nursery or greenhouse in which agricultural laborers are present.

~~[(28) Workplace--A geographical location containing one or more work areas.]~~

(26) [~~(29)~~] Work season--Crop season.

(27) [~~(30)~~] WPS--The federal Worker Protection Standard, 40 Code of Federal Regulations, Part 170.

§8.3. Agricultural Laborer.

(a) The terms "agricultural laborer" or "laborer" as used in this chapter mean an individual who does one or more of the following activities at an agricultural establishment including a farm, a tree or sod farm, ranch, packing shed, greenhouse, or nursery:

(1) plants, cultivates, harvests, or handles an agricultural or horticultural commodity in its unmanufactured state. "Agricultural laborer" includes, but is not limited to, field workers who plant, weed, thin, cultivate, detassel, hoe, irrigate, harvest, tie vines;[~~,~~] nursery workers; [~~and~~] workers who load trucks to take the commodity from the field to the packing shed;[~~,~~] and workers at the packing shed who handle the commodity;

(2) handles [~~uses~~] a covered pesticide chemical as part of the agricultural laborer's [~~his~~] duties at [~~as an agricultural laborer on~~] the agricultural establishment [~~farm~~], including, but not limited to, mixing, loading, or applying a covered pesticide chemical;

(3) risks exposure [~~may be exposed~~] to a covered pesticide chemical because of the agricultural laborer's duties [~~his or her job assignment~~] which include [~~includes~~], but is not limited to, disposal of used pesticide containers on a farm, scouting, and flagging; or

(4) (No change.)

(b) The definition of agricultural laborer does not include:

(1) - (5) (No change.)

§8.4. Covered Employer.

(a) An employer is a "covered employer" if the employer [~~he~~] annually uses or stores in excess of the threshold amount of any one covered pesticide chemical, and either directly, or through labor agents:

(1) [~~himself, or through labor agents,~~] hires agricultural laborers to perform seasonal or migrant work and whose gross annual payroll for those laborers is $15,000 or more; or

(2) [~~himself, or through labor agents,~~] hires agricultural laborers for purposes other than seasonal or migrant work and whose gross annual payroll for those laborers is $50,000 or more.

(b) An employer is a covered employer if the employer [~~he or she~~] meets the minimum payroll requirements described in subsection (a)(1) or (2) of this section[~~,~~] and causes agricultural laborers to be present in a workplace(s) where the threshold amount of any one covered pesticide chemical is annually used or stored. An example of such an employer may be a packing shed or other entity which makes an agreement with a farmer to furnish agricultural laborers to produce a crop being produced at the farmer's farm. In such instances, the packing shed and the farmer would have the following responsibilities under the Act:[~~.~~]

(1) - (2) (No change.)

(3) If the packing shed causes agricultural laborers to be present at more than one farm or work area, the covered chemicals used or stored at all such work areas will be totaled [~~totalled~~] to determine whether more than the threshold amount is stored or used.

(4) The packing shed is free to secure the assistance of others in performing particular responsibilities. For instance, it may use crew leaders [~~crewleaders~~] or foremen to read the crop sheets and it may arrange for farmers to help compile the workplace chemical lists. However, responsibility for compliance rests solely with the packing shed.

(5) (No change.)

(6) The farmer is responsible for complying with the Act only if the farmer [~~he or she~~] standing alone is a covered employer. In other words, the packing shed's agricultural laborers are not counted in determining whether the farmer meets the minimum payroll test for coverage.

(7) Even where the farmer is a covered employer, the farmer's [~~his or her~~] only responsibility under the Act is with respect to those agricultural laborers whom the farmer [~~he or she~~] has hired directly or through a labor agent.

(8) (No change.)

(c) Hiring "through labor agents" includes an employer who contracts with or utilizes a crew leader [~~crewleader~~] or labor contractor to provide harvesters or other agricultural laborers.

(d) Amounts paid by an employer to a labor agent, crew leader [~~crewleader~~], or labor contractor are considered part of the employer's gross annual payroll for purposes of subsection (a) of this section.

(e) Where an employer uses or stores any covered pesticide chemicals in more than one work area or workplace, the total amount used in all such work areas and workplaces shall be counted to determine whether he or she annually uses in excess of the threshold amount [~~50 gallons or 500 pounds~~].

(f) An employer who purchases in excess of the threshold amount [~~55 gallons or 500 pounds~~] of a covered pesticide chemical at one time or within a period of one calendar year is presumed to have used or stored in excess of the threshold amount [~~55 gallons or 500 pounds~~] of a covered pesticide chemical.

§8.5. Designated Representative.

(a) (No change.)

(b) Recognized or certified representatives.

(1) Certified collective bargaining agent. A certified collective bargaining agent is a person or unit that has been sanctioned by a governmental body to represent agricultural laborers [~~workers~~] in matters of wages and working conditions. A certified collective bargaining agent is not required to have written authorization from the agricultural laborer who the certified collective bargaining agent [~~he~~] represents.

(2) Recognized collective bargaining agent. A recognized collective bargaining agent is a person or unit that has been acknowledged in a collective bargaining contract between an employer and an agricultural laborer. A recognized collective bargaining agent is not required to have a written authorization from the agricultural laborer who the recognized collective bargaining agent [~~he~~] represents in order to exercise the laborer's rights under the Act.

(3) Certified designated representative. A certified designated representative is a person who has been approved for certification

by the department. In order to become a certified designated representative, an individual or organization shall submit a request for certification as a designated representative to the department. The request shall include the requester's name and address, the name of the agricultural laborer's employer, the address of the agricultural laborer's employer, if known, and a description of which of the laborer rights under the Act the designated representative intends to exercise. The laborer's written authorization shall be attached to the request and processed by the department as follows:[.]

(A) The department shall review the request and determine whether to accept or reject it within two business days after receipt. If the department determines that the request fulfills the requirements of the Act and this chapter, [these regulations] the department shall certify the requester as a designated representative. The designated representative remains certified until the agricultural laborer notifies the department that the agricultural laborer [he or she] has withdrawn [his or her] authorization. If the department rejects the request, the department shall notify the requester of the decision and give a statement of the reasons for the rejection. A person whose request has been rejected may attempt to address the reasons for rejection and ask that the request be reconsidered. Alternatively, the requester may appeal the rejection to the commissioner. A person not satisfied with the decision of the commissioner may appeal in the manner provided for contested cases under the Texas Administrative Procedure Act, Texas Government Code, Chapter 2001.

(B) A certified designated representative is not required to reveal to anyone other than the department the identity of the agricultural laborer represented [he or she represents]. The department shall maintain the laborer's anonymity, unless the laborer waives it.

(C) (No change.)

§8.6. Material Safety Data Sheet [(MSDS)].

(a) Defined. Generally referred to as a "safety data sheet" (SDS), a material safety data sheet [An MSDS] is a document containing chemical hazard and safe handling information that is prepared in accordance with the requirements of the Occupational Safety and Health Administration (OSHA) standard for that document. In the case of a chemical labeled under the Federal Insecticide, Fungicide, and Rodenticide Act, 7 United States Code §§136 et seq., for which an SDS [MSDS] is both unavailable and not required under the federal OSHA hazard communication standard, a product label, or other document equivalent to an SDS [MSDS], which contains precautionary statements, such as hazards to humans and domestic animals, and environmental, physical, or chemical hazards, including warning statements, may serve as an SDS [MSDS].

(b) Responsibilities of manufacturers and distributors.

(1) A registrant, chemical manufacturer, or distributor shall provide the most current appropriate SDS [MSDS], product label, or equivalent documentation to any person in this state to whom that entity [he] distributes a covered pesticide chemical.

(2) A chemical manufacturer or distributor shall provide, in a timely manner, the most current appropriate SDS [MSDS] to covered employers upon request.

(3) A registrant or chemical manufacturer shall ensure that all SDSs [MSDSs] for all covered pesticide chemicals that entity [he or she] distributes are correct and current.

(4) A registrant shall provide with the [his or her] registration application a copy of the most current appropriate SDS [MSDS] for each pesticide for which the registrant [he or she] is applying for registration.

(5) A chemical manufacturer or distributor shall submit to the department a copy of the most current appropriate SDS [MSDS] for all fertilizers with covered pesticide chemicals.

(6) Retail outlets that distribute pesticide chemicals to the general public only for nonagricultural purposes are exempted from this section.

(c) Responsibilities of covered employers.

(1) A covered employer is responsible for obtaining and maintaining the most current appropriate SDS [MSDS], product label, or equivalent documentation for each covered pesticide chemical the covered employee [he or she] buys, applies, or causes another to apply.

(2) A covered employer who has not been provided with an SDS [MSDS] for a covered pesticide chemical shall request the most current appropriate SDS [MSDS] product label, or equivalent documentation in writing from the manufacturer or distributor in a timely manner.

(3) A covered employer shall make an SDS [MSDS], product label, or equivalent documentation for covered pesticide chemicals accessible to agricultural laborers, designated representatives, treating medical personnel, members of the community, the department, and emergency personnel in the same manner as the workplace chemical list is to be made accessible to those persons in §8.7(c) of this chapter [title] (relating to Workplace Chemical List).

§8.7. Workplace Chemical List.

(a) Defined. A workplace chemical list (WCL) is a form that must be completed with the information required by the Act, §§125.004-.005 [and §125.005]. In order to determine whether the covered pesticide chemical must be listed, a covered employer shall total the quantities of pesticide products containing the same active ingredient to determine whether more than the threshold amount of any covered pesticide chemical is actually used or stored annually in the workplace. In order to determine total quantities when both liquid and dry formulations of a covered pesticide chemical have been used or stored, the covered employer shall convert pounds to gallons or gallons to pounds using the ratio 9.09 pounds/gallon or .11 gallon/pound. The following documents or information shall be attached to the workplace chemical list:

(1) the material safety data sheet, generally referred to as the "safety data sheet" (SDS) [(MSDS)] for each chemical listed on the workplace chemical list, or in the case for which an SDS [MSDS] is both unavailable and not required under the federal Occupational Health and Safety Administration [(OSHA)] hazard communication standard, a product label, or equivalent documentation;

(2) crop sheets and other health and safety data provided by the department that the covered employer has been required to distribute to the covered employer's [his] agricultural laborers; and

(3) (No change.)

(b) Responsibility to compile and maintain a workplace chemical list.

(1) - (4) (No change.)

(5) The covered employer is responsible for obtaining the workplace chemical list form from a department regional office or the department website and is not relieved of these [his] duties under the Act and this chapter [these regulations] because he or she has not received a form from the department.

(6) - (7) (No change.)

(8) Any covered employer who wishes to file these records with the department shall include the covered employer's identification number. Records should be sent to the Texas Department of Agriculture, Pesticide [~~Right To Know~~] Program, P.O. Box 12847, Austin, Texas 78711. Records for each calendar year shall be filed by January 31 of the following year. The department shall issue a receipt acknowledging records have been received from the covered employer.

(9) If the department determines that a covered employer repeatedly fails to maintain the workplace chemical list and its attachments as required, the department may require the covered employer to file annually [~~file~~] the list and attachments with the department.

(10) If a workplace ceases to be used for the agricultural activities for which the workplace chemical list and attachments are required, the covered employer shall send the workplace chemical lists and attachments to the Texas Department of Agriculture, Pesticide [~~Right To Know~~] Program, P.O. Box 12847, Austin, Texas 78711.

(11) If the agricultural activities for which the workplace chemical list and attachments are maintained continue at a workplace but the covered employer is succeeded or replaced in function by another person, the successor shall comply with the provisions of this subsection. The successor is not liable for violations of the Act or this chapter committed by his predecessor unless the transaction(s) leading to the transfer were undertaken for the purpose of avoiding responsibility for violations of the Act or this chapter [~~these regulations~~].

(12) A licensed commercial applicator may satisfy the obligations to keep records under the Texas Agriculture Code [~~Pesticide Control Act~~], §76.114, and §7.33 of this title (relating to Records of Application [~~the Texas Pesticide Regulations,~~ §7.18], and to maintain the workplace chemical list by maintaining a single record, provided that the records maintained comply with all of the requirements of this section as well as of §7.33 [~~§7.18~~] of this title (relating to Records of Application). The department will develop a form for the workplace chemical list which satisfies the recordkeeping requirements for applicators.

(c) Access to the workplace chemical list.

(1) A covered employer shall make the workplace chemical list and attachments accessible to an agricultural laborer, a designated representative, treating medical personnel, or a member of the community. The term "accessible" as used in this chapter [~~these regulations~~] means:

(A) (No change.)

(B) in the case of a medical or safety emergency, the term "accessible" means that the document or information shall be given immediately to the requester authorized by the Act and this chapter regardless of when the request is made.

(2) A designated representative or treating medical personnel is not required to identify the agricultural laborer being represented or treated [~~he or she represents or is treating~~].

(3) (No change.)

(4) If the covered employer has filed the workplace chemical list with the department, the covered employer [~~he or she~~] shall inform the requester that the requested workplace chemical list is available from the department and provide the department's contact information [~~address~~].

(5) If a covered employer refuses to make accessible the workplace chemical list and attachments to a designated representative, treating medical personnel, or member of the community, that person may notify the appropriate regional office of the department of the [~~his or her~~] request and of the covered employer's refusal.

(6) - (9) (No change.)

(d) Department [~~The department~~] workplace chemical list files.

(1) - (3) (No change.)

§8.8. Crop Sheets.

(a) Development of crop sheets.

(1) The department shall develop crop sheets which contain information relevant to specific crops including pesticides most commonly used on particular crops [~~the crop~~], the acute and chronic health effects of these pesticides, ways to minimize pesticide exposure, recommended medical emergency measures, and agricultural laborers' rights.

(2) (No change.)

(3) The information on [~~the~~] crop sheets shall be provided in both English and Spanish.

(4) (No change.)

(5) The department shall annually provide to each covered employer copies of appropriate crop sheets for crops grown in the relevant region. If a covered employer has not received a crop sheet for any crop that the covered employer [~~he~~] grows, the covered employer shall request appropriate crop sheets from the local regional [~~district~~] office of the department or the Service [~~service~~].

(6) (No change.)

(b) Providing and reading crop sheets to laborers.

(1) A covered employer shall provide an appropriate crop sheet and ensure that the information on the crop sheet designated by the department is read to each agricultural laborer including each laborer assigned to a new crop. This information shall be read in either Spanish or English, as appropriate. The most current crop sheets for the crops the laborer will be working with shall be provided and read on the first day of the work season or the first day the laborer begins employment, whichever is later. For nursery or greenhouse workers, the work season shall be deemed to run from January 1 to December 31 [~~January 1-December 31~~] of each calendar year. The covered employer shall provide and ensure that the appropriate information on [~~the~~] crop sheets [~~sheet~~] is read prior to the time the laborer begins to work.

(2) A covered employer may comply with the [~~his or her~~] obligation under paragraph (1) of this subsection to ensure that the appropriate information is read by playing to [~~the~~] laborers a tape recording of the information [~~which is~~] required to be read.

(3) A covered employer shall inform those agricultural laborers to whom the covered employer [~~he~~] is required to read a crop sheet, including each laborer who is assigned to a different crop or job, of the product name of the covered pesticide chemical, the date and time it was last applied or is scheduled to be applied to the work area, and the expiration date of its reentry interval, except that such information is not required to be provided to those agricultural laborers who are not field laborers. An example of this type of agricultural laborer is a packing shed worker who [~~that~~] works only in the shed.

(4) A covered employer does not have to provide or read a [~~the~~] crop sheet or provide the information described in paragraph (3) of this subsection to an agricultural laborer [~~laborer(s)~~] who has [~~have~~] a card issued under the Act, §125.009(g), except that a [~~the~~] crop sheet is [~~sheets are~~] required to be provided to any agricultural laborer upon request.

(5) A covered employer shall provide crop sheets and the information described in paragraph (3) of this subsection to any agricultural laborer upon [~~the laborer's~~] request [~~for a crop sheet~~].

(6) A covered employer may comply with the requirements of paragraph (1) of this subsection for its agricultural laborers who [~~that~~] are not field workers[~~,~~] by posting in a conspicuous place at the work area a replica of the crop sheets [~~sheet~~] for crops which are handled by those laborers. The posters must be at least 14 inches by 22 inches and must contain all of the information included on the crop sheet(s) for crops handled by those laborers.

(c) A covered employer shall offer to each agricultural laborer, on the day on which the laborer is [~~given his~~] first paid [~~pay~~] for that work season, basic safety and health-related information provided to the covered employer by the department.

§8.9. Providing Protective Clothing, Equipment, and Devices.

A covered employer shall provide for use and at no cost to each agricultural laborer employed by the covered employer [~~him or her~~] any protective clothing, equipment, or device that is specified on the label for the activities in which the agricultural laborer is engaged as part of the agricultural laborer's [~~his~~] duties. If the label does not specify protective clothing, then the covered employer shall provide the protective clothing, equipment, or device specified in the most current appropriate material safety data sheet (generally referred to as the safety data sheet) [~~MSDS~~], crop sheet, or as provided in Chapter 7, Subchapter D [~~§7.25~~] of this title (relating to Use and [~~Scope of Pesticide~~] Application [~~Standards~~]), whichever is more protective. This section does not require that the covered employer provide the long sleeve shirts, pants, shoes, and socks customarily provided by the agricultural laborers.

§8.10. Retaliation.

(a) A covered employer, employer's representative, labor agent, or crew leader [~~crewleader~~] may not take any retaliatory actions against any agricultural laborer because the laborer has made an inquiry, filed a complaint, assisted the department's inspectors, instituted any proceeding under or related to the Act or this chapter, testified or is about to testify in such a proceeding, or exercised any rights afforded under the Act or this chapter on behalf of the agricultural laborer [~~himself or herself~~] or on behalf of others. Under this section, retaliatory actions include discharge, causing to be discharged, discipline, or adversely affecting the agricultural laborer's pay, position, seniority, or other benefits.

(b) An employer may not ask or require an agricultural laborer, as a condition of [~~his or her~~] employment, to waive any [~~of his~~] rights under the Act or this chapter [~~and these regulations~~].

§8.11. Training Program.

(a) (No change.)

(b) Training provided by the department.

(1) The department shall provide the training program in counties with a hired farm labor work force of 2,000 or more, according to the most recent United States Census of Agriculture. [~~The counties are as follows: Cherokee, Gaines, Harris, Hidalgo, Parker, Smith, and Wharton.~~]

(2) - (3) (No change.)

(c) Training provided by the Service [~~service~~]. The Service [~~service~~] shall provide training in all remaining counties.

(d) Notification of training. The department or the Service [~~service~~] shall notify agricultural laborers on a regular basis of the availability of training programs.

(e) (No change.)

(f) Certification of completion of training.

(1) When an agricultural laborer completes a training program, the trainer shall provide the agricultural laborer [~~him or her~~] with an EPA training verification card for WPS training.

(2) - (3) (No change.)

(g) (No change.)

§8.12. Emergency Response.

(a) Covered employers.

(1) A covered employer who normally stores covered pesticide chemicals within one-quarter of a [~~1/4~~] mile of a residential area composed of three or more private dwellings shall provide to the fire chief of the fire department having jurisdiction over the storage place the name(s) and telephone number(s) of a knowledgeable representative(s) of the covered employer who can be contacted for further information, or in case of an emergency. This information shall be in writing.

(2) - (3) (No change.)

(4) A covered employer shall allow the fire chief having jurisdiction over the storage place, or the fire chief's [~~his~~] representative, upon reasonable request, to conduct on-site inspections of the chemicals on the workplace chemical list to prepare fire department emergency response activities.

(b) Other farm operators and other entities.

(1) Farm operators who are not covered employers and other entities who normally store covered pesticide chemicals in an amount in excess of the threshold amount [~~55 gallons or 500 pounds~~] within one-quarter of a [~~1/4~~] mile of a residential area composed of three or more private dwellings shall provide to the fire chief having jurisdiction over the storage place [~~area~~], in writing, the name(s) and telephone number(s) of a knowledgeable representative(s) of the farm operator or other entity who can be contacted for further information, or in case of an emergency. The [~~55 gallon or 500 pound~~] threshold amount shall be based upon the sum of all covered pesticide chemicals normally stored.

(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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Skyler Shafer
Assistant General Counsel
Texas Department of Agriculture
Earliest possible date of adoption: January 22, 2023
For further information, please call: (512) 936-9360

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CHAPTER 12. WEIGHTS AND MEASURES

The Texas Department of Agriculture (Department) proposes amendments to 4 Texas Administrative Code §12.1 (Definitions), §12.10 (Standards), §12.11 (Registration of Commercial Weighing and Measuring Devices), §12.12 (Fee Schedule for

Commercial Weighing and Measuring Devices and Consumer Information Stickers), §12.13 (Devices Subject to Registration and Inspection; Exemptions), §12.14 (Inspection and Testing Requirements for Hopper Scales), §12.15 (Records), §12.21 (Standards), §12.30 (Metrology Services), §12.40 (License Requirements), §12.41 (Application and Renewal Procedure), §12.42 (Authority and Responsibilities), §12.60 (Registration Requirement and Procedure), §12.61 (Authority and Responsibilities), §12.71 (Application Procedure), §12.72 (Bond), §12.73 (Fees), and §12.74 (Records), and the repeal of §12.70 (General Requirement). The proposed amendments and proposed repeal are collectively referred to as the proposal.

The Department identified the need for the proposal during its rule review conducted pursuant to Texas Government Code §2001.039, the adoption of which can be found in the Review of Agency Rules section of this issue.

The proposed amendments to §12.1 delete unnecessary definitions for the terms, "anniversary date," "food for immediate consumption," "NCWM," and "place in service" because those terms are no longer used in this chapter; remove definitions for the terms, "public weigher," "service company," and "service technician" as these terms are defined in Chapter 13 of the Texas Agriculture Code (Code); update the definition for "device" by remove pumps, liquid measuring devices, and bulk meters to reflect the types of devices the Department currently regulates; make a conforming change to the definition of "immediate consumption food scale" for consistency with Section 13.1002 of the Code; modify the composition of the standard weights in the definition for "test kit" to allow for only one one-pound weight to reflect the composition of test kits currently available on the market; delete the definition for "Handbook 44" and replace it with "NIST Handbook 44" for consistency with internal references in this chapter; change Department references to "department" for consistency with usage in Title 4, Part 1; change a reference to the Code to make it the same as its definition in this rule; revise references to Service Technician to read "service technician" for consistency with usage in this chapter and Chapter 13 of the Code; correct grammatical errors; and remove redundant language.

The proposed amendments to §12.10 removes outdated and unnecessary contact information on obtaining Handbook 44, now known as NIST Handbook 44, from the National Institute of Standards and Technology (NIST) as the handbook is readily available online at www.nist.time.gov.

The proposed amendments to §12.11 change references to the Code to conform to its definition in §12.1, clarify that forms required to register commercial measuring and weighing devices under this section are prescribed by the Department, and update Department contact information.

The proposed amendments to §12.12 make grammatical changes for consistency within this chapter.

The proposed amendments to §12.13 remove unnecessary references to Section 13.029 of the Code and correct citations to the Code.

The proposed amendments to §12.14 add LPG meters to hopper scale inspection and testing requirements to reflect the Department's policy of applying the same requirements to both types of devices; update language to reflect current reporting requirements, namely that service companies file inspection reports with the Department within 10 days of placing these devices back into service rather than device operators within 30 days; remove outdated subsections providing requirements for hopper scales inspected and tested within four years preceding this rule's adoption; update Department contact information; and make editorial changes to language on inspection and testing requirements for these devices to improve the rule's readability.

The proposed amendment to §12.15 changes a Department references to "department" for consistency with usage in Title 4, Part 1.

The proposed amendments to §12.21 update references to sets of uniform regulations in NIST Handbooks 130 and 133, remove outdated and unnecessary language, and correct a grammatical error.

The proposed amendments to §12.30 remove outdated and unnecessary language on obtaining information from NIST; change Department references to "department" for consistency with usage in Title 4, Part 1; make grammatical corrections; and make editorial changes to language on metrology calibration services and fees to improve the rule's readability.

The proposed amendments to §12.40 update a reference to the NIST's Handbook 105 series and remove unnecessary language.

The proposed amendments to §12.41 specify the type of form on which service company applications must be submitted, clarify a general reference to "the law" to read Chapter 13 of the Code and this chapter, and correct a grammatical error.

The proposed amendments to §12.42 remove unnecessary language about service companies' insurance requirements appearing verbatim in Section 13.460 of the Code and replace it with a reference to that section; change a Department reference to "department" for consistency with usage in Title 4, Part 1; and make editorial changes to language on insurance requirements to improve the rule's readability.

The proposed amendments to §12.60 correct grammatical errors and make editorial changes to language on registration requirements and procedures to improve the rule's readability.

The proposed amendments to §12.61 change a reference to the Code to utilize a defined term in §12.1 and correct a grammatical error.

The proposed amendments to §12.71 relocate language on licensing application requirements to its own subsection and make related editorial changes to language on these requirements to improve the rule's clarity.

The proposed amendments to §12.72 update a reference to the Texas Department of Insurance, add a subsection to ensure certified public weighers maintain bonding coverage, and remove unnecessary language.

The proposed amendment to §12.73 corrects a grammatical error.

The proposed amendments to §12.74 update recordkeeping requirements for public weighers to allow them to maintain issued official certificates in either physical or electronic format due to the prevalence of electronic business.

The repeal to §12.70 is proposed because its provisions are included verbatim in Section 13.255 of the Code and consequently are unnecessary.

LOCAL EMPLOYMENT IMPACT STATEMENT: Ms. Christina Osborn, the Director for Consumer Product Protection, has de-

termined that the proposal will not affect a local economy, so the Department is not required to prepare a local employment impact statement under Texas Government Code, §2001.022.

GOVERNMENT GROWTH IMPACT STATEMENT: Pursuant to Texas Government Code, §2001.0221, Ms. Osborn provides the following Government Growth Impact Statement for the proposal. For each year of the first five years the proposal will be in effect:

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

(2) implementation of the proposal will not require the creation or elimination of existing employee positions;

(3) implementation of the proposal will not require an increase or decrease in future legislative appropriations to the Department;

(4) the proposal will not require an increase or decrease in fees paid to the Department;

(5) the proposal does not create a new regulation;

(6) the proposal will not expand, limit, or repeal an existing regulation;

(7) the proposal will not increase or decrease the number of individuals subject to the rules; and

(8) the proposal will not affect this state's economy.

FISCAL IMPACT ON STATE AND LOCAL GOVERNMENT: Ms. Osborn has determined that for the first five-year period the proposal is in effect, there will be no fiscal implications for the state or local governments as a result of enforcing or administering the proposal.

PUBLIC BENEFITS AND PROBABLE ECONOMIC COST: Ms. Osborn has determined that for each year of the first five-year period the proposal is in effect, the public benefit will be increased consumer protection through an updated version of this chapter that improves the readability and clarity of its rules, and that facilitates Department efforts at regulating weighing and measuring devices. Ms. Osborn has also determined that for each year of the first five-year period the proposal is in effect, there will be no costs to persons who are required to comply with the proposal.

FISCAL IMPACT ON SMALL BUSINESSES, MICROBUSINESSES, AND RURAL COMMUNITIES: The Department has determined there will be no adverse economic effect on small businesses, micro-businesses, or rural communities as a result of the proposal, therefore preparation of an economic impact statement and a regulatory flexibility analysis, as detailed under Texas Government Code, §2006.002, is not required.

Written comments on the proposal may be submitted by mail to Mr. Morris Karam, Assistant General Counsel, Texas Department of Agriculture, P.O. Box 12847, Austin, Texas 78711, or by email to morris.karam@texasagriculture.gov. Comments must be received no later than 30 days from the date of publication of the proposal in the *Texas Register.*

SUBCHAPTER A. DEFINITIONS [~~GENERAL PROVISIONS~~]

4 TAC §12.1

The amendments are proposed under Section 13.002 of the Texas Agriculture Code, which requires the Department to enforce Chapter 13.

The code affected by the proposed amendments is Texas Agriculture Code, Chapter 13.

§12.1. Definitions.

In addition to the definitions set out in the Texas Agriculture Code, Chapter 13 and Texas Administrative Code, Title 4, Part 1, §1.1, the following words and terms, when used in this chapter, shall have the following meanings, unless the context clearly indicates otherwise.

[~~(1) Anniversary date--The last day of the month during which test standards are due annual calibration.~~]

(1) [~~(2)~~] ASTM--American Society for Testing Materials

(2) [~~(3)~~] Audit--An official department [~~TDA~~] administrative review [~~completed by a Representative of the Commissioner~~] of all device inspections, tests, and calibrations records and/or related documentation.

(3) [~~(4)~~] Certificate of authority [~~Authority~~]--Written authorization issued by the department authorizing a public weigher to issue an official certificate.

(4) [~~(5)~~] Certified/Certification--Written verification from a department-approved [~~department approved~~] laboratory declaring the accuracy of a service company's test standards.

(5) [~~(6)~~] Code--The Texas Agriculture Code.

(6) [~~(7)~~] Commercial transaction--The purchase, offer or submission for sale, hire or award, or barter or exchange of an item.

(7) [~~(8)~~] Consumer information sticker [~~Information Sticker~~]--A sticker that directs consumers to registration, inspection, and complaint information regarding a device; and that must be placed on each weighing or measuring device used for commercial transactions.

(8) [~~(9)~~] Device--Any [~~pump, liquid measuring device,~~] scale[~~, or bulk~~] or liquefied petroleum gas meter used in a commercial transaction. Device includes any accessory which may affect accuracy. The term also includes weighing and measuring equipment in official use for the enforcement of law or for the collection of statistical information by government agencies.

[~~(10) Food for Immediate Consumption--Food or meals prepared, served or sold by restaurants, lunch counters, or cafeterias that when sold requires no further preparation by the purchaser prior to consumption on the premises, except for:~~]

[~~(A) refrigerated food that is typically reheated prior to eating;~~]

[~~(B) sliced luncheon products such as meat, poultry, or cheese when sold separately;~~]

[~~(C) food that is only cut, repackaged, or pasteurized by the seller; or~~]

[~~(D) fruits and vegetables.~~]

[~~(11) Handbook 44--NIST publication that sets the specifications, tolerances and other technical requirements for weighing and measuring devices.~~]

(9) [~~(12)~~] Immediate consumption food scale [~~Consumption Food Scales~~]--A scale exclusively used to weigh food sold in accordance with Section 13.1002 of the Code [~~for immediate consumption on premises~~].

(10) [~~(13)~~] Inspection--The act of examining, testing, or calibrating a weighing or measuring device, including department [~~TDA~~] audits, service observations, and onsite facility review duties.

(11) [~~(14)~~] LPG Meter--A device used for the measurement of liquefied petroleum gas.

~~[(15) NCWM--National Conference on Weights and Measures.]~~

(12) [~~(16)~~] NIST--National Institute of Standards and Technology, United States Department of Commerce.

(13) NIST Handbook 44--NIST publication that sets the specifications, tolerances, and other technical requirements for weighing and measuring devices.

(14) [~~(17)~~] Official certificate--A certificate declaring the accurate weight or measure of a commodity which includes: the time and date the weight or measure was taken, signature and license number of the public weigher, and the seal of the department.

(15) [~~(18)~~] OIML--International Organization of Legal Metrology.

(16) [~~(19)~~] Operator of a Device--A person operates a device if the person collects or distributes payments for a commercial transaction for which the device is used; oversees the day-to-day operation of the device; or owns, leases, manages, or otherwise controls the physical location of the device or the device itself.

(17) [~~(20)~~] Out-of-order [~~Out-of-Order~~] tag--A notice attached to a device directing that the device may not be used for commercial service.

(18) [~~(21)~~] Person--An individual or a corporation, partnership, limited liability company, business trust, trust, association, or other organization, estate, government or governmental subdivision or agency, or other legal entity.

~~[(22) Place in service--An approval for the device to be placed into commercial operation.]~~

~~[(23) Public Weigher--A business appointed to issue an official certificate in Texas.]~~

(19) [~~(24)~~] Ranch scale--A livestock scale which is located on a private ranch and which has a capacity of 5,000 pounds or greater.

(20) [~~(25)~~] Representative of the Commissioner--An individual employed by the department [~~Department,~~] authorized to perform one or more of the following: audits, reviews, inspections, and/or service observations under specified chapters of the [~~Texas Agriculture~~] Code.

~~[(26) Service Company--A person who holds a service company license issued by the Department under this chapter, also referred to as a Licensed Service Company (LSC).]~~

(21) Service observation--An official department observation completed by a Representative of the Commissioner on service technicians that occurs periodically to ensure compliance with the applicable standards of device inspection, testing, and calibrating.

(22) [~~(27)~~] Service report--A prescribed report, prepared by a service technician and filed with the department [~~Department~~] by a service company, describing the services performed on a device or a set of devices by the service technician.

~~[(28) Service Technician--An individual who holds a service technician license issued by the Department under this chapter, also referred to as a Licensed Service Technician (LST).]~~

(23) [~~(29)~~] Sub-kit--A subdivided series of test standards that weigh a total of not less than one pound in avoirdupois units and whose smallest test standard weighs not more than one-sixteenth (1/16) ounce or five-thousandths (0.005) pound.

(24) [~~(30)~~] Test--A field examination of a device to determine compliance with the requirements of this chapter.

(25) [~~(31)~~] Test Standard--A certified weight or measure used to test a device.

(26) [~~(32)~~] Test kit--A collection of test standards that collectively weigh 30 pounds and that consists of one sub-kit, at least one [~~two~~] one-pound standard [~~standards~~], and any other combination of standards that allows a scale with a capacity of 30 pounds or less be tested in one-pound increments to capacity.

~~[(33) Service Observation--An official TDA observation completed by a Representative of the Commissioner on Service Technicians that occurs periodically to ensure LSC and LST compliance with the applicable standards of device inspection, testing, and calibrating.]~~

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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Skyler Shafer
Assistant General Counsel
Texas Department of Agriculture
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SUBCHAPTER B. DEVICES

4 TAC §§12.10 - 12.15

The amendments are proposed under Section 13.002 of the Texas Agriculture Code (Code), which requires the Department to enforce Chapter 13; Section 13.021 of the Code, which allows the Department to adopt rules for administering and ensuring standard weights and measures and for bringing about uniformity between the standards for weights and measures established under the Code and those established by federal law; Section 13.1011 of the Code, which allows the Department to adopt rules related to registering a weighing or measuring device for commercial transactions; and Section 13.113 of the Code, which allows the Department to adopt rules regulating the frequency and place of inspection for weighing or measuring devices

The code affected by the proposed amendments is Texas Agriculture Code, Chapter 13.

§12.10. Standards.

The department adopts by reference NIST Handbook 44. [~~This handbook is available upon request from the Superintendent of Documents, United States Government Printing Office, 710 North Capitol Street, Washington, D.C. 20402.~~]

§12.11. Registration of Commercial Weighing and Measuring Devices.

(a) (No change.)

(b) Registration by Owner. Notwithstanding subsection (a) of this section, the owner of a device operated by another person may register, under the owner's name, the location where the device is operated, provided that all devices of the same type at that location are covered

by the same registration. Both the person registering the location and the operator of the devices at that location are responsible for ensuring that the devices and their operation comply with the requirements of this chapter and Chapter 13 of the [~~Texas Agriculture~~] Code.

(c) (No change.)

(d) Annual Registration Renewal Required. The registration required by this section shall be renewed annually by:

(1) submitting to the department a complete and accurate registration renewal form prescribed by the department, using the most current version of the form and declaring any increase or decrease in the number of devices installed if not previously reported under subsection (e) of this section;

(2) (No change.)

(3) including within the total remitted fee any late fee adjustments required by §12.024 of the [~~Texas Agriculture~~] Code.

(e) - (h) (No change.)

(i) Public Notice of Registration Required. A person registering a location under this section shall prominently display at the location both the person's Weights and Measures Certificate of Registration and the required number of consumer information stickers in the manner provided by this subsection.

(1) Weights and Measures Certificate of Registration.

(A) - (B) (No change.)

(C) Damaged, Destroyed, Lost, or Illegible Original Certificate or Copy. If an original or copy certificate becomes damaged, destroyed, lost, or otherwise illegible so that any part of the information on the certificate is no longer legible to the average consumer of weighed or measured products sold or offered for sale at the registered location, the original or copy shall be replaced as follows:

(i) Replacement of Original. The person registering the location shall within 10 days, after the original certificate requires replacement as provided by this subsection or upon written notice from the department that a replacement is required, contact the department for a replacement certificate at phone number (877) 542-2474 or email address: License.Inquiry@TexasAgriculture.gov [~~Licenseinquiry@TexasAgriculture.gov~~].

(ii) (No change.)

(2) (No change.)

§12.12. Fee Schedule for Commercial Weighing and Measuring Devices and Consumer Information Stickers.

(a) (No change.)

(b) Consumer Information Sticker.[~~:~~] The [~~the~~] fee for a page containing eight consumer information stickers is: $8.

§12.13. Devices Subject to Registration and Inspection; Exemptions.

(a) The following devices are subject to the registration requirements of the Code, §13.1011 [~~of the Code; as authorized by §13.029 of the Code~~]:

(1) - (2) (No change.)

(b) The following devices are subject to the inspection requirements of the Code, §13.101(a): [~~of the Code; as authorized by §13.029 of the Code.~~]

(1) - (2) (No change.)

(c) Pursuant to the Code, §13.029 [~~of the Code~~], the following devices are exempt from registration and inspection requirements set forth in the Code, §13.1001 and §13.1011 [~~of the Code~~]:

(1) - (5) (No change.)

§12.14. Inspection and Testing Requirements for LPG Meters and Hopper Scales.

(a) (No change.)

(b) Each LPG meter or hopper scale operated in this state for commercial transactions shall be inspected and tested for accuracy by a [~~Texas-licensed private~~] service company at least once every four years. Each LPG meter or [~~such~~] scale found to be inaccurate during [~~such~~] inspection and testing or otherwise found to be in disrepair shall be placed out-of-order by the service company, repaired, and calibrated to be accurate prior to further operation. Upon completion of the inspection, testing, and, if necessary, repair of the LPG meter or scale, the service company [~~person operating the scale~~] shall within 10 [~~30~~] calendar days after placing the device back into service file with the department a form prescribed by the department, using the most recent version of the form.

(c) A person operating an LPG meter or [~~a~~] hopper scale shall notify the department in writing at least 14 calendar days prior to the scheduled inspection required by subsection (b) [~~(a)~~] of this section. If inspection and testing [~~of the scale~~] is delayed, the person operating the LPG meter or hopper scale shall notify the department [~~by phone~~] of the delay and the anticipated new inspection and testing date if known and shall additionally submit a written notice of the new inspection and testing date. A department inspector may observe the inspection and testing of the LPG meter or hopper scale at the department's discretion.

[~~(d) If a hopper scale operated in this state has been inspected and tested for accuracy by a Texas-licensed private service company within the four-year period immediately preceding the adoption date of this rule, the person operating the scale shall within 30 calendar days after the date this rule is adopted file with the department a form prescribed by the department, using the most recent version of the form.~~]

[~~(e) If the certification required by subsection (d) of this section cannot be made, because the hopper scale was not calibrated and repaired in compliance with Handbook 44 standards and specifications to be accurate or for some other reason, the person operating the hopper scale shall place the scale out-of-order and not operate the scale until such time as the required report can be submitted.~~]

(d) [~~(f)~~] Any notice or report to be provided under this section [~~subsection~~] shall be made to: Texas Department of Agriculture, Weights and Measures Program, P.O. Box 12847, Austin, Texas 78711 or: WeightsMeasures@TexasAgriculture.gov[~~, phone number (800) 835-5832, email address: Regulatory@TexasAgriculture.gov, or fax number (888) 205-7224~~].

§12.15. Records.

Records or other documents related to the inspection, testing, and calibration of metering devices must be maintained in accordance with Chapter 13 of the Code, and shall be submitted to the department [~~Department~~] in the manner and time period as specified in a notice provided by a Representative of the Commissioner.

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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Skyler Shafer
Assistant General Counsel
Texas Department of Agriculture
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For further information, please call: (512) 936-9360

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SUBCHAPTER C. PACKAGES AND PRICE VERIFICATION

4 TAC §12.21

The amendments are proposed under Section 13.002 of the Texas Agriculture Code (Code), which requires the Department to enforce Chapter 13, and Section 13.021 of the Code, which allows the Department to adopt rules for administering and ensuring standard weights and measures and for bringing about uniformity between the standards for weights and measures established under the Code and those established by federal law.

The code affected by the proposed amendments is Texas Agriculture Code, Chapter 13.

§12.21. Standards.

The department adopts by reference NIST Handbook 133[~~,~~] and NIST Handbook 130, as it pertains [~~relating~~] to "Uniform Packaging and Labeling Regulation" and "Uniform Regulation for the Method of Sale of Commodities [~~Regulation~~]." [~~Handbooks 130 and 133 are available upon request from the Superintendent of Documents, United States Government Printing Office, 710 North Capitol Street, Washington, D.C. 20402.~~]

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. METROLOGY

4 TAC §12.30

The amendments are proposed pursuant to Section 13.021 of the Texas Agriculture Code (Code) which allows the Department to adopt rules for administering and ensuring standard weights and measures and for bringing about uniformity between the standards for weights and measures established under the Code and those established by federal law; and Section 13.115 of the Code, which allows the Department to collect fees for tests of weighing and measuring devices.

The code affected by the proposed amendments is Texas Agriculture Code, Chapter 13.

§12.30. Metrology Services.

(a) Metrology Services and Laboratory Traceability. The department's [~~Department's~~] metrology laboratory shall maintain NIST [~~National Institute of Standards and Technology (NIST)~~] recognition and certification of international metrological traceability to the International System of Units (SI), as necessary to provide a service to calibrate standards needing the same international metrological traceability.

(b) [~~(1)~~] The department [~~Department~~] adopts by reference NIST Handbook 143-State Weights and Measures Laboratories Program Handbook [~~(available on the NIST State Laboratory Program Resources website and also available upon request from the Superintendent of Documents, United States Government Printing Office, 710 North Capitol Street, Washington, D.C. 20402)~~].

[~~(2) For information on scheduling an appointment for metrology services, see the Department's website or contact the Department's Giddings metrology laboratory.~~]

(c) [~~(b)~~] Calibration Service Parameters and Fees. Metrology calibration services are available according to the following nominal value ranges and fee schedule.

(1) Mass Calibrations and Adjustments.

(A) Precision Calibrations (Echelon II, Fine Accuracy). Includes weight classes of ASTM Class "2,3" and[~~;~~] OIML Class "F1,F2":

(i) Up to and including 3 kilograms: $70;

(ii) More than 3 kilograms, up to and including 30 kilograms: $110; or

(iii) More than 30 kilograms: $140.

(B) Tolerance Calibrations (Echelon III, Medium Accuracy). Includes the [~~following~~] weight classes of [~~--~~]NIST Class "F"; ASTM Class "4,5,6,7"; OIML Class "M1,M2,M3"; and other weights:

(i) Less than 10 pounds: $20;

(ii) 10 pounds or more, but less than 500 pounds: $30;

(iii) 500 pounds or more, but less than 2,500 pounds: $60; or

(iv) 2,500 pounds or more: $110.

(C) Weight Adjustments.

(i) Less than 10 pounds: $10;

(ii) 10 pounds or more, but less than 100 pounds: $10;

(iii) 100 pounds up to and including 1,000 pounds: $20; or

(iv) More [~~Greater~~] than 1,000 pounds: $40.

(2) Volume Calibrations and Neck Calibrations. Volume Transfer II.

(A) 5 gallons or less: $55;

(B) More than 5 gallons: $65, plus $1 for each gallon over 5 gallons;

(C) LPG provers holding 25 gallons or less: $150;

(D) LPG provers holding over 25 gallons: $325; or

(E) Prover neck calibration [~~Neck Calibration~~] (new, first time calibrated, or damaged): $50.

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SUBCHAPTER E. SERVICE COMPANIES

4 TAC §§12.40 - 12.42

The amendments are proposed under Section 13.002 of the Texas Agriculture Code (Code), which requires the Department to enforce Chapter 13; Section 13.453 of the Code, which allows the Department to adopt rules for licensing service technicians and companies, and the regulation of device maintenance activities; and Section 13.457 of the Code, which allows the Department to require additional documentation for licensure as a service technician or company.

The code affected by the proposed amendments is Texas Agriculture Code, Chapter 13.

§12.40. License Requirements.

(a) Unless the person is exempt from the license requirement, a person may not employ an individual who performs or offers to perform device maintenance activities unless the person holds a service company license issued by the department [~~under this subchapter~~].

(b) The department may issue a license to a person who:

(1) has available annually certified test standards meeting the specifications in NIST Handbook 105 series, for each class of license as follows:

(A) - (E) (No change.)

(2) (No change.)

§12.41. Application and Renewal Procedure.

(a) An applicant must submit [~~to the department~~] an application on a form prescribed by the department. [~~An application may be obtained from the department.~~] An out-of-state service company shall designate on the application an agent who meets the following requirements:

(1) (No change.)

(2) maintains a permanent address within Texas where documents dealing with the administration and enforcement of the Code, Chapter 13 and this chapter [~~this law~~] may be served. An out-of-state service company shall notify the department in writing within ten days of any change of its [~~their~~] resident agent. Failure to give such notice shall be grounds for suspending the service company's license.

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

§12.42. Authority and Responsibilities.

(a) (No change.)

(b) Responsibilities. A service company shall [~~is authorized to~~]:

(1) ensure compliance with this chapter and that the device is suitable for its intended use;

(2) submit a [~~prescribed~~] service report on a form prescribed by the department to the appropriate department [~~Texas Department of Agriculture~~] regional office or to the headquarters of the department, within ten days of:

(A) - (C) (No change.)

(3) - (4) (No change.)

(5) maintain at all times while the service company performs device maintenance activities an insurance policy as required by the Code, §13.460, [~~a current effective operations liability insurance policy issued by an insurance company authorized to do business in this state or by a surplus lines insurer that meets the requirements of Chapter 981, Texas Insurance Code, and rules adopted by the commissioner of insurance in an amount set by the department and based on the type of licensed activities to be performed. General liability coverage including: premises and operations~~] in an amount not less than $25,000 per occurrence[~~;~~] or $50,000 aggregate.

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 G. SERVICE TECHNICIANS

4 TAC §12.60, §12.61

The amendments are proposed under Section 13.002 of the Texas Agriculture Code (Code), which requires the Department to enforce Chapter 13; Section 13.453 of the Code, which allows the Department to adopt rules for licensing service technicians and companies, and the regulation of device maintenance activities; Section 13.457 of the Code, which allows the Department to determine documentation submitted to obtain a service technician license; and Section 13.458 of the Code, which allows the Department to make rules setting certain requirements for licensing service technicians.

The code affected by the proposed amendments is Texas Agriculture Code, Chapter 13.

§12.60. Registration Requirement and Procedure.

(a) The department may issue a registration to each individual who:

(1) submits to the department an application prescribed by [~~obtained from~~] the department; and

(2) passes a written examination for each class of license which tests [~~test~~] the applicant's knowledge of the Code, Chapter 13; this chapter; [~~Texas Weights and Measures Laws and Regulations~~] and NIST Handbook 44.

(b) The minimum passing score for each examination shall be 70%.

(c) The registration is valid for [~~a period of~~] five years.

(d) Military members, military veterans, and military spouses as defined in Texas Occupations Code, Chapter 55, may request on their application form for an examination to be expedited, provided [~~as long as~~] they meet all other licensing requirements.

(e) The examination fee [~~Examination fees~~] for each class of license is $60.

§12.61. Authority and Responsibilities.

(a) (No change.)

(b) Responsibilities. In addition to the responsibilities and authority provided in the [~~Texas Agriculture~~] Code, Chapter 13, a service technician shall:

(1) - (2) (No change.)

(3) place a department-approved [~~department approved~~] security seal on devices to prevent any unauthorized access to the adjusting mechanism unless otherwise authorized by the department.

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 H. PUBLIC WEIGHERS

4 TAC §12.70

The repeal of §12.70 is proposed under Section 13.002 of the Texas Agriculture Code (Code), which requires the Department to enforce Chapter 13, and Section 13.258 of the Code, which allows the Department to adopt rules necessary to administer the certification of public weighers.

The code affected by the proposed repeal is Texas Agriculture Code, Chapter 13.

§12.70. General Requirement.

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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4 TAC §§12.71 - 12.74

The amendments are proposed under Section 13.002 of the Texas Agriculture Code (Code), which requires the Department to enforce Chapter 13; Section 13.258 of the Code; which requires the Department to adopt rules necessary to administer the certification of public weighers; and Section 13.261 of the Code, which requires the Department to adopt rules governing bonding requirements for public weighers and to set fees related to public weighers.

The code affected by the proposed amendments is Texas Agriculture Code, Chapters 13.

§12.71. Application Procedure.

[~~(a)~~] To obtain a certificate of authority, the applicant shall submit to the department: [~~an application obtained from the department.~~]

(1) an application on a form prescribed by the department;

(2) [~~(b)~~] [~~The applicant shall submit~~] a bond as required by this subchapter; and[~~.~~]

(3) [~~(c)~~] [~~The applicant shall remit~~] a fee as required by this subchapter with the application.

§12.72. Bond.

(a) Any bond executed as a condition for holding office as a public weigher shall be:

(1) signed by a bonding agent licensed by the Texas Department of Insurance [~~State Board of Insurance to do business in Texas~~];

(2) completed on a form prescribed by the department[~~. The bond form may be obtained from the department~~]; and

(3) in the amount of $10,000 payable to the State of Texas and filed with the department.

(b) Any bond executed as a condition for holding office as a public weigher shall be current during the entire time period the public weigher maintains a valid certificate of authority.

§12.73. Fees.

The public [~~Public~~] weigher fee is $500.

§12.74. Records.

A public weigher shall retain [~~in a well bound book, for a period of two years,~~] a copy of each official certificate issued for a period of two years. Such copies shall be maintained together in either physical or electronic form.

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 I. ELECTRIC VEHICLE CHARGING STATIONS

4 TAC §§12.75 - 12.92

The Texas Department of Agriculture (Department) proposes a new Subchapter I to Texas Administrative Code, Title 4, Part 1, Chapter 12, Electric Vehicle Charging Stations. As a part of this new Subchapter I, the Department proposes new rules: §12.75, concerning the Purpose, title, and authority; §12.76, concerning Application of rules; §12.77, concerning Definitions; §12.78, concerning Interpretation of rules; §12.79, concerning Relief from rules; §12.80, concerning Fee Schedule; §12.81, concerning Implementation of this subchapter; §12.82, concerning Record keeping; §12.83, concerning Registration and contact information; §12.84, concerning Annual reporting requirements; §12.85, concerning Reporting of openings and closings; §12.86, concerning Inspections and Tests; §12.87, concerning Charging stations equipment and applicable standards; §12.88, concerning Equipment Testing; §12.89, concerning Consumer services informal review; §12.90, concerning Records of service complaints, investigations; §12.91, concerning Determining assessment of costs; and §12.92, concerning Fines.

The Department identified the need for the proposed new rules during its rule review of Texas Administrative Code, Title 4, Part 1, Chapter 12 conducted pursuant to Texas Government Code, §2001.039.

Proposed new §12.75 identifies the purpose of these new rules and the authority under which they were promulgated.

Proposed new §12.76 explains the applicability of these rules.

Proposed new §12.77 provides the definitions applicable to these rules.

Proposed new §12.78 identifies the standards to be followed in the interpretation of these rules.

Proposed new §12.79 identifies the criteria to be used by the Department in granting relief from the

application of these rules.

Proposed new §12.80 explains the Department's fee schedule.

Proposed new §12.81 explains the Department's timeframe for implementation of this subchapter.

Proposed new §12.82 specifies the Department's record keeping requirements for a charging station operator.

Proposed new §12.83 specifies the Department's registration and contact information requirements for a charging station operator.

Proposed new §12.84 specifies the Department's annual reporting requirements for a charging station operator.

Proposed new §12.87 specifies the Department's standards for public charging station equipment and facilities.

Proposed new §12.88 specifies the Department's standards for the maintenance and testing of the equipment at public charging stations.

Proposed new §12.89 specifies the Department's procedures for consumer services informal reviews of consumer complaints.

Proposed new §12.90 specifies the Department's record keeping requirements for a public charging station operator, relating to service complaints and investigations.

Proposed new §12.91 specifies the Department's procedures for assessing costs in enforcement proceedings.

Proposed new §12.92 specifies the Department's procedures for the assessment and disposition of fines resulting from enforcement proceedings.

LOCAL EMPLOYMENT IMPACT STATEMENT: Ms. Christina Osborn, the Director for Consumer Product Protection, has determined that the proposed rules will not affect a local economy, so the Department is not required to prepare a local employment impact statement under Texas Government Code, §2001.022.

GOVERNMENT GROWTH IMPACT STATEMENT: Pursuant to Texas Government Code, §2001.0221, Ms. Osborn provides the following Government Growth Impact Statement for the proposed rules. For each year of the first five years the proposed rules will be in effect:

(1) the proposed new Subchapter will lead to the creation of new staff positions involving regulation and possibly inspecting electric vehicle charging stations associated with new Subchapter I;

(2) implementation of the proposal will require the creation of new employee positions associated with new Subchapter I;

(3) implementation of the proposed rules will not require an increase or decrease in future legislative appropriations to the Department;

(4) the proposed rules will require an increase in fees paid to the Department in the form of licensure fee and associated fees related to electric charging vehicle stations associated with new Subchapter I;

(5) the proposed rules will create new regulations in the form of new Subchapter I;

(6) the proposed rules will not expand existing regulation;

(7) the proposed rules will increase the number of individuals subject to the rules, as owners and operators of electric vehicle charging stations will be subject to new Subchapter I; and

(8) the proposed rules will affect this state's economy through the possibility of licensure and associated fees which electric charging stations would have to pay pursuant to new Subchapter I.

FISCAL IMPACT ON STATE AND LOCAL GOVERNMENT: Ms. Christina Osborn, the Director for Consumer Product Protection, has determined that for the first five-year period the proposed rules are in effect, there will be no fiscal implications for local governments as a result of enforcing or administering the proposed rules. However, there will be fiscal implications for the state government as the Department will be required to expend funds and resources overseeing and operating any program associated with electric vehicle charging stations. Ms. Osborn has determined that for each year of the first five years the proposed rules will be in effect, costs to the state will be as follows: (1) in the first year, an estimated cost of $265,055; (2) in the second year, an estimated cost of $348,465; (3) in the third year, an estimated cost of $347,871; (4) in the fourth year, an estimated cost of $411,159; and (5) in the fifth year, an estimated cost of $475,516.

Ms. Osborn has determined that for each year of the first five years the proposed rules will be in effect, the estimated increase in revenue to the state will be as follows: (1) in the first year, an estimated increase of $472,500; (2) in the second year, an estimated increase of $472,500; (3) in the third year, an estimated increase of $472,500; (4) in the fourth year, an estimated

increase of $472,500; and (5) in the fifth year, an estimated increase of $472,500.

PUBLIC BENEFITS AND PROBABLE ECONOMIC COST: Ms. Osborn has determined that for each year of the first five-year period the proposed rules are in effect, the public benefit will be increased consumer protection and oversight involving electric vehicle charging stations in the state, as no current oversight exists. Ms. Osborn has also determined that for each year of the first five-year period the proposed rules are in effect, there will be costs to persons required to comply with the proposed rules in the form of licensure and associated fees as provided by §12.80.

FISCAL IMPACT ON SMALL BUSINESSES, MICRO-BUSINESSES, AND RURAL COMMUNITIES: The Department has determined there will be no adverse economic effect on small businesses, micro-businesses, or rural communities as a result of the proposed amendments, therefore preparation of an economic impact statement and a regulatory flexibility analysis, as detailed under Texas Government Code, §2006.002, is not required.

Written comments on the proposal may be submitted by mail to Mr. J. Christopher Gee, Lead Assistant General Counsel, Texas Department of Agriculture, P.O. Box 12847, Austin, Texas 78711, or by email to Chris.Gee@TexasAgriculture.gov. Comments must be received no later than 30 days from the date of publication of the proposal in the *Texas Register.*

The new rules are proposed pursuant to Section 12.016 of the Texas Agriculture Code (Code), which provides the department with the authority to adopt rules necessary for the administration of its powers and duties under the Code.

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

§12.75. Purpose, Title, and Authority.

(a) The purpose of this subchapter is to establish rules to implement and enforce weights and measures requirements pertaining to electric vehicle charging stations pursuant to Texas Agriculture Code, Chapter 13.

(b) The department has authority to promulgate and enforce these rules pursuant to Texas Agriculture Code, §12.016.

§12.76. Application of Rules.

(a) This subchapter shall be read in context with any applicable:

(1) Federal law and/or regulation;

(2) State law and/or regulation; and

(3) Commission order and/or rule.

(b) This subchapter shall be applicable to all public charging stations operating in the State of Texas.

(c) This subchapter is not applicable to charging stations:

(1) That are not available for use by the public (e.g., at a personal residence, including multifamily dwellings, workplaces, or other non-public locations).

(2) That dispense electrical energy at no cost to the consumer.

(3) Used solely for dispensing electrical energy in connection with operations in which the amount dispensed does not affect customer charges or compensation (e.g., a store provides a free charging station on its property, a paid parking lot provides a charging station for which there is no charge based on the amount of energy delivered, a car manufacturer provides free charging services for its owners, or an organization charges a monthly fee for unlimited use of its network of charging stations).

(4) With a charging capacity of less than fifty (50) kilowatts.

§12.77. Definitions.

In addition to the terms defined in Texas Agriculture Code, §13.001 and Texas Administrative Code, Title 4, Part 1, §1.1, the following words or terms, when used in this subchapter, shall have the following meanings, unless the context clearly indicates otherwise.

(1) "Commission" means the Public Utility Commission of Texas.

(2) "Consumer" or "Customer" means any person charging an electric vehicle at a public charging station.

(3) "EVSE port" or "electric vehicle supply equipment port" means the part of charging station equipment that has the power to charge only one electric vehicle at a time even though it may have multiple connectors/plugs.

(4) "Install," "installing" or "installation" means the major activities and actions required to connect, in accordance with applicable building and electrical codes, the conductors, connectors and all associated fittings, devices, power outlets or apparatuses mounted at the premises that are directly involved in delivering energy from the premises' electrical wiring to the public charging station.

(5) "Maintain," "maintaining" or "maintenance" means the major activities and actions required to keep in an appropriate, safe condition and operation the conductors, connectors and all associated fittings, devices, power outlets or apparatuses mounted at the premises that are directly involved in delivering energy from the premises' electrical wiring to the public charging station.

(6) "NIST" means the National Institute of Standards and Technology.

(7) "Person" means an individual, partnership, corporation, association, trust, and every other type of legal entity, including an officer or employee of the Commission.

(8) "Repair" or "repairing" means the major activities and actions required to restore to a safe, sound condition and operation the conductors, connectors and all associated fittings, devices, power outlets or apparatuses mounted at the premises that are directly involved in delivering energy from the premises' electrical wiring to the public charging station.

§12.78. Interpretation of Rules.

The words contained in this subchapter shall be given their ordinary and customary meanings, with technical terms and words being construed as generally understood within the electric and electric vehicle industries, except where otherwise expressly provided.

§12.79. Relief from Rules.

Whenever compliance with any requirement of this subchapter would result in unreasonable hardship upon or excessive expense to a party or parties subject to the rules of this subchapter, the department may, upon application and for good cause shown, issue an order waiving or modifying the requirements of this subchapter. The department may grant temporary relief pending hearing.

§12.80. Fee Schedule.

(a) Registration fee.

(1) Location. Each location shall be assessed a fee of $2500;

(2) Devices. An additional fee of $250 per device will also be assessed; and

(3) Annual Report. An annual fee of $125 shall be due upon submission of the annual report.

(b) Consumer Information Sticker: the fee for a page containing eight consumer information stickers is: $8.

§12.81. Implementation of this Subchapter.

(a) The requirement to register devices subject to this subchapter shall be effective as of September 1, 2024.

(b) Inspection of devices subject to this subchapter shall commence September 1, 2025.

§12.82. Record Keeping.

(a) Each charging station operator operating a public charging station shall:

(1) Maintain third-party testing and inspection reports for three (3) years. Each testing and inspection report shall contain:

(A) Sufficient information to identify the meter;

(B) The date of the test;

(C) Reading of the meter;

(D) Safety measures provided to protect the public while using device;

(E) Results of the test; and

(F) The reason for conducting the test.

(2) Retain documentation regarding the installation of a charging station for three (3) years.

(3) Retain calibration records for the life of the meter. These records shall include the date when the meter was last calibrated and adjusted.

(b) All records shall be kept and sorted by location.

(c) All records included in this section shall be provided to or made available for inspection by the department or commission upon reasonable request.

§12.83. Registration and Contact Information.

(a) On or before March 1, 2023, or within thirty (30) days of opening a new public charging station, each charging station operator operating a public charging station shall provide the following information to the department for each public charging station:

(1) The station name, complete physical address, type of facility where the station is located, and, directions from the nearest intersection;

(2) Global positioning system ("GPS") coordinates;

(3) Date the station was placed in service to charge electric vehicles;

(4) Access days and times;

(5) The number of each type of EVSE port located at the charging station (e.g. Level 1, Level 2, DC fast charger);

(6) Electric vehicle connector types usable;

(7) Electric vehicle charging network, if applicable; and

(8) How the customer is charged.

(b) Each charging station operator shall include the name(s), mailing address(es), electronic mail address(es) and telephone number(s) of the individual(s) primarily responsible for:

(1) Providing customer service;

(2) Repair and maintenance;

(3) Answering complaints;

(4) Safety of the location;

(5) Authorizing and/or furnishing refunds to customers;

(6) Regulatory matters;

(7) Serving as primary emergency contact;

(8) Serving as contact for after-hours emergency(ies);

(9) Providing legal representation for regulatory matters;

(10) Reporting requirements;

(11) Serving as community liaison; and

(12) Engineering operations, meter tests, and repairs.

(c) If the information listed in subsections (a) or (b) of this section is unavailable, the charging station operator may seek a waiver from the department by making the request in writing.

(d) Any changes to the information in subsections (a) or (b) of this section shall be provided to the department within thirty (30) calendar days of the change.

(e) The contact person under subsection (b) of this section may be the same for one or more of the listed items and shall be furnished applicable to each specific public charging station, if different, so that the department will be able to reach the responsible person at any time.

(f) Each charging station operator operating a public charging station shall promptly furnish such other information as the department or commission may request.

§12.84. Annual Reporting Requirements.

(a) On or before March 1 of each year, each charging station operator operating a public charging station shall electronically submit information required by the department, which includes but is not limited to the following:

(1) Certification that the information provided under §12.83(a) and (b) of this subchapter is accurate;

(2) The number of EVSE ports located at each public charging station, sorted by physical address;

(3) The name, telephone number, and electronic mail address of at least one person designated by the charging station operator to address questions pertaining to the report; and

(4) A certification stating that all testing has been completed pursuant to the requirements in this subchapter.

(b) One report may be submitted for multiple public charging stations if the information, other than the physical address and the number of EVSE ports, is the same.

(c) No confidential information should be included in the report.

§12.85. Reporting of Openings and Closings.

(a) The charging station operator operating a public charging station shall inform the department in writing within thirty (30) calendar days of opening and/or permanently closing a public charging station.

(b) The department shall be notified in writing if a public charging station is closed due to maintenance and/or repairs for greater than fifteen (15) business days.

§12.86. Inspections and Tests.

(a) The department, or its authorized representative, shall be permitted to inspect and test the facilities located at any public charging station for compliance with Texas Agriculture Code, Chapter 13.

(b) Inspections and tests must be performed in compliance with all applicable state and federal regulations.

§12.87. Charging Station Equipment and Applicable Standards.

(a) Public charging stations must be maintained in all respects, including the functioning of the equipment.

(b) The charging station must be legibly and permanently marked to show the name, phone number, and electronic mail address of the person to contact for emergencies, malfunctioning equipment, customer service, and for other concerns.

(c) No meter shall be installed which is known to be defective, or to have incorrect constants or standards, or which has not been tested and adjusted, if necessary, in accordance with the manufacturer's requirements or industry standards.

(d) All electrical equipment must meet the requirements of the most recent version of the National Fire Protection Association's NFPA 70, the National Electrical Code, and any updates thereto as it applies to wet, damp and hazardous conditions. All electrical wiring and equipment must be suitable for the locations in which it is installed; and, required emergency switches must be installed and appropriately placed.

(e) Public charging station facilities must be resistant to damage from the impact of a motor vehicle or be protected by suitable collision barriers.

(f) All required markings, instructions, graduations, indications, or recorded representations and their defining figures, words, and symbols must be easily readable and of such character that they will not easily become illegible.

(g) The department encourages all public charging stations to follow the standards in Section 3.40 of the NIST Handbook 44 (Specifications, Tolerances, and other Technical Requirements for Weighing and Measuring Devices), and its future amendments, unless there exists a conflict with the statute or a provision of this subchapter.

(h) The requirements of this section will be enforced beginning September 1, 2023.

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§12.88. Equipment Testing.

(a) Each charging station operator operating a public charging station shall provide and install at its own expense and shall continue to own, maintain, and operate proper and sufficient equipment for the accurate measurement of electricity delivered by each public charging station.

(b) Each charging station operator operating a public charging station shall follow test procedures necessary for testing its meters in compliance with the manufacturer's requirements or industry standards. The equipment facilities and procedures shall be available for inspection by the department or its authorized representative. A charging station operator operating a public charging station may contract for testing of its meters by a third party.

(c) To ensure accuracy, meters shall be tested in accordance with a testing schedule established by the charging station operator, but in no instance shall it be greater than three (3) years between tests. Initial certifications from the manufacturer may count toward the first three (3) year certification requirement. Charging stations that began operations prior to January 1, 2023, must complete testing no later than January 1, 2026.

(d) If charging station equipment is determined by the charging station operator or the department to be nonfunctional or having incorrect or inaccurate meter measurements, the equipment shall be taken out-of-service immediately, unless waived in writing by the department for good cause shown. Once repairs are completed, the equipment shall be tested to confirm metered measurements and readings are within the original manufacturer's calibrations and/or specifications. Repaired equipment may be put back into service after the test results have been reported to the department.

§12.89. Consumer Services Informal Review.

(a) Whenever there is a dispute between the charging station operator operating a public charging station and the consumer as to the accuracy of the charging station meter, the matter may be brought by either party to the department. A consumer may be represented by a third party, if the consumer is available for verification of facts related to the dispute.

(b) The department will review the matter and issue an informal review decision in writing. If the dispute can be resolved by telephone with the party seeking review, the review decision need not be in writing unless requested by either party.

(c) During the department's informal review, the department may direct the charging station operator to test the accuracy of the equipment. The test shall be performed within ninety days and may be performed by a third party.

(1) Prior to conducting the test, the charging station operator shall provide the cost to conduct the test and provide the consumer notice that if the meter is found to test within the accuracy prescribed by the manufacturer of the equipment, the consumer will be required to pay the cost of the test. The consumer may withdraw the written request at any time prior to the test being conducted.

(2) If requested in writing by the consumer, the charging station operator shall conduct the test in the presence of the consumer, the consumer's representative, and/or an expert.

(3) The charging station operator shall prepare a written report stating the name of the consumer requesting the test, the date of the request, the location of meter, the type, make, size, and serial number of the meter, the date tested, and the result of the test. This report shall be provided to the consumer and the department within ten (10) business days after the completion of the test.

(4) If the meter is found to test outside of the limits of accuracy prescribed by the manufacturer of the equipment or industry standards, the charging station operator shall refund any overcharge to the consumer.

(d) If the department is unable to resolve the dispute to the mutual satisfaction of the consumer or charging station operator, either may file a Consumer Services Complaint with the department.

§12.90. Records of Service Complaints; Investigations.

Each charging station operator operating a public charging station shall make a full and prompt investigation of every formal complaint made to it by its consumers, either directly, or through the department after the consumer or other interested party has contacted the charging station operator. Each charging station operator operating a public charging station shall keep a record of all formal complaints received, which record shall show the name and address of the complainant, the date, the nature of the complaint, and the adjustment, or disposal made

thereof, which record shall be retained for examination by the department. For purposes of this section, a formal complaint is a written communication by a consumer or other interested party to the charging station operator operating a public charging station that prompts an investigation by the charging station operator. All records of formal complaints shall be retained for a period of at least two (2) years from the date of final disposition.

§12.91. Determining Assessment of Costs.

(a) If a department proceeding is filed to enforce testing, calibration, and inspection report requirements, costs of the proceeding may be assessed by the department upon the filing of a motion.

(b) Pursuant to subsection (a) of this section, the department will determine the estimated costs of the case. These costs will be the basis of the amount assessed to the charging station operator subject to this subchapter.

(c) After notice and hearing, the department shall issue an order which shall include the following:

(1) Whether or not the charging station operator will be assessed a cost;

(2) The amount to be assessed; and

(3) The date that the payment(s) shall be made.

§12.92. Fines.

(a) If a charging station operator operating a public charging station fails to meet the requirements of this subchapter, the department shall, following notice and a hearing, assess a fine not to exceed five hundred dollars ($500.00) per day, per violation. Each day on which a violation occurs will be deemed a separate and distinct offense.

(b) All costs, fees, fines, or assessments collected shall be deposited into the State of Texas General Revenue Fund.

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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Skyler Shafer
Assistant General Counsel
Texas Department of Agriculture
Earliest possible date of adoption: January 22, 2023
For further information, please call: (512) 936-9360

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CHAPTER 20. COTTON PEST CONTROL

The Texas Department of Agriculture (Department) proposes amendments to Texas Administrative Code, Title 4, Part 1, Chapter 20 (Cotton Pest Control), §20.1 (Definitions), §20.3 (Violations and Enforcement Actions), §20.12 (Suppressed Areas), §20.13 (Functionally Eradicated Areas), §20.14 (Eradicated Areas), §20.15 (Regulated Articles), §20.17 (Inspections and Certificates), §20.30 (Hostable Cotton in Commercial Cotton Fields), and §20.31 (Hostable Volunteer and Other Noncommercial Cotton in Locations Other Than Commercial Cotton Fields).

The Department identified the need for the proposed amendments during its rule review conducted pursuant to Texas Government Code, §2001.039, the adoption of which can be found in the Review of Agency Rules section of this issue.

The proposed amendments are the result of efforts from Department staff with input from the Board of Directors of the Texas Boll Weevil Eradication Foundation (Foundation). The Foundation administers efforts to counter cotton pests for the Department. The proposed amendments were reviewed and discussed at the board's open meeting on August 31, 2022.

The proposed amendments to §20.1 remove a definition for a term already defined in statute (Texas Agriculture Code (Code), Section 74.002), correct a cross reference to Code, Section 74.0032, remove unnecessary information in a reference to Code, Section 74.119, remove unnecessary internal references within this chapter, and make grammatical and editorial changes to improve the rule's readability.

The proposed amendment to §20.3 corrects a spelling error.

The proposed amendments to §20.12 replace references to the "Department" with "department" for consistency with the remaining chapters in Title 4, Part 1 and make a reference to the location of the definition for "suppressed area" more specific by adding a cross reference to §20.1.

The proposed amendments to §20.13 change references to the Upper Coastal Bend (UCB) and South Texas Winter Garden Boll Weevil Eradication Zones to their complete titles, add a cross reference to §3.117, the rule providing for the UCB, replace a reference to the "Commissioner" with "commissioner" for consistency with general usage in Title 4, Part 1 and Chapter 74 of the Code, make a references to the location of the definition for "functionally eradicated area" more specific by adding a cross reference to §20.1, and make an editorial change to language to improve the rule's readability.

The proposed amendments to §20.14 replaces references to the "Commissioner" with "commissioner" as "commissioner" is the term generally used in Title 4, Part 1 and Chapter 74 of the Code, add the phrase "of this title" to cross references to rules in Chapter 3, and make a reference to the location of the definition for "eradicated area" more specific by adding a cross reference to §20.1.

The proposed amendments to §20.15 clarify internal references within this chapter, incorporate a statutory citation to a definition, and make grammatical changes to improve the rule's readability.

The proposed amendments to §20.17 make grammatical changes to improve the rule's readability.

The proposed amendments to §20.30 change cross references to §§20.12 - 20.14 and make grammatical changes to improve the rule's readability.

The proposed amendments to §20.31 update a cross reference to §3.53 and §§20.11 - 20.14, clarify internal references within this chapter; revise the phrase, "pest management zone," to conform with usage in Code, Chapter 74; and makes grammatical changes.

FISCAL IMPACT ON STATE AND LOCAL GOVERNMENT: Mr. Phillip Wright, the Administrator for Regulatory Affairs for Agriculture and Consumer Protection, has determined that for the first five-year period the proposed amendments are in effect, there will be no fiscal implications for the state or local governments as a result of enforcing or administering the rules.

PUBLIC BENEFITS AND PROBABLE ECONOMIC COSTS: Mr. Wright has determined that for each year of the first five years the proposed amendments are in effect, the public benefit will be improved readability and clarity of the rules. Mr. Wright has also determined there are no anticipated economic costs to persons required to comply with the proposed amendments.

LOCAL EMPLOYMENT IMPACT STATEMENT: Mr. Wright has determined that the proposed amendments will not affect a local economy, so the Department is not required to prepare a local employment impact statement under Texas Government Code, §2001.022.

GOVERNMENT GROWTH IMPACT STATEMENT: Pursuant to Texas Government Code, §2001.0221, Mr. Wright provides the following Government Growth Impact Statement for the proposed amendments. For each year of the first five years the proposed amendments will be in effect, the Department has determined the following:

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

(2) no employee positions will be created or eliminated;

(3) there will be no increase or decrease in future legislative appropriations to the Department;

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

(5) no new regulations will be created by the proposed amendments;

(6) there will be no expansion, limitation, or repeal of existing regulation;

(7) there will be no increase or decrease in the number of individuals subject to the rules; and

(8) there will be no positive or adverse effect on the Texas economy.

FISCAL IMPACT ON SMALL BUSINESSES, MICRO-BUSINESSES, AND RURAL COMMUNITIES: The Department has determined there will be no adverse economic effect on small businesses, micro-businesses, or rural communities as a result of the proposed amendments, therefore preparation of an economic impact statement and a regulatory flexibility analysis, as detailed under Texas Government Code, §2006.002, is not required.

Written comments on the proposed amendments may be submitted by mail to Mr. Morris Karam, Assistant General Counsel, Texas Department of Agriculture, P.O. Box 12847, Austin, Texas 78711, or by email to morris.karam@texasagriculture.gov. Comments must be received no later than 30 days from the date of publication of the proposal in the *Texas Register.*

SUBCHAPTER A. GENERAL PROVISIONS

4 TAC §20.1, §20.3

The amendments are proposed under Section 74.006 of the Texas Agriculture Code (Code), which provides the Department with the authority to adopt rules as necessary for the effective enforcement and administration of the cotton pest control program, and Section 74.004 of the Code, which provides the Department with the authority to establish regulated areas, dates, and appropriate methods of destruction of cotton stalks, other cotton parts, and products of host plants for cotton pests.

The code affected by the proposed amendments is Texas Agriculture Code, Chapter 74.

§20.1. Definitions.

In addition to the definitions set out in the Texas Agriculture Code, Chapter 74, and Part 1, Chapter 1, §1.1 of this title, the [~~The~~] following words and terms, when used in this chapter, shall have the following meanings unless the context clearly indicates otherwise.

(1) - (5) (No change.)

[~~(6) Cotton--Any parts of cotton or wild cotton plants; this definition includes all members of the genera Gossypium and Thurberia.~~]

(6) [~~(7)~~] Cotton lint--All forms of raw ginned cotton except linters and gin waste.

(7) [~~(8)~~] Cotton products--Seed cotton, cotton lint, linters, oil mill waste, gin waste, squares, bolls, gin trash, cotton seed, cotton-seed hulls, and all other forms of unmanufactured cotton fiber.

(8) [~~(9)~~] Cotton seed--The seed of the cotton plant, separated from lint.

(9) [~~(10)~~] Destroyed (or destruction) [~~Destroyed, or destruction~~]--Compliant with applicable requirements and restrictions established in [~~Subchapters C and D of~~] this chapter; for noncommercial cotton, made non-hostable.

(10) [~~(11)~~] Destruction deadline--The date established in this chapter for destruction of cotton stalks.

(11) [~~(12)~~] Eradicated area--An area apparently free of boll weevil or, for which scientific documentation acceptable to the department has been provided that indicates that no boll weevils were captured for a period of at least one cotton growing season by weevil pheromone traps operated by the foundation [~~Texas Boll Weevil Eradication Foundation~~] or other governmental agency.

(12) [~~(13)~~] Eradication area--A defined area in which a boll weevil eradication program has been initiated.

(13) [~~(14)~~] Foundation--The Texas Boll Weevil Eradication Foundation, Inc.

(14) [~~(15)~~] Functionally eradicated area--An area meeting the trapping criteria for a suppressed area with no confirmed evidence of boll weevil reproduction occurring in the area and no oviposition in squares, and in which the movement of regulated articles presents a threat to the success of the boll weevil eradication program. The boll weevil population must be equal to or less than an average of 0.001 boll weevils per trap per week for the cotton growing season as measured by boll weevil pheromone traps operated by the foundation [~~Texas Boll Weevil Eradication Foundation~~] or other governmental agency.

(15) [~~(16)~~] Gin motes--Short fragments of unmanufactured cotton fiber removed from lint cleaners after ginning cotton.

(16) [~~(17)~~] Gin trash--All material produced during the cleaning and ginning of seed cotton, except lint, linters, cotton seed, and gin waste.

(17) [~~(18)~~] Gin waste--All forms of unmanufactured waste cotton fiber resulting from the ginning of seed cotton, including gin motes.

(18) [~~(19)~~] Hostable material--Cotton [~~In Subchapter A or B of this chapter, cotton~~] fruiting structures such as buds, squares, flowers, or bolls.

(19) [~~(20)~~] Hostable commercial cotton fee--The hostable cotton fee established in Texas Agriculture Code, §74.0032, [~~§74.032,~~

as enacted by House Bill 1580, 81st Legislature, 2009,], which applies to hostable cotton stalks, volunteer cotton or noncommercial cotton which remain past the stalk destruction deadline in a commercial cotton field.

(20) [(21)] Hostable cotton (or hostable)--Cotton [In Subchapters C and D of this chapter, cotton] with fruiting structures including buds, squares, flowers, uncracked bolls or unopened bolls.

(21) [(22)] Hostable noncommercial cotton fee--The volunteer cotton fee established in Texas Agriculture Code, §74.119[, as amended by House Bill 1580, 81st Legislature, 2009, which applies to hostable cotton stalks, volunteer cotton or noncommercial cotton in a crop field or other location that is not a commercial cotton field].

(22) [(23)] Linters--Residual unmanufactured cotton fiber separated from cottonseed after the lint has been removed.

(23) [(24)] New crop--Cotton planted on or after the earliest planting date that follows the most recent destruction deadline.

(24) [(25)] Non-hostable cotton (or non-hostable)--Cotton [In Subchapters C and D of this chapter cotton] that is free of living, normally colored (not wilted or darkened) fruiting structures including buds, squares, flowers, uncracked bolls, or unopened bolls.

(25) [(26)] Noncommercial cotton--Any cotton that is not commercial cotton.

(26) [(27)] Oil mill waste--Waste products, including linters, derived from the milling of cottonseed.

(27) [(28)] Plow--To dislodge or sever the roots of plants in a manner which prevents further growth. Equipment used to accomplish this could include a stalk puller, any type of plow, or similar implement.

(28) [(29)] Protection plan--A plan developed for the purpose of mitigating, with the goal of preventing, boll weevil infestation and establishment in an area. Mitigating measures may include, but are not limited to, the following:

(A) the field treatment of cotton and cotton products prior to delivery to an area or a gin by an approved insecticide;

(B) requirements for moving, handling, storage, and treatment or use of approved insecticide applications to regulated articles; and

(C) monitoring of boll weevils at a specified site(s) as approved by the department.

(29) [(30)] Regrowth cotton (or regrowth) [Regrowth cotton, or regrowth]--Vegetative and/or reproductive growth produced on a cotton plant following its destruction or partial destruction.

(30) [(31)] Restricted Area--An area designated as suppressed, functionally eradicated, or eradicated of boll weevils, as those terms are defined in this section.

(31) [(32)] Seed cotton--All forms of un-ginned cotton from which the seed has not been separated.

(32) [(33)] Stalk puller--An implement which dislodges the roots of cotton plants by pulling up the stalks.

(33) [(34)] Suppressed area--An area in which some boll weevil reproduction may be present in the area or a portion thereof, and in which the movement of regulated articles presents a threat to the success of the boll weevil eradication program. The boll weevil population must be equal to or less than 0.025 boll weevils per trap per week for the cotton-growing season as measured by boll weevil pheromone traps operated by the foundation [Texas Boll Weevil Eradication Foundation] or other governmental agency.

(34) [(35)] Trap--Type of adult boll weevil pheromone trap approved by the foundation [Texas Boll Weevil Eradication Foundation].

(35) [(36)] Treatment--The act of eliminating possible cotton pest infestation(s) by means of cleaning, spraying or fumigation to eliminate the infestation.

(36) [(37)] Volunteer cotton--For purposes of this chapter, a cotton plant or plants that were not deliberately planted.

§20.3. Violations and Enforcement Actions.

(a) (No change.)

(b) Enforcement Actions.

(1) The department may direct any means of conveyance containing plants, plant products, or other items susceptible to cotton pest contamination to an authorized inspection point for treatment or reinspection prior to entering a restricted area. To minimize the risk of contamination of a restricted area by such means of conveyance discovered or apprehended in restricted areas, the department may seize and maintain control over the means of conveyance and its [it's] relevant contents until the department is satisfied that they are safely decontaminated or that they no longer pose a threat to the quarantine. Any costs associated with such decontamination (including the cost of decontamination, transportation of the means of conveyance, destruction of contaminated materials, and special materials that the department may deem necessary to prevent regulated materials from leaving the means of conveyance) are the responsibility of the violator(s).

(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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Skyler Shafer
Assistant General Counsel
Texas Department of Agriculture
Earliest possible date of adoption: January 22, 2023
For further information, please call: (512) 936-9360

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SUBCHAPTER B. QUARANTINE REQUIREMENTS

4 TAC §§20.12 - 20.15, 20.17

The amendments are proposed under Section 74.006 of the Texas Agriculture Code (Code), which provides the Department with the authority to adopt rules as necessary for the effective enforcement and administration of the cotton pest control program; Section 74.010 of the Code, which requires the Department to inspect substances susceptible to cotton pest contamination that are being carried from quarantined territory into, through, or within this state; and Section 74.004 of the Code, which provides the Department with the authority to establish regulated areas, dates, and appropriate methods of destruction of cotton stalks, other cotton parts, and products of host plants for cotton pests.

The code affected by the proposed amendments is Texas Agriculture Code, Chapter 74.

§20.12. Suppressed Areas.

(a) The commissioner may grant a request for declaration of an area in Texas as suppressed after a written recommendation is submitted to the department from the foundation [~~Foundation~~], supported by scientific documentation acceptable to the department indicating that movement of regulated articles into the area presents a threat to the success of boll weevil eradication.

(b) The department will recognize as suppressed any areas outside of Texas that are declared suppressed by that state's department of agriculture if the department [~~Texas Department of Agriculture~~] determines that state's definition of a suppressed area is equivalent to the definition of a suppressed area [~~found~~] in §20.1 [~~Subchapter A~~] of this chapter (relating to Definitions [~~General Provisions~~]).

(c) The department has determined that the New Mexico and Oklahoma departments of agriculture's definitions of a suppressed area are equivalent to the definition of a suppressed area in §20.1 [~~Subchapter A~~] of this chapter.

§20.13. Functionally Eradicated Areas.

(a) The commissioner may grant a request for declaration of an area in Texas as functionally eradicated after a written recommendation is submitted to the department from the foundation [~~Foundation~~], supported by scientific documentation acceptable to the department indicating that movement of regulated articles into the area presents a threat to the success of boll weevil eradication.

(b) The Upper Coastal Bend (UCB) Boll Weevil Eradication Zone and the South Texas Winter Garden (STWG) Boll Weevil Eradication Zone [~~Zones~~], as defined in §3.117 of this title (relating to Upper Coastal Bend Boll Weevil Eradication Zone) and the Texas Agriculture Code, §74.1021, have been declared as functionally eradicated by the commissioner [~~Commissioner~~].

(c) The department will recognize as functionally eradicated any areas outside of Texas that are declared functionally eradicated by that state's department of agriculture if that state's definition of a functionally eradicated area is equivalent to the definition of a functionally eradicated area in §20.1 [~~Subchapter A~~] of this chapter (relating to Definitions [~~General Provisions~~]).

(d) The department has determined that the definitions of a functionally eradicated area of New Mexico and Oklahoma departments of agriculture are equivalent to the definition of a functionally eradicated area in §20.1 [~~Subchapter A~~] of this chapter.

§20.14. Eradicated Areas.

(a) The commissioner [~~Commissioner~~] may grant a request for declaration of an area in Texas as eradicated after a written recommendation is submitted to the department by the foundation [~~Foundation~~], supported by scientific documentation acceptable to the department indicating that movement of regulated articles into the area presents a threat to the success of boll weevil eradication.

(b) The West Texas Maintenance Area, as provided in §3.702 of this title (relating to West Texas Maintenance Area), the Northern Blacklands (NBL) Boll Weevil Eradication Zone, as provided in §3.116 of this title (relating to Northern Blacklands Boll Weevil Eradication Zone), and the Southern Blacklands (SBL) Boll Weevil Eradication Zone, as provided in §3.114 of this title (relating to Southern Blacklands Boll Weevil Eradication Zone), have been declared as eradicated by the commissioner [~~Commissioner~~].

(c) The department will recognize as eradicated any areas outside of Texas that are declared eradicated by that state's department of agriculture if that state's definition of an eradicated area is equivalent to the definition of an eradicated area in §20.1 [~~Subchapter A~~] of this chapter (relating to Definitions [~~General Provisions~~]).

(d) The department has determined that the definitions of an eradicated area of the New Mexico and Oklahoma departments of agriculture are equivalent to the definition of an eradicated area in §20.1 [~~Subchapter A~~] of this chapter.

§20.15. Regulated Articles.

(a) The quarantined pest as defined in §20.10 of this chapter [~~title~~] (relating to Quarantined Pest).

(b) Cotton harvesting equipment and other equipment associated with the production and transport of cotton, including, but not limited to the following:

(1) - (2) (No change.)

(3) miscellaneous associated equipment:

(A) trucks (to include service trucks, parts trucks, and harvesting equipment trucks);

(B) flatbed trailers, portable living quarters, and fuel and all other support vehicles; and

(C) (No change.)

(4) (No change.)

(c) (No change.)

(d) Cotton products as defined in §20.1 of this chapter [~~title (relating to Definitions)~~].

(e) Cotton as defined in Texas Agriculture Code, Section 74.002 [~~§20.1 of this title (relating to Definitions)~~].

(f) All other products, articles, or means of conveyance not covered above when the quarantined pest is present.

§20.17. Inspections and Certificates.

(a) (No change.)

(b) Certificates.

(1) An inspection certificate may be issued certifying the movement of regulated articles in compliance with these rules[~~,~~] for the current growing season, if an authorized representative of the department determines:

(A) that adequate measures have been taken to ensure that there will be little or no danger of increased infestation of the quarantined pest or expansion of a regulated area by such movement; [~~or~~]

(B) - (C) (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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For further information, please call: (512) 936-9360

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SUBCHAPTER D. REGULATION OF VOLUNTEER AND OTHER NONCOMMERCIAL COTTON; HOSTABLE COTTON FEE

4 TAC §20.30, §20.31

The amendments are proposed under Section 74.006 of the Texas Agriculture Code (Code), which provides the Department with the authority to adopt rules as necessary for the effective enforcement and administration of the cotton pest control program, and Section 74.004 of the Code, which provides the Department with the authority to establish regulated areas, dates, and appropriate methods of destruction of cotton stalks, other cotton parts, and products of host plants for cotton pests.

The code affected by the proposed amendments is Texas Agriculture Code, Chapter 74.

§20.30. Hostable Cotton in Commercial Cotton Fields.

(a) (No change.)

(b) Grace period. Upon discovery of hostable volunteer or other noncommercial cotton in a commercial cotton field, the department will give notice to the grower or landowner to destroy the hostable volunteer or hostable regrowth cotton within a seven-day [~~7-day~~] grace period after the date notice is given. If weather conditions prevent destruction of the cotton within the seven-day [~~7-day~~] grace period, the grower or landowner may, before the end of the seven-day [~~7-day~~] grace period submit a request for an extension of the grace period.

(c) Fee rates for boll weevil quarantined areas. In a boll weevil quarantined area, as established by §20.11 of this chapter (relating to Quarantined Areas) in conjunction with §§20.12 -[~~, 20.13 and~~] 20.14 of this chapter (relating to Suppressed Areas, Functionally Eradicated Areas, and Eradicated Areas [~~Quarantine Requirements~~]):

(1) (No change.)

(2) For fields that contain only hostable volunteer or hostable regrowth cotton, the hostable commercial cotton fee is calculated at:

(A) $5.00 per acre for each full or partial week through the end of the fifth week after the end of the seven-day [~~7-day~~] grace period or an approved extended period provided for subsection (b) of this section; and

(B) $7.50 per acre for each full or partial week beginning with the sixth week after the end of the seven-day [~~7-day~~] grace period or an approved extended period provided for in subsection (b) of this section.

(d) Fee rates for boll weevil suppressed, functionally eradicated, or eradicated areas. In a boll weevil suppressed, functionally eradicated or eradicated area, as established by §§20.12 -[~~, 20.13 and~~] 20.14 of this chapter in conjunction with §20.11 of this chapter:

(1) (No change.)

(2) For fields that contain only hostable volunteer or hostable regrowth cotton, the hostable commercial cotton fee is calculated at:

(A) $5.00 per acre for each full or partial week through the end of the fifth week after the end of the seven-day [~~7-day~~] grace period or an approved extended period provided for in subsection (b) of this section; and

(B) $7.50 per acre for each full or partial week beginning with the sixth week after the end of the seven-day [~~7-day~~] grace period or an approved extended period provided for in subsection (b) of this section.

(e) (No change.)

§20.31. Hostable Volunteer and Other Noncommercial Cotton in Locations Other Than Commercial Cotton Fields.

(a) Cotton grown under a noncommercial cotton permit issued by the department under §3.53 of this title (relating to Notice of Prohibition [~~of Planting of Cotton~~]) is exempt from the requirements of this section.

(b) Except as provided by subsection (a) of this section, volunteer and other noncommercial cotton shall be destroyed by the grower or landowner prior to becoming hostable, if the volunteer or other noncommercial cotton is:

(1) (No change.)

(2) in a boll weevil quarantined, suppressed or functionally eradicated area, as established by §§20.11 - 20.13[~~, §20.12 and §20.13~~] of this chapter (relating to Quarantined Areas, Suppressed Areas, and Functionally Eradicated Areas) in conjunction with §20.14 of this chapter (relating to Eradicated Areas [~~Quarantine Requirements~~]).

(c) Upon discovery of hostable volunteer or other hostable noncommercial cotton, the department will give notice to the grower or landowner, or both the grower and the landowner, to destroy the hostable volunteer or other hostable noncommercial cotton within 14 days after the date notice is given. If weather conditions prevent destruction of the cotton within the 14-day grace period, the grower or landowner may, before the end of the 14-day grace period submit a request for an extension of the grace period.

(1) (No change.)

(2) Other locations. If hostable volunteer or other hostable noncommercial cotton not located in a crop field or commercial cotton field is not destroyed on or before the 14th day after notice is given, the department may declare the location a public nuisance, destroy the cotton, and charge the landowner 150% [~~150 percent~~] of the actual destruction costs.

(d) Hostable Noncommercial Cotton Fee. If hostable volunteer or other hostable noncommercial cotton in a crop field, or other location that is not a commercial cotton field, is not destroyed on or before the 14th day after notice is given or the expiration of an approved extended period, the grower or landowner shall pay a hostable noncommercial cotton fee of $5.00 per acre for each full or partial week until the cotton is destroyed.

(1) (No change.)

(2) Prior to the established destruction deadline listed in §20.22 of this chapter [~~title~~] (relating to Stalk Destruction Requirements) for the applicable pest management zone [~~Pest Management Zone~~], the total fee per acre shall not exceed the per acre assessment for boll weevil eradication that would be applicable if the location were a commercial cotton field. If hostable noncommercial cotton is present after the date of the destruction deadline or any approved extension of the destruction deadline, the grower or landowner shall pay a hostable noncommercial cotton fee of $5.00 per acre for each full or partial week that shall be in addition to any fees accrued prior to the destruction deadline.

(3) (No change.)

(e) (No change.)

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

Filed with the Office of the Secretary of State on December 8, 2022.

TRD-202204878
Skyler Shafer
Assistant General Counsel
Texas Department of Agriculture
Earliest possible date of adoption: January 22, 2023
For further information, please call: (512) 936-9360

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PART 2. TEXAS ANIMAL HEALTH COMMISSION

CHAPTER 35. BRUCELLOSIS
SUBCHAPTER A. ERADICATION OF BRUCELLOSIS IN CATTLE

4 TAC §35.4

The Texas Animal Health Commission (commission) proposes an amendment to Title 4, Texas Administrative Code, Chapter 35, §35.4, concerning Entry, Movement, and Change of Ownership.

BACKGROUND AND SUMMARY OF PROPOSED AMENDMENTS

The proposed amendments to §35.4 remove additional brucellosis entry requirements created by the commission in 2013 for sexually intact cattle entering Texas from the Designated Surveillance Area (DSA) comprised of the states of Idaho, Montana, and Wyoming, established by the United States Department of Agriculture (USDA), Animal and Plant Health Inspection Services (APHIS) Veterinary Services (VS). Bovine brucellosis, is a reportable, contagious disease caused by the bacteria *Brucella abortus (B. abortus). B. abortus* primarily affects cattle, bison, and cervids. Brucellosis is a zoonotic disease; however, eradication efforts along with modern sanitary practices and pasteurization of milk products have greatly decreased the frequency of human infections.

In 2014, USDA-APHIS-VS, Center for Epidemiology and Animal Health (CEAH) released a report of a formal assessment (Portacci et al. 2014) that estimated the risk of brucellosis escape from the combined DSAs to be 0.027 per year (roughly interpretable as an escape expected every 37 years). The USDA-APHIS-VS-CEAH assessment also evaluated the costs and benefits of post-movement requirements and found that the costs of those requirements exceed the costs of outbreak responses near the end of the brucellosis eradication campaign and far exceed the costs of spillover containment responses conducted by Idaho, Montana, and Wyoming.

Following nine (9) years of testing without any detection of brucellosis-infected cattle, and in the absence of significant program deficits found during the USDA-APHIS-VS triennial review of the state brucellosis programs in the DSA states, the commission proposes the amendments to §35.4 to eliminate the additional entry requirements for cattle imported from the DSA.

The TAHC adopted Brucellosis regulations pursuant to Agriculture Code Chapter 161 and 163. Section 161.041(a) and (b) authorizes the commission to adopt any rules necessary to eradicate or control any disease or agent of transmission for any disease that affects livestock, which includes Brucellosis. Section 163.066 authorizes the commission, as a control measure, to regulate the movement of cattle. The commission may require testing, vaccination, or another procedure that is epidemiologically sound before or following the movement of cattle.

SECTION-BY-SECTION DISCUSSION

The proposed amendment to §35.4, Entry, Movement, and Change of Ownership removes the DSA-specific entry requirements for cattle originating from Idaho, Montana, or Wyoming and eliminates §35.4(b)(3)-(5).

FISCAL NOTE

Myra Sines, Chief of Staff, has determined that for each year of the first five years that the rule is in effect, enforcing or administering the rule does not have foreseeable implications relating to costs or revenues of state or local governments. Commission employees will administer and enforce these rules as part of their current job duties and resources. Ms. Sines also determined for the same period that there is no estimated increase or loss in revenue to the state or local government as a result of enforcing or administering the rule amendment.

PUBLIC BENEFIT NOTE

Ms. Sines determined that for each year of the first five years the rule is in effect, the public will benefit from the proposed amendment because it facilitates the movement of animals in interstate commerce.

TAKINGS IMPACT ASSESSMENT

The commission determined that the proposal does not restrict, limit, or impose a burden on an owner's rights to his or her private real property that would otherwise exist in the absence of government action. Instead, the proposed amendments relate to the handling of animals, including requirements concerning testing, movement, inspection, identification, reporting of disease, and treatment pursuant to 4 TAC §59.7. Therefore, the proposed rules are compliant with the Private Real Property Preservation Act in Texas Government Code §2007.043 and do not constitute a takings.

LOCAL EMPLOYMENT IMPACT STATEMENT

The commission determined that the proposed rules would not impact local economies and, therefore, did not file a request for a local employment impact statement with the Texas Workforce Commission pursuant to Texas Government Code §2001.022.

REGULATORY ANALYSIS OF MAJOR ENVIRONMENTAL RULES

The commission determined that this proposal is not a "major environmental rule" as defined by Government Code §2001.0225. "Major environmental rule" is defined to mean a rule the specific intent of which is to protect the environment or reduce risk to human health from environmental exposure and that may adversely affect, in a material way, the economy, a sector of the economy, productivity, competition, jobs, the environment or the public health and safety of a state or a sector of the state. This proposal is not specifically intended to protect the environment or reduce risks to human health from environmental exposure.

GOVERNMENT GROWTH IMPACT STATEMENT

In compliance with the requirements of Texas Government Code §2001.0221, the commission prepared the following Government Growth Impact Statement and determined that during the first five years that the rule is in effect:

1. the amendment will not create or eliminate a government program;

2. implementation of the amendment will not affect the number of employee positions;

3. implementation of the amendment will result in no assumed change in future legislative appropriations;

4. the amendment will not affect fees paid to the commission;

5. the amendment will not create a new rule;

6. the amendment will repeal existing rules;

7. the amendment will not change the number of individuals subject to the rule; and

8. the amendment will not affect the state's economy.

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

Ms. Sines also determined that there will be no adverse economic effect on small businesses, micro-businesses, or rural communities. The rules do not impose any additional costs on small businesses, micro-businesses, or rural communities that are required to comply with the rules.

COSTS TO REGULATED PERSONS

The commission determined there are no costs anticipated for persons who import cattle into Texas from the DSA. The amendments may reduce costs to producers who import cattle from the DSA because the number and frequency of tests will be reduced.

PUBLIC COMMENT

Written comments on the proposal may be submitted to Amanda Bernhard, Texas Animal Health Commission, 2105 Kramer Lane, Austin, Texas 78758, by fax to (512) 719-0719 or by e-mail to comments@tahc.texas.gov.

To be considered, comments must be submitted no later than 30 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) faxed or 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 faxing or emailing comments, please indicate "Comments on Proposed Rule-Chapter 35, Brucellosis" in the subject line.

STATUTORY AUTHORITY

The amendment is authorized by Texas Agriculture Code, Chapter 161.

Pursuant to §161.041, titled "Disease Control", the commission shall protect all livestock, exotic livestock, domestic fowl, and exotic fowl from diseases the commission determines require control or eradication. Pursuant to §161.041(b) the commission may act to eradicate or control any disease or agent of transmission for any disease that affects livestock, exotic livestock, domestic fowl, or exotic fowl. The commission may adopt any rules necessary to carry out the purposes of this subsection, including rules concerning testing, movement, inspection, and treatment.

Pursuant to §161.046, titled "Rules", the commission may adopt rules as necessary for the administration and enforcement of this chapter.

Pursuant to §161.047, titled "Entry Power", a commissioner or veterinarian or inspector employed by the commission may enter public or private property for the exercise of an authority or performance of a duty under Chapter 161.

Pursuant to §161.048, titled "Inspection of Shipment of Animals or Animal Product", the commission may require testing, vaccination, or another epidemiologically sound procedure before or after animals are moved. An agent of the commission is entitled to stop and inspect a shipment of animals or animal products being transported in this state to determine if the shipment originated from a quarantined area or herd; or determine if the shipment presents a danger to the public health or livestock industry through insect infestation or through a communicable or non-communicable disease.

Pursuant to §161.054, titled "Regulation of Movement of Animals; Exception", the commission may by rule regulate the movement of animals, and may restrict the intrastate movement of animals even though the movement of the animals is unrestricted in interstate or international commerce. The commission may require testing, vaccination, or another epidemiologically sound procedure before or after animals are moved.

Pursuant to §161.056(a), titled "Animal Identification Program", the commission, to provide for disease control and enhance the ability to trace disease-infected animals or animals that have been exposed to disease, may develop and implement an animal identification program that is no more stringent than a federal animal disease traceability or other federal animal identification program. Section 161.056(d) authorizes the commission to adopt rules to provide for an animal identification program more stringent than a federal program only for control of a specific animal disease or for animal emergency management.

Pursuant to §161.081, titled "Importation of Animals", the commission by rule may provide the method for inspecting and testing animals before and after entry into the state of Texas. The commission may create rules requiring health certificates and entry permits.

Pursuant to §163.002, titled "Cooperative Program", the commission, in order to bring about effective control of bovine brucellosis, to allow Texas cattle to move in interstate and international commerce with the fewest possible restrictions, and to accomplish those purposes in the most effective, practical, and expeditious manner, the commission may enforce this chapter and enter into cooperative agreements with the United States Department of Agriculture.

Pursuant to §163.066, titled "Regulation of Movement of Cattle; Exception", the commission by rule may regulate the movement of cattle and may restrict intrastate movement of animals even though the movement of the animals is unrestricted in interstate or international commerce. The commission may require testing, vaccination, or another epidemiologically sound procedure before or after animals are moved.

No other statutes, articles, or codes are affected by this proposal.

§35.4. Entry, Movement, and Change of Ownership.

(a) (No change.)

(b) Requirements for cattle entering Texas from other states.

(1) - (2) (No change.)

~~[(3) Requirements for cattle entering Texas directly from the Brucellosis Designated Surveillance Area (DSA) located in the states of Idaho, Wyoming, and Montana.]~~

~~[(A) All breeding bulls and sexually intact female cattle entering Texas for purposes other than immediate slaughter or feeding for slaughter in a feedlot shall be tested for brucellosis 60 to 120 days post entry or other time frames as approved by the commission to accommodate unique management practices.]~~

~~[(B) Sexually intact female cattle entering Texas that have not calved must be held until tested negative 30 to 90 days after calving (post parturient) or other time frames as approved by the commission to accommodate unique management practices.]~~

~~[(C) Nonvaccinated sexually intact female cattle between 4 and 12 months of age entering Texas for purposes other than immediate slaughter or feeding for slaughter shall be officially brucellosis vaccinated prior to entry as provided in paragraph (1) of this subsection. The vaccination exception in paragraph (1)(D) of this subsection does not apply to heifers from the DSA.]~~

~~[(D) All cattle must also meet the applicable requirements contained in Chapter 51 of this title (relating to Entry Requirements). All breeding bulls and sexually intact female cattle require an entry permit from the commission as provided for in §51.2 of this title (relating to General Requirements).]~~

~~[(4) Requirements for cattle entering Texas from the states of Idaho, Wyoming, and Montana that currently do not reside in the DSA:]~~

~~[(A) All breeding bulls and post parturient female cattle shall enter Texas with one of the following statements on the Certificate of Veterinary Inspection:]~~

~~*[(i)* The cattle represented on this certificate never resided in the DSA; or]~~

~~*[(ii)* The cattle represented on this certificate tested negative for brucellosis at least 60 days after leaving the DSA.]~~

~~[(B) Sexually intact female cattle that have not calved shall meet the requirements listed in paragraph (3)(B) of this subsection or may enter Texas with a statement on the Certificate of Veterinary Inspection that the cattle represented on this certificate never resided in the DSA.]~~

~~[(C) All cattle must also meet the applicable requirements contained in Chapter 51 of this title.]~~

~~[(5) Requirements for cattle entering Texas from states other than Idaho, Wyoming, and Montana that previously resided in the DSA:]~~

~~[(A) A statement on the Certificate of Veterinary Inspection indicating that the cattle represented on this certificate tested negative for brucellosis at least 60 days after leaving the DSA; or]~~

~~[(B) Must meet the applicable requirements contained in paragraph (3)(A) or (B) of this subsection.]~~

(c) - (d) (No change.)

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

Filed with the Office of the Secretary of State on December 12, 2022.

TRD-202204977
Myra Sines
Chief of Staff
Texas Animal Health Commission
Earliest possible date of adoption: January 22, 2023
For further information, please call: (512) 719-0724

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CHAPTER 40. CHRONIC WASTING DISEASE

4 TAC §40.6

The Texas Animal Health Commission proposes amendments to Title 4, Texas Administrative Code, Chapter 40 titled "Chronic Wasting Disease." Specifically, amendments are proposed to §40.6, concerning CWD Movement Restriction Zones.

BACKGROUND AND SUMMARY OF PROPOSED AMENDMENTS

The purpose of this chapter is to prevent and control the incidence of chronic wasting disease (CWD) in Texas by seeking to reduce the risk of interstate and intrastate transmission of CWD in susceptible cervid species. The Texas Animal Health Commission (commission) proposes amendments to §40.6 to clarify, correct, and update information regarding CWD management.

CWD is a degenerative and fatal neurological communicable disease recognized by the veterinary profession that affects susceptible cervid species. CWD can spread through natural movements of infected animals and transportation of live infected animals or carcass parts. Specifically, prions are shed from infected animals in saliva, urine, blood, soft-antler material, feces, or from animal decomposition, which ultimately contaminates the environment in which CWD susceptible species live. CWD has a long incubation period, so animals infected with CWD may not exhibit clinical signs of the disease for months or years after infection. The disease can be passed through contaminated environmental conditions, and may persist for a long period of time. Currently, no vaccine or treatment for CWD exists.

To mitigate the risks and spread of CWD, the commission works in coordination and collaboration with the Texas Parks and Wildlife Department (TPWD) to address CWD. The commission has jurisdiction over exotic CWD susceptible species. TPWD has jurisdiction over mule deer, white-tailed deer, and other native species. Those native species are classified as property of the state of Texas and managed as state resources. TPWD, under specific statutory authorization, allows herd owners to breed, trade, sell, and move white-tailed or mule deer that meet certain TPWD requirements.

The purpose of the restriction zones is to both increase surveillance and reduce the risk of CWD being spread from areas where it may exist. As required by §40.6(g), the commission reviewed the movement restriction zones and recommends the modifications as stated herein. The proposed amendments would establish one new containment zone (CZ) 5, expand existing CZ 2 and CZ 3, create a new surveillance zone (SZ) 8, and modify existing SZ 5 to either implement or improve surveillance efforts as part of the agency's effort to manage chronic wasting disease (CWD).

SECTION-BY-SECTION DISCUSSION

§40.6 CWD Movement Restriction Zones

The proposed amendment to §40.6(b)(1)(B) would enlarge current Containment Zone (CZ) 2 in Hartley County following confirmation that a 2.5-year-old white-tailed deer killed by an automobile tested positive for CWD in the summer of 2018 and to further align with the zones developed in consultation with the Texas Parks and Wildlife Department.

The proposed amendment to §40.6(b)(1)(C) would enlarge current CZ 3 in Medina County in response to the detection of CWD in another deer within the current CZ. On January 25, 2022, the commission received confirmation that a free-ranging 5.5-year-old female white-tailed deer within the current CZ had tested positive for CWD. The action enlarges the current CZ in order to comport the CZ with existing parameters for containment zones and is necessary to provide for additional surveillance within the recalculated parameters.

The proposed amendment to §40.6(b)(1)(E) would create new CZ 5 in Kimble County in response to the detection of CWD in another deer within the county. On February 26, 2020, the commission received confirmation that a 5.5-year-old female white-tailed deer in a deer breeding facility in Kimble County had tested positive for CWD. Two white-tailed deer harvested on a release site associated with the index facility subsequently tested positive (January 12, 2022 and February 18, 2022, respectively).

The proposed amendment to create §40.6(b)(1)(F) would move current §40.6(b)(1)(E), which describes CZ 6, to this new subsection for continuity of numbering of the containment zones.

The proposed amendment to §40.6(b)(2)(E) would enlarge Surveillance Zone (SZ) 5 in Kimble County to include the city of Junction, which would allow hunters to transport carcasses to processors and taxidermists in Junction without carcass movement restrictions.

The proposed amendment to create §40.6(b)(2)(H) would create new SZ 8 in Duval County in response to the detection of CWD in a deer breeding facility at the end of 2021 and to allow hunters to transport carcasses to processors and taxidermists in Alice and Freer without carcass movement restrictions.

Each proposed zone aligns with zones developed in consultation with the Texas Parks and Wildlife Department.

FISCAL NOTE

Ms. Myra Sines, Chief of Staff of the Texas Animal Health Commission, determined for each year of the first five years the rules are in effect, there are no estimated additional costs or reductions in costs to state or local governments as a result of enforcing or administering the proposed rules. Commission employees will administer and enforce these rules as part of their regular job duties and resources. Ms. Sines also determined for the same period that there is no estimated increase or loss in revenue to the state or local government as a result of enforcing or administering the proposed rules, and the proposed rules do not have foreseeable implications relating to costs or revenues of state governments.

PUBLIC BENEFIT

Ms. Sines determined that for each year of the first five years the proposed rules are in effect, the anticipated public benefits will be the protection of CWD susceptible species by increasing the probability of detecting CWD in areas of the state where it is confirmed or likely to be detected and by reducing the inadvertent movement of the disease from those areas.

LOCAL EMPLOYMENT IMPACT STATEMENT

The commission determined that the proposed rules will not impact local economies and, therefore, did not file a request for a local employment impact statement with the Texas Workforce Commission.

MAJOR ENVIRONMENTAL RULE

The commission determined that Texas Government Code §2001.0225 does not apply to the proposed rules because the specific intent of these rules is not primarily to protect the environment or reduce risks to human health from environmental exposure, and therefore, is not a major environmental rule.

TAKINGS ASSESSMENT

The commission determined that the proposal does not restrict, limit, or impose a burden on an owner's rights to his or her private real property that would otherwise exist in the absence of government action. Instead, the proposed rules relate to the handling of animals, including requirements concerning movement, inspection, identification, and reporting of disease pursuant to 4 TAC §59.7. Therefore, the proposed rules are compliant with the Private Real Property Preservation Act in Texas Government Code §2007.043 and do not constitute a takings.

ECONOMIC IMPACT STATEMENT

The commission determined that the proposed amendments to §40.6 may impact animal agricultural industries, which meet the definition of a small business or microbusiness pursuant to Texas Government Code, Chapter 2006, and may affect rural communities. Specifically, the commission determined that the proposed rules may affect herd owners of exotic CWD susceptible species located in the proposed containment and surveillance zones.

The commission determined that the proposed surveillance and containment zones in response to recent positive CWD cases would not adversely affect herd owners of exotic CWD susceptible species because the proposal applies to exotic CWD susceptible species located in geographic areas where CWD has been detected or there is a high probability of detection. As such, the movement and testing requirements resulting from the proposed zones are intended to reduce exposure to other susceptible species in the same rural community, where the disease risk is greatest, and other communities and small businesses across the state. As a result, the application of the rule will help prevent adverse economic impacts associated with chronic wasting disease.

Although the commission does not predict adverse economic impacts to those directly regulated by the commission, the commission considered the businesses that may be impacted and regulatory alternatives as part of its rule proposal process. Texas has an unknown number of exotic cervid species that are free-ranging and also maintained on high-fenced premises. Many of those premises are hunting ranches, which are not subject to the seasonal and regulatory hunting restrictions of TPWD for exotic CWD susceptible species. The commission is not aware of premises containing exotic CWD susceptible species in proposed new Containment Zone 5, modified Surveillance Zone 5, or new Surveillance Zone 8. The commission is aware of premises in the proposed expansion of Surveillance Zone 3; however, the agency cannot determine the exact number of businesses that may be affected by the expanded zone. The premises known to be in proposed expanded Containment Zone 3 are confirmed CWD positive facilities with testing and

movement requirements equal to or more stringent than the zone testing and movement requirements proposed by these rules.

REGULATORY FLEXIBILITY ANALYSIS

The commission considered several alternative methods for achieving the proposed rule's purpose while minimizing adverse economic impacts on small businesses, microbusinesses, and rural communities, as applicable, pursuant to Texas Government Code, Chapter 2006. The following sections analyze the substantive proposed changes that may have direct, adverse economic impacts on regulated parties in the order they are presented in Chapter 40.

Containment and Surveillance Zones. The commission considered alternatives for all proposed zones, especially where there are known exotic CWD susceptible species, including voluntary surveillance and alternative zone boundaries that followed more recognizable features. However, the commission determined that voluntary testing would not protect the health of other CWD susceptible species in the affected area and across the state. The commission also determined that the regulated community would benefit from consistent zone boundaries for both native and exotic CWD susceptible species. As such, the commission proposes zone boundaries to align with boundaries developed in consultation with Texas Parks and Wildlife Department.

GOVERNMENT GROWTH IMPACT STATEMENT

In compliance with the requirements of Texas Government Code §2001.0221, the commission prepared the following Government Growth Impact Statement (GGIS). For each year of the first five years the proposed rules would be in effect, the commission determined the following:

The proposed rules will not create or eliminate a government program;

Implementation of the proposed rules will not require the creation of new employee positions or the elimination of existing employee positions;

Implementation of the proposed rules will not require an increase or decrease in future legislative appropriations to the commission;

The proposed rules will not require an increase or decrease in fees paid to the commission;

The proposed rules will not create a new regulation;

The proposed rules will expand existing rules, but will not otherwise limit or repeal an existing regulation;

The proposed rules may increase the number of individuals subject to the regulation; and

The proposed rules will not adversely affect this state's economy.

COST TO REGULATED PERSONS

The proposed amendments to §40.6 may impose a cost on a regulated person if they are owners of exotic CWD susceptible species located within a proposed surveillance or containment zone. The commission determined these proposals are necessary to follow the legislative requirement that the commission protect exotic livestock from certain diseases, specifically Chronic Wasting Disease. The proposed rules do not otherwise impose a direct cost on a regulated person, state agency, a special district, or a local government within the state. Pursuant to Section 2001.0045 of the Texas Government Code, therefore, it is unnecessary to amend or repeal any other existing rule.

REQUEST FOR COMMENT

Comments regarding the proposed amendments may be submitted to Amanda Bernhard, Texas Animal Health Commission, 2105 Kramer Lane, Austin, Texas 78758, by fax at (512) 719-0719 or by e-mail to comments@tahc.texas.gov. Comments must be received no later than thirty (30) days from the date of publication of this proposal in the *Texas Register.*

STATUTORY AUTHORITY

The amendments to §40.6 within Chapter 40 of the Texas Administrative Code are proposed under the following statutory authority as found in Chapter 161 of the Texas Agriculture Code.

The Texas Animal Health Commission is vested by statute, §161.041(a), titled "Disease Control", to protect all livestock, exotic livestock, domestic fowl, and exotic fowl from disease. The commission is authorized, through §161.041(b), to act to eradicate or control any disease or agent of transmission for any disease that affects livestock, exotic livestock, domestic fowl, or exotic fowl.

Pursuant to §161.0415, titled "Disposal of Diseased or Exposed Livestock or Fowl", the commission may require by order the slaughter of livestock, domestic fowl, or exotic fowl exposed to or infected with certain diseases.

Pursuant to §161.0417, titled "Authorized Personnel for Disease Control", the commission must authorize a person, including a veterinarian, to engage in an activity that is part of a state or federal disease control or eradication program for animals.

Pursuant to §161.046, titled "Rules", the commission may adopt rules as necessary for the administration and enforcement of this chapter.

Pursuant to §161.048, titled "Inspection of Shipment of Animals or Animal Product", the commission may require testing, vaccination, or another epidemiologically sound procedure before or after animals are moved. An agent of the commission is entitled to stop and inspect a shipment of animals or animal products being transported in this state to determine if the shipment originated from a quarantined area or herd; or determine if the shipment presents a danger to the public health or livestock industry through insect infestation or through a communicable or non-communicable disease.

Pursuant to §161.049, titled "Dealer Records", the commission may require a livestock, exotic livestock, domestic fowl, or exotic fowl dealer to maintain records of all livestock, exotic livestock, domestic fowl, or exotic fowl bought and sold by the dealer. The commission may also inspect and copy the records of a livestock, exotic livestock, domestic fowl, or exotic fowl dealer that relate to the buying and selling of those animals. The commission by rule shall adopt the form and content of the records maintained by a dealer.

Pursuant to §161.054, titled "Regulation of Movement of Animals; Exception", the commission, by rule, may regulate the movement of animals. The commission may restrict the intrastate movement of animals even though the movement of the animals is unrestricted in interstate or international commerce. The commission may require testing, vaccination, or another epidemiologically sound procedure before or after animals are moved. The commission is authorized, through §161.054(b), to prohibit or regulate the movement of animals into a quarantined

herd, premises, or area. The Executive Director of the commission is authorized, through §161.054(d), to modify a restriction on animal movement, and may consider economic hardship.

Pursuant to §161.0541, titled "Elk Disease Surveillance Program", the commission by rule may establish a disease surveillance program for elk. Such rules include the requirement for persons moving elk in interstate commerce to test the elk for chronic wasting disease. Additionally, provisions must include testing, identification, transportation, and inspection under the disease surveillance program.

Pursuant to §161.0545, titled "Movement of Animal Products", the commission may adopt rules that require the certification of persons who transport or dispose of inedible animal products, including carcasses, body parts, and waste material. The commission by rule may provide terms and conditions for the issuance, renewal, and revocation of a certification under this section.

Pursuant to §161.056(a), titled "Animal Identification Program", the commission, to provide for disease control and enhance the ability to trace disease-infected animals or animals that have been exposed to disease, may develop and implement an animal identification program that is no more stringent than a federal animal disease traceability or other federal animal identification program. Section 161.056(d) authorizes the commission to adopt rules to provide for an animal identification program more stringent than a federal program only for control of a specific animal disease or for animal emergency management.

Pursuant to §161.060, titled "Authority to Set and Collect Fees", the commission may charge a fee for an inspection made by the commission as provided by commission rule.

Pursuant to §161.061, titled "Establishment", if the commission determines that a disease listed in §161.041 of this code or an agent of transmission of one of those diseases exists in a place in this state or among livestock, exotic livestock, domestic animals, domestic fowl, or exotic fowl, or a place in this state or livestock, exotic livestock, domestic animals, domestic fowl, or exotic fowl are exposed to one of those diseases or any agent of transmission of one of those diseases, the commission shall establish a quarantine on the affected animals or on the affected place. The quarantine of an affected place may extend to any affected area, including a county, district, pasture, lot, ranch, farm, field, range, thoroughfare, building, stable, or stockyard pen. The commission may, through §161.061(c), establish a quarantine to prohibit or regulate the movement of any article or animal the commission designates to be a carrier of a disease listed in Section 161.041 or a potential carrier of one of those diseases, if movement is not otherwise regulated or prohibited for an animal into an affected area, including a county district, pasture, lot, ranch, field, range, thoroughfare, building, stable, or stockyard pen.

Pursuant to §161.0615, titled "Statewide or Widespread Quarantine", the commission may quarantine livestock, exotic livestock, domestic fowl, or exotic fowl in all or any part of this state as a means of immediately restricting the movement of animals potentially infected with disease and shall clearly describe the territory included in a quarantine area.

Pursuant to §161.065, titled "Movement from Quarantined Area; Movement of Quarantined Animals", the commission may provide a written certificate or written permit authorizing the movement of animals from quarantined places. If the commission finds animals have been moved in violation of an established quarantine or in violation of any other livestock sanitary law, the commission shall quarantine the animals until they have been properly treated, vaccinated, tested, dipped, or disposed of in accordance with the rules of the commission.

Pursuant to §161.081, titled "Importation of Animals", the commission may regulate the movement of livestock, exotic livestock, domestic animals, domestic fowl, or exotic fowl into this state from another state, territory, or country. The commission by rule may provide the method for inspecting and testing animals before and after entry into this state, and for the issuance and form of health certificates and entry permits.

Pursuant to §161.101, titled "Duty to Report", a veterinarian, a veterinary diagnostic laboratory, or a person having care, custody, or control of an animal shall report the existence of the disease, if required by the commission, among livestock, exotic livestock, bison, domestic fowl, or exotic fowl to the commission within 24 hours after diagnosis of the disease.

Pursuant to §161.148, titled "Administrative Penalty", the commission may impose an administrative penalty on a person who violates Chapter 161 or a rule or order adopted under Chapter 161. The penalty for a violation may be in an amount not to exceed $5,000, effective September 1, 2021.

The proposed rule in this chapter for adoption do not affect other statutes, sections or codes.

§40.6. CWD Movement Restriction Zones.

(a) (No change.)

(b) Declaration of area restricted for CWD. CWD has been detected in susceptible species in different locations in Texas. This creates a high risk for CWD exposure or infection in CWD susceptible species in those geographic areas. In order to protect other areas of the state from the risk of exposure and spread of CWD, restricted areas, such as containment zones and surveillance zones, are created to protect against the spread of and exposure to CWD and have necessary surveillance to epidemiologically assess the risk. The high-risk areas are delineated as follows:

(1) Containment Zone Boundaries:

(A) - (B) (No change.)

(C) Containment Zone 3. That portion of the state lying within Bandera, Medina and Uvalde counties and depicted in the following figure and more specifically described by the following latitude-longitude coordinate pairs: -99.37150859160, 29.63847446060; -99.37149088670, 29.63846662930; -99.37140891920, 29.63848553940; -99.37060541260, 29.63866345050; -99.36979991580, 29.63883435770; -99.36899250760, 29.63899824440; -99.36818326920, 29.63915509460; -99.36737228030, 29.63930489330; -99.36655962200, 29.63944762460; -99.36574537420, 29.63958327440; -99.36492961890, 29.63971182950; -99.36411243690, 29.63983327680; -99.36329390830, 29.63994760490; -99.36247411610, 29.64005480240; -99.36165314010, 29.64015485800; -99.36083106340, 29.64024776200; -99.36000796690, 29.64033350600; -99.35918393260, 29.64041208020; -99.35835904140, 29.64048347690; -99.35753337730, 29.64054768950; -99.35670702030, 29.64060471180; -99.35588005420, 29.64065453800; -99.35505256020, 29.64069716300; -99.35422462000, 29.64073258190; -99.35339631770, 29.64076079330; -99.35256773320, 29.64078179120; -99.35173895150, 29.64079557700; -99.35091005250, 29.64080214650; -99.35008112110, 29.64080150020; -99.34925223720, 29.64079363850; -99.34842348390, 29.64077856180; -99.34759494500, 29.64075627050; -99.34676670140,

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Figure: 4 TAC §40.6(b)(1)(C) (No change.)

(D) (No change.)

(E) Containment Zone 5 [6].

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30.34088175330;		

-99.63072498160, 30.34022372110; -99.63282520140, 30.33968364210; -99.63496162850, 30.33926382870; -99.63712512170, 30.33896607510; -99.63930642450, 30.33879165670; -99.64149620530, 30.33874131980 [~~That portion of the state within the boundaries of a line beginning in Lubbock County where County Road (C.R.) 3600 intersects with E. Division Street in Slaton; thence west along E. Division Street to S. New Mexico Street; thence northwest along S. New Mexico Street to Railroad Avenue; thence northwest along Railroad Avenue to Industrial Drive; thence northwest along Industrial Drive to U.S. Highway (U.S.) 84; thence northwest along U.S. 84 to State Highway (S.H.) Spur 331; thence northwest along S.H. 331 to S.H. Loop 289; thence north along S.H. Loop 289 to Farm to Market (F.M.) 40; thence east along F.M. 40 to C.R. 3650; thence south along C.R. 3650 to C.R. 6840; thence east along C.R. 6840 to C.R. 3700; thence south along C.R. 3700 to C.R. 3600; thence south along C.R. 3600 to E. Division Street~~].

(F) Containment Zone 6. That portion of the state within the boundaries of a line beginning in Lubbock County where County Road (C.R.) 3600 intersects with E. Division Street in Slaton; thence west along E. Division Street to S. New Mexico Street; thence northwest along S. New Mexico Street to Railroad Avenue; thence northwest along Railroad Avenue to Industrial Drive; thence northwest along Industrial Drive to U.S. Highway (U.S.) 84; thence northwest along U.S. 84 to State Highway (S.H.) Spur 331; thence northwest along S.H. 331 to S.H. Loop 289; thence north along S.H. Loop 289 to Farm to Market (F.M.) 40; thence east along F.M. 40 to C.R. 3650; thence south along C.R. 3650 to C.R. 6840; thence east along C.R. 6840 to C.R. 3700; thence south along C.R. 3700 to C.R. 3600; thence south along C.R. 3600 to E. Division Street.

(2) Surveillance Zone Boundaries:

(A) (No change.)

(B) Surveillance Zone 2. That portion of the state within the boundaries of a line beginning at the New Mexico state line where U.S. 60 enters Texas; thence northeast along U.S. 60 to U.S. 87 in Randall County; thence south along U.S. 87 to S.H. 217 in Canyon; thence east along S.H. 217 to F.M. 1541; thence north along F.M. 1541 to Loop 335; thence east and north along Loop 335 to S.H. 136; thence northwest along S.H. 136 to N. Lakeside Dr.; thence north along N. Lakeside Dr. to E. Willow Creek Dr.; thence west along E. Willow Creek Dr. to Denton St.; thence north along Denton St. to E. Cherry; thence west along E. Cherry to N. Eastern St.; thence south along N. Eastern St. to E. Willow Creek Dr.; thence west along E. Willow Creek Dr. to U.S. 87; thence north along U.S. 87 to the City of Dumas; thence along the city limits of Dumas [~~to I.H. 27; thence north along U.S. 87/I.H. 27~~] to U.S. 287 in Moore County; thence north along U.S. 287 to the Oklahoma state line.

(C) - (D) (No change.)

(E) Surveillance Zone 5. That portion of the state lying within the boundaries of a line beginning on U.S. 83 at the Kerr/Kimble County line; thence north along U.S. 83 to I.H. 10; thence northwest along on I.H. 10 to South State Loop 481; thence west along South State Loop 481 to the city limit of Junction in Kimble County; thence following the Junction city limit so as to circumscribe the city of Junction before intersecting with F.M. 2169; thence east along F.M. 2169 to County Road (C.R.) 410; thence east along C.R. 410 to C.R. 412; thence south along C.R. 412 to C.R. 470; thence east along C.R. 470 to C.R. 420; thence south along C.R. 420 to F.M. 479; thence east along F.M. 479 to C.R. 443; thence south along C.R. 443 to U.S. 290; thence west along U.S. 290 to I.H. 10; thence southeast along I.H. 10 to the Kerr/Kimble County line; thence west along the Kerr/Kimble County line to U.S. 83.

(F) - (G) (No change.)

(H) Surveillance Zone 8.

(i) That portion of the state within the boundaries of a line beginning at the intersection of Farm to Market (F.M.) Road 624 and U.S. Highway (U.S.) 59 in Live Oak County; thence southwest along U.S. 59 to the intersection of County Road (C.R.) 101 in Duval County; thence southeast along C.R. 101 to North Julian Street in San Diego; thence south along Julian Street to State Highway (S.H.) 44; thence east on S.H. 44 to C.R. 145 in Jim Wells County; thence north along C.R. 145 to C.R. 172; thence east on C.R. 172 to C.R. 170; thence south on C.R. 170 to C.R. 120; thence east on C.R. 120; to U.S. 281; thence north on U.S. 281 to F.M. 624; thence west along F.M. 624 to U.S. 59.

(ii) For the purposes of this subchapter, the zone described in clause (i) of this subparagraph includes the following:

(I) the area within the city limits of Freer;

(II) the area within the city limits of Alice;

(III) the roadway and right-of-way of:

(-a-) U.S. 59 between the city of Freer and the intersection with C.R. 101;

(-b-) U.S. 44 between the city of Freer and the city of Alice; and

(-c-) U.S. 281 between the city of Alice and the intersection with F.M. 624.

(c) - (g) (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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Myra Sines
Chief of Staff
Texas Animal Health Commission
Earliest possible date of adoption: January 22, 2023
For further information, please call: (512) 719-0724

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CHAPTER 45. REPORTABLE AND ACTIONABLE DISEASES

4 TAC §45.3

The Texas Animal Health Commission (commission) proposes amendments to Title 4, Texas Administrative Code, Chapter 45, §45.3 concerning "Reportable and Actional Disease List". The purpose of the amendment is to establish and include "Malignant Catarrhal Fever caused by a ruminant gamma herpesvirus" as a disease that is reportable to the commission.

BACKGROUND AND SUMMARY OF PROPOSED AMENDMENTS

Malignant Catarrhal Fever is caused by one of eight known members of gamma-herpesvirus and has been documented in over 50 species. Many of the susceptible species are economically important in the state of Texas and include bison, bongo, blackbuck, 3 species of gazelle, roan and sable antelope, and white-tailed deer. While domestic cattle are susceptible, losses are

typically minor; this contrasts with bison, which are the most susceptible species known. Bison require as little as 1/10,000th the dose needed to infect cattle, and clinically affected bison almost always die (Gailbreath et al, 2010).

While ovine herpes virus-2 (OvHV-2) has caused catastrophic outbreaks in bison, relatively little is known about the epidemiology of this virus. Even less is known about the other MCF viruses that affect wild and exotic species. Reporting diseases is critical to managing current, and preventing future, outbreaks. But reporting is also a valuable and necessary first step towards understanding disease dynamics and transmission routes.

The proposed amendment to 4 TAC §45.3 will add Malignant Catarrhal Fever caused by a ruminant gamma herpesvirus to the list of diseases that are reportable to the commission in order to address the emerging threat to susceptible species in Texas.

SECTION BY SECTION DISCUSSION

The proposed amendment to §45.3, Reportable and Actionable Disease List, adds Malignant Catarrhal Fever caused by a ruminant gamma herpesvirus to the list of reportable and actionable diseases and agents of disease transmission among multiple species and reorders the list in alphabetical order.

FISCAL NOTE

Ms. Myra Sines, Chief of Staff of the Texas Animal Health Commission, determined that for each year of the first five years the rules are in effect, there will be no additional fiscal implications for state or local government because current commission employees will administer and enforce these rules as part of their current job duties and resources. Ms. Sines also determined for the same period that there is no estimated increase or loss in revenue to state or local government as a result of enforcing or administering the rule amendments.

PUBLIC BENEFIT NOTE

Ms. Sines determined that for each year of the first five years the rules are in effect, the anticipated public benefit, due to enforcing the rules, will allow the agency to more effectively address the risk from animals that have tested positive for MCF caused by a ruminant gamma herpesvirus and reduce the risk of exposure to other animals in the state.

TAKINGS IMPACT ASSESSMENT

The commission determined that the proposal does not restrict, limit, or impose a burden on an owner's rights to his or her private real property that would otherwise exist in the absence of government action. Instead, the proposed amendments relate to the handling of animals, including requirements concerning testing, movement, inspection, identification, reporting of disease, and treatment pursuant to 4 TAC §59.7. Therefore, the proposed rules are compliant with the Private Real Property Preservation Act in Texas Government Code §2007.043 and do not constitute a takings.

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

Ms. Sines also determined that there will be no adverse economic effect on small businesses, micro-businesses, or rural communities. The rules do not impose any additional costs on small businesses, micro-businesses, or rural communities that are required to comply with the rules.

REGULATORY ANALYSIS OF MAJOR ENVIRONMENTAL RULES

The commission determined that this proposal is not a "major environmental rule" as defined by Government Code §2001.0225. "Major environmental rule" is defined to mean a rule the specific intent of which is to protect the environment or reduce risk to human health from environmental exposure and that may adversely affect, in a material way, the economy, a sector of the economy, productivity, competition, jobs, the environment or the public health and safety of a state or a sector of the state. This proposal is not specifically intended to protect the environment or reduce risks to human health from environmental exposure.

LOCAL EMPLOYMENT IMPACT STATEMENT

The commission determined that the proposed rules would not impact local economies and, therefore, did not file a request for a local employment impact statement with the Texas Workforce Commission pursuant to Texas Government Code §2001.022.

GOVERNMENT GROWTH IMPACT STATEMENT

In compliance with the requirements of Texas Government Code §2001.0221, the commission prepared the following Government Growth Impact Statement. For each year of the first five years the proposed rules would be in effect, the commission determined the following:

1. The proposed rules will not create or eliminate a government program;

2. Implementation of the proposed rules will not require the creation of new employee positions or the elimination of existing employee positions;

3. Implementation of the proposed rules will not increase future legislative appropriations to the commission;

4. The proposed rules will not increase or decrease the fees paid to the commission;

5. The proposed rules will not create a new rule;

6. The proposed rules expand an existing rule but will not otherwise limit or repeal existing rules;

7. The proposed rules will increase the number of individuals subject to the rules; and

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

COSTS TO REGULATED PERSONS

The commission determined there will be no costs associated with adding MCF, gamma herpesvirus, and diseases caused by gamma herpesvirus because the commission does not plan to take action based on diagnosis of MCF. There will be no movement restriction placed on an affected animal or the herd, and no requirements laid out in a herd plan to address MCF in either the affected animal or herd. Any cost would be associated with the act of reporting itself. Per verbal conversation with TVMDL management, MCF is typically diagnosed in Texas animals 15 or fewer times per year. Reporting is typically accomplished via an email or phone call, or both.

The commission also determined the proposed rules follow the legislative requirement that the commission shall protect all livestock from disease the commission determines require control or eradication. Further, Government Code §2001.045, related to increasing costs to regulated persons, does not apply to this rule proposal to adopt a new reportable or actionable disease pursuant to Agriculture Code §161.041, the rules proposed here do not impose a direct cost on regulated persons, including a state agency, a special district, or a local government, within the

state. Therefore, it is not necessary to repeal or amend any other existing rule.

REQUEST FOR COMMENT

Written comments regarding the proposed amendments may be submitted to Amanda Bernhard, Texas Animal Health Commission, 2105 Kramer Lane, Austin, Texas 78758, by fax to (512) 719-0719 or by email to comments@tahc.texas.gov. To be considered, comments must be received no later than thirty (30) days from the date of publication of this proposal in the *Texas Register.* When faxing or emailing comments, please indicate "Comments on Chapter 45-Reportable and Actionable Diseases" in the subject line.

STATUTORY AUTHORITY

The amendments are authorized by Texas Agriculture Code, Chapter 161.

Pursuant to §161.041, titled "Disease Control", the commission shall protect all livestock, exotic livestock, domestic fowl, and exotic fowl from diseases the commission determines require control or eradication. Pursuant to §161.041(b) the commission may act to eradicate or control any disease or agent of transmission for any disease that affects livestock, exotic livestock, domestic fowl, or exotic fowl. The commission may adopt any rules necessary to carry out the purposes of this subsection, including rules concerning testing, movement, inspection, and treatment.

Pursuant to §161.043, titled "Regulation of Exhibitions", the commission may regulate the entry of livestock and may require certification of those animals as reasonably necessary to protect against communicable diseases.

Pursuant to §161.046, titled "Rules", the commission may adopt rules as necessary for the administration and enforcement of this chapter.

Pursuant to §161.047, titled "Entry Power", a commissioner or veterinarian or inspector employed by the commission may enter public or private property for the exercise of an authority or performance of a duty under Chapter 161.

Pursuant to §161.048, titled "Inspection of Shipment of Animals or Animal Product", the commission may require testing, vaccination, or another epidemiologically sound procedure before or after animals are moved. An agent of the commission is entitled to stop and inspect a shipment of animals or animal products being transported in this state to determine if the shipment originated from a quarantined area or herd; or determine if the shipment presents a danger to the public health or livestock industry through insect infestation or through a communicable or non-communicable disease.

Pursuant to §161.054, titled "Regulation of Movement of Animals; Exception", the commission may by rule regulate the movement of animals, and may restrict the intrastate movement of animals even though the movement of the animals is unrestricted in interstate or international commerce. The commission may require testing, vaccination, or another epidemiologically sound procedure before or after animals are moved.

Pursuant to §161.056(a), titled "Animal Identification Program", the commission, to provide for disease control and enhance the ability to trace disease-infected animals or animals that have been exposed to disease, may develop and implement an animal identification program that is no more stringent than a federal animal disease traceability or other federal animal identification program. Section 161.056(d) authorizes the commission to adopt rules to provide for an animal identification program more stringent than a federal program only for control of a specific animal disease or for animal emergency management.

Pursuant to §161.081, titled "Importation of Animals", the commission by rule may provide the method for inspecting and testing animals before and after entry into the state of Texas. The commission may create rules for the issuance and form of health certificates and entry permits.

Pursuant to §161.101, titled "Duty to Report", a veterinarian, a veterinary diagnostic laboratory, or a person having care, custody, or control of an animal shall report the existence of the disease, if required by the commission, among livestock, exotic livestock, bison, domestic fowl, or exotic fowl to the commission within 24 hours after diagnosis of the disease.

No other statutes, articles, or codes are affected by this proposal.

§45.3. Reportable and Actionable Disease List.

(a) - (b) (No change.)

(c) The commission designates the following as reportable and actionable diseases and agents of disease transmission.

(1) Multiple species:

(A) - (J) (No. change.)

(K) Malignant Catarrhal Fever caused by a ruminant gamma herpesvirus [~~Rabies~~];

(L) Rabies [~~Rift Valley fever~~];

(M) Rift Valley fever [~~Rinderpest~~];

(N) Rinderpest [~~Schmallenberg virus~~];

(O) Schmallenberg virus; [~~Screwworm; and~~]

(P) Screwworm; and [~~Vesicular stomatitis virus;~~]

(Q) Vesicular stomatitis virus;

(2) - (8) (No change.)

(d) (No change.)

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

Filed with the Office of the Secretary of State on December 12, 2022.

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Myra Sines
Chief of Staff
Texas Animal Health Commission
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For further information, please call: (512) 719-0724

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CHAPTER 51. ENTRY REQUIREMENTS

4 TAC §51.2, §51.8

The Texas Animal Health Commission (commission) proposes amendments to Title 4, Texas Administrative Code, Chapter 51, §51.2 concerning General Requirements, and §51.8, concerning Cattle.

BACKGROUND AND SUMMARY OF PROPOSED AMENDMENTS

The proposed amendment to §51.2(b)(2)(B) clarifies that the certificate of veterinary inspection must include "official" individual animal identification on the certificate. Animals moved interstate must be accompanied by a certificate of veterinary inspection (CVI) in accordance with Texas Agriculture Code §161.054, Title 9 Code of Federal Regulations §86.5, and 4 TAC §51.2(b)(1). The commission is proposing an amendment to §51.2 to clarify the type of individual animal identification that must be documented on a CVI, align TAHC rules with federal requirements in 9 CFR §86.1, and improve animal disease traceability for animals moving into Texas.

The proposed amendment to §51.8 increases the tuberculosis testing age for dairy cattle moving into Texas from two to six months. Tuberculosis is a contagious, chronic, respiratory disease that affect cattle and other livestock and non-livestock species. The TAHC has more stringent disease testing requirements than USDA and other states related to the interstate movement of dairy cattle. Because of this variation, animal health officials in other states requested TAHC to review the current tuberculosis test age requirement for dairy cattle moving to Texas. TAHC staff determined that testing dairy calves at six months of age, instead of two months, was adequate to mitigate the disease risks associated with the movement of dairy calves in interstate commerce.

The amendments are proposed pursuant to Texas Agriculture Code §161.041(a) and (b), which authorizes the commission to adopt any rules necessary to eradicate or control any disease or agent of transmission for any disease that affects livestock, exotic livestock, domestic fowl and exotic fowl. Recording official identification, which is unique to that animal, on a certificate of veterinary inspection ensures the animal or animal(s) moved into Texas were examined by a veterinarian and found to be free of symptoms or evidence of communicable or infectious diseases. Recording the official identification also enhances the TAHC's ability to trace disease-infected or disease exposed animals. Additionally, tuberculosis test requirements for dairy cattle six months of age or older adequately mitigate the risk that tuberculosis, a contagious respiratory disease in cattle and other species, is not inadvertently moved into Texas.

SECTION-BY-SECTION DISCUSSION

The proposed amendment to §51.2, General Requirements, adds that animals vaccinated or tested for any disease, as required by the commission, be individually officially identified on a certificate of veterinary inspection instead of just individually identified.

The proposed amendments to §51.8, Cattle, increases the tuberculosis testing age for dairy cattle entering Texas from two to six months of age.

FISCAL NOTE

Ms. Myra Sines, Chief of Staff of the Texas Animal Health Commission, determined that for each year of the first five years the rules are in effect, there will be no additional fiscal implications for state or local government because current commission employees will administer and enforce these rules as part of their current job duties and resources. Ms. Sines also determined for the same period that there is no estimated increase or loss in revenue to state or local government as a result of enforcing or administering the rule amendments.

PUBLIC BENEFIT NOTE

Ms. Sines determined that for each year of the first five years the rules are in effect, the anticipated public benefit is to facilitate the movement of animals in interstate commerce and promote understanding and compliance with interstate movement requirements.

TAKINGS IMPACT ASSESSMENT

The commission determined that the proposal does not restrict, limit, or impose a burden on an owner's rights to his or her private real property that would otherwise exist in the absence of government action. Instead, the proposed amendments relate to the handling of animals, including requirements concerning testing, movement, inspection, identification, reporting of disease, and treatment pursuant to 4 TAC §59.7. Therefore, the proposed rules are compliant with the Private Real Property Preservation Act in Texas Government Code §2007.043 and do not constitute a takings.

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

Ms. Sines also determined that there will be no adverse economic effect on small businesses, micro-businesses, or rural communities. The rules do not impose any additional costs on small businesses, micro-businesses, or rural communities that are required to comply with the rules.

REGULATORY ANALYSIS OF MAJOR ENVIRONMENTAL RULES

The commission determined that this proposal is not a "major environmental rule" as defined by Government Code §2001.0225. "Major environmental rule" is defined to mean a rule the specific intent of which is to protect the environment or reduce risk to human health from environmental exposure and that may adversely affect, in a material way, the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of a state or a sector of the state. This proposal is not specifically intended to protect the environment or reduce risks to human health from environmental exposure.

LOCAL EMPLOYMENT IMPACT STATEMENT

The commission determined that the proposed rules would not impact local economies and, therefore, did not file a request for a local employment impact statement with the Texas Workforce Commission pursuant to Texas Government Code §2001.022.

GOVERNMENT GROWTH IMPACT STATEMENT

In compliance with the requirements of Texas Government Code §2001.0221, the commission prepared the following Government Growth Impact Statement. For each year of the first five years the proposed rules would be in effect, the commission determined the following:

1. The proposed rules will not create or eliminate a government program;

2. Implementation of the proposed rules will not require the creation of new employee positions or the elimination of existing employee positions;

3. Implementation of the proposed rules will not increase future legislative appropriations to the commission;

4. The proposed rules will not increase or decrease the fees paid to the commission;

5. The proposed rules will not create a new rule;

6. The proposed rules will limit an existing rule but will not otherwise expand or repeal existing rules;

7. The proposed rules will not increase the number of individuals subject to the rules; and

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

COSTS TO REGULATED PERSONS

The commission determined there will be no costs associated with requiring official individual identification to be recorded on interstate certificates of veterinary inspection because veterinarians are currently required to include individual identification on the certificate and 9 CFR §86.1 requires accredited veterinarians to list the official identification number for each animal. The commission also determined there will be no costs anticipated in changing the tuberculosis test age for dairy cattle entering the state from two to six months of age.

The commission also determined that the rules as proposed follow the legislative requirement that the commission shall protect all livestock from diseases the commission determines require control or eradication, which includes tuberculosis. The rules do not impose a direct cost on regulated persons, including a state agency, a special district, or a local government, within the state. Therefore, it is not necessary to repeal or amend any other existing rule.

REQUEST FOR COMMENT

Written comments regarding the proposed amendments may be submitted to Amanda Bernhard, Texas Animal Health Commission, 2105 Kramer Lane, Austin, Texas 78758, by fax to (512) 719-0719, or by email to comments@tahc.texas.gov. To be considered, comments must be received no later than thirty (30) days from the date of publication of this proposal in the *Texas Register.* When faxing or emailing comments, please indicate "Comments on Chapter 51-Entry Requirements" in the subject line.

STATUTORY AUTHORITY

The amendments are authorized by Texas Agriculture Code, Chapter 161.

Pursuant to §161.041, titled "Disease Control," the commission shall protect all livestock, exotic livestock, domestic fowl, and exotic fowl from diseases the commission determines require control or eradication. Pursuant to §161.041(b) the commission may act to eradicate or control any disease or agent of transmission for any disease that affects livestock, exotic livestock, domestic fowl, or exotic fowl. The commission may adopt any rules necessary to carry out the purposes of this subsection, including rules concerning testing, movement, inspection, and treatment.

Pursuant to §161.043, titled "Regulation of Exhibitions," the commission may regulate the entry of livestock and may require certification of those animals as reasonably necessary to protect against communicable diseases.

Pursuant to §161.046, titled "Rules," the commission may adopt rules as necessary for the administration and enforcement of this chapter.

Pursuant to §161.047, titled "Entry Power," a commissioner or veterinarian or inspector employed by the commission may enter public or private property for the exercise of an authority or performance of a duty under Chapter 161.

Pursuant to §161.048, titled "Inspection of Shipment of Animals or Animal Product," the commission may require testing, vaccination, or another epidemiologically sound procedure before or after animals are moved. An agent of the commission is entitled to stop and inspect a shipment of animals or animal products being transported in this state to determine if the shipment originated from a quarantined area or herd, or determine if the shipment presents a danger to the public health or livestock industry through insect infestation or through a communicable or non-communicable disease.

Pursuant to §161.054, titled "Regulation of Movement of Animals; Exception," the commission may by rule regulate the movement of animals and may restrict the intrastate movement of animals, even though the movement of the animals is unrestricted in interstate or international commerce. The commission may require testing, vaccination, or another epidemiologically sound procedure before or after animals are moved.

Pursuant to §161.056(a), titled "Animal Identification Program," the commission, to provide for disease control and enhance the ability to trace disease-infected animals or animals that have been exposed to disease, may develop and implement an animal identification program that is no more stringent than a federal animal disease traceability or other federal animal identification program. Section 161.056(d) authorizes the commission to adopt rules to provide for an animal identification program more stringent than a federal program only for control of a specific animal disease or for animal emergency management.

Pursuant to §161.081, titled "Importation of Animals," the commission by rule may provide the method for inspecting and testing animals before and after entry into the state of Texas. The commission may create rules for the issuance and form of health certificates and entry permits.

Pursuant to §161.101, titled "Duty to Report," a veterinarian, a veterinary diagnostic laboratory, or a person having care, custody, or control of an animal shall report the existence of the disease, if required by the commission, among livestock, exotic livestock, bison, domestic fowl, or exotic fowl to the commission within 24 hours after diagnosis of the disease.

No other statutes, articles, or codes are affected by this proposal.

§51.2. General Requirements.

(a) (No change.)

(b) Certificate of veterinary inspection.

(1) (No change.)

(2) The certificate of veterinary inspection shall state that:

(A) (No change.)

(B) the animals were subjected to tests, immunizations, and treatment required by rule of the commission. Animals that have been vaccinated or tested for any disease as required by the commission shall be individually officially identified on the certificate of veterinary inspection; and

(C) (No change.)

(3) (No change.)

§51.8. Cattle.

(a) (No change.)

(b) Tuberculosis requirements.

(1) - (2) (No change.)

(3) All dairy breed animals, including steers and spayed heifers, shall be officially identified prior to entry into the state. All sexually intact dairy cattle[,] that are six [~~two~~] months of age or older may enter, provided that they are officially identified[,] and are accompanied by a certificate of veterinary inspection stating that they were negative to an official tuberculosis test conducted within 60 days prior to the date of entry. All sexually intact dairy cattle that are less than six [~~two~~] months of age must obtain an entry permit from the Commission, as provided in §51.2(a) of this title (relating to General Requirements), to a designated facility where the animals will be held until they are tested negative at the age of six [~~two~~] months. Animals which originate from a tuberculosis accredited herd, and/or animals moving directly to an approved slaughtering establishment, are exempt from the test requirement. Dairy cattle delivered to an approved feedlot for feeding for slaughter by the owner or consigned there and accompanied by certificate of veterinary inspection with an entry permit issued by the commission are exempt from testing, unless from a restricted herd. In addition, all sexually intact dairy cattle originating from a state or area with anything less than a tuberculosis free state status shall be tested negative for tuberculosis in accordance with the appropriate requirements for states or zones with a status as provided by Title 9 of the Code of Federal Regulations, Part 77, Sections 77.10 through 77.19, for that status, prior to entry with results of the test recorded on the certificate of veterinary inspection.

(4) - (7) (No change.)

(c) (No change.)

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

Filed with the Office of the Secretary of State on December 12, 2022.

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Myra Sines
Chief of Staff
Texas Animal Health Commission
Earliest possible date of adoption: January 22, 2023
For further information, please call: (512) 719-0724

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TITLE 10. COMMUNITY DEVELOPMENT

PART 1. TEXAS DEPARTMENT OF HOUSING AND COMMUNITY AFFAIRS

CHAPTER 1. ADMINISTRATION

SUBCHAPTER A. GENERAL POLICIES AND PROCEDURES

10 TAC §1.23

The Texas Department of Housing and Community Affairs (the Department) proposes the repeal of 10 TAC Chapter 1, Subchapter A, General Policies and Procedures, §1.23, State of Texas Low Income Housing Plan and Annual Report (SLIHP). The purpose of the proposed repeal is to eliminate an outdated rule while adopting a new updated rule under separate action, in order to adopt by reference the 2023 SLIHP.

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

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

Mr. Bobby Wilkinson, Executive Director, has determined that, for the first five years the proposed repeal would be in effect:

1. The proposed repeal does not create or eliminate a government program, but relates to the repeal, and simultaneous adoption by reference the 2023 SLIHP, as required by Tex. Gov't Code 2306.0723.

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

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

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

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

6. The proposed action will repeal an existing regulation, but is associated with a simultaneous readoption in order to adopt by reference the 2023 SLIHP.

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

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

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

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

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

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

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

e. PUBLIC BENEFIT/COST NOTE REQUIRED BY TEX. GOV'T CODE §2001.024(a)(5). Mr. Wilkinson, has determined that, for each year of the first five years the proposed repeal is in effect, the public benefit anticipated as a result of the repealed section would be an updated more germane rule that will adopt by reference the 2023 SLIHP. There will not be economic costs to individuals required to comply with the repealed section.

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

REQUEST FOR PUBLIC COMMENT. The 30 day public comment period for the rule will be held Monday, December 19, 2022, to Tuesday, January 17, 2023, to receive input on the proposed repealed section. Written comments may be submitted to the Texas Department of Housing and Community Affairs, Attn: Housing Resource Center, Rule Comments, P.O. Box 13941, Austin, Texas 78711-3941, or email info@tdhca.state.tx.us. ALL COMMENTS MUST BE RECEIVED BY 5:00 p.m., Austin local time, Tuesday, January 17, 2023.

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

§1.23. State of Texas Low Income Housing Plan and Annual Report (SLIHP).

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

Filed with the Office of the Secretary of State on December 12, 2022.

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Bobby Wilkinson
Executive Director
Texas Department of Housing and Community Affairs
Earliest possible date of adoption: January 22, 2023
For further information, please call: (512) 475-3959

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10 TAC §1.23

The Texas Department of Housing and Community Affairs (the Department) proposes new 10 TAC Chapter 1, Subchapter A, General Policies and Procedures, §1.23 State of Texas Low Income Housing Plan and Annual Report (SLIHP). The purpose of the proposed new section is to provide compliance with Tex. Gov't Code §2306.0723 and to adopt by reference the 2023 SLIHP, which offers a comprehensive reference on statewide housing needs, housing resources, and strategies for funding allocations. The 2023 SLIHP reviews TDHCA's housing programs, current and future policies, resource allocation plans to meet state housing needs, and reports on performance during the preceding state fiscal year (September 1, 2021, through August 31, 2022).

Tex. Gov't Code §2001.0045(b) does not apply to the rule proposed for action because it is exempt under item (c)(9) because it is necessary to implement legislation. Tex. Gov't Code §2306.0721 requires that the Department produce a state low income housing plan, and Tex. Gov't Code §2306.0722 requires that the Department produce an annual low income housing report. Tex. Gov't Code §2306.0723 requires that the Department consider the annual low income housing report to be a rule. This rule provides for adherence to that statutory requirement. Further no costs are associated with this action, and therefore no costs warrant being offset.

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

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

Mr. Bobby Wilkinson, Executive Director, has determined that, for the first five years the proposed new rule would be in effect:

1. The proposed new rule does not create or eliminate a government program, but relates to the adoption, by reference, of the 2023 SLIHP, as required by Tex. Gov't Code 2306.0723.

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

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

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

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

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

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

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

b. ADVERSE ECONOMIC IMPACT ON SMALL OR MICRO-BUSINESSES OR RURAL COMMUNITIES AND REGULATORY FLEXIBILITY REQUIRED BY TEX. GOV'T CODE §2006.002. The Department, in drafting this proposed rule, has attempted to reduce any adverse economic effect on small or micro-business or rural communities while remaining consistent with the statutory requirements of Tex. Gov't Code, §2306.0723.

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

2. There are no small or micro-businesses subject to the proposed rule for which the economic impact of the rule is projected to be null. There are no rural communities subject to the proposed rule for which the economic impact of the rule is projected to be null.

3. The Department has determined that because the proposed rule will adopt by reference the 2023 SLIHP, there will be no economic effect on small or micro-businesses or rural communities.

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

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

The Department has evaluated the rule as to its possible effects on local economies and has determined that for the first five years the rule will be in effect the proposed rule has no economic effect on local employment because the proposed rule will

adopt by reference the 2023 SLIHP; therefore, no local employment impact statement is required to be prepared for the rule.

Tex. Gov't Code §2001.022(a) states that this "impact statement must describe in detail the probable effect of the rule on employment in each geographic region affected by this rule. Considering that the proposed rule will adopt by reference the 2023 SLIHP there are no "probable" effects of the new rule on particular geographic regions.

e. PUBLIC BENEFIT/COST NOTE REQUIRED BY TEX. GOV'T CODE §2001.024(a)(5). Mr. Wilkinson has determined that, for each year of the first five years the new section is in effect, the public benefit anticipated as a result of the new section will be an updated and more germane rule that will adopt by reference the 2023 SLIHP, as required by Tex. Gov't Code §2306.0723. There will not be any economic cost to any individuals required to comply with the new section because the adoption by reference of prior year SLIHP documents has already been in place through the rule found at this section being repealed.

f. FISCAL NOTE REQUIRED BY TEX. GOV'T CODE §2001.024(a)(4). Mr. Wilkinson also has determined that for each year of the first five years the new section is in effect, enforcing or administering the new section does not have any foreseeable implications related to costs or revenues of the state or local governments because the new rule will adopt by reference the 2023 SLIHP.

REQUEST FOR PUBLIC COMMENT. The 30 day public comment period for the rule will be held Monday, December 19, 2022, to Tuesday, January 17, 2023, to receive input on the new proposed section. Written comments may be submitted to the Texas Department of Housing and Community Affairs, Attn: Housing Resource Center, Rule Comments, P.O. Box 13941, Austin, Texas 78711-3941 or email info@tdhca.state.tx.us. ALL COMMENTS MUST BE RECEIVED BY 5:00 p.m., Austin local time, TUESDAY, JANUARY 17, 2023.

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

§1.23. State of Texas Low Income Housing Plan and Annual Report (SLIHP).

The Texas Department of Housing and Community Affairs (TDHCA or the Department) adopts by reference the 2023 State of Texas Low Income Housing Plan and Annual Report (SLIHP). The full text of the 2023 SLIHP may be viewed at the Department's website: www.tdhca.state.tx.us. The public may also receive a copy of the 2023 SLIHP by contacting the Department's Housing Resource Center at (512) 475-3976.

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

Filed with the Office of the Secretary of State on December 12, 2022.

TRD-202204930
Bobby Wilkinson
Executive Director
Texas Department of Housing and Community Affairs
Earliest possible date of adoption: January 22, 2023
For further information, please call: (512) 475-3959

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TITLE 13. CULTURAL RESOURCES

PART 8. TEXAS FILM COMMISSION

CHAPTER 121. TEXAS MOVING IMAGE INDUSTRY INCENTIVE PROGRAM

The Office of the Governor ("OOG") proposes the repeal of 10 TAC §121.16, concerning Texas-Based National Network Project. The OOG also proposes amendments to 13 TAC §121.1, concerning Background and Purpose, §121.2, concerning Definitions, §121.3, concerning Eligible Projects, §121.4, concerning Ineligible Projects, §121.5, concerning Eligible and Ineligible In-State Spending, §121.6, concerning Grant Awards, §121.7, concerning Underutilized and Economically Distressed Areas, §121.8, concerning Grant Application, §121.9, concerning Processing and Review of Applications, §121.10, concerning Disqualification of an Application, §121.11, concerning Confirmation and Verification of Texas Expenditures, §121.12, concerning Disbursement of Funds, §121.13, concerning Texas Heritage Project, §121.14, concerning Revocation and Recapture of Incentives. The OOG identified the necessity of the proposed amendments and repeal during the Governor's Office's periodic review of 13 TAC Chapter 121, conducted pursuant to Texas Government Code 2001.039. The proposed amendments and repeal will make changes to better carry out the purpose of the program, respond to the evolving landscape of the industry in Texas, and improve readability and clarity.

EXPLANATION OF PROPOSED AMENDMENTS

The rules under consideration relate to Texas Moving Image Industry Incentive Program ("TMIIIP"), which was implemented to increase employment opportunities for Texas industry professionals, encourage tourism to the state, and boost economic activity in Texas cities and the overall Texas economy.

The proposed amendments to §121.1 update outdated language and make non-substantive updates to style and grammar.

The proposed amendments to §121.2 update definitions to better align with the purpose of the program and based on changes in the industry, add a definition for the term "Man Hours," remove an unnecessary definition for the term "Qualifying Application," update outdated language, and make non-substantive updates to style and grammar.

The proposed amendments to §121.3 clarify and update how an Applicant may meet the statutory eligibility requirements, including new ways to satisfy the requirement that at least 60 percent of the moving image project must be filmed in Texas. The proposed amendments also make non-substantive updates to style and grammar.

The proposed amendments to §121.4 update the types of projects that are ineligible for grants under this program by removing the exception to award shows for broadcast on national network television to a national audience and adding interactive digital media experiences used in gambling devices. The proposed amendments also make non-substantive updates to style and grammar.

The proposed amendments to §121.5 clarify the lists of eligible and ineligible in-state expenditures under the program. The proposed amendments also make non-substantive updates to style and grammar.

The proposed amendments to §121.6 revise the potential grant amounts for reality TV projects and commercials. Previously, such projects could receive a grant equal to five percent or ten percent of eligible in-state spending based on the project's total eligible in-state spending. Now, such projects will only be eligible to receive a grant of five percent of total eligible in-state spending. The proposed amendments also make non-substantive updates to style and grammar.

The proposed amendments to §121.7 add four new options to the existing option for Applicants to receive a single additional grant equal to two-and-a-half percent of total in-state spending. The additional options relate to: (1) demonstrating that ten percent of the combined total of paid Crew and paid Cast, including extras, who are paid by the Applicant are Texas Resident "Veterans"; (2) sponsoring at least one training event during the calendar year in which Production occurs in a municipality mutually agreed upon by the Applicant and the Commission; (3) sponsoring or creating two or more public service announcements (PSAs) for use by the Texas Film Commission and/or the Office of the Governor on social media and/or website channels; and (4) expending ten percent of the total eligible in-state spending on eligible expenditures during Postproduction, including labor, vendors, and music costs. The proposed amendments also establish that an Applicant may only qualify for one of the options and may not receive multiple additional two-and-a-half percent additional grants. The proposed amendments also make non-substantive updates to style and grammar.

The proposed amendments to §121.8 update the methods by which applicants may obtain application forms from the Texas Film Commission to include telephone, Internet, or other means if additional special needs facilitation is required, instead of directing Applicants to a specific website. The proposed amendments extend the window to submit an application from up to 120 calendar days prior to a project's Principal Start Date to up to 180 calendar days prior to a project's Principal Start Date. For a delay to the start of a project, the consequence is changed from mandating re-application to allowing the Texas Film Commission to require re-application at its discretion. The proposed amendments also revise the actions the OOG will take if it receives a request for information submitted by an Applicant, as well as make non-substantive updates to style and grammar.

The proposed amendments to §121.9 clarify the factors the Texas Film Commission shall consider when determining, in its sole discretion, whether to approve a Qualifying Application. The proposed amendments specify that periodic tracking and review of a grant agreement can include requesting reports on a quarterly basis and remove instructions for completion of the Declaration of Texas Residency Forms so that those instructions may be provided on the form itself. The proposed amendments also make non-substantive updates to style and grammar.

The proposed amendments to §121.10 update the citation for inappropriate content as described in the Texas Penal Code and make non-substantive updates to style and grammar.

The proposed amendments to §121.11 add and clarify certain items that the Expended Budget must include in providing the final verifying documentation. The proposed amendments also make non-substantive updates to style and grammar.

The proposed amendments to §121.12 remove the provisions relating to assignment of a grant payment to a third party and make non-substantive updates to style and grammar.

The proposed amendments to §121.13 make non-substantive updates to style and grammar.

The proposed amendments to §121.14 make non-substantive updates to style and grammar.

The proposed repeal of §121.16 removes provisions that are not necessary because they relate to a designation no longer offered under TMIIIP.

The remaining proposed amendments also clarify or remove outdated or unnecessary language from the rules, including using the word "shall" or "must" when provisions require certain behaviors or actions.

FISCAL NOTE

Stephanie Whallon, Director, Texas Film Commission, has determined that during each year of the first five years in which the proposed amendments are in effect, there will be no expected fiscal impact on state and local governments as a result of enforcing or administering the proposed amendments.

Ms. Whallon does not anticipate any measureable effect on local employment or the local economy as a result of the proposed amendments.

PUBLIC BENEFIT AND COSTS

Ms. Whallon has also determined that during each year of the first five years in which the proposed amendments are in effect, the public benefits anticipated as a result of the amendments are improving the program's ability to increase employment opportunities for individuals in this industry and encourage production of media projects, responding to changes in the industry, and making the rules easier to understand and follow.

Ms. Whallon has determined there are no measurable anticipated economic costs to persons required to comply with the proposed amendments.

There will be no adverse economic effect on small businesses, micro-businesses, or rural communities. Since the OOG has determined that the proposed rule will have no adverse economic effect on small businesses, micro-businesses, or rural communities, preparation of an Economic Impact Statement and a Regulatory Flexibility Analysis, as detailed under Texas Government Code §2006.002, is not required.

GOVERNMENT GROWTH IMPACT STATEMENT

Ms. Whallon has determined that during each year of the first five years in which the proposed amendments are in effect, the amendments:

1) will not create or eliminate a government program;

2) will not require the creation of new employee positions or the elimination of existing employee positions;

3) will not require an increase or decrease in future legislative appropriations to the OOG;

4) will not require an increase or decrease in fees paid to the OOG;

5) do not create a new regulation;

6) will expand certain existing regulations, limit certain existing regulations, and repeal an existing regulation;

7) will not increase or decrease the number of individuals subject to the applicability of the rules; and

8) will not positively or adversely affect the Texas economy.

TAKINGS IMPACT ASSESSMENT

The OOG has determined that no private real property interests are affected by the proposed rules and the proposed rules do not restrict, limit, or impose a burden on an owner's rights to the owner's private real property that would otherwise exist in the absence of government action. As a result, the proposed amendments do not constitute a taking or require a takings impact assessment under Government Code §2007.043.

SUBMISSION OF COMMENTS

Written comments regarding the proposed rule amendments may be submitted for 30 days following the date of publication of this notice by mail to Stephanie Whallon, Office of the Governor, Texas Film Commission, P.O. Box 12428, Austin, Texas 78711 or by email to TFCRules.Comments@gov.texas.gov with the subject line "TMIIIP Rule Review." The deadline for receipt of comments is 5:00 p.m., Central Time, on January 22, 2023.

13 TAC §§121.1 - 121.14

STATUTORY AUTHORITY

The amendments are proposed under Sections 485.022 and 485.024 of the Texas Government Code, which require the Texas Film Commission to develop procedures for the administration and calculation of grant awards under TMIIIP.

CROSS REFERENCE TO STATUTE

Chapter 121 of Texas Government Code. No other statutes, articles, or codes are affected by the proposed amendments.

§121.1. Background and Purpose.

(a) Background.

(1) The Texas Moving Image Industry Incentive Program administered by the Texas Film Commission (Commission) offers grants based upon eligible expenditures within the state by the Applicant, subject to this Chapter [~~chapter~~] and Chapter 485 of the Texas Government Code.

(2) Grants are available upon submission of all required documentation by the Applicant to the Commission, initial verification by the Commission and a compliance review by the Office of the Governor. These grants are in addition to the sales tax exemptions [~~Sales Tax Exemptions~~] described in Sections [~~Texas Tax Code,~~ §]151.318 and [§]151.3185 of the Texas Tax Code and [~~the Texas Comptroller of Public Accounts Administrative Rule,~~ 34 ~~TAC~~] §3.300 of Title 34 of the Texas Administrative Code.

(b) Purpose.

(1) The Texas Moving Image Industry Incentive Program increases [~~was implemented to increase~~] employment opportunities for Texas industry professionals, encourages tourism to the state, and boosts [~~to boost~~] economic activity in Texas cities and the overall Texas economy. Rather than [~~Texas~~] being an exporter of talent, Texas attracts [~~can now attract~~] a wide range of projects from traditional film, television, and commercial productions, to technology-driven [~~the technology driven~~] visual effects, animation, [~~productions and~~] video games, and other digital interactive media productions.

(2) The Texas Moving Image Industry Incentive Program promotes the [~~allows for~~] growth of the indigenous segments of media production, thereby encouraging Texas's[~~. It is an important goal of this program to have Texas~~'] talented workforce to stay in Texas and realize real professional growth in the industry. The program increases the value of the Texas workforce and the viability of the small businesses that rely on media production activity, increasing Texas's [~~Texas~~'] capacity to take on more production activity and increasing the state's [~~Texas~~] competitive edge.

(3) The Texas Moving Image Industry Incentive Program is not intended for productions or projects that are permanently located in [~~the State of~~] Texas, including, but not limited to, news productions, sports productions, and religious service productions.

§121.2. Definitions.

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

(1) Applicant--

(A) For Feature Films, Television Programs, Visual Effects Projects for Feature Films or Television Programs, Reality Television Projects or Educational or Instructional Videos:[~~,~~] either the Production Company producing the project or the owner of the copyright.

(B) For Commercials or Visual Effects Projects for Commercials:[~~,~~] the Production Company, advertising agency, or client; provided, however, that if an advertising agency or client applies as the Applicant, but a Production Company expends the funds in the state in connection with a project, then either a chain of downstream payment from the Applicant to the Production Company or a production services agreement [~~actually expending the funds~~] must be evidenced in connection with the submission of the Expended Budget.

(C) For Digital Interactive Media Productions:[~~,~~] the Production Company, game or content developer, or game publisher.

(2) Business Day--A day other than Saturday, Sunday, or a [~~legal~~] Federal or State of Texas holiday.

(3) Cast--Actors paid by the Applicant to perform roles in Texas, including, but not limited to, featured actors, extras, stunt performers, voice-over talent, hosts, judges, announcers and roles or performers that appear on a recurring basis, but excluding talk show guests, game or contest show contestants, [~~Reality Series participants, documentary subjects or interviewees, musicians performing as part of a music performance production,~~] and litigants and witnesses in courtroom reality programs.

(4) Commercial--A[~~Any~~] live-action or animated-production advertisement, including, but not limited to, [~~; that is~~] an individual advertisement [~~Commercial~~], more than one advertisement [~~Commercial~~] created in a contiguous production period for the same client, [~~or~~] a music video, or an infomercial that is made for the purpose of [~~entertaining or~~] promoting a product, service, or idea and is produced for distribution via broadcast, cable, or any digital format, including, but not limited to, cable, satellite, Internet, or mobile electronic device.

(5) Crew--Independent contractors or employees paid by the Applicant to perform work in Texas that are directly contracted and credited for a specific position. An individual may work in more than one position on a production. Executive producers and/or permanent salaried employees of an Applicant who are listed on call sheets or production reports but not paid Wages on the project other than producing services, shall not be counted in Crew calculations for Texas Residency purposes. Vendors serving a traditional crew function and providing personal services, but who are paid as independent contractors rather than through payroll, shall be counted in Crew calculations for Texas Residency purposes and must provide a Declaration of Texas Residency Form. [~~Workers paid by the Applicant to perform work in Texas that is directly contracted and credited for a specific position, but excluding musicians performing as part of a music performance~~

~~production. An individual may work in more than one position on a production. Executive Producers and/or permanent salaried employees of an Applicant for a Commercial project listed on call sheets or production reports, but not paid Wages and do not perform services on the project other than producing services, shall not be counted in Crew calculations for Texas Residency purposes. Vendors serving a traditional crew function and providing personal services, but paid as independent contractors rather than through payroll, will be counted in Texas Residency Crew calculations and should provide a Declaration of Texas Residency Form.~~]

(6) Declaration of Texas Residency Form--A document promulgated by the Texas Film Commission (Commission) to be utilized by Applicants [~~in order~~] to prove the residency status of each Texas Resident employee, contractor, Crew, or Cast member.

(7) Digital Interactive Media Production--Software that provides a user or users with a game to play or other interactive technology experience for the purpose of entertainment or education, including for military or medical simulation training, and which is created for a game console or platform, personal computer, handheld console, or mobile electronic [~~machine or an electronic~~] device used by a business or consumer solely for bona fide amusement purposes [~~that rewards the player exclusively with non-cash merchandise prizes or a representation of value redeemable for those items,~~] as outlined in Section 47.01 of the Texas Penal Code[~~, §47.01~~].

(8) Educational or Instructional Video--An [~~Any~~] individual live-action [~~live action~~] or animated production, or a contiguous series of more than one live-action or animated production created for the same client, that is produced for exhibition in an educational or instructional setting.

(9) Episodic Television Series--A Television Program consisting of multiple episodes of a single season.

(10) Expended Budget--The final verifying documentation and worksheets submitted by an Applicant to the Commission at the completion of a project that shows the total eligible in-state spending, as defined in Section 485.021(1) of the Texas Government Code, and includes all documentation considered by the Commission to be necessary to show compliance with the requirements of the Texas Moving Image Industry Incentive Program.

(11) Feature Film--Any live-action or animated for-profit production, including narrative and [~~or~~] documentary productions, that is produced for distribution in theaters or via any digital format, including, but not limited to, DVD, Internet, or mobile electronic device.

(12) Filming Day--A day of Production as defined in paragraph (18)[~~(17)~~] of this section. When [~~For purposes of~~] calculating 60% of Filming Days for purposes of §121.3 of this Chapter, [~~chapter~~] [~~(~~]but not for purposes of calculating 25% of Filming Days for purposes of §121.7 of this Chapter [~~chapter)~~], a Filming Day [~~"day"~~] may include [~~not only~~] a traditional day [~~"day"~~] of Production in live-action or digital media, as well as[~~, but also~~] a concurrent day [~~"day"~~] of Production conducted by a second unit, so long as:

(A) such [~~Such~~] second unit, is not a splinter unit, but is utilized for a bona fide, production-related purpose and would be recognized by the Directors Guild of America as a second unit; and

(B) a [~~A~~] call sheet, and production report, for such day [~~"day"~~] is circulated and executed in connection with the activities of such second unit. Any [~~such~~] bona fide, second unit day [~~"day"~~] shall be added to both the numerator of Texas days and the denominator of total days for purposes of calculating 60% of Filming Days for purposes of §121.3 of this Chapter [~~chapter~~].

(13) Man Hours--A unit of one hour's work by one person.

(14) [~~(13)~~] Physical Production--The period encompassing Pre-Production, Production, and Postproduction.

(15) [~~(14)~~] Postproduction--The period [~~of Physical Production~~] that occurs after the end of Production,[~~as defined in paragraph (17) of this section;~~] including but not limited to, animation, bug-fixing, codebase completion, compositing, editing, lighting, music, patch-creation, sound, testing, and visual effects [~~and animation~~].

(16) [~~(15)~~] Pre-Production--The period [~~of Physical Production~~] that occurs before the start of Production, including, but not limited to, casting actors, estimating budgets, mechanics, scouting locations, and testing story[~~as defined in paragraph (17) of this section~~].

(17) [~~(16)~~] Principal Start Date--

(A) For a live-action [~~live action~~] Feature Film, Television Program, Reality Television Project, Educational or Instructional Video, or Commercial project:[~~, this is~~] the first day of principal photography.

(B) For a Digital Interactive Media Production, Visual Effects Project or animated project:[~~, this is~~] the first day of asset creation (i.e. character or environment modeling and/or rigging) [~~Production~~].

(18) [~~(17)~~] Production--

(A) For a live-action [~~live action~~] Feature Film, Television Program, Reality Television Project, Educational or Instructional Video or Commercial project:[~~, this is~~] the period starting [~~of Physical Production between~~] the first day of principal photography through [~~and~~] the last day [~~days~~] of principal photography[~~, inclusive~~].

(B) For a Digital Interactive Media Production, Visual Effects Project or animated project:[~~, this is~~] the period starting [~~of Physical Production between~~] the first day of asset creation or commencement of layout (i.e. character or environment modeling and/or rigging) through the last day of animation, code freeze, and/or final layout [~~end of Pre-Production and completion of the project~~].

(19) [~~(18)~~] Production Company--A company that engages in any of the activities included in Physical Production for a Feature Film, Television Program, Reality Television Project, Educational or Instructional Video, Commercial project, or [~~film production company, television production company,~~] Digital Interactive Media Production [~~developer, commercial production company, visual effects company, animation production company or postproduction company~~].

~~[(19) Qualifying Application--A Qualifying Application has the meaning provided in §121.8(a)(1) of this chapter.]~~

(20) Reality Series--A Reality Television Project consisting of multiple episodes of a single season.

(21) Reality Television Project--A live-action [~~Any live action~~], for-profit production based upon unscripted content, including, but not limited to, a Reality Series, a contest or game show (to include individual episodes), or a talk show (to include individual episodes), that is produced for distribution via broadcast, cable, or any digital format, including, but not limited to, satellite, Internet, or [~~and~~] mobile electronic device.

(22) Television Program--An episodic [~~Any~~] live-action or animated for-profit production that is produced in a[~~,~~] narrative or documentary style, including, but not limited to, a television series [~~an Episodic Television Series~~], [~~a~~] miniseries, limited series, [~~a~~] television movie, [~~a~~] television pilot, [~~a~~] television episode, [~~an interstitial Television Program,~~] or a musical performance [~~more than 30 minutes~~

~~in length~~] that is produced for distribution via broadcast, cable, or any digital format, including, but not limited to, satellite, Internet, or [~~and~~] mobile electronic device (including a short narrative or documentary episode or series of episodes[, ~~either narrative or documentary, that is~~] distributed initially as streamed content[~~an Internet download or stream~~]).

(23) Texas Heritage Project--A Feature Film or Television Program (excluding a Reality Television Project), that promotes or documents Texas's [~~Texas'~~] diverse cultural, historical, natural or man-made resources, and that meets the requirements established in [~~as determined in accordance with~~ §] §121.13 of this Chapter [~~chapter~~].

(24) Texas Resident--An individual who is a permanent resident of Texas for at least 120 days prior to the Principal Start Date of the project and who has completed a Declaration of Texas Residency Form.

(25) Underutilized and Economically Distressed Area--

(A) Underutilized Area--An area of the state that receives less than 15% of the total moving image industry [~~film and television~~] production in the state during a fiscal year, as determined by the Commission. An area of the state wherein [~~Areas determined by the Commission to receive in excess of~~] 15% or more of the total moving image industry [~~film and television~~] production takes place during a fiscal year, as determined by the Commission, includes [~~in the state will be deemed to include the area within~~] a thirty mile radius from city hall of that area's largest municipality [~~municipality's city hall~~].

(B) Economically Distressed Area--An area within the [~~above-determined~~] thirty mile radius described in Subsection (A) where the median household income does not exceed 75% of the median household income as determined by the Texas Demographic Center or its successor [~~State Data Center, University of Texas San Antonio~~].

(26) Visual Effects Project--A self-contained production whereby computer generated images are created or manipulated to integrate with live-action footage of a Feature Film, Television Program, Educational or Instructional Video, or Commercial.

(27) Wages--Compensation paid to an individual for work performed. Payment methods [~~may~~] include, but are not limited to, direct payments, payments through an agent or agency, payments through a loan-out company or payments through a payroll service. Wages [~~may~~] include, but are not limited to, gross wages, per diems (if signed for by the recipient), employer paid Social Security (Old Age, Survivors, and Disability Insurance (OASDI)) payments, employer paid Medicare (MEDI) payments, employer paid Federal Unemployment Insurance (FUI) payments, employer paid Texas State Unemployment Insurance (SUI) payments, employer paid pension, health and welfare payments, and employer paid vacation and holiday pay. Only the first $1,000,000 in aggregate wages and/or compensation per person shall [~~will~~] constitute eligible Wage expenditures.

§121.3. Eligible Projects.

(a) A project may be eligible for a grant under the Texas Moving Image Industry Incentive Program if it meets the stated minimum requirements listed in Subsections [~~subsections~~] (b) - (h) of this Section [~~section~~], is appropriate in content, and represents a potential economic impact in Texas, as assessed in §121.9(c)(3) of this Chapter [~~chapter~~], that is sufficient to justify acceptance in the program.

(b) Feature Films.

(1) Feature Film Applicants must expend [~~spend~~] a minimum of $250,000 in in-state spending.

(2) Applicants must film at least 60% of a project [~~the Filming Days must be completed~~] in Texas. Applicants must fulfill this requirement by:

(A) completing at least 60% of Filming Days in Texas; or

(B) if the Texas Film Commission (Commission) provides prior written approval:

(i) completing at least 60% of the total project Man Hours in Texas; or

(ii) having at least 60% of the actual locations used and paid for, not including basecamps, in Texas.

(3) Except as provided in paragraph (4) of this Subsection, 70% of the [~~paid~~] Crew paid by the Applicant and 70% of the [~~paid~~] Cast paid by the Applicant, including extras, must be Texas Residents, unless it is determined and certified by the [~~Texas Film~~] Commission [~~(Commission)~~] in writing that a sufficient number of qualified Crew and Cast, including extras, are not available and every effort has been made by the production to meet the requirement by the Principal Start Date.

(4) For animated [~~Animated~~] or documentary Feature Films, [~~must have~~] 70% of the combined total of [~~paid~~] Crew and [~~paid~~] Cast paid by the Applicant, including extras, must be Texas Residents, unless it is determined and certified by the Commission in writing that qualified Crew and Cast are not available and every effort has been made by the production to meet the requirement by the Principal Start Date.

(c) Television Programs.

(1) Television Program Applicants must expend [~~spend~~] a minimum of $250,000 in in-state spending.

(2) 60% of the project must be filmed in Texas. This must be fulfilled by completing at least 60% of the Filming Days [~~must be completed~~] in Texas, or, if permitted by the Commission in its sole discretion:

(A) completing at least 60% of the total Man Hours in Texas; or

(B) at least 60% of the actual locations used and paid for, not including basecamps, being located in Texas.

(3) Except as provided in paragraph (4) of this Subsection, 70% of the [~~paid~~] Crew paid by the Applicant and 70% of the [~~paid~~] Cast paid by the Applicant, including extras, must be Texas Residents, unless it is determined and certified by the Commission in writing that a sufficient number of qualified Crew and Cast, including extras, are not available and every effort has been made by the production to meet the requirement by the Principal Start Date.

(4) For animated [~~Animated~~] or documentary Television Programs, [~~must have~~] 70% of the combined total of [~~paid~~] Crew and [~~paid~~] Cast paid by the Applicant, including extras, must be Texas Residents, unless it is determined and certified by the Commission in writing that qualified Crew and Cast are not available and every effort has been made by the production to meet the requirement by the Principal Start Date.

(d) Reality Television Projects.

(1) Reality Television Project Applicants must expend [~~spend~~] a minimum of $250,000 in in-state spending.

(2) 60% of the project must be filmed in Texas. This must be fulfilled by completing at least 60% of the Filming Days [~~must be~~

~~completed~~] in Texas, or, if permitted by the Commission in its sole discretion:

(A) completing at least 60% of the total Man Hours in Texas; or

(B) at least 60% of the actual locations used and paid for, not including basecamps, being located in Texas.

(3) 70% of the combined total of [~~paid~~] Crew and [~~paid~~] Cast paid by the Applicant, including extras, must be Texas Residents, unless it is determined and certified by the Commission in writing that a sufficient number of qualified Crew and Cast, including extras, are not available and every effort has been made by the production to meet the requirement by the Principal Start Date.

(e) Commercials.

(1) Commercial Applicants must expend [~~spend~~] a minimum of $100,000 in in-state spending.

(2) 60% of the project must be filmed in Texas. This must be fulfilled by completing at least 60% of the Filming Days [~~must be completed~~] in Texas, or, if permitted by the Commission in its sole discretion:

(A) completing at least 60% of the total Man Hours in Texas; or

(B) at least 60% of the actual locations used and paid for, not including basecamps, being located in Texas.

(3) 70% of the combined total of [~~paid~~] Crew and [~~paid~~] Cast paid by the Applicant, including extras, [~~which are paid by the Applicant,~~] must be Texas Residents, unless it is determined and certified by the Commission in writing that a sufficient number of qualified Crew and Cast, including extras, are not available and every effort has been made by the production to meet the requirement by the Principal Start Date.

(f) Digital Interactive Media Productions.

(1) Digital Interactive Media Production Applicants must expend [~~spend~~] a minimum of $100,000 in in-state spending.

(2) 60% of the project must be filmed in Texas. This must be fulfilled by completing at least 60% of the Filming Days [~~must be completed~~] in Texas, or, if permitted by the Commission in its sole discretion:

(A) completing at least 60% of the total Man Hours in Texas; or

(B) at least 60% of the actual locations used and paid for, not including basecamps, being located in Texas.

(3) 70% of the combined total of [~~paid~~] Crew and [~~paid~~] Cast [~~which are~~] paid by the Applicant must be Texas Residents, unless it is determined and certified by the Commission in writing that qualified Crew and Cast are not available and every effort has been made by the production to meet the requirement by the Principal Start Date.

(g) Educational or Instructional Videos.

(1) Educational or Instructional Video Applicants must expend [~~spend~~] a minimum of $100,000 in in-state spending.

(2) 60% of the project must be filmed in Texas. This must be fulfilled by completing at least 60% of the Filming Days [~~must be completed~~] in Texas, or, if permitted by the Commission in its sole discretion:

(A) completing at least 60% of the total Man Hours in Texas; or

(B) at least 60% of the actual locations used and paid for, not including basecamps, being located in Texas.

(3) 70% of the combined total of [~~paid~~] Crew and [~~paid~~] Cast paid by the Applicant, including extras, [~~which are paid by the Applicant,~~] must be Texas Residents, unless it is determined and certified by the Commission in writing that qualified Crew and Cast are not available and every effort has been made by the production to meet the requirement by the Principal Start Date.

(h) Visual Effects Projects.

(1) Visual Effect Project for a Feature Film or Television Program:

(A) Applicants must expend [~~spend~~] a minimum of $250,000 in in-state spending.

(B) 60% of the project must be filmed in Texas. This must be fulfilled by completing at least 60% of the Filming Days [~~must be completed~~] in Texas, or, if permitted by the Commission in its sole discretion:

(i) completing at least 60% of the total Man Hours in Texas; or

(ii) at least 60% of the actual locations used and paid for, not including basecamps, being located in Texas.

(C) 70% of the [~~paid~~] Crew paid by the Applicant and 70% of the [~~paid~~] Cast paid by the Applicant, including extras, must be Texas Residents, unless it is determined and certified by the Commission in writing that a sufficient number of qualified Crew and Cast, including extras, are not available and every effort has been made by the production to meet the requirement by the Principal Start Date.

(2) Visual Effect Project for an Educational or Instruction Video or Commercial:

(A) Applicants must expend [~~spend~~] a minimum of $100,000 in in-state spending.

(B) 60% of the project must be filmed in Texas. This must be fulfilled by completing at least 60% of the Filming Days [~~must be completed~~] in Texas, or, if permitted by the Commission in its sole discretion:

(i) completing at least 60% of the total Man Hours in Texas; or

(ii) at least 60% of the actual locations used and paid for, not including basecamps, being located in Texas.

(C) 70% of the combined total of [~~paid~~] Crew and [~~paid~~] Cast paid by the Applicant, including extras, must be Texas Residents, unless it is determined and certified by the Commission in writing that a sufficient number of qualified Crew and Cast, including extras, are not available and every effort has been made by the production to meet the requirement by the Principal Start Date.

§121.4. Ineligible Projects.

(a) The following types of projects are not eligible for grants under this program:

(1) pornography or obscene material, as defined by Section 43.21 of the Texas Penal Code[~~, §43.21~~];

(2) news, current event or public access programming, political advertising, including public service announcements which ad-

vance a public policy or political position, or programs that include weather or market reports;

(3) local events or religious services;

(4) productions not intended for commercial, educational, or instructional distribution;

(5) sporting events or activities;

(6) awards shows [(unless broadcast on national network television to a national audience)], galas, telethons or programs that solicit funds;

(7) projects intended for undergraduate or graduate course credit;

(8) application software, system software, or middleware;

(9) casino-type video games and interactive digital media experiences used in a gambling device, as such term is defined in Section 47.01 of the Texas Penal Code [pursuant to Texas Penal Code, §47.01]; or

(10) Commercials or advertising for the State of Texas or any Texas state agency or department.

(b) [Not every project will qualify for a grant.] The Texas Film Commission (Commission) is not required to act on any application and may deny an application or eventual grant payments [payment on an application] because of inappropriate content or content that portrays Texas or Texans in a negative fashion, as determined by the Commission[, in a project]. In determining whether to act on or deny an application, the Commission shall consider general standards of decency and respect for the diverse beliefs and values of the citizens of Texas. As part of the preliminary application process, the Commission shall [will] review the Content Document, as defined in §121.8(a)(1)(C) of this Chapter [chapter], and shall [will] advise the potential Applicant on whether the content precludes [will preclude] the project from receiving a grant.

(c) Once an approved project has been completed, the Commission shall [will] review the final content before issuing the grant payment[,] to determine if any substantial changes occurred during Production [production] to include content described by Subsection (a) or (b) of this Section [subsection (a) of this section] .

§121.5. Eligible and Ineligible In-State Spending.

(a) The following are eligible expenditures:

(1) Wages paid to Texas Residents for work performed in Texas, including additional compensation paid as part of a contractual or collective bargaining agreement.

(2) Additional compensation or reimbursements paid to Texas Residents, including, but not limited to:

(A) mileage or car allowance;

(B) housing allowance; and

(C) box or kit rentals for use of personal equipment.

(3) Workers compensation insurance premiums for Texas Residents, but only if the premiums are paid to a Texas-based insurance company or broker.

(4) Payroll company service fees for Texas Residents, but only if paid to a Texas-based payroll company that processes payroll within Texas.

(5) Payments made to Texas-domiciled [Texas domiciled] entities, sole proprietorships, or individuals for goods and services used in Texas that are directly attributable to the Physical Production of the project. In the case of Digital Interactive Media Productions, Visual Effects Projects, and animated projects, the amount attributable to Pre-Production and research and development costs shall [will] be limited to an amount not to exceed 30% of the project's overall in-state spending.

(6) Payments for shipping on shipments originating in Texas[(in the case of Federal Express, DHL or UPS shipments, the use of an Account Number of a Texas domiciled entity or sole proprietorship where the address associated with the account number is printed) shall be conclusive proof of Texas origination for this purpose].

(7) Air travel to and from Texas on a Texas-based airline[, including American Airlines and Southwest Airlines,] or on a Texas-based air charter service, provided that an itemized receipt showing an itinerary and passenger name from the airline is provided confirming payment.

(8) Rentals of vehicles registered and licensed in the State of Texas or rented from a Texas-domiciled [Texas domiciled] entity or sole proprietorship, including, but not limited to, national rental car companies with one or more [a] physical outlets [outlet] in Texas.

(9) Fees paid to Texas Residents to compose, orchestrate, and perform music that is specifically created for the project.

(10) Legal fees directly attributable to the Physical Production of the project that are paid to Texas-based lawyers or law firms[that are directly attributable to the Physical Production of the project].

(11) Internet purchases, but only if purchased from a Texas-domiciled [Texas domiciled] entity or sole proprietorship or a retailer with a physical store or outlet in Texas. Items purchased must be shipped directly to Texas.

(12) Capital expenditures that are:

(A) less than $1,000 for an individual item from a Texas-domiciled [Texas domiciled] entity or sole proprietorship [under $1,000]; or

(B) equal to or greater than $1,000 for [spending on] an individual [capital] item purchased that [for over $1,000 which item] is not exhausted during the course of Production[is an eligible expenditure], so long as such item is sold or appropriately disposed of at the end of Production and evidence of such sale or disposition is furnished to the Texas Film Commission (Commission). Evidence of sale or disposition [Such documentation] must show that only the difference between the purchase price and the sale price is submitted as an eligible expenditure and a copy of the check or receipt for the sale must [should] be included as back up with the original purchase documentation.

(13) Location fees, if an executed location agreement by and between the Applicant and the location owner or owner's representative is provided to the Commission with the Applicant's Expended Budget.

(b) The following are ineligible expenditures:

(1) Payments made to non-Texas-domiciled [non-Texas domiciled] entities, or if a sole proprietorship or individual, to non-Texas Residents.

(2) Payments made for goods and services not used in Texas.

(3) Payments made for goods and services that are not directly attributable to the Physical Production of the project.

(4) Payments made by Digital Interactive Media Productions, Visual Effects Projects, and animated projects for Pre-Production costs that exceed 30% of the project's overall in-state spending.

(5) Expenses related to distribution, publicity, marketing, or promotion of the project, including, but not limited to, promotional stills.

(6) Payments, other than properly allowable location fees, for facilities and automobiles that are part of a permanent/continuous business operation including, but not limited to, rental, lease or mortgage payments, utilities, software, and insurance.

(7) Wages paid to non-Texas Residents, including additional compensation paid as part of a contractual or collective bargaining agreement.

(8) Payments made to a company, entity, association, or person that acts as an agent or broker for companies, entities, associations, or persons outside of Texas to provide goods, services, or labor for the purpose of taking advantage of the Texas Moving Image Industry Incentive Program (also known as "pass-through" entities).

(9) Fees for story rights, music rights, or clearance rights and licensing fees.

(10) Additional compensation or reimbursements paid to non-Texas Residents, including, but not limited to:

(A) mileage or car allowance;

(B) housing allowance; and

(C) box or kit rentals for use of personal equipment.

(11) Workers' [~~Workers~~] compensation insurance payments for non-Texas Residents.

(12) Payroll company service fees for non-Texas Residents or those paid to a non-Texas-based payroll company.

(13) Payments for shipments originating outside of Texas[~~(unless, in the case of Federal Express, DHL or UPS shipments, an Account Number of a Texas domiciled entity or sole proprietorship has been used for such shipments and such Account Number is printed on the invoices with the Texas address associated with the Account Number)~~].

(14) Payments for mobile and landline telephone service if the service or billing address is not in Texas.

(15) Payments for alcoholic beverages, cigarettes, and tobacco products.

(16) Payments to adult-oriented [~~adult oriented~~] businesses or for adult-oriented material.

(17) Payments for entertainment, including, but not limited to, parties, event tickets, movies, hotel mini-bar items, meals unrelated to the Physical Production of the project, and personal gifts.

(18) Payments for tips and gratuities.

(19) Capital expenditures for an individual item over $1,000 which item is not exhausted during the course of Production [~~production~~], unless such purchase is from a Texas-domiciled [~~Texas domiciled~~] entity or sole proprietorship, the item is sold at the end of the Production [~~production~~] and evidence of such sale is furnished to the Commission. The [~~(such~~] documentation provided to the Commission must show that only the difference between the purchase price and the sale price is submitted as an eligible expenditure and a copy of the check or receipt for the sale should be included as back up with the original purchase documentation[~~)~~].

(20) Payments to any business that sells alcohol or tobacco products reflected on receipts which are not itemized, even if the submitted item itself is otherwise eligible.

(21) Any [~~On Commercial productions where the Applicant is a production company rather than the client or ad agency,~~] "talent handling fees," "overage fees," and "production fees[~~;~~]" for a Commercial where the Applicant is a Production Company rather than the client or advertisement agency, other than the following items which must have been budgeted on the original, awarded bid to be eligible expenditures: the Applicant's insurance fees from the actual column of the actual Association of Independent Commercial Producers (AICP) budget (if it does not exceed the original, awarded bid and if a Texas-based insurance company or broker is used);[~~;~~] editorial or Postproduction fees from the actual column of the AICP budget (if such fees do not exceed the Postproduction fees on the original, awarded bid);[~~;~~] and any bona fide internal billing items which do not exceed the usual and customary cost of the goods or services, such as when Production Company [~~production company~~] employees work directly on the production using equipment and/or studio space owned by the Applicant that is "rented" to the production in lieu of using an outside vendor[~~; to be included, however, these items must have been budgeted on the original, awarded bid~~].

(22) Any payments made other than by the Applicant, including, but not limited to, payments made on behalf of the Applicant by a third party, unless a production services agreement or similar documentation is provided to show sufficient proof, as determined by the Commission in its sole discretion, of the relationship between the Applicant and the third party.

(c) The Commission reserves the right to determine which expenses are eligible or ineligible.

§121.6. Grant Awards.

(a) Feature Films, Television Programs, and Visual Effects Projects for Feature Films or Television Programs with total eligible in-state spending of:

(1) At least $250,000 but less than $1 million shall [~~will~~] be eligible to receive a grant equal to 5% of eligible in-state spending.

(2) At least $1 million but less than $3.5 million shall [~~will~~] be eligible to receive a grant equal to 10% of eligible in-state spending.

(3) At least $3.5 million shall [~~will~~] be eligible to receive a grant equal to 20% of eligible in-state spending.

(b) Digital Interactive Media Productions with total eligible in-state spending of:

(1) At least $100,000 but less than $1 million shall [~~will~~] be eligible to receive a grant equal to 5% of eligible in-state spending.

(2) At least $1 million but less than $3.5 million shall [~~will~~] be eligible to receive a grant equal to 10% of eligible in-state spending.

(3) At least $3.5 million shall [~~will~~] be eligible to receive a grant equal to 20% of eligible in-state spending.

(c) Reality Television Projects with total eligible in-state spending of at [~~:~~]

[~~(1)~~] [~~At~~] least $250,000 [~~but less than $1 million will~~] be eligible to receive a grant equal to 5% of eligible in-state spending.

[~~(2) At least $1 million will be eligible to receive a grant equal to 10% of total eligible in-state spending.~~]

(d) Commercials, Educational or Instructional Videos, and Visual Effects Projects for Commercials or Educational or Instruction Videos with total eligible in-state spending of at [~~:~~]

[~~(1)~~] [~~At~~] least $100,000 [~~but less than $1 million will~~] be eligible to receive a grant equal to 5% of eligible in-state spending.

[(2) At least $1 million will be eligible to receive a grant equal to 10% of total eligible in-state spending.]

§121.7. Additional Grant Award [Underutilized and Economically Distressed Areas].

[(a)] An applicant shall be eligible for a single additional grant equal to 2.5% of total in-state spending by meeting one of the following:

(1) Completing [Projects which complete] at least 25% of their total Filming Days in Underutilized or Economically Distressed Areas (UEDAs)[may receive an additional 2.5% of total in-state spending. The additional 2.5% applies to all eligible spending in all areas of Texas; it is not restricted to the spending in UEDAs].

(A) [(b)] In the event that multiple locations are utilized within a single Filming Day, in order to calculate the 25% of total Filming Days in UEDAs necessary to receive this [an] additional grant [2.5% of total in-state spending], the Texas Film Commission (Commission) shall [may] pro-rate a given Filming Day by the number of shooting locations reflected on production reports furnished by an Applicant to the Commission. For example, if eight shooting locations are utilized in a Filming Day, and five are located in UEDAs, 5/8 of that Filming Day shall [will] count in calculating the 25% of total Filming Days necessary [to become eligible] for this [the] additional grant [percentage].

(B) [(c)] If one or more shooting locations is [are] not located in a UEDA [UEDAs], but is [are] serviced by a basecamp located in a [an] UEDA, such shooting locations shall be deemed to be located in a UEDA [UEDAs] when calculating the 25% of total Filming Days necessary [to become eligible] for this [the] additional grant [percentage]. A Production Company [production company] must have paid financial consideration to the owner/leaseholder of the basecamp location pursuant to a location agreement to be considered a "basecamp" under this subparagraph [subsection]. The basecamp location must be listed on the call sheets and/or other relevant production documentation.

(C) [(d)] The Commission shall [use maps to] identify the areas that qualify for designation as UEDAs [in accordance with §121.2(25) of this chapter]. [The maps in effect since August 28, 2011 shall expire on August 31, 2017 at which time the Commission shall update the maps. The Commission, having no obligation to do so, will endeavor to make such updated maps available in an electronic format on the Commission's Internet website up to 90 days prior to their effective date.]

(2) Demonstrating that 10% of the combined total of paid Crew and paid Cast, including extras, who are paid by the Applicant are Texas Resident "Veterans."

(A) For purposes of this Section, a "Veteran" is a person who served in and has been honorably discharged from the United States Army, Navy, Marine Corps, Air Force, or Coast Guard; the National or Air National Guard of the United States; the Texas Army National Guard; the Texas Air National Guard; a Reserve component of any of the aforementioned military organizations; or any other military service that the Commission determines to be allowable.

(B) The Applicant shall submit sufficient information confirming the Veteran's status, including military-issued discharge documentation and other information requested by the Commission to support a determination that the person qualifies as a Veteran.

(3) Sponsoring at least one training event during the calendar year in which Production occurs in a municipality mutually agreed upon by the Applicant and the Commission. The training event must:

(A) focus on skills development and workforce training related to the film, television, commercial, animation, visual effects, video game and extended reality industries; and

(B) be pre-approved by the Commission, including topics and content to be presented.

(4) Sponsoring or creating two or more public service announcements (PSAs) for use by the Commission and/or the Office of the Governor on social media and/or website channels. The PSAs must:

(A) be provided to the Commission during the calendar year in which Production occurs; and

(B) be pre-approved by the Commission, including topics and content of the PSAs.

(5) Expending 10% of the total eligible in-state spending on eligible expenditures during Postproduction, including labor, vendors, and music costs.

§121.8. Grant Application.

(a) Initial Submission

(1) A Qualifying Application includes [is defined to include]:

(A) A completed Qualifying Application form for the Texas Moving Image Industry Incentive Program;

(B) An itemized budget detailing only estimated Texas expenditures; and

(C) A Content Document:

(i) for [For] Feature Films, Television Programs (except Episodic Television Series) and Visual Effects Projects for Feature Films and Television Programs:[,] the [a] full script;[.]

(ii) for [For] Episodic Television Series:[,] the full script of the first episode to be filmed in Texas;[.]

(iii) for [For] Commercials, Educational or Instructional Videos, and Visual Effects Projects for Commercials or Educational or Instructional Videos:[,] the scripts, storyboards, or detailed outlines/summaries of content;[.]

(iv) for [For] Digital Interactive Media Productions:[,] a [brief] summary of game content providing sufficient detail concerning the platform, themes, settings, story, characters, and events [to the Texas Film Commission (Commission) upon which to base its preliminary content approval consideration];[.] or

(v) for [For] Reality Television Projects:[,] a detailed treatment or outline of program content.

(2) [Qualifying] Application forms for each type of project are available by request to [at] the Commission [web site: http://www.texasfilmcommission.com, or by contacting the Commission if] via telephone, Internet, or other means if additional [access is not available or] special needs facilitation is required.

(3) Applications shall [will] not be accepted earlier than 180 [120] calendar days prior to a project's Principal Start Date.

(4) Applications must be received no later than 5:00 p.m. Central Time on the fifth Business Day prior to the Principal Start Date.

(5) Only one application by a single [and] Applicant [per project] is allowed for a project.

(6) Within 5 Business Days of the Principal Start Date indicated on the Qualifying Application form, an Applicant for a Feature Film, Television Program, Reality Television Project, Digital Interac-

tive Media Production, Visual Effects Project or Educational or Instructional Video must confirm with the Commission in writing, to include e-mail, that the production began on time. If the start of the project is delayed for more than 30 days, an application may be disqualified and the Applicant may be required to [must] reapply. If an Applicant fails to confirm that the production began on time within such 5 Business Day period, the Commission may, at its sole election but with no obligation to do so, disqualify the application.

(b) The Office of the Governor, as a state agency, must comply with the Texas Public Information Act (the "Act"). In the event that a public information request related to the Applicant and/or the application is submitted to the agency, the Office of the Governor shall [will promptly] notify the Applicant within a reasonable amount of time using the Applicant's most [of the request if] current contact information provided to the Commission [is available, take all appropriate actions with the Attorney General of Texas to prevent release of confidential information, including asserting exemptions under the Act, and provide the Applicant with full information and opportunity to participate in such process if current contact information is available].

§121.9. Processing and Review of Applications.

(a) All applications shall [will] be reviewed in the order they are received.

(b) Initial Review.

(1) Each application shall [will] go through an initial review process when the Qualifying Application is [has been] received.

(A) If an Applicant [a project] submits a Qualifying Application with all required materials, the Texas Film Commission (Commission) shall notify the Applicant by [will receive an] e-mail [notifying them] that the [Texas Film] Commission [(Commission)] has received the Applicant's [their] complete application, and the preliminary eligibility determination process shall [will] begin.

(B) If an Applicant [a project] submits a Qualifying Application without all required materials, the Commission shall notify the Applicant by [will receive an] e-mail [notifying them] that the Applicant's [their] application requires additional materials or documentation, and that not receiving them by the fifth Business Day prior to the project's Principle Start Date may result in disqualification of the [an] application [being disqualified].

(2) Applicants may [will have the ability to] amend information on their application. The Commission shall [may] determine whether an Applicant's amendment(s) [will] require the Applicant [them] to reapply [or not].

(c) Preliminary Eligibility Determination.

(1) During the preliminary eligibility determination process, the Commission shall [will] review the project's Qualifying Application and budget to identify eligible expenditures and to determine if the Applicant meets the minimum program requirements for in-state spending, Texas Filming Days, and Texas Residency.

(2) The Commission shall [will] also review the Content Document, as defined in §121.8(a)(1)(C) of this Chapter [chapter], to determine if the content [it] is appropriate.

(3) The [Finally, the] Commission shall [will] examine the Qualifying Application in light of the following criteria to assess, in the aggregate, the potential magnitude of the economic impact of the project in the State of Texas:

(A) the [The] financial viability of the Applicant and the likelihood of successful project execution and planned spending in the State of Texas;

(B) proposed [Proposed] spending on existing state production infrastructure, including [(such as] soundstages and industry vendors[)];

(C) the [The] number of Texas jobs estimated to be created by the project;

(D) the [The] ability to promote Texas as a tourist destination through the conduct of the project and planned expenditure of funds;

(E) the [The] magnitude of estimated expenditures in Texas; and

(F) whether [Whether] the project will be directed or produced by an individual who is a Texas Resident, with [(where] the term "produced by" meaning [is intended to encompass] a non-honorary producer who has [with] direct involvement in the day-to-day [day to day] production of the project[, but] above the level of line producer[)].

(4) The Commission shall notify the Applicant by [will receive an] e-mail [notifying them] that the Qualifying Application is [has been] approved if:

(A) the [The] Qualifying Application meets all minimum program requirements for in-state spending, Texas Filming Days, and Texas Residency, as determined by the Commission;

(B) the [The] Commission determines there will be sufficient economic impact of the project in the State of Texas [to grant an award] based on the criteria specified in paragraph (3) of this Subsection [subsection];

(C) the Commission determines the content, as described in the [The] Content Document, is appropriate; [and]

(D) appropriated [Appropriated] funds are [then] available at such time of determination; and[.]

(E) the Commission, in its sole discretion, elects to approve the Qualifying Application based on the totality of the circumstances.

(5) If the Commission denies a Qualifying Application, the Commission shall notify the Applicant by [will receive an] e-mail [notifying them] that the Qualifying Application is [has been] denied. The notice shall [will] inform the Applicant whether the denial is based on failure to meet the minimum program requirements, insufficient economic impact, [or] inappropriate content, or some other reason. Qualifying Applications shall [will] be assessed in the order in [at the point in time at] which they are received[, and will not enter any queue in the event they are denied].

(6) All funding decisions made by the Commission are final and are not subject to appeal. [Neither the approval of the Qualifying Application nor any award of funds shall obligate the Commission in any way to make any additional award of funds.]

(d) Grant Agreement.

(1) Upon Commission approval of the Qualifying Application, the Commission shall issue a conditional award letter, which shall be contingent upon execution of a grant agreement [will be executed] between the Office of the Governor [Commission] and the Applicant. The estimated grant amount shall [will] be based upon the Applicant's estimated in-state spending.

(2) The grant agreement must be returned to the Commission with original signatures.[;] The Commission may disqualify a project for the Applicant's failure to return the grant agreement with

original signatures [could cause the Commission to disqualify the project].

(e) Periodic Tracking and Review. After [Once] the grant agreement has been executed by both parties, the Commission may periodically review production activity including, but not limited to, requesting quarterly reports that describe in-state spending, production locations, and number of Texas Residents hired, and may require documentation for all of the above.

(f) Encumbrance of Funds.

(1) The Office of the Governor will not encumber funds until an Applicant provides a completed W-9 and a Texas Application for Payee Identification Number Form. [Upon Commission approval of a Qualifying Application and receipt of a signed Grant Agreement, the Office of the Governor will encumber funds for the project.]

(2) The amount encumbered for a project shall [will] be equal to the estimated grant amount in [on] the grant agreement [Grant Agreement].

(3) [To encumber funds, an Applicant must have a Texas Payee Identification Number. Applicants without an existing Texas Payee Identification Number must submit a completed W-9 Form and a Texas Application for Payee Identification Number Form.]

[(4)] Provided sufficient funds are [then] available, the Commission, in its sole discretion, may adjust the amount encumbered [may be adjusted by the Commission, at its sole election having no obligation to do so], but only if an Applicant amends the estimated Texas spending amount on their Qualifying Application in writing, prior to submitting their Expended Budget as described in §121.11 of this Chapter [chapter].

(g) Verifying Texas Residency.

(1) In order to verify Texas Residency, the Applicant shall provide the Commission with completed Declaration of Texas Residency Forms for each Texas Resident Crew and Cast member.

(2) Declaration of Texas Residency Forms are available on the Commission's web site or by request to the Commission via telephone, Internet, or other means if additional special needs facilitation is required. [To be considered a Texas Resident, a Crew or Cast member must complete Sections I, II and III of the Declaration of Texas Residency Form. Section III must be completed with a valid Texas driver license, a valid Texas identification card or a current Texas voter registration. A full-time student of a Texas Institution of Higher Education, as defined by Texas Education Code, §61.003, who does not have a Texas driver license, Texas identification card or Texas voter registration may complete Section III of the form with a current student identification card issued by a Texas Institution of Higher Education.]

[(3) A minor who does not have a Texas driver license, Texas identification card or Texas voter registration may have a Texas Resident parent or legal guardian complete Section III of the form, so long as such parent or legal guardian also signs Section III of the form, indicating such relationship to the minor.]

[(4) A representative of the Applicant must complete Section IV of the Declaration of Texas Residency Form.]

(3) [(5)] In the event that a Crew or Cast member possesses one of the [three] documents specified in [Section III of] the Declaration of Texas Residency Form, but not for the required 120 days, Texas Residency may also be verified if:

(A) the project consists of at least 30 Filming Days; and

(B) the Applicant provides [applicant presents] one of the following documents naming said Crew or Cast member and dated at least 120 days and no more than 13 months prior to the project's Principal Start Date:

(i) an executed HUD-1 settlement statement showing the purchase of residential real property located in Texas; or

(ii) a notice of appraised value or bill assessing property tax on residential real property located in Texas.

(4) [(6)] If a Crew of Cast member does not possess any of the [three] documents specified in [Section III of] the Declaration of Texas Residency Form, Texas Residency may also be verified by attaching to the Declaration a copy of their military ID card and their military orders that:

(A) name said Crew or Cast member, or their spouse, parent, or legal guardian, as applicable;

(B) show a permanent change of station to a military station in Texas; and

(C) are dated at least 120 days prior to the project's Principal Start Date.

(h) Texas Film Commission Logo. The [Having no obligation to do so, the] Commission may require as a condition of the grant agreement that the Applicant must [to] include the Texas Film Commission logo in the closing credits of a Feature Film, Reality Series or Television Production, or in the credits of a Digital Interactive Media Production.

§121.10. Disqualification of an Application.

(a) A Qualifying Application may be disqualified at any time if a project does not meet the necessary requirements or if a Qualifying Application is incomplete. If a Qualifying Application [a project] is disqualified, the Texas Film Commission (Commission) shall notify the Applicant [will be notified] by e-mail. Qualifying Applications that have been disqualified may be resubmitted with the required changes or additional information, no earlier than 180 [120] calendar days before the Principal Start Date, and no later than 5:00 p.m. Central Time on the fifth Business Day preceding the Principal Start Date.

(b) In the event that the [case of a change in] principal start or completion date is changed, the Applicant must notify the [Texas Film] Commission [(Commission)] in writing, to include e-mail, of the new principal start or completion date, and must provide sufficient reasoning [give the reason(s)] for the change. If the start of the project is delayed two or more times [repeatedly] or for more than 30 days, a Qualifying Application may be disqualified and the Applicant may be required to [must] reapply.

(c) A Qualifying Application may [also] be disqualified for reasons including, but not limited to:

(1) failure [Failure] to submit required documents and notifications, or additional documents as requested or as required by this Chapter [chapter];

(2) failure [Failure] to meet minimum requirements for in-state spending, number of Texas Residents hired, and/or percentage of Filming Days;

(3) submission [Submission] of false information;

(4) inappropriate [Inappropriate] content as described in Section 43.21 of the Texas Penal Code[, §43.23] or content described by §121.4(b) of this Chapter [chapter];

(5) lack [Lack] of available funding;

(6) ineligible [~~Ineligible~~] project as listed in §121.4 of this Chapter [~~chapter~~];

(7) pursuant [~~Pursuant~~] and subject to §121.8(a)(6) of this Chapter [~~chapter~~], if an Applicant fails to confirm that the production began on time;

(8) lack [~~Lack~~] of meaningful production activity on a project, as determined in the Commission's sole discretion, for a period of at least six months; or

(9) a written, voluntary [~~Voluntary~~] notification [~~in writing~~] by the Applicant to the Commission of the cancellation of the project.

§121.11. Confirmation and Verification of Texas Expenditures.

(a) The Applicant must [~~should~~] collect, authenticate and assemble an Expended Budget and all final verifying documentation and submit it to the Texas Film Commission (Commission) within 60 days of completing Texas expenditures. The Commission shall [~~will~~] perform the initial review, and a compliance review shall [~~will~~] be performed by the Office of the Governor.

(b) The Expended Budget must be in a format acceptable to the Commission and must contain all final verifying documentation including, but not limited to:

(1) a [~~A~~] Texas Moving Image Industry Incentive Program Verification Worksheet confirming that all program requirements have been met and final verifying documentation is complete;

(2) expenditure [~~Expenditure~~] reports and worksheets that document all eligible Texas spending;

(3) copies [~~Copies~~] of all invoices, receipts, pay orders, proof of payment, and any other documentation the Commission considers to be [~~considered~~] necessary [~~by the Commission~~] for review of the expenditure reports;

(4) completed [~~Completed~~] Declaration of Texas Residency Forms for all Texas Resident employees, contractors, Crew, and Cast members;

(5) employees, Crew, and Cast lists that document employees, Crew, and Cast members and [~~, which also~~] indicate whether such employees, Crew, and Cast members were paid or not (regardless of whether the Applicant was the source of payment), with the absence of such [~~which~~] indication creating [~~shall create~~] the presumption that such employees, Cast, and Crew were [~~indeed~~] paid;

(6) call [~~Call~~] sheets, production reports or production calendars that document all Filming Days and production days;

(7) a copy of final content or online access to final [~~Final~~] content;

[~~(A) Feature Films, Television Programs, and Visual Effects Projects must submit a copy of the final content for review.~~]

[~~(B) Commercials, Digital Interactive Media Productions, Reality Television Projects and Educational or Instructional Videos must submit final content (or online access to final content) for review.~~]

(8) any other [~~Additional~~] documentation the Commission requires, [~~may be required~~] including, but not limited to, financials with all reports of expenditures. [~~the following:~~]

[~~(A) Financials, including all reports of expenditures.~~]

[~~(B) Proof of payment for expenditures.~~]

(c) The [~~It is the responsibility of the~~] Applicant must [~~to~~] ensure that the final verifying documentation submitted in the Expended Budget is correct and complete. Once the Expended Budget is accepted by the Commission for review, the Applicant shall [~~will~~] not be allowed [~~able~~] to submit additional information unless requested to do so by the Commission.

§121.12. Disbursement of Funds.

(a) Disbursement of funds shall [~~will~~] not occur until the Applicant has paid all financial obligations incurred to the State of Texas, and the Office of the Governor has completed and approved a final compliance review [~~has been completed and approved~~].

(b) In the event of unpaid financial obligations to the State of Texas, the Office of the Governor shall [~~will~~] determine whether or not to withhold grant disbursement, pending resolution of the unpaid financial obligation [~~settlement~~].

[~~(c) Payment Assignment.~~]

[~~(1) An Applicant can assign payment of the grant to a third party.~~]

[~~(2) To assign payment the Applicant must submit:~~]

[~~(A) A Texas Application for Payee Identification Number Form with Section IV completed; and~~]

[~~(B) An assignment agreement completed and signed by the Applicant and assignee.~~]

§121.13. Texas Heritage Project.

(a) The Texas Film Commission (Commission) may, in its sole discretion, designate a Feature Film or [~~Films and~~] Television Program [~~Programs designated by the Texas Film Commission (Commission)~~] as a Texas Heritage Project [~~may receive an additional 2.5% of total in-state spending~~].

(b) A project that the Commission designates as a Texas Heritage Project may receive an additional grant in an amount equal to 2.5% of total in-state spending.

(c) [~~(b)~~] When evaluating a project as a Texas Heritage Project, the Commission shall [~~will~~] consider the project's:

(1) [~~The~~] current and likely future effect on the promotion of Texas' historic, cultural, natural, or man-made resources;

(2) [~~The~~] current and likely future economic impact on Texas communities through direct production spending and tourism;

(3) inclusion of [~~The significant involvement in the project, as determined by the Commission, by~~] Texas residents in positions of significant creative or economic influence, such as producer, director, or investor; and

(4) [~~The~~] portrayal of Texas and Texans in a positive fashion[~~, as determined by the Commission~~].

(d) [~~(c)~~] Designation as a Texas Heritage Project is discretionary and is made in the [~~by~~] sole determination of the Commission. [~~Only a select few projects will qualify for this designation. The Commission is not required to make this designation for any project and may decline to do so for any reason.~~]

(e) [~~(d)~~] Up to $2,500,000 of Texas Moving Image Industry Incentive Program funds may be used during each biennium for awarding the additional grant to designated Texas Heritage Projects.

§121.14. Revocation and Recapture of Incentives.

(a) An Applicant's eligibility for funds may [~~can~~] be revoked after the project is completed for the reasons [~~including, but not limited to, those~~] enumerated in §121.10(c) of this Chapter [~~chapter,~~] or in accordance with the grant agreement [~~inability to complete the project~~].

(b) If an Applicant has already received [~~the~~] grant funds under this Chapter and the Texas Film Commission (Commission) determines the Applicant does [~~is determined to~~] not meet a requirement [~~in any way~~], the [~~Texas Film~~] Commission may [~~can~~] require that the Applicant return [~~refund~~] any sum of the grant funds [~~money~~] paid to the Applicant [~~by the State of Texas~~].

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

Filed with the Office of the Secretary of State on December 6, 2022.

TRD-202204816
Stephanie Whallon
Director
Texas Film Commission
Earliest possible date of adoption: January 22, 2023
For further information, please call: (512) 463-2000

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13 TAC §121.16

STATUTORY AUTHORITY

This repeal is proposed under sections 485.022 and 485.024 of the Texas Government Code, which require the Texas Film Commission to develop procedures for the administration and calculation of grant awards under TMIIIP.

CROSS REFERENCE TO STATUTE

Chapter 121 of Texas Government Code. No other statutes, articles, or codes are affected by the proposed amendments.

§121.16. Texas-Based National Network Project.

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

Filed with the Office of the Secretary of State on December 6, 2022.

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Stephanie Whallon
Director
Texas Film Commission
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For further information, please call: (512) 463-2000

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TITLE 16. ECONOMIC REGULATION

PART 9. TEXAS LOTTERY COMMISSION

CHAPTER 402. CHARITABLE BINGO OPERATIONS DIVISION

SUBCHAPTER C. BINGO GAMES AND EQUIPMENT

16 TAC §§402.331 - 402.338

The Texas Lottery Commission (Commission) proposes new rules 16 TAC §402.331 (Shutter Card Bingo Systems - Definitions), §402.332 (Shutter Card Bingo Systems - Site System Standards), §402.333 (Shutter Card Bingo Systems - Shutter Card Station and Customer Account Standards), §402.334 (Shutter Card Bingo Systems - Approval of Shutter Card Bingo Systems), §402.335 (Shutter Card Bingo Systems - Licensed Authorized Organization Requirements), §402.336 (Shutter Card Bingo Systems - Distributor Requirements), §402.337 (Shutter Card Bingo Systems - Security Standards), and §402.338 (Shutter Card Bingo Systems - Inspections and Restrictions).

On July 5, 2022, the Commission received a petition filed by Daniel R. Moore Inc., K&B Sales Inc., and Roy Bingo Supplies of Texas Inc., each a Texas licensed distributor of bingo equipment, for adoption of the above-referenced new rules relating to shutter card bingo systems. Although Commission rules recognize shutter cards may be used in the play of bingo, the proposed new rules would provide specificity by authorizing and regulating shutter card bingo systems, including customer accounts, for use in Texas. On August 22, 2022, the Commission voted to grant the petition and initiate the rulemaking process to propose these new rules. The proposed new rules are necessary in order to set out clear guidelines for the use of shutter card bingo systems in Texas.

The proposed new Rule 402.331 (Shutter Card Bingo Systems - Definitions) provides definitions for words and terms used relative to shutter card bingo systems.

The proposed new Rule 402.332 (Shutter Card Bingo Systems - Site System Standards) provides requirements for the site system design, internal accounting system, verification of winning shutter cards, storing of certain information regarding transactions affecting a shutter card station and shutter cards, capability to generate reports that detail each transaction of a shutter card sale or return, and use of and requirements of a customer account.

The proposed new Rule 402.333 (Shutter Card Bingo Systems - Shutter Card Station and Customer Account Standards) provides requirements and restrictions for shutter card stations and customer accounts.

The proposed new Rule 402.334 (Shutter Card Bingo Systems - Approval of Shutter Card Bingo Systems) provides the approval process to the manufacturers of shutter card bingo systems for use in Texas.

The proposed new Rule 402.335 (Shutter Card Bingo Systems - Licensed Authorized Organization Requirements) provides licensed authorized organizations the requirements and guidelines for utilizing shutter card bingo systems.

The proposed new Rule 402.336 (Shutter Card Bingo Systems - Distributor Requirements) provides the requirements and guidelines for distributing shutter card bingo systems for use in Texas.

The proposed new Rule 402.337 (Shutter Card Bingo Systems - Security Standards) provides the security standards and restrictions for the shutter card bingo system components: site systems, shutter card stations, and customer accounts.

The proposed new Rule 402.338 (Shutter Card Bingo Systems - Inspections and Restrictions) provides the requirements related to the inspection and restrictions of shutter card bingo systems.

Kelly Stuckey, Controller, has determined that for each year of the first five years the rules will be in effect, there will be no significant fiscal impact for state or local governments as a result of the proposed rules. There will be no adverse effect on small businesses or rural communities, micro businesses, or local or state employment. There will be no additional economic cost to persons required to comply with the rules, as proposed. Furthermore, an Economic Impact Statement and Regulatory Flexibility Analysis is not required because the proposed rules will not have an adverse economic effect on small businesses or rural communities as defined in Texas Government Code §2006.001(1-a) and (2).

LaDonna Castañuela, Director of the Charitable Bingo Operations Division, has determined that for each year of the first five years the proposed new rules will be in effect, the anticipated public benefit are clear and concise requirements and guidelines for manufacturers, distributors, and licensed authorized organizations that are involved with shutter card bingo systems to ensure that the fairness and integrity of the games will not be compromised.

Pursuant to Texas Government Code §2001.0221, the Commission provides the following Government Growth Impact Statement for the proposed rules. For each year of the first five years the proposed rules will be in effect, Kelly Stuckey, Controller, has determined the following:

(1) The proposed rules do not create or eliminate a government program.

(2) Implementation of the proposed rules does not require the creation of new employee positions or the elimination of existing employee positions.

(3) Implementation of the proposed rules does not require an increase or decrease in future legislative appropriations to the Commission.

(4) The proposed rules do not require an increase or decrease in fees paid to the Commission.

(5) The proposed rules do not create a new regulation.

(6) The proposed rules do not expand or limit an existing regulation.

(7) The proposed rules do not increase or decrease the number of individuals subject to the rules' applicability.

(8) The proposed rules do not positively or adversely affect this state's economy.

The Commission requests comments on the proposed rules from any interested person. Comments may be submitted to Tyler Vance, Assistant General Counsel, by mail at Texas Lottery Commission, P.O. Box 16630, Austin, Texas 78761-6630; by facsimile at (512) 344-5189; or by email at legal.input@lottery.state.tx.us. Comments must be received within 30 days after publication of this proposal in the *Texas Register* in order to be considered. The Commission also will hold a public hearing to receive comments on this proposal at 9:00 a.m. on January 18, 2023, at 1700 N. Congress Ave., Austin, TX 78701, Stephen F. Austin State Office Building, Room 170.

The new rules are proposed under Texas Occupations Code §2001.054, which authorizes the Commission to adopt rules to enforce and administer the Bingo Enabling Act; and Texas Government Code §467.102, which authorizes the Commission to adopt rules for the laws under the Commission's jurisdiction.

This proposal is intended to implement Texas Occupations Code, Chapter 2001.

§402.331. Shutter Card Bingo Systems - Definitions.

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

(1) Shutter Card Bingo System--A shutter card and related hardware and software that is interfaced with or connected to equipment used to conduct a game of bingo using shutter cards. A shutter card bingo system consists of the following three parts:

(A) Shutter Card--A device made of cardboard or other suitable material with plastic "shutters" that cover a number to simulate the number being daubed and that is used in conjunction with a shutter card customer account.

(B) Shutter Card Bingo Site System--Computer hardware, software, and peripheral equipment that is located at the bingo premises, is controlled by the licensed authorized organization conducting bingo, and interfaces with, connects with, controls, or defines the operational parameters of shutter card customer accounts. Shutter Card Bingo Site Systems must include, but are not limited to, the following components: point of sale station, shutter card station, a caller station verifier, printers, remote access capability, proprietary executable software, report generation software, and an accounting system and database.

(C) Shutter Card Station--Computer hardware and software that is located at a player's seat that allows the player to select up to three shutter cards located at the player's seat for play in a bingo game at the bingo premises.

(2) Cards and Card Sets--The number of unique bingo shutter cards on site, with the card numbers and card data being used.

(3) Checksum--A value of fixed-size computed from a block of digital data for the purpose of detecting changes or modifications. Also referred to as a digital signature or hash sum.

(4) Connected--Communication between the player's shutter card station and the site system by wired or wireless means during an active bingo session.

(5) Customer Account--An account established by a customer and tracked with the use of a unique player shutter card station identification number assigned by a licensed authorized organization based on a player's seat position. The customer may access their own Customer Account to track:

(A) the deposit of funds; and

(B) the purchase of bingo shutter cards.

(6) Shutter Card Station ID number--The unique identification number assigned by a manufacturer to a specific shutter card station.

(7) Shutter Card Station Played--A shutter card station utilized within a bingo occasion.

(8) End of Occasion Log--Information stored in the site system database at the end of each bingo occasion containing pertinent sales, refunds, game and system accounting information to include the following:

(A) licensed authorized organization's name;

(B) licensed authorized organization's license number;

(C) bingo occasion site (location);

(D) listings of transactions or receipt numbers, including balance refunds;

(E) date and time of the bingo occasion and occasion number, if applicable;

(F) total quantity of shutter cards played;

(G) the shutter card station ID number of each shutter card station loaded;

(H) total dollar value of funds deposited and shutter cards sold;

(I) total dollar value of deposits refunded;

(J) total dollar value of unused deposits retained by the organization;

(K) total dollar value of shutter card bingo prizes awarded;

(L) listing of the balls called, in order called, for each game; and

(M) listing of all shutter cards verified for each game, both the non-winning and the winning card face numbers.

(9) Independent Testing Facility--A laboratory approved by the Commission that is demonstrably competent and qualified to test the site systems scientifically and evaluate them for compliance with statutes and regulations. An independent testing laboratory shall maintain the current applicable standards of the International Organization of Standardization as an accredited laboratory in the field of information technology testing. An independent laboratory shall not be owned or controlled by a licensed authorized organization, the state, or any manufacturer or distributor or operator of shutter card bingo systems.

(10) Mobile Point of Sale--A mobile device that allows a licensed authorized organization to conduct customer shutter card sales transactions anywhere within the bingo premises and is a component of the site system.

(11) Model Number--A number designated by the manufacturer that indicates the unique structural design of the shutter card bingo system.

(12) Occasion Report--A report generated by the site system at the end of each bingo occasion containing pertinent sales, refunds, game, and system accounting to include the following information:

(A) licensed authorized organization's name;

(B) licensed authorized organization's license number;

(C) bingo occasion site (location);

(D) total dollar value of funds deposited and shutter cards sold;

(E) total dollar value of deposits refunded;

(F) total dollar value of unused deposits retained by the organization;

(G) total dollar value of prizes awarded;

(H) total dollar value of prize fees collected in conjunction with shutter card bingo prizes awarded.

(13) Occasion Summary Report--A report generated by the site system for any specified period which contains the following information:

(A) licensed authorized organization's name;

(B) licensed authorized organization's taxpayer number;

(C) bingo occasion site (location);

(D) total dollar value of funds deposited and shutter cards sold;

(E) total dollar value of deposits refunded;

(F) total dollar value of unused deposits retained by the organization;

(G) total dollar value of shutter card bingo prizes awarded; and

(H) total dollar value of prize fees collected in conjunction with shutter card bingo prizes awarded.

(14) Secondary Component--Additional software or hardware components provided by the manufacturer that are part of, or are connected to, a shutter card bingo system and that do not affect the conduct of the bingo game. Secondary components may include computer screen backgrounds, battery charge-up software routines, printers, printer software drivers, and charging racks.

(15) Proprietary Software--Custom computer software developed by a licensed manufacturer that is the primary component of a shutter card bingo system and is required for a shutter card bingo system to be used in a game of bingo.

(16) Software Modifications--Alterations to proprietary software approved by the Commission.

(17) Transaction Log--A site system report containing a record of transaction information in detail.

(18) Version Number--A unique number designated by the manufacturer to signify a specific version of software used on or by the shutter card bingo system.

§402.332. Shutter Card Bingo Systems - Site System Standards.

(a) The site system must be designed so that the Commission may remotely verify the operation, compliance, and internal accounting systems of the site system at any time. The manufacturer shall provide to the Commission all current protocols, usernames, passwords, and any other required information needed to access the system. Any and all reports maintained or available for generation by the shutter card bingo system shall be capable of being downloaded or otherwise accessed via the remote connection.

(b) The site system's internal accounting system must be capable of recording the licensed authorized organization's player deposits, sale of shutter cards, deposit refunds, deposits retained, shutter card bingo prizes awarded, and prize fee collected in conjunction with shutter card bingo prizes awarded.

(c) The site system must be able to verify winning shutter cards and print the shutter cards for posting. For verification purposes, the site system must be capable of storing and printing an ordered list of all balls called for each bingo game played using shutter cards.

(d) The site system must be capable of storing:

(1) all transactions affecting a shutter card system and/or station;

(2) the shutter card station ID number for each transaction affecting the shutter card system and/or station; and

(3) the date, time, quantity of shutter cards affected, price per card, and deposit refunds.

(e) The site system shall not allow the exact duplication of cards.

(f) Upon completion of each transaction, the site system must not allow any transactional information including date, time, quantity of shutter cards, price per card or package, package number, or other source information to be changed within the accounting system or database.

(g) The site system must recognize the shutter card station ID number and store that number on the transaction log for each and every transaction that directly affects that shutter card station.

(h) The site system must have a database backup and recovery system to prevent loss of transactional information in the event of power failures or any disruptive event.

(i) The site system must be capable of printing a report that details each transaction of a credit or shutter card sale or credit return that includes, at a minimum, the following information:

(1) licensed authorized organization's name;

(2) licensed authorized organization's taxpayer number;

(3) bingo occasion location name;

(4) date and time of the transaction, in DD/MM/YYYY HH:MM:SS; format;

(5) the dollar value of the transaction and quantity of player funds deposited and refunded and the sales of shutter cards;

(6) the shutter card station where any sales and refunds were done; and

(7) the total dollar value of the transaction.

(j) The site system must be capable of storing and printing:

(1) a transaction log; and

(2) end of occasion log for each bingo occasion.

(k) The site system must be capable of storing and printing an Occasion Report and Occasion Summary Report on demand.

(l) The site system must be capable of maintaining all required information for the end of occasion log and the occasion summary report for a period of forty-eight (48) months.

(m) The site system must not erase or overwrite any of the required bingo occasion information until both detail and summary information is transferred to a secondary storage medium.

(n) Any subsequent changes or modifications to an approved system require compliance with this section and must be re-submitted to the Commission for approval prior to use.

(o) The site system may, but is not required to, be designed to incorporate the use of a customer account. However, if the site system incorporates the use of a customer account, the site system must include the following requirements:

(1) Be capable of recording each transaction made by a player from their customer account and include the transaction number, dollar amount deposited, time and date, quantity and price of the shutter cards purchased, or player funds refunded;

(2) Not be used to track and credit a customer's account with bingo prizes won;

(3) Additional funds may only be added to the customer's account only by using a site system Point-of-Sale that is operated by a registered bingo worker;

(4) Capable to generate financial reports for customer account activity to include:

(A) customer account number;

(B) initial amount of funds deposited in the account;

(C) each transaction including quantity of shutter cards purchased, dollar amount, time and date, any ending balance, bingo worker login information; and

(D) if any remaining player funds were refunded at end of occasion or retained by the organization as other income.

(E) be capable of and shall provide a receipt for each customer transaction that contains the following disclaimer: "Any funds remaining in your customer account that you do not claim by the end of the occasion may be kept by the licensed authorized organization."

§402.333. Shutter Card Bingo Systems - Shutter Card Station and Customer Account Standards.

(a) The shutter card bingo system must have a unique and permanent identification number for each shutter card station.

(b) The shutter card station must automatically transmit its identification number to the site system or be known by the site system, to be recorded on the transaction log, each time the shutter card station is involved in a transaction with the site system.

(c) The shutter card station must not track bingo numbers called or assist the customer in any way to mark their shutter cards.

(d) The shutter card station must not allow a player to change cards after a game has started.

(e) The shutter card station must clear the shutter cards in play after each game.

(f) A shutter card station utilizing a customer account may not permit customers to purchase any bingo equipment other than shutter cards that are part of the shutter card bingo system.

(g) A shutter card station must display the player's account balance at all times.

(h) A customer account and a shutter card station shall not:

(1) track and store any winnings from authorized bingo games;

(2) replay any winnings;

(3) be used to credit the player's winnings;

(4) be used to purchase or play pull-tab bingo tickets; or

(5) be used for video confirmation of pull-tab bingo tickets.

(i) The customer account and shutter card station may not be used:

(1) to generate or determine the random letters, numbers, or other symbols used in playing the shutter card;

(2) as a receptacle for the deposit of tokens or money in payment for playing the shutter card; or

(3) as a dispenser for the payment of a bingo prize, including coins, paper currency, or a thing of value for playing the shutter card.

§402.334. Shutter Card Bingo Systems - Approval of Shutter Card Bingo Systems.

(a) A shutter card bingo system must not be sold, leased, or otherwise furnished to any person for use in the conduct of bingo until

it has first been tested and certified as compliant with the standards in this subchapter by an independent testing facility or the Commission's own testing lab, as applicable. The shutter card bingo system shall be submitted for testing at the manufacturer's expense. The testing facility should be required to ensure that the shutter card bingo system conforms to the restrictions and conditions set forth in these standards. The approval process is set forth in subsections (b)-(e) of this section.

(b) Utilizing an Independent Testing Facility:

(1) Manufacturer submits system to lab with letter outlining the shutter card bingo system to be tested for approval in Texas;

(2) Lab performs validation testing to ensure compliance with the Commission's requirements. Testing may include functional testing and/or modification testing, if applicable;

(3) Lab creates certification report which includes file verification methodology, software/firmware signatures (checksum), and testing results;

(4) Manufacturer submits approval request with certification report to the Commission;

(5) Once the Commission has received the certification report from the independent testing facility, the Commission may request a demonstration of the product; and

(6) The Commission shall either approve or disapprove the submission based on the test results and inform the manufacturer and lab of the results within thirty (30) calendar days of receipt of the test results.

(c) After the Commission approves a shutter card bingo system, the manufacturer shall notify the Commission of the date, time and place of the first installation of the system so that a Commission representative may observe and review the shutter card bingo system.

(d) Checksum or digital signatures will be obtained from the proprietary software submitted for testing to be used to verify that proprietary software at playing locations is the same as the software that was approved.

(e) The decision by the director to approve or disapprove any component of a shutter card bingo is administratively final.

(f) The manufacturer shall be responsible for the costs related to the testing of shutter card bingo system to include the fees charged by independent testing facilities.

(g) The manufacturer shall be responsible for the travel costs incurred by the Commission to audit the initial installation of a shutter card bingo system in the state of Texas.

(h) Any subsequent changes or modifications to an approved shutter card bingo system require compliance with this section and must be re-submitted to the Commission for approval prior to use.

§402.335. Shutter Card Bingo Systems - Licensed Authorized Organization Requirements.

(a) The licensed authorized organization must ensure that the site system is accessible to the Commission via remote connection at all times.

(b) The licensed authorized organization must ensure that the reports for its bingo occasion display the correct licensed authorized organization's name, location name, time, and date.

(c) The licensed authorized organization must ensure that the occasion report displays the correct licensed authorized organization's name, location name, date of the bingo occasion, and all other required information contained in Rule §402.331(12) of this title.

(d) Each licensed authorized organization must record all sales of credits, sales of shutter cards, credit refunds, and all prizes awarded.

(e) Each licensed authorized organization purchasing, leasing, or otherwise utilizing a shutter card bingo system must maintain a log or other records showing the following:

(1) the date the shutter card bingo system was installed or removed; and

(2) the name and license number of the distributor from which the shutter card bingo system was purchased, leased or otherwise obtained.

(f) If multiple licensed authorized organizations hold an interest in a shutter card bingo system, a single record identifying each licensed authorized organization should be retained on the premises where the shutter card bingo system is utilized.

(g) The licensed authorized organization must retain all records and reports relating to the shutter card bingo system's transactions, maintenance, and repairs for a period of forty-eight (48) months for examination by the Commission. Such records shall be kept on the premises where the licensed authorized organization is licensed to conduct bingo, or at a location designated in writing to the Commission by the licensed authorized organization.

(h) All shutter card stations must be enabled for play on the premises where the game will be played.

(i) After the last game of the bingo occasion has been completed, the licensed authorized organization shall print an occasion report from the site system.

(j) The bingo player must be physically present during the game on the premises where the game is actually conducted.

(k) A licensed authorized organization may not add to or remove any software program related to the conduct of bingo to an approved shutter card bingo system. If the Commission detects or discovers a shutter card bingo system at a bingo premises that is using components or software that were not approved by the Commission as required, the shutter card bingo system is deemed to have an unauthorized modification.

(l) No licensed authorized organization may display, use, or otherwise furnish a shutter card station which has in any manner been tampered with, or which otherwise may deceive the player or affect a player's chances of winning.

(m) At the time a player establishes a customer account, the licensed authorized organization must notify the player that any unclaimed balances in the customer account at the end of the occasion will be retained by the organization. Information regarding the retention by the licensed authorized organization of the unclaimed balances in a customer account at the end of an occasion must be included in the information the organization must provide to its players pursuant to §402.200 of this chapter. Any unclaimed balances retained by the organization under this subsection shall be considered to be funds derived from the conduct of bingo, deposited into the organization's bingo account, and reported as other income. However, any unclaimed balances deposited into the organization's bingo account are restricted to the organization's charitable purposes, as provided by Texas Occupations Code §2001.453(2) and §2001.454.

(1) For a licensed authorized organization that conducts bingo through a unit created and operated under Texas Occupations Code Chapter 2001, Subchapter I-1, any balances on a customer account may be used by the customer for any bingo occasion conducted

on the same day of any of the organizations in the unit on the premises specified in their bingo licenses.

(2) For a licensed authorized organization that conducts bingo on consecutive occasions within one 24-hour period, any balances on a customer account may be used by the customer during either occasion.

(n) A licensed authorized organization must comply with the requirements in §402.200(b)(6) of this chapter regarding all bingo equipment malfunctions, including customer accounts on a shutter card bingo system.

(o) Each licensed authorized organization must ensure that the shutter card bingo system records the actual selling price of each shutter card sold.

(p) A licensed authorized organization shall not pre-sale or add credits to a shutter card station or a player's account prior to the start of an occasion, except as allowed by Rule §402.335(m)(1) and (2) of this section.

(q) If the shutter cards are not changed between every occasion, a licensed authorized organization shall not conduct a bingo game using the shutter card bingo system in which a player may have an advantage based on their knowledge of the numbers available on the stations. For example, a game in which any given number is "wild" could be exploited by a player with knowledge of which station has the highest occurrence of that number.

(r) The licensed authorized organization must handle deposit refunds in the following manner:

(1) The player must present the original receipt which was issued at the time of the deposit of funds;

(2) The word "refund" shall be clearly printed on the receipt issued once the refund as occurred;

(3) All refund receipts must be attached to the bingo occasion report printed at the end of each bingo occasion and maintained with the records.

(s) A licensed authorized organization may not reserve or hold a station for any player.

§402.336. Shutter Card Bingo Systems - Distributor Requirements.

(a) Installation. Each distributor that leases, sells, or otherwise furnishes a shutter card bingo system shall install the system based on the manufacturer's approval letter for use in Texas. Each system shall be installed with:

(1) a point of sale, caller station, verifier, and all other software components of the site system as listed in the approval letter;

(2) the software settings as established in the approval letter;

(3) all of the manufacturer requirements and restrictions in place; and

(4) a dedicated modem phone line or internet connectivity.

(b) Before initial use by a licensed authorized organization, each distributor that leases, sells, or otherwise furnishes a shutter card bingo system must provide notice to the Commission in writing on a form prescribed by the Commission, or electronically in a format prescribed by the Commission, that includes the following information:

(1) the modem number or IP address and protocol for remote access;

(2) total number of shutter card stations installed at the bingo premises;

(3) the name of the bingo premises, physical address, telephone number, and licensed commercial lessor's taxpayer identification number, if applicable, where the shutter card bingo system is located;

(4) the expected start-up date for use of the shutter card bingo system by the licensed authorized organization;

(5) the name and taxpayer identification number of the licensed authorized organization to whom the shutter card bingo system was sold, leased, or otherwise furnished;

(6) the name and taxpayer identification number of the distributor from whom the shutter card bingo system was leased, purchased, or otherwise obtained;

(7) the name and taxpayer identification number of the manufacturer, model and version number of the shutter card bingo system; and

(8) a certification statement from the manufacturer that the remote connectivity is operating properly.

(c) If a shutter card or shutter card station is to be used at more than one bingo premises, each bingo premises must have its own shutter card bingo site system.

(d) Before the complete removal or hardware upgrade of any shutter card bingo system, each distributor must supply one copy of the data files to each licensed authorized organization that utilized the shutter card bingo system and maintain one additional copy for a period of forty-eight (48) months.

(e) A distributor selling, leasing, or otherwise providing shutter card bingo systems to a licensed authorized organization or another licensed distributor must provide the licensed authorized organization or licensed distributor with an invoice that contains, at a minimum, the following information and must maintain copies of the invoice or documentation for a period of forty-eight (48) months:

(1) the invoice number;

(2) the date of sale or lease period covered by the invoice;

(3) the manufacturer's name;

(4) the name and version number of the shutter card bingo system;

(5) the quantity of shutter cards sold or leased; and

(6) the total invoice amount.

(f) The distributor shall serve as the initial contact for the licensed authorized organization with respect to requests for installation, service, maintenance, or repair of shutter cards, shutter card stations, and site systems. The distributor may, as needed, enlist the aid of the manufacturer in providing service, repair, or maintenance of the site system.

(g) A distributor may not add to nor remove any software programs related to the conduct of bingo to an approved shutter card bingo system. If the Commission detects or discovers a shutter card bingo system at a bingo premises that is using components or software that were required to have been approved by the Commission but have not been approved, the shutter card bingo system is deemed to have an unauthorized modification.

(h) Upon the Commission's notification to the manufacturer, the manufacturer must immediately disable the system. A distributor may not display, use, or otherwise furnish a shutter card or shutter card

station which has in any manner been tampered with, or which otherwise may deceive the player or affect a player's chances of winning.

§402.337. Shutter Card Bingo Systems - Security Standards.

(a) A customer account, shutter card station, or site system shall not be a video lottery machine or machine that, upon insertion of cash, is available to play or simulate the play of a video game, including but not limited to, video poker, keno, and blackjack, utilizing a video display and microprocessor in which the player may receive free games or credits that can be redeemed for cash, coins, or tokens or that directly dispenses cash, coins, or tokens.

(b) The shutter card station or site system shall provide password protection for each organization at a location using the shutter card station or site system.

(c) The site system shall be able to provide the winning game patterns required for the entire bingo occasion. A printout or electronic display of the winning patterns must be available at the bingo occasion upon request by patrons or Commission personnel.

(d) The manufacturer shall provide to the Commission all current protocols, usernames, passwords, and any other required information needed to access the system prior to the operation of the system within Texas.

(e) The manufacturer and distributor shall notify the Commission of any changes they have made in the protocols, usernames, passwords, and any other required information needed to access the system within ten (10) calendar days of the change.

(f) The system shall have sufficient security safeguards to ensure that any restrictions or requirements authorized by the Commission or any approved proprietary software are protected from alteration.

(g) A manufacturer of a shutter card bingo system shall employ sufficient security safeguards in designing and manufacturing the shutter card bingo system such that only approved proprietary software used directly in the operation of bingo are accessible by the licensed authorized organization.

§402.338. Shutter Card Bingo Systems - Inspections and Restrictions.

(a) The Commission may examine and inspect any shutter card bingo system that was used, is being used, or is intended for subsequent use, in the conduct of bingo, including any individual shutter card, shutter card station, and related site system. Such examination and inspection include immediate access to the shutter card, shutter card station, and unlimited inspection of all parts of the shutter card bingo system.

(b) Distributors and manufacturers shall provide records related to approved shutter card bingo systems requested by the Commission, or any of its employees, within fourteen (14) calendar days of the request unless a longer response time is allowed by the request.

(c) If the Commission detects or discovers any problem with the shutter card bingo system that affects the security and/or integrity of the bingo game or shutter card bingo system, the Commission:

(1) may direct the manufacturer, distributor, or licensed authorized organization to cease the sale, lease, or use of the shutter card bingo system, as applicable and/or to remove the shutter card bingo system from use or play until further notice by the Commission; and

(2) may require the manufacturer to correct the problem or recall the shutter card bingo system immediately upon notification by the Commission to the manufacturer.

(d) If the manufacturer, distributor, or licensed authorized organization detects or discovers any defect, malfunction, or problem with the shutter card bingo system that affects the security and/or integrity of the bingo game or shutter card bingo system, the manufacturer, distributor, or licensed authorized organization, as applicable, shall immediately:

(1) remove the shutter card bingo system from use or play; and

(2) notify the Commission of such action.

(e) The Commission, at its discretion, may require additional examination or inspection of shutter card bingo systems at any time. Such additional examinations or inspections may be at the manufacturer's expense and may be a condition of the continued use of such system.

(f) A manufacturer's demonstration of a non-approved shutter card bingo system or any secondary component may take place only after permission is granted by the Commission. The request to demonstrate must be provided to the Commission at least seven (7) calendar days prior to the date of demonstration. The Commission may request a manufacturer to voluntarily demonstrate to the Commission staff a shutter card bingo system that the manufacturer markets in another jurisdiction.

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

Filed with the Office of the Secretary of State on December 12, 2022.

TRD-202204960
Bob Biard
General Counsel
Texas Lottery Commission
Earliest possible date of adoption: January 22, 2023
For further information, please call: (512) 344-5392

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TITLE 19. EDUCATION

PART 2. TEXAS EDUCATION AGENCY

CHAPTER 33. STATEMENT OF INVESTMENT OBJECTIVES, POLICIES, AND GUIDELINES OF THE TEXAS PERMANENT SCHOOL FUND

The State Board of Education (SBOE) proposes the repeal of §§33.1, 33.5, 33.10, 33.15, 33.20, 33.25, 33.30, 33.35, 33.40, 33.45, 33.50, 33.55, 33.60, 33.65, and 33.67 and new §§33.3, 33.4, 33.6, 33.7, and 33.8, concerning statement of investment objectives, policies, and guidelines of the Texas Permanent School Fund (PSF). The proposed new rules would include changes to the existing rules relating to the Bond Guarantee Program, including changes to the reserve. The proposed revisions would also organize the rules in Chapter 33 by creating new Subchapter B, Texas Permanent School Fund Corporation Rules, which would contain §33.21.

BACKGROUND INFORMATION AND JUSTIFICATION: In accordance with statute, the rules in Chapter 33 establish investment objectives, policies, and guidelines for the Texas PSF.

Senate Bill (SB) 1232, 87th Texas Legislature, Regular Session, 2021, allows the SBOE to create the Texas PSF Corporation

and delegate its authority to manage the PSF to the Texas PSF Corporation.

Existing §§33.5, 33.20, 33.65, and 33.67 would be repealed. The sections would be renumbered and amended as follows.

Proposed new §33.3, Duties and Responsibilities of the State Board of Education Related to the Texas Permanent School Fund Corporation, would replace existing §33.20. The following significant changes would be made from the existing rule. The proposed new rule would update the duties and responsibilities of the SBOE to align with SB 1232, including the repeal of provisions that are no longer applicable. The remaining provisions would specify the role of the SBOE as fiduciary of the PSF and the duties and responsibilities of the SBOE with respect to the Texas PSF Corporation, as set forth in SB 1232 and the Texas PSF Corporation's governing documents.

Proposed new §33.4, Ethical Standards for Members of the State Board of Education, would replace existing §33.5. The following significant changes would be made from the existing rule. The proposed new rule would change most of the ethical provisions related to the investment and management of the PSF because under SB 1232, the PSF Corporation now the has strategic and operational control of PSF investments. The SBOE will no longer hire companies and individuals to manage the PSF. The SBOE's role concerning the PSF has significantly changed. The PSF Corporation has developed an ethics policy as required by SB 1232. The provisions of the new rule would provide ethical standards for SBOE members, the commissioner of education, Texas Education Agency (TEA) staff, and persons who provide services to the SBOE relating to the PSF.

Proposed new §33.6, Bond Guarantee Program for School Districts, would replace existing §33.65. The following significant changes would be made from the existing rule. The commissioner would have the authority to increase or decrease the multiplier, and changes would be made to the fund's reserve to (1) allow the SBOE to establish an amount of capacity held in reserve of up to 5.0% of the fund's capacity; (2) remove the limitations on the use of the reserve capacity; and (3) provide the commissioner or SBOE the ability to increase or decrease the amount held in reserve. Additionally, the changes would allow applications for districts that experience unforeseen catastrophes or emergencies to be prioritized.

Proposed new §33.7, Bond Guarantee Program for Charter Schools, would replace existing §33.67. The only significant change that would be made from the existing rule would be to allow the commissioner to hold up to 5.0% of the charter school available capacity in reserve each month.

New §33.8, Compliance with Securities and Exchange Commission (SEC) Rule 15c2-12 Pertaining to Disclosure of Information Relating to the Bond Guarantee Program, would be proposed. The proposed new rule would codify the SEC Rule 15c2-12 undertaking in Chapter 33. Additionally, the new rule would add a definition of Texas PSF Corporation and specify that the annual report is prepared by the Texas PSF Corporation.

Existing §§33.1, 33.10, 33.15, 33.25, 33.30, 33.35, 33.40, 33.45, 33.50, 33.55, and 33.60 are proposed for repeal because they are no longer applicable to the SBOE due to the implementation of SB 1232 and the delegation of the authority to manage and invest the PSF to the Texas PSF Corporation.

The SBOE approved the proposed repeals and new sections for first reading and filing authorization at its November 18, 2022 meeting.

FISCAL IMPACT: Holland Timmins, chief investment officer for the Permanent School Fund, has determined that there are no additional costs to state or local government required to comply with the proposal.

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

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

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

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

GOVERNMENT GROWTH IMPACT: TEA staff prepared a Government Growth Impact Statement assessment for this proposed rulemaking. During the first five years the proposed rulemaking would be in effect, it would create new regulations and repeal existing regulations to align with SB 1232, 87th Texas Legislature, Regular Session, 2021. The new provisions would address the SBOE's responsibilities in relation to the PSF.

The proposed rulemaking would not create or eliminate a government program; would not require the creation of new employee positions or elimination of existing employee positions; would not require an increase or decrease in future legislative appropriations to the agency; would not require an increase or decrease in fees paid to the agency; would not expand or limit an existing regulation; would not increase or decrease the number of individuals subject to its applicability; and would not positively or adversely affect the state's economy.

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

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

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

PUBLIC COMMENTS: The public comment period on the proposal begins December 23, 2022, and ends at 5:00 p.m. on January 27, 2023. A form for submitting public comments is available on the TEA website at https://tea.texas.gov/About_TEA/Laws_and_Rules/SBOE_Rules_(TAC)/Proposed_State_Board_of_Education_Rules/. The SBOE will take registered oral and written comments on the proposal at the appropriate committee meeting in January-February 2023 in

accordance with the SBOE board operating policies and procedures. A request for a public hearing on the proposal submitted under the Administrative Procedure Act must be received by the commissioner of education not more than 14 calendar days after notice of the proposal has been published in the *Texas Register* on December 23, 2022.

SUBCHAPTER A. STATE BOARD OF EDUCATION RULES

19 TAC §§33.1, 33.5, 33.10, 33.15, 33.20, 33.25, 33.30, 33.35, 33.40, 33.45, 33.50, 33.55, 33.60, 33.65, 33.67

STATUTORY AUTHORITY. The repeals are proposed under Texas Constitution, Article VII, §5(a), which authorizes the State Board of Education (SBOE) to make distributions from the Permanent School Fund (PSF) to the available school fund with certain limits; Texas Constitution, Article VII, §5(f), which authorizes the SBOE to manage and invest the PSF according to the prudent person standard and make investments it deems appropriate; Texas Education Code (TEC), §43.001, which describes the PSF as a perpetual endowment; TEC, §43.0031, which requires the SBOE to adopt an ethics policy; and Senate Bill 1232, 87th Texas Legislature, Regular Session, 2021, which allows the SBOE to create the Texas PSF Corporation and delegate its authority to manage the PSF to the Texas PSF Corporation.

CROSS REFERENCE TO STATUTE. The repeals implement Texas Constitution, Article VII, §5(a) and (f); Texas Education Code, §43.001 and §43.0031; and Senate Bill 1232, 87th Texas Legislature, Regular Session, 2021.

§33.1. Constitutional Authority and Constitutional Restrictions.

§33.5. Code of Ethics.

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

§33.15. Objectives.

§33.20. Responsible Parties and Their Duties.

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

§33.30. Standards of Performance.

§33.35. Guidelines for the Custodian and the Securities Lending Agent for the Texas Permanent School Fund (PSF) and the PSF Liquid Account.

§33.40. Trading and Brokerage Policy.

§33.45. Proxy Voting Policy.

§33.50. Socially and Politically Responsible Investment Policy.

§33.55. Standards for Selecting Consultants, Investment Managers, Custodians, and Other Professionals To Provide Outside Expertise for the Fund.

§33.60. Performance and Review Procedures.

§33.65. Bond Guarantee Program for School Districts.

§33.67. Bond Guarantee Program for Charter Schools.

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

Filed with the Office of the Secretary of State on December 12, 2022.

TRD-202204942
Cristina De La Fuente-Valadez
Director, Rulemaking
Texas Education Agency
Earliest possible date of adoption: January 22, 2023
For further information, please call: (512) 475-1497

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19 TAC §§33.3, 33.4, 33.6 - 33.8

STATUTORY AUTHORITY. The new sections are proposed under Texas Constitution, Article VII, §5(a), which authorizes the State Board of Education (SBOE) to make distributions from the Permanent School Fund (PSF) to the available school fund with certain limits; Texas Constitution, Article VII, §5(f), which authorizes the SBOE to manage and invest the PSF according to the prudent person standard and make investments it deems appropriate; Texas Education Code (TEC), §43.001, which describes the PSF as a perpetual endowment; TEC, §43.0031, which requires the SBOE to adopt an ethics policy; and Senate Bill 1232, 87th Texas Legislature, Regular Session, 2021, which allows the SBOE to create the Texas PSF Corporation and delegate its authority to manage the PSF to the Texas PSF Corporation.

CROSS REFERENCE TO STATUTE. The new sections implement Texas Constitution, Article VII, §5(a) and (f); Texas Education Code, §43.001 and §43.0031; and Senate Bill 1232, 87th Texas Legislature, Regular Session, 2021.

§33.3. Duties and Responsibilities of the State Board of Education Related to the Texas Permanent School Fund Corporation.

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

(b) Pursuant to Texas Education Code, Chapter 43, Subchapter B, the SBOE delegated the authority to manage and invest the PSF to the Texas PSF Corporation, a special-purpose governmental corporation that is an instrumentality of the state of Texas with all necessary and implied powers to accomplish its purpose. The SBOE has the following duties and responsibilities with respect to the Texas PSF Corporation:

(1) establish by rule the terms of the five members of the SBOE appointed to the Texas PSF Corporation Board of Directors;

(2) adopt the certificate of formation for the Texas PSF Corporation;

(3) approve the adoption and amendment of the Texas PSF Corporation bylaws; and

(4) act as the sole member of the Texas PSF Corporation.

§33.4. Ethical Standards for Members of the State Board of Education.

(a) Definitions. For purposes of this section, the following definitions have the following meanings.

(1) Commissioner--the commissioner of education. As the commissioner is an employee of the Texas Education Agency (TEA), any provisions that apply to TEA employees apply to the commissioner.

(2) Official act or official action--a vote, decision, recommendation, approval, disapproval, or other action, including inaction, that involves the use of discretionary authority.

(3) Permanent School Fund (PSF) service provider--any person who provides services to the PSF or relating to the management or investment of the PSF, including, but not limited to, external investment managers and consultants, banks, custodians, and professional services (attorneys, accountants, etc.). Notwithstanding the foregoing, for all purposes under this section, the term PSF service provider excludes State Board of Education (SBOE) members, TEA employees, and private fund managers. PSF service providers who provide services to the Texas PSF Corporation are covered by the Texas PSF Corporation's ethics policy.

(4) Personal securities transactions--

(A) transactions for a member's or employee's own account, including an individual retirement account; or

(B) transactions for an account, other than an account over which the member or employee has no direct or indirect influence or control, in which the member or employee (or the member's or employee's spouse, minor child, or other dependent relative):

(i) is an income or principal beneficiary or other equity owner of the account; or

(ii) receives compensation for managing the account for the benefit of persons other than the member or employee or his or her family.

(5) Private fund manager--a person who controls a nonpublicly traded investment fund or other investment vehicle (including, but not limited to, a partnership, limited liability company, trust, association, or other entity) in which the PSF is invested. A private fund manager may include the vehicle's sponsor, general partner, managing member, manager, advisor, or other agent thereof. For purposes of this section, private fund managers are not considered to be PSF service providers.

(6) Publicly traded securities--securities of a class that is listed on a national securities exchange or quoted on the NASDAQ national market system in the United States or that is publicly traded on any foreign stock exchange or other foreign market.

(7) Relative--an individual related within the third degree by consanguinity (blood relative) or the second degree by affinity (marriage) determined in accordance with Texas Government Code, §§573.021-573.025. For purposes of this definition:

(A) examples of a relative within the third degree by consanguinity are a child, grandchild, great-grandchild, parent, grandparent, great-grandparent, brother, sister, uncle, aunt, niece, or nephew;

(B) examples of a relative within the second degree by affinity are a spouse, an individual related to a spouse within the second degree by consanguinity, or a spouse of such an individual;

(C) an individual adopted into a family is considered a relative on the same basis as a natural born family member; and

(D) an individual is considered a spouse even if the marriage has been dissolved by death or divorce if there are surviving children of that marriage.

(8) Texas Education Agency (TEA) employee--a person employed by TEA who provides advice to the SBOE, commissioner, or TEA concerning the PSF.

(b) General principles. Under Texas Education Code (TEC), §43.0031, members of the SBOE, the commissioner, TEA employees, and persons providing services to the SBOE relating to the PSF are subject to general ethical standards relating to the PSF. The PSF is held in public trust for the benefit of the schoolchildren of Texas. The members of the SBOE serve as fiduciaries of the PSF in accordance with the Texas Constitution, Article VII, §5(f). SBOE members or anyone acting on their behalf shall aspire to the highest standards of ethical conduct and shall comply with the provisions of this section, the Texas Constitution, Texas statutes, and all other applicable provisions governing the responsibilities of a fiduciary.

(c) General ethical standards.

(1) SBOE members must comply with all laws applicable to them, which may include one or more of the following statutes: Texas Government Code, §572.051 (Standards of Conduct; State Agency Ethics Policy), §552.352 (Distribution or Misuse of Confidential Information), §572.002 (General Definitions), §572.004 (Definition: Regulation), §572.054 (Representation by Former Officer or Employee of Regulatory Agency Restricted; Criminal Offense), §572.058 (Private Interest in Measure or Decision; Disclosure; Removal from Office for Violation), §572.021 (Financial Statement Required), §2252.908 (Disclosure of Interested Parties), Chapter 573 (Degrees of Relationship; Nepotism Prohibitions), and Chapter 305 (Registration of Lobbyists); Texas Penal Code, Chapter 36 (Bribery and Corrupt Influence) and Chapter 39 (Abuse of Office); and TEC, §43.0032 (Conflicts of Interest) and §43.0033 (Reports of Expenditures). The omission of any applicable statute listed in this paragraph does not excuse violation of its provisions.

(2) SBOE members must be honest in the exercise of their duties and must not take actions that will discredit the PSF.

(3) SBOE members shall be loyal to the interests of the PSF to the extent that such loyalty is not in conflict with other duties that legally have priority.

(4) SBOE members shall not use nonpublic information gained through their relationship with the PSF to seek or obtain personal gain beyond agreed compensation and/or any properly authorized expense reimbursement. This should not be interpreted to forbid the use of PSF as a reference or the communication to others of the fact that a relationship with PSF exists, provided that no misrepresentation is involved.

(5) This section is adopted to satisfy the requirements of TEC, §43.0031.

(d) Conflicts of interest.

(1) A conflict of interest exists whenever SBOE members, the commissioner, or TEA employees have business, commercial, or other relationships, including, but not limited to, personal and private relationships, that could reasonably be expected to diminish their independence of judgment in the performance of their duties. Conflicts include, but are not limited to, beneficial interests in securities, corporate memberships, trustee positions, familial relationships, or other special relationships that could reasonably be considered a conflict of interest with the fiduciary duties to the PSF. Further, TEC, §43.0032, requires disclosure and no participation in a matter affected by the possible conflict of interest, unless a waiver is granted, when an SBOE member, the commissioner, a TEA employee, or a person who provides services to the SBOE that relate to management or investment of the PSF has a business, commercial, or other relationship that could rea-

sonably be expected to diminish a person's independence of judgment in the performance of the person's responsibilities relating to the PSF. Such business, commercial, or other relationship is defined to be a relationship that is prohibited under Texas Government Code, §572.051, or that would require public disclosure under Texas Government Code, §572.058, or a relationship that does not rise to this level but that is determined by the SBOE to create an unacceptable risk to the integrity and reputation of the PSF investment program.

(2) Any person who has a possible conflict of interest as defined in paragraph (1) of this subsection shall, upon discovery, promptly disclose the possible conflict to the commissioner and the chair and vice chair of the SBOE on a disclosure form prescribed by the commissioner.

(e) Prohibited transactions and interests. SBOE members, the commissioner, and TEA employees may not:

(1) engage in any personal securities transaction when the person has actual knowledge that the Texas PSF Corporation is trading such securities or has acquired information through his or her position that is not otherwise available to the public. An SBOE member, the commissioner, or a TEA employee may otherwise buy or sell a publicly traded security of an issuer that is held by the Texas PSF Corporation;

(2) accept or solicit any gifts, favors, services, or benefits that might reasonably tend to influence the person in the discharge of his or her duties for the PSF or that the person knows, or should know, is being offered with the intent to influence the person's conduct on behalf of the PSF;

(3) accept employment or engage in a business or professional activity while serving as an SBOE member or a TEA employee that the member or employee might reasonably expect would require or induce the member or employee to disclose confidential information acquired by reason of his or her position concerning the PSF;

(4) accept employment or compensation while serving as a member or employee that could reasonably be expected to impair the member's or employee's independence of judgment in the performance of his or her duties;

(5) make personal investments that could reasonably be expected to create a substantial conflict of interest between the member's or employee's private interest and the interests of the PSF;

(6) intentionally or knowingly solicit, accept, or agree to accept any gifts, favors, services, or benefits for the exercise of the member's or employee's authority or performance of the member's or employee's duties;

(7) purchase, sell, exchange, or lease property to or from the Texas PSF Corporation if such person holds an interest in the property (whether direct or indirect);

(8) purchase, sell, or exchange any interest in an entity with the Texas PSF Corporation if such person holds an interest in the entity (whether direct or indirect);

(9) accept offers, under any circumstances, by reason of their official position to trade in any security or other investment on terms more favorable than those available to the general investing public or, in the case of private market investments, a similarly situated investor;

(10) lend to or borrow from the Texas PSF Corporation, PSF service providers, private fund managers, or other third parties with which the Texas PSF Corporation has a business relationship, unless such entities are normally engaged in such lending in the usual course of their business, and then only on customary terms offered to others under similar circumstances to finance proper and usual activities; or

(11) act as a representative or agent of a third party, including a PSF service provider or private fund manager, in connection with the acquisition of services or an investment for the Texas PSF Corporation.

(f) Gifts and entertainment. An SBOE member, the commissioner, or a TEA employee (or the spouse, minor child, or dependent relative thereof) may not:

(1) accept any gift or benefit, unless such gift is a permissible gift as defined in subsection (g) of this section;

(2) solicit, offer, or accept a gift or benefit (for the personal benefit of the member or employee or for the benefit of a third party), regardless of whether it is a permissible gift, that the member or employee knows, or should know, is being offered or given because of the member's or employee's official position, in exchange for an official act, or with the intent to influence the member's or employee's conduct on behalf of the PSF;

(3) solicit, accept, or agree to accept an honorarium in consideration for services that the member or employee would not have been requested to provide but for his or her official position or duties;

(4) accept any gift or benefit from a lobbyist, or a person who is required to be registered as a lobbyist, that is not expressly permitted by Texas Government Code, Chapter 305; or

(5) accept a gift or benefit if the source of the gift or benefit is not identified or if the member or employee knows, or has reason to know, that a prohibited gift is being offered through an intermediary.

(g) Definition of permissible gift. The term "permissible gift" means a gift or benefit that is offered or accepted in compliance with all applicable statutes and rules and is one of the following:

(1) an occasional gift that is not cash or money, including checks, gift cards, or negotiable instruments, and does not exceed $50 in value;

(2) food, lodging, entertainment, and transportation, if accepted as a guest (i.e., the donor is present) and, if required, the member or employee reports the gift as required by law;

(3) an item is given in the context of a personal relationship, such as kinship, or a professional or business relationship that is independent of the member's or employee's official capacity; or

(4) transportation, lodging, and meals in connection with attendance at a conference or similar event in which the member or employee renders services, such as speaking, if the services are more than perfunctory.

(h) Receipt of prohibited gift. A member or employee who receives a gift that is not a permissible gift should return the gift to its source or, if that is not possible or feasible, donate the gift to a recognized tax-exempt charitable organization or governmental entity.

(i) Contributions and solicitation of support.

(1) All SBOE members, the commissioner, and TEA employees (and their respective agents) shall follow all applicable laws governing campaign contributions, including, without limitation, the rules promulgated by the Securities and Exchange Commission relating to political contributions by certain investment advisors.

(2) An SBOE member shall not request that a PSF service provider or private fund manager make any gift or donation to a school or other charitable interest on behalf of or at the request of a member.

(j) Compliance and enforcement.

(1) The SBOE will enforce this section through its chair or vice chair or the commissioner.

(2) Any violation of this section will be reported to the chair and vice chair of the SBOE and the commissioner, and a recommended action will be presented to the SBOE by the chair of the SBOE or the commissioner.

(3) The ethics advisor of TEA shall respond to inquiries from SBOE members, the commissioner, and TEA employees concerning the provisions of this section. The ethics advisor may confer with the general counsel.

(k) Ethics training. The SBOE shall receive annual training regarding state ethics laws through the Texas Ethics Commission or TEA's ethics advisor. TEA employees shall complete all ethics training required by TEA.

§33.6. Bond Guarantee Program for School Districts.

(a) Statutory provision. The commissioner of education must administer the guarantee program for school district bonds according to the provisions of Texas Education Code (TEC), Chapter 45, Subchapter C.

(b) Definitions. The following definitions apply to the guarantee program for school district bonds.

(1) Annual debt service--payments of principal and interest on outstanding bonded debt scheduled to occur between September 1 and August 31 during the fiscal year in which the guarantee is sought as reported by the Municipal Advisory Council (MAC) of Texas or its successor, if the district has outstanding bonded indebtedness.

(A) The annual debt service will be determined by the current report of the bonded indebtedness of the district as reported by the MAC of Texas or its successor as of the date of the application deadline.

(B) The annual debt service does not include:

(i) the amount of debt service to be paid on the bonds for which the reservation is sought; or

(ii) the amount of debt service attributable to any debt that is no longer outstanding at the application deadline, provided that the Texas Education Agency (TEA) has sufficient evidence of the discharge or defeasance of such debt.

(C) Solely for the purpose of this calculation, the debt service amounts for variable rate bonds will be those that are published in the final official statement, or if there is no official statement, debt service amounts based on the maximum rate permitted by the bond order or other bond proceeding that establishes a maximum interest rate for the bonds.

(2) Application deadline--the last business day of the month in which an application for a guarantee is filed. Applications must be submitted electronically through the website of the MAC of Texas or its successor by 5:00 p.m. on the last business day of the month to be considered in that month's application processing.

(3) Average daily attendance (ADA)--total refined average daily attendance as defined by TEC, §42.005.

(4) Bond--a debt security issuance approved by the attorney general, issued under TEC, §45.003 or §45.004, to provide long-term financing with a maturity schedule of at least three years.

(5) Bond Guarantee Program (BGP)--the guarantee program that is described by this section and established under TEC, Chapter 45, Subchapter C.

(6) Bond order--the order adopted by the governing body of a school district that authorizes the issuance of bonds and the pricing certificate, if any, establishing the terms of the bonds executed pursuant to such order.

(7) Combination issue--an issuance of bonds for which an application for a guarantee is filed that includes both a new money portion and a refunding portion, as permitted by the Texas Government Code, Chapter 1207. The eligibility of combination issues for the guarantee is limited by the eligibility of the new money and refunding portions as defined in this subsection.

(8) Enrollment growth--growth in student enrollment, as defined by §129.1025 of this title (relating to Adoption by Reference: Student Attendance Accounting Handbook), that has occurred over the previous five school years.

(9) Nationally recognized investment rating firm--an investment rating firm that is designated by the United States Securities and Exchange Commission as a nationally recognized statistical rating organization (NRSRO) and is demonstrating that it has:

(A) had its current NRSRO designation for at least three consecutive years;

(B) provided credit ratings to each of the following:

(i) fifteen or more fixed income securities denominated in United States dollars and issued during the immediately preceding three years; and

(ii) ten or more school districts in the United States; and

(C) a documented separation of duties between employees involved in credit analysis and employees involved in business relationships with clients.

(10) New money issue--an issuance of bonds for the purposes of constructing, renovating, acquiring, and equipping school buildings; the purchase of property; or the purchase of school buses. An issuance of bonds for the purpose of constructing teacher or student housing is eligible for the guarantee for new money only if it is an integral part of the educational mission of the school district as determined by the commissioner. Eligibility for the guarantee for new money issues is limited to the issuance of bonds authorized under TEC, §45.003. A new money issue does not include the issuance of bonds to purchase a facility from a public facility corporation created by the school district or to purchase any property that is currently under a lease-purchase contract under the Local Government Code, Chapter 271, Subchapter A. A new money issue does not include an issuance of bonds to refinance any type of maintenance tax-supported debt. Maintenance tax-supported debt includes, but is not limited to:

(A) time warrants or loans entered under TEC, Chapter 45, Subchapter E; or

(B) any other type of loan or warrant that is not supported by bond taxes as defined by TEC, §45.003.

(11) Notes issued to provide interim financing--an issuance of notes, including commercial paper notes, designed to provide short-term financing for the purposes of constructing, renovating, acquiring, and equipping school buildings; the purchase of property; or the purchase of school buses. For notes to be eligible for the guarantee under this section, the notes must be:

(A) issued to pay costs for which bonds have been authorized at an election occurring before the issuance of the notes;

(B) approved by the attorney general or issued in accordance with proceedings that have been approved by the attorney general; and

(C) refunded by bonds issued to provide long-term financing no more than three years from the date of issuance of such notes, provided that the date of issuance of notes will be determined by reference to the date on which the notes were issued for capital expenditures and the intervening date or dates of issuance of any notes issued to refinance outstanding notes will be disregarded.

(12) Refunding issue--an issuance of bonds for the purpose of refunding bonds, including notes issued to provide interim financing, that are supported by bond taxes as defined by TEC, §45.003. Eligibility for the guarantee for refunding issues is limited to refunding issues that refund bonds, including notes issued to provide interim financing, that were authorized by a bond election under TEC, §45.003.

(13) Total debt service--total outstanding principal and interest on bonded debt.

(A) The total debt service will be determined by the current report of the bonded indebtedness of the district as reported by the MAC of Texas or its successor as of the date of the application deadline, if the district has outstanding bonded indebtedness.

(B) The total debt service does not include:

(i) the amount of debt service to be paid on the bonds for which the reservation is sought; or

(ii) the amount of debt service attributable to any debt that is no longer outstanding at the application deadline, provided that TEA has sufficient evidence of the discharge or defeasance of such debt.

(C) Solely for the purpose of this calculation, the debt service amounts for variable rate bonds will be those that are published in the final official statement, or if there is no official statement, debt service amounts based on the maximum rate permitted by the bond order or other bond proceeding that establishes a maximum interest rate for the bonds.

(c) Data sources.

(1) The following data sources will be used for purposes of prioritization:

(A) projected ADA for the current school year as adopted by the legislature for appropriations purposes;

(B) final property values certified by the comptroller of public accounts, as described in the Texas Government Code, Chapter 403, Subchapter M, for the tax year preceding the year in which the bonds will be issued. If final property values are unavailable, the most recent projection of property values by the comptroller, as described in the Texas Government Code, Chapter 403, Subchapter M, will be used;

(C) debt service information reported by the MAC of Texas or its successor as of the date of the application deadline; and

(D) enrollment information reported to the Public Education Information Management System (PEIMS) for the five-year time period ending in the year before the application date.

(2) The commissioner may consider adjustments to data values determined to be erroneous or not reflective of current conditions before the deadline for receipt of applications for that application cycle.

(d) Bond eligibility.

(1) Only those combination, new money, and refunding issues as defined in subsection (b)(7), (10), and (12), respectively, of this section are eligible to receive the guarantee.

(2) Refunding issues must comply with the following requirements to retain eligibility for the guarantee for the refunding bonds, except that subparagraph (C) of this paragraph does not apply to a refunding issue that provides long-term financing for notes issued to provide interim financing.

(A) As with any district applying for approval for the guarantee, the district issuing the refunding bonds must meet the requirements for initial approval specified in subsection (g)(2)(A) of this section.

(B) The bonds to be refunded must have been:

(i) previously guaranteed by the Permanent School Fund (PSF) or approved for credit enhancement under §61.1038 of this title (relating to School District Bond Enhancement Program);

(ii) issued on or after November 1, 2008, and before January 1, 2010; or

(iii) issued as notes to provide interim financing as defined in subsection (b)(11) of this section.

(C) The district must demonstrate that issuing the refunding bond(s) will result in a present value savings to the district and that the refunding bond or bonds will not have a maturity date later than the final maturity date of the bonds being refunded. Present value savings is determined by computing the net present value of the difference between each scheduled payment on the original bonds and each scheduled payment on the refunding bonds. Present value savings must be computed at the true interest cost of the refunding bonds. If the commissioner approves refunding bonds for the guarantee based on evidence of present value savings but at the time of the sale of the refunding bonds a present value savings is not realized, the commissioner may revoke the approval of the bonds for the guarantee.

(D) The refunding transaction must comply with the provisions of subsection (g)(4)(A)-(C) of this section.

(3) If a district files an application for a combination issue, the application will be treated as an application for a single issue for the purposes of eligibility for the guarantee. A guarantee for the combination issue will be awarded only if both the new money portion and the refunding portion meet all of the applicable eligibility requirements described in this section. As part of its application, the applicant district must present data that demonstrate compliance for both the new money portion of the issue and the refunding portion of the issue.

(4) If the commissioner determines that an applicant has deliberately misrepresented information related to a bond issue to secure a guarantee, the commissioner must revoke the approval of the bonds for the guarantee.

(e) Determination of PSF capacity to guarantee bonds.

(1) Each month the commissioner will estimate the available capacity of the PSF. If necessary, the commissioner will confirm that the PSF has sufficient capacity to guarantee the bonds before the issuance of the final approval for the guarantee in accordance with subsection (g)(3) of this section. The calculation of capacity will be based on a multiplier of three and one-half times the cost value of the PSF with the proviso that under no circumstances could the capacity of the fund exceed the limits set by federal regulation. The commissioner may increase or decrease the multiplier to prudently manage fund capacity and preserve the AAA credit rating of the PSF. Changes to the

multiplier made by the commissioner are to be ratified or rejected by the State Board of Education (SBOE) at the next meeting for which the item can be posted.

(2) The SBOE may establish an amount of capacity to be held in reserve of up to 5.0% of the fund's capacity. The amount to be held in reserve may be increased or decreased by a majority vote of the SBOE based on changes in the cost value asset allocation and risk in the portfolio, or may be increased or decreased by the commissioner as necessary to prudently manage fund capacity and preserve the AAA credit rating of the PSF. Changes to the amount held in reserve made by the commissioner are to be ratified or rejected by the SBOE at the next meeting for which the item can be posted.

(3) The net capacity of the PSF to guarantee bonds is determined by subtracting the amount to be held in reserve, as determined under paragraph (2) of this subsection, from the total available capacity, as described in paragraph (1) of this subsection.

(f) Application process and application processing.

(1) Application submission and fee. A district must apply to the commissioner for the guarantee of eligible bonds or the credit enhancement of eligible bonds as authorized under §61.1038 of this title by submitting an application electronically through the website of the MAC of Texas or its successor. The district must submit the information required under TEC, §45.055(b), and this section and any additional information the commissioner may require. The application and all additional information required by the commissioner must be received before the application will be processed. The district may not submit an application for a guarantee or credit enhancement before the successful passage of an authorizing proposition.

(A) The application fee is $1,500.

(B) The fee is due at the time the application for the guarantee or the credit enhancement is submitted. An application will not be processed until the fee has been remitted according to the directions provided on the website of the MAC of Texas or its successor and received by TEA.

(C) The fee will not be refunded to a district that:

(i) is not approved for the guarantee or the credit enhancement; or

(ii) does not sell its bonds before the expiration of its approval for the guarantee or the credit enhancement.

(D) The fee may be transferred to a subsequent application for the guarantee or the credit enhancement by the district if the district withdraws its application and submits the subsequent application before the expiration of its approval for the guarantee or the credit enhancement.

(2) Application prioritization and processing. Applications will be prioritized based on districts' property wealth per ADA, with the application of a district with a lower property wealth per ADA prioritized before that of a district with a higher property wealth per ADA. Applications may also be prioritized for districts that experience unforeseen catastrophes or emergencies that require the renovation or replacement of school facilities as described in TEC, §44.031(h). All applications received during a calendar month will be held until up to the 15th business day of the subsequent month. On or before the 15th business day of each month, the commissioner will announce the results of the prioritization and process applications for initial approval for the guarantee, up to the available net capacity as of the application deadline, subject to the requirements of this section.

(A) Approval for guarantees will be awarded each month beginning with the districts with the lowest property wealth per ADA until the PSF reaches its net capacity to guarantee bonds.

(B) Approval for guarantees will be awarded based on the fund's capacity to fully guarantee the bond issue for which the guarantee is sought. Applications for bond issues that cannot be fully guaranteed will not receive an award. The amount of bond issue for which the guarantee was requested may not be modified after the monthly application deadline for the purposes of securing the guarantee during the award process. If PSF net capacity has been exhausted, the commissioner will process the application for approval of the credit enhancement as specified in §61.1038 of this title.

(C) The actual guarantee of the bonds is subject to the approval process prescribed in subsection (g) of this section.

(D) An applicant school district is ineligible for consideration for the guarantee if its lowest credit rating from any nationally recognized investment rating firm as defined in subsection (b)(9) of this section is the same as or higher than that of the PSF.

(3) Late application. An application received after the application deadline will be considered a valid application for the subsequent month, unless withdrawn by the submitting district before the end of the subsequent month.

(4) Notice of application status. Each district that submits a valid application will be notified of the application status within 15 business days of the application deadline.

(5) Reapplication. If a district does not receive approval for the guarantee or for any reason does not receive approval of the bonds from the attorney general within the time period specified in subsection (g)(4) of this section, the district may reapply in a subsequent month. Applications that were denied approval for the guarantee will not be retained for consideration in subsequent months.

(g) Approval for the guarantee; district responsibilities on receipt of approval.

(1) Initial and final approval provisions.

(A) If, during the monthly estimation of PSF capacity described in subsection (e)(1) of this section, the commissioner determines that the available capacity of the PSF is 10% or less, the commissioner may require an applicant school district to obtain final approval for the guarantee as described in paragraph (3) of this subsection.

(B) If the commissioner has not made such a determination:

(i) the commissioner will consider the initial approval described in paragraph (2) of this subsection as both the initial and final approval; and

(ii) an applicant school district that has received notification of initial approval for the guarantee, as described in paragraph (2) of this subsection, may consider that notification as notification of initial and final approval for the guarantee and may complete the sale of the applicable bonds.

(2) Initial approval.

(A) The following provisions apply to all applications for the guarantee, regardless of whether an application is for a new money, refunding, or combination issue. Under TEC, §45.056, the commissioner will investigate the applicant school district's accreditation status and financial status. A district must be accredited and financially sound to be eligible for initial approval by the commissioner. The commissioner's review will include the following:

(i) the purpose of the bond issue;

(ii) the district's accreditation status as defined by §97.1055 of this title (relating to Accreditation Status) in accordance with the following:

(I) if the district's accreditation status is Accredited, the district will be eligible for consideration for the guarantee;

(II) if the district's accreditation status is Accredited-Warned or Accredited-Probation, the commissioner will investigate the underlying reason for the accreditation rating to determine whether the accreditation rating is related to the district's financial soundness. If the accreditation rating is related to the district's financial soundness, the district will not be eligible for consideration for the guarantee; or

(III) if the district's accreditation status is Not Accredited-Revoked, the district will not be eligible for consideration for the guarantee;

(iii) the district's compliance with statutes and rules of TEA; and

(iv) the district's financial status and stability, regardless of the district's accreditation rating, including approval of the bonds by the attorney general under the provisions of TEC, §45.0031 and §45.005.

(B) The following limitation applies to applications for new money issues of bonds for which the election authorizing the issuance of the bonds was called after July 15, 2004. The commissioner will limit approval for the guarantee to a district that has, at the time of the application for the guarantee, less than 90% of the annual debt service of the district with the highest annual debt service per ADA, as determined by the commissioner annually, or less than 90% of the total debt service of the district with the highest total debt service per ADA, as determined by the commissioner annually. The limitation will not apply to school districts that have enrollment growth, as defined in subsection (b)(8) of this section, of at least 25%, based on PEIMS data on enrollment available at the time of application. The annual debt service amount is the amount defined by subsection (b)(1) of this section. The total debt service amount is the amount defined by subsection (b)(13) of this section.

(C) The commissioner will grant or deny initial approval for the guarantee based on the review described in subparagraph (A) of this paragraph and the limitation described in subparagraph (B) of this paragraph and will provide an applicant district whose application has received initial approval for the guarantee written notice of initial approval.

(3) Final approval. The provisions of this paragraph apply only as described in paragraph (1) of this subsection. A district must receive final approval before completing the sale of the bonds for which the district has received notification of initial approval.

(A) A district that has received initial approval must provide a written notice to TEA two business days before issuing a preliminary official statement (POS) for the bonds that are eligible for the guarantee or two business days before soliciting investment offers, if the bonds will be privately placed without the use of a POS.

(i) The district must receive written confirmation from TEA that the capacity continues to be available before proceeding with the public or private offer to sell bonds.

(ii) TEA will provide this notification within one business day of receiving the notice of the POS or notice of other solicitation offers to sell the bonds.

(B) A district that received confirmation from TEA in accordance with subparagraph (A) of this paragraph must provide written notice to TEA of the placement of an item to approve the bond sale on the agenda of a meeting of the school board of trustees no later than two business days before the meeting. If the bond sale is completed pursuant to a delegation by the board to a pricing officer or committee, notice must be given to TEA no later than two business days before the execution of a bond purchase agreement by such pricing officer or committee.

(i) The district must receive written confirmation from TEA that the capacity continues to be available for the bond sale before the approval of the sale by the school board of trustees or by the pricing officer or committee.

(ii) TEA will provide this notification within one business day before the date that the district expects to complete the sale by official action of the board or of a pricing officer or committee.

(C) TEA will process requests for final approval from districts that have received initial approval on a first come, first served basis. Requests for final approval must be received before the expiration of the initial approval.

(D) A district may provide written notification as required by this paragraph by facsimile transmission or by email in a manner prescribed by the commissioner.

(4) District responsibilities on receipt of approval.

(A) Once a district is awarded initial approval for the guarantee, each issuance of the bonds must be approved by the attorney general within 180 days of the date of the letter granting the approval for the guarantee. The initial approval for the guarantee will expire at the end of the 180-day period. The commissioner may extend the 180-day period, based on extraordinary circumstances, on receiving a written request from the district or the attorney general before the expiration of the 180-day period.

(B) If the bonds are not approved by the attorney general within 180 days of the date of the letter granting the approval for the guarantee, the commissioner will consider the application withdrawn, and the district must reapply for a guarantee.

(C) If applicable, the district must comply with the provisions for final approval described in paragraph (3) of this subsection to maintain approval for the guarantee.

(D) A district may not represent bonds as guaranteed for the purpose of pricing or marketing the bonds before the date of the letter granting approval for the guarantee.

(h) Financial exigency. The following provisions describe how a declaration of financial exigency under §109.2001 of this title (relating to Financial Exigency) affects a district's application for guarantee approval or a district's previously granted approval.

(1) Application for guarantee of new money issue. The commissioner will deny approval of an application for the guarantee of a new money issue if the applicant school district has declared a state of financial exigency for the district's current fiscal year. The denial of approval will be in effect for the duration of the applicable fiscal year unless the district can demonstrate financial stability.

(2) Approval granted before declaration. If in a given district's fiscal year the commissioner grants approval for the guarantee of a new money issue and the school district subsequently declares a state of financial exigency for that same fiscal year, the district must immediately notify the commissioner and may not offer the bonds for sale unless the commissioner determines that the district may proceed.

(3) Application for guarantee of refunding issue. The commissioner will consider an application for the guarantee of a refunding issue that meets all applicable requirements specified in this section even if the applicant school district has declared a state of financial exigency for the district's current fiscal year. In addition to fulfilling all applicable requirements specified in this section, the applicant school district must also describe, in its application, the reason financial exigency was declared and how the refunding issue will support the district's financial recovery plan.

(i) Allocation of specific holdings. If necessary to successfully operate the BGP, the commissioner may allocate specific holdings of the PSF to specific bond issues guaranteed under this section. This allocation will not prejudice the right of the SBOE to dispose of the holdings according to law and requirements applicable to the fund; however, the SBOE will ensure that holdings of the PSF are available for a substitute allocation sufficient to meet the purposes of the initial allocation. This allocation will not affect any rights of the bond holders under law.

(j) Defeasance. The guarantee will be completely removed when bonds guaranteed by the BGP are defeased, and such a provision must be specifically stated in the bond order. If bonds guaranteed by the BGP are defeased, the district must notify the commissioner in writing within ten calendar days of the action.

(k) Bonds issued before August 15, 1993. For bonds issued before August 15, 1993, a school district seeking the guarantee of eligible bonds must certify that, on the date of issuance of any bond, no funds received by the district from the Available School Fund (ASF) are reasonably expected to be used directly or indirectly to pay the principal or interest on, or the tender or retirement price of, any bond of the political subdivision or to fund a reserve or placement fund for any such bond.

(l) Bonds guaranteed before December 1, 1993. For bonds guaranteed before December 1, 1993, if a school district cannot pay the maturing or matured principal or interest on a guaranteed bond, the commissioner will cause the amount needed to pay the principal or interest to be transferred to the district's paying agent solely from the PSF and not from the ASF. The commissioner also will direct the comptroller of public accounts to withhold the amount paid, plus interest, from the first state money payable to the district, excluding payments from the ASF.

(m) Bonds issued after August 15, 1993, and guaranteed on or after December 1, 1993. If a school district cannot pay the maturing or matured principal or interest on a guaranteed bond, the commissioner will cause the amount needed to pay the principal or interest to be transferred to the district's paying agent from the PSF. The commissioner also will direct the comptroller of public accounts to withhold the amount paid, plus interest, from the first state money payable to the district, regardless of source, including the ASF.

(n) Payments. For purposes of the provisions of TEC, Chapter 45, Subchapter C, matured principal and interest payments are limited to amounts due on guaranteed bonds at scheduled maturity, at scheduled interest payment dates, and at dates when bonds are subject to mandatory redemption, including extraordinary mandatory redemption, in accordance with the terms of the bond order. All such payment dates, including mandatory redemption dates, must be specified in the bond order or other document pursuant to which the bonds initially are issued. Without limiting the provisions of this subsection, payments attributable to an optional redemption or a right granted to a bondholder to demand payment on a tender of such bonds according to the terms of the bonds do not constitute matured principal and interest payments.

(o) Guarantee restrictions. The guarantee provided for eligible bonds under the provisions of TEC, Chapter 45, Subchapter C, is restricted to matured bond principal and interest. The guarantee applies to all matured interest on eligible bonds, whether the bonds were issued with a fixed or variable interest rate and whether the interest rate changes as a result of an interest reset provision or other bond order provision requiring an interest rate change. The guarantee does not extend to any obligation of a district under any agreement with a third party relating to bonds that is defined or described in state law as a "bond enhancement agreement" or a "credit agreement," unless the right to payment of such third party is directly as a result of such third party being a bondholder.

(p) Notice of default. A school district that has determined that it is or will be unable to pay maturing or matured principal or interest on a guaranteed bond must immediately, but not later than the fifth business day before maturity date, notify the commissioner.

(q) Payment from PSF.

(1) Immediately after the commissioner receives the notice described in subsection (p) of this section, the commissioner will instruct the comptroller to transfer from the appropriate account in the PSF to the district's paying agent the amount necessary to pay the maturing or matured principal or interest.

(2) Immediately after receipt of the funds for payment of the principal or interest, the paying agent must pay the amount due and forward the canceled bond or coupon to the comptroller. The comptroller will hold the canceled bond or coupon on behalf of the PSF.

(3) Following full reimbursement to the PSF with interest, the comptroller will further cancel the bond or coupon and forward it to the school district for which payment was made. Interest will be charged at the rate determined under the Texas Government Code, §2251.025(b). Interest will accrue as specified in the Texas Government Code, §2251.025(a) and (c).

(r) Bonds not accelerated on default. If a school district fails to pay principal or interest on a guaranteed bond when it matures, other amounts not yet mature are not accelerated and do not become due by virtue of the school district's default.

(s) Reimbursement of PSF. If payment from the PSF is made on behalf of a school district, the school district must reimburse the amount of the payment, plus interest, in accordance with the requirements of TEC, §45.061.

(t) Repeated failure to pay. If a total of two or more payments are made under the BGP or the credit enhancement program authorized under §61.1038 of this title on the bonds of a school district, the commissioner will take action in accordance with the provisions of TEC, §45.062.

§33.7. Bond Guarantee Program for Charter Schools.

(a) Statutory provision. The commissioner of education must administer the guarantee program for open-enrollment charter school bonds according to the provisions of Texas Education Code (TEC), Chapter 45, Subchapter C.

(b) Definitions. The following definitions apply to the guarantee program for open-enrollment charter school bonds.

(1) Amortization expense--the annual expense of any debt and/or loan obligations.

(2) Annual debt service--payments of principal and noncapitalized interest on outstanding bonded debt scheduled to occur during a charter district's fiscal year as reported by the Municipal Advisory

Council (MAC) of Texas or its successor, if the charter district is responsible for outstanding bonded indebtedness.

(A) The annual debt service will be determined by the current report of the bonded indebtedness of the charter district as reported by the MAC of Texas or its successor as of the date of the application deadline.

(B) Solely for the purpose of this calculation, the debt service amounts for variable rate bonds will be those that are published in the final official statement or, if there is no official statement, debt service amounts based on the maximum rate permitted by the bond resolution or other bond proceeding that establishes a maximum interest rate for the bonds.

(C) Annual debt service includes required payments into a sinking fund as authorized under 26 United States Code (USC) §54A(d)(4)(C), provided that the sinking fund is maintained by a trustee or other entity approved by the commissioner that is not under the control or common control of the charter district.

(3) Application deadline--the last business day of the month in which an application for a guarantee is filed. Applications must be submitted electronically through the website of the MAC of Texas or its successor by 5:00 p.m. on the last business day of the month to be considered in that month's application processing. This application deadline does not apply to applications for issues to refund bonds previously guaranteed by the Bond Guarantee Program.

(4) Board resolution--the resolution adopted by the governing body of an open-enrollment charter holder that:

(A) requests guarantee of bonds through the Bond Guarantee Program; and

(B) authorizes the charter holder's administration to pursue bond financing.

(5) Bond--a debt security issuance approved by the attorney general, issued under TEC, Chapter 53, to provide long-term financing with a maturity schedule of at least three years.

(6) Bond Guarantee Program (BGP)--the guarantee program that is described by this section and established under TEC, Chapter 45, Subchapter C.

(7) Bond resolution--the resolution, indenture, or other instrument adopted by the governing body of an issuer of bonds authorizing the issuance of bonds for the benefit of a charter district.

(8) Charter district--an open-enrollment charter holder designated as a charter district under subsection (e) of this section, as authorized by TEC, §12.135.

(9) Combination issue--an issuance of bonds for which an application for a guarantee is filed that includes both a new money portion and a refunding portion, as permitted by TEC, Chapter 53. The eligibility of combination issues for the guarantee is limited by the eligibility of the new money and refunding portions as defined in this subsection.

(10) Debt service coverage ratio--a measure of a charter district's ability to pay interest and principal with cash generated from current operations. The debt service coverage ratio (total debt service coverage on all long-term capital debt) equals the excess of revenues over expenses plus interest expense plus depreciation expense plus amortization expense, all divided by annual debt service. The calculation can be expressed as: (Excess of revenues over expenses + interest expense + depreciation expense + amortization expense)/ annual debt service.

(11) Depreciation expense--the audited amount of depreciation that was expensed during the fiscal period.

(12) Educational facility--a classroom building, laboratory, science building, faculty or administrative office building, or other facility used exclusively for the conduct of the educational and administrative functions of a charter school.

(13) Foundation School Program (FSP)--the program established under TEC, Chapters 41, 42, and 46, or any successor program of state appropriated funding for school districts in the state of Texas.

(14) Long-term debt--any debt of the charter district that has a term of greater than three years and is secured on a parity basis with the bonds to be guaranteed.

(15) Maximum annual debt service--as of any date of calculation, the highest annual debt service requirements with respect to all outstanding long-term debt for any succeeding fiscal year.

(16) Nationally recognized investment rating firm--an investment rating firm that is designated by the United States Securities and Exchange Commission as a nationally recognized statistical rating organization (NRSRO) and is demonstrating that it has:

(A) had its current NRSRO designation for at least three consecutive years;

(B) provided credit ratings to each of the following:

(i) fifteen or more fixed income securities denominated in United States dollars and issued during the immediately preceding three years;

(ii) ten or more school districts in the United States;

(iii) one or more charter schools in the United States; and

(C) a documented separation of duties between employees involved in credit analysis and employees involved in business relationships with clients.

(17) New money issue--an issuance of revenue bonds under TEC, Chapter 53, for the purposes of:

(A) the acquisition, construction, repair, or renovation of an educational facility of an open-enrollment charter school and equipping real property of an open-enrollment charter school, provided that any bonds for student or teacher housing must meet the following criteria:

(i) the proposed housing is contemplated in the charter or charter application; and

(ii) the proposed housing is an essential and integral part of the educational program included in the charter contract; or

(B) the refinancing of one or more promissory notes executed by an open-enrollment charter school, each in an amount in excess of $500,000, that evidence one or more loans from a national or regional bank, nonprofit corporation, or foundation that customarily makes loans to charter schools, the proceeds of which loans were used for a purpose described in subparagraph (A) of this paragraph; or

(C) both.

(18) Open-enrollment charter--this term has the meaning assigned in §100.1001 of this title (relating to Definitions).

(19) Open-enrollment charter holder--this term has the meaning assigned to the term "charter holder" in TEC, §12.1012.

(20) Open-enrollment charter school--this term has the meaning assigned to the term "charter school" in §100.1001 of this title.

(21) Open-enrollment charter school campus--this term has the meaning assigned to the term "charter school campus" in §100.1001 of this title.

(22) Refunding issue--an issuance of bonds under TEC, Chapter 53, for the purpose of refunding:

(A) bonds that have previously been issued under that chapter and have previously been approved by the attorney general; or

(B) bonds that have previously been issued for the benefit of an open-enrollment charter school under Vernon's Civil Statutes, Article 1528m, and have previously been approved by the attorney general.

(c) Bond eligibility.

(1) Only those combination, new money, and refunding issues as defined in subsection (b)(9), (17), and (22), respectively, of this section are eligible to receive the guarantee. The bonds must, without the guarantee, be rated as investment grade by a nationally recognized investment rating firm and must be issued on or after September 28, 2011.

(2) Refunding issues must comply with the following requirements to retain eligibility for the guarantee for the refunding bonds.

(A) As with any open-enrollment charter holder applying for approval for the guarantee, the charter holder for which the refunding bonds are being issued must meet the requirements for charter district designation specified in subsection (e)(2) of this section and the requirements for initial approval specified in subsection (f)(3)(A) of this section.

(B) The charter holder must demonstrate that issuing the refunding bond(s) will result in a present value savings to the charter holder. Present value savings is determined by computing the net present value of the difference between each scheduled payment on the original bonds and each scheduled payment on the refunding bonds. Present value savings must be computed at the true interest cost of the refunding bonds. If the commissioner approves refunding bonds for the guarantee based on evidence of present value savings but at the time of the sale of the refunding bonds a present value savings is not realized, the commissioner may revoke the approval of the bonds for the guarantee.

(C) For issues that refund bonds previously guaranteed by the BGP, the charter holder must demonstrate that the refunding bond or bonds will not have a maturity date later than the final maturity date of the bonds being refunded.

(D) The refunding transaction must comply with the provisions of subsection (f)(5)(A)-(C) and (E) of this section.

(3) If an open-enrollment charter holder files an application for a combination issue, the application will be treated as an application for a single issue for the purposes of eligibility for the guarantee. A guarantee for the combination issue will be awarded only if both the new money portion and the refunding portion meet all of the applicable eligibility requirements described in this section. As part of its application, the charter holder making the application must present data that demonstrate compliance for both the new money portion of the issue and the refunding portion of the issue.

(4) If the commissioner determines that an applicant has deliberately misrepresented information related to a bond issue to secure a guarantee, the commissioner must revoke the approval of the bonds for the guarantee.

(d) Determination of Permanent School Fund (PSF) capacity to guarantee bonds for charter districts.

(1) Each month the commissioner will estimate the available capacity of the PSF to guarantee bonds for charter districts. This capacity is determined by multiplying the net capacity determined under §33.6 of this title (relating to Bond Guarantee Program for School Districts) by the percentage of the number of students enrolled in open-enrollment charter schools in this state compared to the total number of students enrolled in all public schools in this state, as determined by the commissioner. The commissioner's determination of the number of students enrolled in open-enrollment charter schools in this state and the number of students enrolled in all public schools in this state is based on the enrollment data submitted by school districts and charter schools to the Public Education Information Management System (PEIMS) during the most recent fall PEIMS submission. Annually, the commissioner will post the applicable student enrollment numbers and the percentage of students enrolled in open-enrollment charter schools on the Texas Education Agency (TEA) web page related to the BGP. The commissioner shall hold up to 5.0% of the charter school available capacity in reserve each month.

(2) Up to half of the total capacity of the PSF to guarantee bonds for charter districts may be used to guarantee charter district refunding bonds.

(e) Application process and application processing. An open-enrollment charter holder must apply to the commissioner for the guarantee of eligible bonds by submitting an application electronically through the website of the MAC of Texas or its successor. Before an application for the guarantee will be considered, a charter holder must first be determined by the commissioner to meet criteria for designation as a charter district for purposes of this section. The application submitted through the website of the MAC of Texas or its successor will serve as both a charter holder's application for designation as a charter district and its application for the guarantee.

(1) Application submission and fee. As part of its application, an open-enrollment charter holder must submit the information required under TEC, §45.055(b), and this section and any additional information the commissioner may require. The application and all additional information required by the commissioner must be received before the application will be processed. The open-enrollment charter holder may not submit an application for a guarantee before the governing body of the charter holder adopts a board resolution as defined in subsection (b)(4) of this section.

(A) The amount of the application fee is the amount specified in §33.6 of this title.

(B) The fee is due at the time the application for charter district designation and the guarantee is submitted. An application will not be processed until the fee has been remitted according to the directions provided on the website of the MAC of Texas or its successor and received by TEA.

(C) The fee will not be refunded to an applicant that:

(i) is designated a charter district but is not approved for the guarantee; or

(ii) receives approval for the guarantee but does not sell its bonds before the expiration of its approval for the guarantee.

(D) The fee may be transferred to a subsequent application for the guarantee by a charter district that has been approved for the guarantee if the charter district withdraws its application and sub-

mits the subsequent application before the expiration of its approval for the guarantee.

(2) Eligibility to be designated a charter district.

(A) To be designated a charter district and have its application for the guarantee considered by the commissioner, an open-enrollment charter holder must:

(i) have operated at least one open-enrollment charter school in the state of Texas for at least three years and have had students enrolled in the school for those three years;

(ii) identify in its application for which open-enrollment charter school and, if applicable, for which open-enrollment charter school campus the bond funds will be used;

(iii) in its application, agree that the bonded indebtedness for which the guarantee is sought will be undertaken as an obligation of all entities under common control of the open-enrollment charter holder and agree that all such entities will be liable for the obligation if the open-enrollment charter holder defaults on the bonded indebtedness, provided that an entity that does not operate a charter school in Texas is subject to this subparagraph only to the extent that it has received state funds from the open-enrollment charter holder;

(iv) not have an unresolved corrective action that is more than one year old, unless the open-enrollment charter holder has taken appropriate steps, as determined by the commissioner, to begin resolving the action;

(v) have had, for the past three years, an audit as required by §100.1047 of this title (relating to Accounting for State and Federal Funds) that was completed with unqualified or unmodified opinions;

(vi) have received an investment grade credit rating from a nationally recognized investment rating firm as defined in subsection (b)(16) of this section as specified by TEC, §45.0541, within the last year; and

(vii) not have materially violated a covenant relating to debt obligation in the immediately preceding three years.

(B) For an open-enrollment charter holder to be designated a charter district and have its application for the guarantee considered by the commissioner, each open-enrollment charter school operated under the charter must not have an accreditation rating of Not Accredited-Revoked and must have a rating of met standard or met alternative standard as its most recent state academic accountability rating. However, if an open-enrollment charter school operated under the charter is not yet rated because the school is in its first year of operation, that fact will not impact the charter holder's eligibility to be designated a charter district and apply for the guarantee.

(3) Application processing. All applications received during a calendar month that were submitted by open-enrollment charter holders determined to meet the criteria in paragraph (2) of this subsection will be held until the 15th business day of the subsequent month. On the 15th business day of each month, the commissioner will announce the results of the pro rata allocation of available capacity, if pro rata allocation is necessary, and process applications for initial approval for the guarantee, up to the available capacity as of the application deadline, subject to the requirements of this section.

(A) If the available capacity is insufficient to guarantee the total value of the bonds for all applicant charter districts, the commissioner will allocate the available capacity on a pro rata basis to each applicant charter district. For each applicant, the commissioner will determine the percentage of the total amount of all applicants' proposed bonds that the applicant's proposed bonds represent. The commissioner will then allocate to that applicant the same percentage of the available capacity, but in no event will an allocation be equal to an amount less than $500,000.

(B) The actual guarantee of the bonds is subject to the approval process prescribed in subsection (f) of this section.

(C) An applicant charter district is ineligible for consideration for the guarantee if its lowest credit rating from any nationally recognized investment rating firm as defined in subsection (b)(16) of this section is the same as or higher than that of the PSF.

(4) Late application. An application received after the application deadline will be considered a valid application for the subsequent month, unless withdrawn by the submitting open-enrollment charter holder before the end of the subsequent month.

(5) Notice of application status. Each open-enrollment charter holder that submits a valid application will be notified of the application status within 15 business days of the application deadline.

(6) Reapplication. If an open-enrollment charter holder does not receive designation as a charter district, does not receive approval for the guarantee, or for any reason does not receive approval of the bonds from the attorney general within the time period specified in subsection (f)(5) of this section, the charter holder may reapply in a subsequent month. An application that was denied approval for the guarantee or that was submitted by a charter holder that the commissioner determined did not meet the criteria for charter district designation will not be retained for consideration in subsequent months. A reapplication fee will be required unless the conditions described in subsection (e)(1)(D) of this section apply to the charter holder.

(f) Approval for the guarantee; charter district responsibilities on receipt of approval.

(1) Approval for the guarantee and charter renewal or amendment.

(A) If an open-enrollment charter holder applies for the guarantee within the 12 months before the charter holder's charter is due to expire, application approval will be contingent on successful renewal of the charter, and the bonds for which the open-enrollment charter holder is applying for the guarantee may not be issued before the successful renewal of the charter.

(B) If an open-enrollment charter holder proposes to use the proceeds of the bonds for which it is applying for the guarantee for an expansion that requires a charter amendment, application approval will be contingent on approval of the amendment, and the bonds may not be issued before approval of the amendment.

(2) Initial and final approval provisions.

(A) The commissioner may require an applicant charter district to obtain final approval for the guarantee as described in paragraph (4) of this subsection if:

(i) during the monthly estimation of PSF capacity described in §33.6 of this title, the commissioner determines that the available capacity of the PSF as described in §33.6 of this title is 10% or less; or

(ii) during the monthly estimation of the available capacity of the PSF to guarantee bonds for charter districts described in subsection (d) of this section, the commissioner determines that the available capacity of the PSF to guarantee bonds for charter districts is 10% or less.

(B) If the commissioner has not made such a determination:

(i) the commissioner will consider the initial approval described in paragraph (3) of this subsection as both the initial and final approval; and

(ii) an applicant charter district that has received notification of initial approval for the guarantee, as described in paragraph (3) of this subsection, may consider that notification as notification of initial and final approval for the guarantee and may complete the sale of the applicable bonds.

(3) Initial approval.

(A) The following provisions apply to all applications for the guarantee, regardless of whether an application is for a new money, refunding, or combination issue. Under TEC, §45.056, the commissioner will investigate the financial status of the applicant charter district and the accreditation status of all open-enrollment charter schools operated under the charter. For the charter district's application to be eligible for initial approval by the commissioner, each open-enrollment charter school operated under the charter must be accredited, and the charter district must be financially sound. The commissioner's review will include review of the following:

(i) the purpose of the bond issue;

(ii) the accreditation status, as defined by §97.1055 of this title (relating to Accreditation Status), of all open-enrollment charter schools operated under the charter in accordance with the following, except that, if an open-enrollment charter school operated under the charter has not yet received an accreditation rating because it is in its first year of operation, that fact will not impact the charter district's eligibility for consideration for the guarantee:

(I) if the accreditation status of all open-enrollment charter schools operated under the charter is Accredited, the charter district will be eligible for consideration for the guarantee;

(II) if the accreditation status of any open-enrollment charter school operated under the charter is Accredited-Warned or Accredited-Probation, the commissioner will investigate the underlying reason for the accreditation rating to determine whether the accreditation rating is related to the open-enrollment charter school's financial soundness. If the accreditation rating is related to the open-enrollment charter school's financial soundness, the charter district will not be eligible for consideration for the guarantee; or

(III) if the accreditation status of any open-enrollment charter school operated under the charter is Not Accredited-Revoked, the charter district will not be eligible for consideration for the guarantee;

(iii) the charter district's financial status and stability, regardless of each open-enrollment charter school's accreditation rating, including approval of the bonds by the attorney general under the provisions of TEC, §53.40;

(iv) whether TEA has required the charter district to submit a financial plan under §109.1101 of this title (relating to Financial Solvency Review) in the last three years;

(v) the audit history of the charter district and of all open-enrollment charter schools operated under the charter;

(vi) the charter district's compliance with statutes and rules of TEA and with applicable state and federal program requirements and the compliance of all open-enrollment charter schools operated under the charter with these statutes, rules, and requirements;

(vii) any interventions and sanctions to which the charter district has been subject; to which any of the open-enrollment charter schools operated under the charter has been subject; and, if applicable, to which any of the open-enrollment charter school campuses operated under the charter has been subject;

(viii) formal complaints received by TEA that have been made against the charter district, against any of the open-enrollment charter schools operated under the charter, or against any of the open-enrollment charter school campuses operated under the charter;

(ix) the state academic accountability rating of all open-enrollment charter schools operated under the charter and the campus ratings of all open-enrollment charter school campuses operated under the charter;

(x) any unresolved corrective actions that are less than one year old; and

(xi) whether the charter district is considered a high-risk grantee by the TEA office responsible for planning, grants, and evaluation.

(B) The commissioner will limit approval for the guarantee to a charter district with a historical debt service coverage ratio, based on annual debt service, of at least 1.1 for the most recently completed fiscal year and a projected debt service coverage ratio, based on projected revenues and expenses and maximum annual debt service, of at least 1.2. If the bond issuance for which an application has been submitted is the charter district's first bond issuance, the commissioner will evaluate only projected debt service coverage. Projections of revenues and expenses are subject to approval by the commissioner.

(C) The commissioner will grant or deny initial approval for the guarantee based on the review described in subparagraph (A) of this paragraph and the limitation described in subparagraph (B) of this paragraph and will provide an applicant charter district whose application has received initial approval for the guarantee written notice of initial approval.

(4) Final approval. The provisions of this paragraph apply only as described in paragraph (2) of this subsection. A charter district must receive final approval before completing the sale of the bonds for which the charter district has received notification of initial approval.

(A) A charter district that has received initial approval must provide a written notice to TEA two business days before issuing a preliminary official statement (POS) for the bonds that are eligible for the guarantee or two business days before soliciting investment offers, if the bonds will be privately placed without the use of a POS.

(i) The charter district must receive written confirmation from TEA that the capacity continues to be available and must continue to meet the requirements of subsection (e)(2) of this section before proceeding with the public or private offer to sell bonds.

(ii) TEA will provide this notification within one business day of receiving the notice of the POS or notice of other solicitation offers to sell the bonds.

(B) A charter district that received confirmation from TEA in accordance with subparagraph (A) of this paragraph must provide written notice to TEA of the placement of an item to approve the bond sale on the agenda of a meeting of the bond issuer's board of directors no later than two business days before the meeting. If the bond sale is completed pursuant to a delegation by the issuer to a pricing officer or committee, notice must be given to TEA no later than two business days before the execution of a bond purchase agreement by such pricing officer or committee.

(i) The charter district must receive written confirmation from TEA that the capacity continues to be available for the bond sale before the approval of the sale by the bond issuer or by the pricing officer or committee.

(ii) TEA will provide this notification within one business day before the date that the bond issuer expects to complete the sale by official action of the bond issuer or of a pricing officer or committee.

(C) TEA will process requests for final approval from charter districts that have received initial approval on a first come, first served basis. Requests for final approval must be received before the expiration of the initial approval.

(D) A charter district may provide written notification as required by this paragraph by facsimile transmission, by email, or in another manner prescribed by the commissioner.

(5) Charter district responsibilities on receipt of approval.

(A) Once a charter district is awarded initial approval for the guarantee, each issuance of the bonds must be approved by the attorney general within 180 days of the date of the letter granting the approval for the guarantee. The initial approval for the guarantee will expire at the end of the 180-day period. The commissioner may extend the 180-day period, based on extraordinary circumstances, on receiving a written request from the charter district or the attorney general before the expiration of the 180-day period.

(B) If applicable, the charter district must comply with the provisions for final approval described in paragraph (4) of this subsection to maintain approval for the guarantee.

(C) If the bonds are not approved by the attorney general within 180 days of the date of the letter granting the approval for the guarantee, the commissioner will consider the application withdrawn, and the charter district must reapply for a guarantee.

(D) A charter district may not represent bonds as guaranteed for the purpose of pricing or marketing the bonds before the date of the letter granting approval for the guarantee.

(E) The charter district must provide evidence of the final investment grade rating of the bonds to TEA after receiving initial approval but before the distribution of the preliminary official statement for the bonds or, if the bonds are offered in a private placement, before approval of the bond sale by the governing body of the charter district.

(F) A charter district must identify by legal description any educational facility purchased or improved with bond proceeds no later than 30 days after entering into a binding commitment to expend bond proceeds for that purpose. The charter district must identify at that time whether and to what extent debt service will be paid with any source of revenue other than state funds.

(g) Allocation of specific holdings. If necessary to successfully operate the BGP, the commissioner may allocate specific holdings of the PSF to specific bond issues guaranteed under this section. This allocation will not prejudice the right of the State Board of Education (SBOE) to dispose of the holdings according to law and requirements applicable to the fund; however, the SBOE will ensure that holdings of the PSF are available for a substitute allocation sufficient to meet the purposes of the initial allocation. This allocation will not affect any rights of the bond holders under law.

(h) Defeasance. The guarantee will be completely removed when bonds guaranteed by the BGP are defeased, and such a provision must be specifically stated in the bond resolution. If bonds guaranteed by the BGP are defeased, the charter district must notify the commissioner in writing within ten calendar days of the action.

(i) Payments. For purposes of the provisions of TEC, Chapter 45, Subchapter C, matured principal and interest payments are limited to amounts due on guaranteed bonds at scheduled maturity, at scheduled interest payment dates, and at dates when bonds are subject to mandatory redemption, including extraordinary mandatory redemption, in accordance with their terms. All such payment dates, including mandatory redemption dates, must be specified in the bond order or other document pursuant to which the bonds initially are issued. Without limiting the provisions of this subsection, payments attributable to an optional redemption or a right granted to a bondholder to demand payment on a tender of such bonds according to the terms of the bonds do not constitute matured principal and interest payments.

(j) Guarantee restrictions. The guarantee provided for eligible bonds under the provisions of TEC, Chapter 45, Subchapter C, is restricted to matured bond principal and interest. The guarantee applies to all matured interest on eligible bonds, whether the bonds were issued with a fixed or variable interest rate and whether the interest rate changes as a result of an interest reset provision or other bond resolution provision requiring an interest rate change. The guarantee does not extend to any obligation of a charter district under any agreement with a third party relating to bonds that is defined or described in state law as a "bond enhancement agreement" or a "credit agreement," unless the right to payment of such third party is directly as a result of such third party being a bondholder.

(k) Notice of default. A charter district that has determined that it is or will be unable to pay maturing or matured principal or interest on a guaranteed bond must immediately, but not later than the fifth business day before the maturing or matured principal or interest becomes due, notify the commissioner.

(l) Charter District Bond Guarantee Reserve Fund. The Charter District Bond Guarantee Reserve Fund is a special fund in the state treasury outside the general revenue fund and is managed by the SBOE in the same manner that the PSF is managed by the SBOE.

(m) Payment from Charter District Bond Guarantee Reserve Fund and PSF.

(1) Immediately after the commissioner receives the notice described in subsection (k) of this section, the commissioner will notify the TEA division responsible for administering the PSF of the notice of default and instruct the comptroller to transfer from the Charter District Bond Guarantee Reserve Fund established under TEC, §45.0571, to the charter district's paying agent the amount necessary to pay the maturing or matured principal or interest.

(2) If money in the reserve fund is insufficient to pay the amount due on a bond under paragraph (1) of this subsection, the commissioner will instruct the comptroller to transfer from the appropriate account in the PSF to the charter district's paying agent the amount necessary to pay the balance of the unpaid maturing or matured principal or interest.

(3) Immediately after receipt of the funds for payment of the principal or interest, the paying agent must pay the amount due and forward the canceled bond or coupon to the comptroller. The comptroller will hold the canceled bond or coupon on behalf of the fund or funds from which payment was made.

(4) To ensure that the charter district reimburses the reserve fund and the PSF, if applicable, the commissioner will withhold from state funds otherwise payable to the charter district the amount that the charter district owes in reimbursement.

(5) Funds intercepted for reimbursement under paragraph (4) of this subsection will be used to fully reimburse the PSF before any funds reimburse the reserve fund. If the funds intercepted under paragraph (4) of this subsection are insufficient to fully reimburse the PSF with interest, subsequent payments into the reserve fund will first be applied to any outstanding obligation to the PSF.

(6) Following full reimbursement to the reserve fund and the PSF, if applicable, with interest, the comptroller will further cancel the bond or coupon and forward it to the charter district for which payment was made. Interest will be charged at the rate determined under the Texas Government Code (TGC), §2251.025(b). Interest will accrue as specified in the TGC, §2251.025(a) and (c). For purposes of this section, the "date the payment becomes overdue" that is referred to in the TGC, §2251.025(a), is the date that the comptroller makes the payment to the charter district's paying agent.

(n) Bonds not accelerated on default. If a charter district fails to pay principal or interest on a guaranteed bond when it matures, other amounts not yet mature are not accelerated and do not become due by virtue of the charter district's default.

(o) Reimbursement of Charter District Bond Guarantee Reserve Fund or PSF. If payment from the Charter District Bond Guarantee Reserve Fund or the PSF is made on behalf of a charter district, the charter district must reimburse the amount of the payment, plus interest, in accordance with the requirements of TEC, §45.061.

(p) Repeated failure to pay. If a total of two or more payments are made under the BGP on the bonds of a charter district, the commissioner may take action in accordance with the provisions of TEC, §45.062.

(q) Report on the use of funds and confirmation of use of funds by independent auditor. A charter district that issues bonds approved for the guarantee must report to TEA annually in a form prescribed by the commissioner on the use of the bond funds until all bond proceeds have been spent. The charter district's independent auditor must confirm in the charter district's annual financial report that bond funds have been used in accordance with the purpose specified in the application for the guarantee.

(r) Failure to comply with statute or this section. An open-enrollment charter holder's failure to comply with the requirements of TEC, Chapter 45, Subchapter C, or with the requirements of this section, including by making any material misrepresentations in the charter holder's application for charter district designation and the guarantee, constitutes a material violation of the open-enrollment charter holder's charter.

§33.8. Compliance with Securities and Exchange Commission (SEC) Rule 15c2-12 Pertaining to Disclosure of Information Relating to the Bond Guarantee Program.

(a) Definitions. As used in this section, the following terms have the meanings ascribed to such terms below.

(1) Agency means the Texas Education Agency and any successors or assigns thereto with respect to the management and administration of the Program or the investment of the Permanent School Fund.

(2) Financial Obligation means, with respect to the Program, a:

(A) debt obligation;

(B) derivative instrument entered into in connection with, or pledged as security or a source of a payment for, an existing or planned debt obligation; or

(C) guarantee of a debt obligation or any such derivative instrument; provided that "financial obligation" shall not include municipal securities as to which a final official statement (as defined in the Rule) has been provided to the MSRB consistent with the Rule.

(3) Guaranteed Bonds means obligations for which application is made and granted for a guarantee under the Program.

(4) Issuing District means a school district or charter district which issues Guaranteed Bonds.

(5) MSRB means the Municipal Securities Rulemaking Board or any successor to its functions under the Rule.

(6) Official Statement means each offering document of an Issuing District used in the offering and/or sale of Guaranteed Bonds.

(7) Order means the resolution, order, ordinance or other instrument or instruments of an Issuing District pursuant to which Guaranteed Bonds are issued and the rights of the holders and beneficial owners thereof are established.

(8) Permanent School Fund means the perpetual school fund established by Article VII, Section 2 of the Texas Constitution.

(9) Program means the program of bond guarantee by the Permanent School Fund, which program has been established by Article VII, Sections 2 and 5 of the Texas Constitution, and is administered in accordance with Subchapter C, Chapter 45, Texas Education Code, as amended, and the rules and regulations of the Agency. The term Program shall also include the rules, regulations and policies of the Agency with respect to the administration of such program of guarantee of school district bonds, as well as the rules, regulations, policies of the Agency with respect to the administration, and the operational and financial results, of the Permanent School Fund.

(10) Program Regulation means this rule of the Agency which is promulgated for the purpose of establishing and undertaking with respect to the Program which satisfies the requirements of the Rule.

(11) PSF Corporation means the Permanent School Fund Corporation created by the State Board of Education pursuant to, and having the powers set forth in, Subchapter B of Chapter 43, Texas Education Code, as amended.

(12) Rule means SEC Rule 15c2-12, as amended from time to time.

(13) SEC means the United States Securities and Exchange Commission.

(b) Annual Reports.

(1) The Agency shall provide annually to the MSRB, within six months after the end of each fiscal year, financial information and operating data with respect to Program of the general type which describes the Program and which is included in an Official Statement for Guaranteed Bonds, which is prepared by the PSF Corporation. Any financial statements to be provided need not be audited. Such information shall be transmitted electronically to the MSRB, in such format and accompanied by such identifying information as prescribed by the MSRB.

(2) If the Agency changes its fiscal year from the year ending August 31, it will file notice with the MSRB of the change (and of the date of the new fiscal year end) prior to the next date by which the Agency otherwise would be required to provide financial information and data pursuant to this section.

(3) The financial information and operating data to be provided pursuant to this section may be set forth in full in one or more

documents or may be included by specific reference to any document (including an official statement or other offering document, if it is available from the MSRB) that theretofore has been provided to either the MSRB or filed with the SEC.

(c) Event Notices.

(1) The Agency shall notify the MSRB, in a timely manner (but not in excess of ten business days after the occurrence of the event), of any of the following events with respect to the Program:

(A) Principal and interest payment delinquencies;

(B) Non-payment related defaults if such event is material within the meaning of the federal securities laws;

(C) Unscheduled draws on debt service reserves reflecting financial difficulties;

(D) Unscheduled draws on credit enhancements reflecting financial difficulties;

(E) Substitution of credit or liquidity providers, or their failure to perform;

(F) Adverse tax opinions, the issuance by the Internal Revenue Service of proposed or final determinations of taxability, Notices of Proposed Issue (IRS Form 5701-TEB), or other material notices or determinations with respect to the tax status of the Program, or other material events affecting the tax status of the Program;

(G) Modifications to rights of holders of the Bonds, if such event is material within the meaning of the federal securities laws;

(H) Bond calls, if such event is material within the meaning of the federal securities laws, and tender offers;

(I) Defeasances;

(J) Release, substitution, or sale of property securing repayment of Guaranteed Bonds, if such event is material within the meaning of the federal securities laws;

(K) Rating changes of the Program;

(L) Bankruptcy, insolvency, receivership, or similar event of the Program, which shall occur as described below;

(M) The consummation of a merger, consolidation, or acquisition involving the Program or the sale of all or substantially all of its assets, other than in the ordinary course of business, the entry into a definitive agreement to undertake such an action or the termination of a definitive agreement relating to any such actions, other than pursuant to its terms, if such event is material within the meaning of the federal securities laws;

(N) Appointment of a successor or additional trustee with respect to the Program or the change of name of a trustee, if such event is material within the meaning of the federal securities laws;

(O) The incurrence of a financial obligation of the Program, if material, or agreement to covenants, events of default, remedies, priority rights, or other similar terms of a financial obligation of the Program, any of which affect security holders, if material; and

(P) Default, event of acceleration, termination event, modification of terms, or other similar events under the terms of a financial obligation of the Program, any of which reflect financial difficulties.

(2) For these purposes, any event described in the immediately preceding paragraph (L) is considered to occur when any of the following occur: the appointment of a receiver, fiscal agent, or similar officer for the Program in a proceeding under the United States Bankruptcy Code or in any other proceeding under state or federal law in which a court or governmental authority has assumed jurisdiction over substantially all of the assets or business of the Program, or if such jurisdiction has been assumed by leaving the existing governing body and officials or officers in possession but subject to the supervision and orders of a court or governmental authority, or the entry of an order confirming a plan of reorganization, arrangement, or liquidation by a court or governmental authority having supervision or jurisdiction over substantially all of the assets or business of the Program.

(3) The Agency shall notify the MSRB, in a timely manner, of any failure by the Agency to provide financial information or operating data in accordance with Section 1 of this Program Regulation by the time required by such Section.

(4) Nothing in this Program Regulation shall obligate the Agency to make any filings or disclosures with respect to Guaranteed Bonds, as the obligations of the Agency hereunder pertain solely to the Program.

(d) Limitations, Disclaimers, and Amendments.

(1) With respect to a series of Guaranteed Bonds, the Agency shall be obligated to observe and perform the covenants specified in this Program Regulation for so long as, but only for so long as, the Agency remains an "obligated person" with respect to the Guaranteed Bonds within the meaning of the Rule.

(2) The provisions of this Program Regulation are for the sole benefit of each Issuing District, as well as holders and beneficial owners of the Guaranteed Bonds; nothing in this Program Regulation, express or implied, shall give any benefit or any legal or equitable right, remedy, or claim hereunder to any other person. The Agency undertakes to provide only the financial information, operating data, financial statements, and notices which it has expressly agreed to provide pursuant to this Program Regulation and does not hereby undertake to provide any other information, even if such information may be relevant or material to a complete presentation of the Program's financial results, condition, or prospects. The Agency does not undertake to update any information provided in accordance with this Program Regulation or otherwise, except as expressly provided herein. The Agency does not make any representation or warranty concerning such information or its usefulness to a decision to invest in or sell Guaranteed Bonds at any time.

(3) Under no circumstances shall the Agency or the Program be liable to the holder or beneficial owner of any Guaranteed Bond, the Issuing District or any other person or entity, in contract or tort, for damages resulting in whole or in part from any breach by the Agency, whether negligent or without fault on its part, of any covenant specified in this Program Regulation, but every right and remedy of any such person, in contract or tort, for or on account of any such breach shall be limited to an action for mandamus or specific performance.

(4) No default by the Agency in observing or performing its obligations under this Program Regulation shall comprise a breach of or default under the Order for purposes of any other provision of the Order. Nothing in this Program Regulation is intended or shall act to disclaim, waive, or otherwise limit the duties of the Agency under federal and state securities laws.

(5) The provisions of this Program Regulation may be amended by the Agency from time to time to adapt to changed circumstances that arise from a change in legal requirements, a change in law, or a change in the identity, nature, status, or type of operations of the Agency, but only if:

(A) the provisions of this Program Regulation, as so amended, would have permitted an underwriter to purchase or sell

Guaranteed Bonds in the primary offering of the Guaranteed Bonds in compliance with the Rule, taking into account any amendments or interpretations of the Rule since such offering as well as such changed circumstances; and

(B) either:

(i) the holders of a majority in aggregate principal amount of the outstanding Guaranteed Bonds consent to such amendment, or

(ii) a person that is unaffiliated with the Agency (such as nationally recognized bond counsel) determines that such amendment will not materially impair the interest of the holders and beneficial owners of the Guaranteed Bonds.

(6) If the Agency so amends the provisions of this Program Regulation, it shall include with any amended financial information or operating data next provided in accordance with subsection (b) of this section (relating to Compliance with SEC Rule 15c2-12 Pertaining to Disclosure of Information Relating to the Bond Guarantee Program) an explanation, in narrative form, of the reason for the amendment and of the impact of any change in the type of financial information or operating data so provided. The Agency may also amend or repeal the provisions of this continuing disclosure agreement if the SEC amends or repeals the applicable provisions of the Rule or a court of final jurisdiction enters judgment that such provisions of the Rule are invalid, but only if and to the extent that the provisions of this sentence would not prevent an underwriter from lawfully purchasing or selling Guaranteed Bonds in the primary offering of the Guaranteed Bonds.

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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Cristina De La Fuente-Valadez
Director, Rulemaking
Texas Education Agency
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For further information, please call: (512) 475-1497

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CHAPTER 111. TEXAS ESSENTIAL KNOWLEDGE AND SKILLS FOR MATHEMATICS

SUBCHAPTER D. OTHER HIGH SCHOOL MATHEMATICS COURSES

19 TAC §111.56

The State Board of Education (SBOE) proposes new §111.56, concerning high school mathematics courses. The proposed new section would add a new Advanced Placement (AP) mathematics course to align with current offerings from the College Board.

BACKGROUND INFORMATION AND JUSTIFICATION: For students to earn state credit toward specific graduation requirements, a course must be approved by the SBOE and included in SBOE administrative rule. In September 2023, the College Board will add a new mathematics course to its AP course catalog. The proposed new rule would add a new AP course to the mathematics Texas Essential Knowledge and Skills (TEKS) so that school districts and charter schools may offer the new AP Precalculus course for state credit toward mathematics graduation requirements.

The SBOE approved the proposed new section for first reading and filing authorization at its November 18, 2022 meeting.

FISCAL IMPACT: Monica Martinez, associate commissioner for standards and programs, has determined that there are no additional costs to state or local government required to comply with the proposal.

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

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

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

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

GOVERNMENT GROWTH IMPACT: Texas Education Agency (TEA) staff prepared a Government Growth Impact Statement assessment for this proposed rulemaking. During the first five years the proposed rulemaking would be in effect, it would create a new regulation by adding TEKS for a new AP mathematics course.

The proposed rulemaking would not create or eliminate a government program; would not require the creation of new employee positions or elimination of existing employee positions; would not require an increase or decrease in future legislative appropriations to the agency; would not require an increase or decrease in fees paid to the agency; would not expand, limit, or repeal an existing regulation; would not increase or decrease the number of individuals subject to its applicability; and would not positively or adversely affect the state's economy.

PUBLIC BENEFIT AND COST TO PERSONS: Ms. Martinez has determined that for each year of the first five years the proposal is in effect, the public benefit anticipated as a result of enforcing the proposal would be added flexibility in course options for students to meet high school graduation requirements. There is no anticipated economic cost to persons who are required to comply with the proposal.

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

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

PUBLIC COMMENTS: The public comment period on the proposal begins December 23, 2022, and ends at 5:00 p.m. on January 27, 2023. A form for submitting public comments is available on the TEA website at https://tea.texa-

s.gov/About_TEA/Laws_and_Rules/SBOE_Rules_(TAC)/Proposed_State_Board_of_Education_Rules/. The SBOE will take registered oral and written comments on the proposal at the appropriate committee meeting in January-February 2023 in accordance with the SBOE board operating policies and procedures. A request for a public hearing on the proposal submitted under the Administrative Procedure Act must be received by the commissioner of education not more than 14 calendar days after notice of the proposal has been published in the *Texas Register* on December 23, 2022.

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

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

§111.56. Advanced Placement (AP) Precalculus (One Credit).

(a) General requirements. Students shall be awarded one credit for successful completion of this course. Recommended prerequisites: Algebra II and Geometry.

(b) Content requirements. Content requirements for Advanced Placement (AP) Precalculus are prescribed in the College Board Publication Advanced Placement Course Description Mathematics: Precalculus, published by The College Board. This publication may be obtained from the College Board Advanced Placement 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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Cristina De La Fuente-Valadez
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CHAPTER 127. TEXAS ESSENTIAL KNOWLEDGE AND SKILLS FOR CAREER DEVELOPMENT AND CAREER AND TECHNICAL EDUCATION

SUBCHAPTER A. MIDDLE SCHOOL

The State Board of Education (SBOE) proposes the repeal of §§127.1, 127.2, and 127.3 and new §127.2, concerning Texas Essential Knowledge and Skills (TEKS) for career development and career and technical education. The proposed revisions would repeal two existing middle school courses, add a new middle school course, and repeal implementation language that will no longer be relevant.

BACKGROUND INFORMATION AND JUSTIFICATION: Texas Education Code (TEC), §28.016, requires each school district to ensure that at least once in Grade 7 or 8 each student receives instruction in high school, college, and career preparation. The instruction must include information regarding the creation of a high school personal graduation plan, the distinguished level of achievement, each endorsement, college readiness standards, and potential career choices and the education needed to enter those careers. School districts are permitted to provide the instruction as part of an existing career and technical education course designated by the SBOE as appropriate for that purpose.

The proposed revisions would replace two existing courses with a single updated course in college and career investigation and preparation. Proposed new §127.2, Flight Plans, Adopted 2022, would be available for districts to use in meeting the requirements of TEC, §28.016.

The implementation section for the subchapter would be repealed and new implementation language added to proposed new §127.2 to align with the changes.

The SBOE approved the proposed revisions for first reading and filing authorization at its November 18, 2022 meeting.

FISCAL IMPACT: Monica Martinez, associate commissioner for standards and programs, has determined that there are no additional costs to the state. During the first five years the proposal is in effect, there may be fiscal implications for school districts and open-enrollment charter schools to implement the proposed new course, which may include the need for professional development and revisions to district-developed databases, curriculum, and scope and sequence documents. Since curriculum and instruction decisions are made at the local district level, it is difficult to estimate the fiscal impact on any given district.

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

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

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

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

GOVERNMENT GROWTH IMPACT: Texas Education Agency (TEA) staff prepared a Government Growth Impact Statement assessment for this proposed rulemaking. The proposed rulemaking would create a new regulation and repeal existing regulations by adding TEKS for a new college and career exploration course and removing existing courses and related implementation language.

The proposed rulemaking would not create or eliminate a government program; would not require the creation of new employee positions or elimination of existing employee positions; would not require an increase or decrease in future legislative appropriations to the agency; would not require an increase or decrease in fees paid to the agency; would not expand or limit an existing regulation; would not increase or decrease the number of individuals subject to its applicability; and would not positively or adversely affect the state's economy.

PUBLIC BENEFIT AND COST TO PERSONS: Ms. Martinez has determined that for each year of the first five years the proposal is in effect, the public benefit anticipated as a result of enforcing the proposal would be updating and streamlining the standards for college and career exploration to ensure the standards remain current. There is no anticipated economic cost to persons who are required to comply with the proposal.

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

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

PUBLIC COMMENTS: The public comment period on the proposal begins December 23, 2022, and ends at 5:00 p.m. on January 27, 2023. A form for submitting public comments is available on the TEA website at https://tea.texas.gov/About_TEA/Laws_and_Rules/SBOE_Rules_(TAC)/Proposed_State_Board_of_Education_Rules/. The SBOE will take registered oral and written comments on the proposal at the appropriate committee meeting in January-February 2023 in accordance with the SBOE board operating policies and procedures. A request for a public hearing on the proposal submitted under the Administrative Procedure Act must be received by the commissioner of education not more than 14 calendar days after notice of the proposal has been published in the *Texas Register* on December 23, 2022.

19 TAC §§127.1 - 127.3

STATUTORY AUTHORITY. The repeals are proposed under Texas Education Code (TEC), §7.102(c)(4), which requires the State Board of Education (SBOE) to establish curriculum and graduation requirements; TEC, §28.002(a), which identifies the subjects of the required curriculum; TEC, §28.002(c), which requires the SBOE to identify by rule the essential knowledge and skills of each subject in the required curriculum that all students should be able to demonstrate and that will be used in evaluating instructional materials and addressed on the state assessment instruments; and TEC, §28.016, which requires each school district to ensure that at least once in Grade 7 or 8 each student receives instruction in high school, college, and career preparation. TEC, §28.016(c)(2), permits school districts to provide the instruction as part of an existing career and technical education course designated by the SBOE as appropriate for that purpose.

CROSS REFERENCE TO STATUTE. The repeals implement Texas Education Code, §§7.102(c)(4), 28.002(a) and (c), and 28.016.

§127.1. Implementation of Texas Essential Knowledge and Skills for Career Development, Middle School, Adopted 2015.

§127.2. Investigating Careers, Adopted 2015.

§127.3. College and Career Readiness, Adopted 2015.

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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19 TAC §127.2

STATUTORY AUTHORITY. The new section is proposed under Texas Education Code (TEC), §7.102(c)(4), which requires the State Board of Education (SBOE) to establish curriculum and graduation requirements; TEC, §28.002(a), which identifies the subjects of the required curriculum; TEC, §28.002(c), which requires the SBOE to identify by rule the essential knowledge and skills of each subject in the required curriculum that all students should be able to demonstrate and that will be used in evaluating instructional materials and addressed on the state assessment instruments; and TEC, §28.016, which requires each school district to ensure that at least once in Grade 7 or 8 each student receives instruction in high school, college, and career preparation. TEC, §28.016(c)(2), permits school districts to provide the instruction as part of an existing career and technical education course designated by the SBOE as appropriate for that purpose.

CROSS REFERENCE TO STATUTE. The new section implements Texas Education Code, §§7.102(c)(4), 28.002(a) and (c), and 28.016.

§127.2. Flight Plans, Adopted 2022.

(a) Implementation. The provisions of this section shall be implemented by school districts beginning with the 2023-2024 school year.

(b) General requirements. This course is recommended for students in Grades 7 and 8.

(c) Introduction.

(1) Career and technical education (CTE) instruction provides content aligned with challenging academic standards and relevant technical knowledge and skills for students to further their education and succeed in current or emerging professions.

(2) Career development is a lifelong pursuit of answers to the questions: Who am I? Why am I here? What am I meant to do with my life? Will my desired career path provide a self-sufficient wage? What occupations are in the highest demand that align to my values and interests? It is vital that students have a clear sense of direction for their career choice. Education and career planning is a critical step and is essential to success.

(3) The career development process is unique to every person and evolves throughout one's life. In Flight Plans, students use decision-making and problem-solving skills for individual career and academic planning. Students explore valid, reliable educational and career information to learn more about themselves and their interests and abilities. Students integrate skills from academic subjects, information technology, and interpersonal communication to make informed decisions. This course is designed to guide students through the process of

investigating and developing a college and career readiness flight plan. Students use aptitude and interest inventory assessments, software, or other tools available to explore college and career areas of personal interest. Students use this information to explore a variety of career paths, especially those in demand, and begin mapping their anticipated secondary coursework and potential postsecondary experiences that are in alignment with their goals.

(4) The goal of this course is to help students build career awareness and engage in deep exploration and study of the Texas CTE career clusters to create a foundation for success in high school, possible postsecondary studies, and careers. Students research labor market information, learn job-seeking skills, and create documents required for employment.

(5) Students are encouraged to explore and participate in extended learning experiences such as career and technical student organizations and other leadership or extracurricular organizations.

(6) Statements that contain the word "including" reference content that must be mastered, while those containing the phrase "such as" are intended as possible illustrative examples.

(d) Knowledge and skills.

(1) The student takes one or more career interest surveys, aptitude tests, or career assessments and explores various college and career options. The student is expected to:

(A) analyze and discuss the initial results of the assessments;

(B) explore and describe the CTE career clusters;

(C) identify various career opportunities within one or more career clusters; and

(D) research and evaluate emerging occupations related to career interest areas.

(2) The student investigates educational and training requirements for career and education pathways in one or more of the career clusters. The student is expected to:

(A) research and describe applicable academic, technical, certification, and training requirements for one or more of the careers in an identified career cluster; and

(B) use available resources to research and evaluate educational and training options for one or more of the careers in an identified career cluster.

(3) The student analyzes educational and career opportunities. The student is expected to:

(A) describe academic requirements for transitioning from middle school to high school and from high school to career or postsecondary education;

(B) explore and list opportunities for earning college credit in high school such as Advanced Placement examinations, International Baccalaureate examinations, dual credit courses, and local and statewide articulated credit courses;

(C) investigate and describe various methods available to pay for college and other postsecondary training, including financial aid, scholarships, college savings, employee benefits, and other sources of income;

(D) discuss the impact of effective college and career planning;

(E) identify how performance on assessments such as the PSAT/NMSQT®, SAT®, ACT®, ASVAB®, and Texas Success Initiative (TSI®) impact personal academic and career goals;

(F) investigate and describe the importance of co-curricular, extracurricular, career preparation, and extended learning experiences in developing college applications or resumes;

(G) investigate and report on the steps required to participate or enroll in a variety of career and educational opportunities, including entry-level employment, military service, apprenticeships, community and technical colleges, and universities, as applicable to the career;

(H) identify professional associations affiliated with a particular career pathway; and

(I) define entrepreneurship and identify entrepreneurial opportunities within a field of personal interest.

(4) The student develops skills for personal success. The student is expected to:

(A) demonstrate effective time-management and goal-setting strategies;

(B) identify skills that can be transferable among a variety of careers;

(C) give oral professional presentations on a topic related to career and college exploration using appropriate technology;

(D) apply core academic skills to meet personal, academic, and career goals;

(E) explain the value of community service and volunteerism; and

(F) define and identify examples in the workplace of characteristics required for personal and professional success such as work ethic, integrity, dedication, and perseverance.

(5) The student investigates labor market information and recognizes the impact of college and career choices on personal lifestyle. The student is expected to:

(A) analyze labor market trends related to a career of interest;

(B) classify evidence of high-skill, high-wage, or high-demand occupations based on analysis of labor market information;

(C) analyze the effects of changing employment trends, societal needs, and economic conditions on career choices;

(D) prepare a personal budget reflecting the student's desired lifestyle; and

(E) use resources to compare salaries of at least three careers in the student's interest area.

(6) The student investigates job-seeking skills. The student is expected to:

(A) identify the steps of an effective job search;

(B) describe appropriate appearance for an interview; and

(C) participate in a mock interview.

(7) The student creates professional documents required for employment. The student is expected to:

(A) write a resume;

(B) write appropriate business correspondence such as a cover letter and a thank you letter;

(C) complete sample job applications; and

(D) explain protocol for selecting and using references.

(8) The student creates an individual career and academic plan. The student is expected to:

(A) select a career pathway in a desired field, such as military service, entrepreneurship, or industry;

(B) document high school courses and postsecondary educational requirements for that career pathway; and

(C) write a plan for starting one's career after the completion of high school and any post-secondary education.

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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Cristina De La Fuente-Valadez
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For further information, please call: (512) 475-1497

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CHAPTER 129. STUDENT ATTENDANCE

The State Board of Education (SBOE) proposes the repeal of §129.1 and §129.21, concerning student attendance accounting. The proposed repeal would implement House Bill (HB) 3, 86th Texas Legislature, 2019, which removed the SBOE's rulemaking authority related to student attendance.

BACKGROUND INFORMATION AND JUSTIFICATION: Chapter 129, Subchapter A, defines the student attendance allowed in Texas schools. The subchapter was adopted effective September 1, 1996. Chapter 129, Subchapter B, defines the requirements for student attendance accounting for state funding purposes. The subchapter was adopted effective September 1, 1996, and was last amended effective December 25, 2019.

HB 3, 86th Texas Legislature, 2019, renumbered Texas Education Code, §42.004, to §48.004. The renumbered statute was amended to transfer rulemaking authority related to the implementation and administration of student attendance from the SBOE to the commissioner of education. The repeal of the rules is necessary since statutory authority no longer exists.

The SBOE approved the proposed repeals for first reading and filing authorization at its November 18, 2022 meeting.

FISCAL IMPACT: Jim Terry, associate commissioner for school finance, has determined that there are no additional costs to state or local government required to comply with the proposal.

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

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

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

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

GOVERNMENT GROWTH IMPACT: Texas Education Agency (TEA) staff prepared a Government Growth Impact Statement assessment for this proposed rulemaking. During the first five years the proposed rulemaking would be in effect, it would repeal existing regulations to implement HB 3, 86th Texas Legislature, 2019, which removed the SBOE's rulemaking authority related to student attendance.

The proposed rulemaking would not create or eliminate a government program; would not require the creation of new employee positions or elimination of existing employee positions; would not require an increase or decrease in future legislative appropriations to the agency; would not require an increase or decrease in fees paid to the agency; would not create a new regulation; would not expand or limit an existing regulation; would not increase or decrease the number of individuals subject to its applicability; and would not positively or adversely affect the state's economy.

PUBLIC BENEFIT AND COST TO PERSONS: Mr. Terry has determined that for each year of the first five years the proposal is in effect, the public benefit anticipated as a result of enforcing the proposal would be implementing legislation by removing rules for which statutory authority no longer exists. There is no anticipated economic cost to persons who are required to comply with the proposal.

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

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

PUBLIC COMMENTS: The public comment period on the proposal begins December 23, 2022, and ends at 5:00 p.m. on January 27, 2023. A form for submitting public comments is available on the TEA website at https://tea.texas.gov/About_TEA/Laws_and_Rules/SBOE_Rules_(TAC)/Proposed_State_Board_of_Education_Rules/. The SBOE will take registered oral and written comments on the proposal at the appropriate committee meeting in January-February 2023 in accordance with the SBOE board operating policies and procedures. A request for a public hearing on the proposal submitted under the Administrative Procedure Act must be received by the commissioner of education not more than 14 calendar days after notice of the proposal has been published in the *Texas Register* on December 23, 2022.

SUBCHAPTER A. STUDENT ATTENDANCE ALLOWED

19 TAC §129.1

STATUTORY AUTHORITY. The repeal is proposed under Texas Education Code, §48.004, as transferred, redesignated, and amended by House Bill 3, 86th Texas Legislature, 2019, which requires the commissioner to adopt rules, take actions, and require reports necessary to implement and administer student attendance.

CROSS REFERENCE TO STATUTE. The repeal implements Texas Education Code, §48.004, as transferred, redesignated, and amended by House Bill 3, 86th Texas Legislature, 2019.

§129.1. Free Attendance in General.

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. STUDENT ATTENDANCE ACCOUNTING

19 TAC §129.21

STATUTORY AUTHORITY. The repeal is proposed under Texas Education Code, §48.004, as transferred, redesignated, and amended by House Bill 3, 86th Texas Legislature, 2019, which requires the commissioner to adopt rules, take actions, and require reports necessary to implement and administer student attendance.

CROSS REFERENCE TO STATUTE. The repeal implements Texas Education Code,§48.004, as transferred, redesignated, and amended by House Bill 3, 86th Texas Legislature, 2019.

§129.21. Requirements for Student Attendance Accounting for State Funding Purposes.

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

Filed with the Office of the Secretary of State on December 12, 2022.

TRD-202204950
Cristina De La Fuente-Valadez
Director, Rulemaking
Texas Education Agency
Earliest possible date of adoption: January 22, 2023
For further information, please call: (512) 475-1497

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TITLE 22. EXAMINING BOARDS

PART 5. STATE BOARD OF DENTAL EXAMINERS

CHAPTER 104. CONTINUING EDUCATION

22 TAC §104.1

The State Board of Dental Examiners (Board) proposes this amendment to 22 TAC §104.1, concerning continuing education requirements. The proposed amendment updates subsection (6) to reflect the merger of the regional examining board CDCA-WREB-CITA, and includes the regional examining board States Resources for Testing and Assessments (SRTA).

FISCAL NOTE: Casey Nichols, Executive Director, has determined that for the first five-year period the proposed rule is in effect, the proposed rule does not have foreseeable implications relating to cost or revenues of the state or local governments.

PUBLIC BENEFIT-COST NOTE: Casey Nichols has also determined that for the first five-year period the proposed rule is in effect, the public benefit anticipated as a result of this rule will be the protection of public safety and welfare.

LOCAL EMPLOYMENT IMPACT STATEMENT: Casey Nichols has also determined that the proposed rule does not affect local economies and employment.

SMALL AND MICRO-BUSINESS, RURAL COMMUNITY IMPACT STATEMENT: Casey Nichols has determined that no economic impact statement and regulatory flexibility analysis for small businesses, micro-businesses, and rural communities is necessary for this rule.

GOVERNMENT GROWTH IMPACT STATEMENT: The Board has determined that for the first five-year period the proposed rule is in effect, the following government growth effects apply: (1) the rule does not create or eliminate a government program; (2) implementation of the proposed rule does not require the creation or elimination of employee positions; (3) the implementation of the proposed rule does not require an increase or decrease in future appropriations; (4) the proposed rule does not require an increase in fees paid to the agency; (5) the proposed rule does not create a new regulation; (6) the proposed rule does expand an existing regulation; (7) the proposed rule does not increase or decrease the number of individuals subject to it; and (8) the proposed rule does not positively or adversely affect the state's economy.

COST TO REGULATED PERSONS: This proposed rule does not impose a cost on a regulated person and, therefore, is not subject to Tex. Gov't. Code §2001.0045.

Comments on the proposed amendment may be submitted to Casey Nichols, Executive Director, 1801 Congress Avenue, Suite 8.600, Austin, Texas 78701, by fax to (512) 649-2482, or by email to official_rules_comments@tsbde.texas.gov for 30 days following the date that the proposed rule is published in the *Texas Register.* To be considered for purposes of this rulemaking, comments must be: (1) postmarked or shipped by the last day of the comment period; or (2) faxed or emailed by midnight on the last day of the comment period.

This rule is proposed under Texas Occupations Code §254.001(a), which gives the Board authority to adopt rules necessary to perform its duties and ensure compliance with state laws relating to the practice of dentistry to protect the public health and safety.

No statutes are affected by this proposed rule.

§104.1. Requirement.

As a prerequisite to the biennial renewal of a dental or dental hygiene license, proof of completion of 24 hours of acceptable continuing education is required.

(1) Each licensee shall select and participate in the continuing education courses endorsed by the providers identified in §104.2 of this title (relating to Providers). A licensee, other than a licensee who resides outside of the United States, who is unable to meet education course requirements may request that alternative courses or procedures be approved by the Licensing Committee.

(A) Such requests must be in writing and submitted to and approved by the Licensing Committee prior to the expiration of the biennial period for which the alternative is being requested.

(B) A licensee must provide supporting documentation detailing the reason why the continuing education requirements set forth in this section cannot be met and must submit a proposal for alternative education procedures.

(C) Acceptable causes may include unanticipated financial or medical hardships or other extraordinary circumstances that are documented.

(D) A licensee who resides outside of the United States may, without prior approval of the Licensing Committee, complete all required hours of coursework by self-study.

(i) These self-study hours must be provided by those entities cited in §104.2 of this title. Examples of self-study courses include correspondence courses, video courses, audio courses, and reading courses.

(ii) Upon being audited for continuing education compliance, a licensee who submits self-study hours under this subsection must be able to demonstrate residence outside of the United States for all periods of time for which self-study hours were submitted.

(E) Should a request to the Licensing Committee be denied, the licensee must complete the requirements of this section.

(2) Effective September 1, 2018, the following conditions and restrictions shall apply to coursework submitted for renewal purposes:

(A) At least 16 hours of coursework must be either technical or scientific as related to clinical care. The terms "technical" and "scientific" as applied to continuing education shall mean that courses have significant intellectual or practical content and are designed to directly enhance the practitioner's knowledge and skill in providing clinical care to the individual patient.

(B) Effective January 1, 2021, a licensed dentist whose practice includes direct patient care must complete not less than 2 hours of continuing education annually, and not less than 4 hours for each biennial renewal, regarding safe and effective pain management related to the prescription of opioids and other controlled substances. These 4 hours may be used to satisfy the 16-hour technical and scientific requirement. The courses taken to satisfy the safe and effective pain management requirement must include education regarding:

(i) reasonable standards of care;

(ii) the identification of drug-seeking behavior in patients; and

(iii) effectively communicating with patients regarding the prescription of an opioid or other controlled substance.

(C) Up to 8 hours of coursework may be in risk-management courses. Acceptable "risk management" courses include courses in risk management, record-keeping, and ethics. Dentists may complete continuing education courses described by §111.1 of this title (relating to Additional Continuing Education Required) to satisfy a portion of the risk-management requirement.

(D) Up to 8 hours of coursework may be self-study. These self-study hours must be provided by those entities cited in §104.2 of this title. Examples of self-study courses include correspondence courses, video courses, audio courses, and reading courses.

(E) Hours of coursework in the standards of the Occupational Safety and Health Administration (OSHA) annual update course or in cardiopulmonary resuscitation (CPR) basic life support training may not be considered in the 24-hour requirement.

(F) Hours of coursework in practice finance may not be considered in the 24-hour requirement.

(3) As part of the 24-hour requirement, a course in human trafficking prevention approved by the executive commissioner of the Texas Health and Human Services Commission must be completed.

(4) Each licensee shall complete the jurisprudence assessment every four (4) years. This requirement is in addition to the twenty-four (24) hours of continuing education required biennially for the renewal of a license.

(5) A licensee may carry forward continuing education hours earned prior to a renewal period which are in excess of the 24-hour requirement and such excess hours may be applied to subsequent years' requirements. Excess hours to be carried forward must have been earned in a classroom setting and within the one year immediately preceding the renewal period. A maximum of 24 total excess credit hours may be carried forward.

(6) Examiners for The Commission on Dental Competency Assessments-The Western Regional Examining Board-The Council of Interstate Testing Agencies (CDCA-WREB-CITA), [~~the Western Regional Examining Board (WREB)~~] States Resources for Testing and Assessments (SRTA), and [~~for~~] Central Regional Dental Testing Services Inc. (CRDTS) will be allowed credit for no more than 12 hours biennially, obtained from calibration and standardization exercises associated with the examinations.

(7) Any individual or entity may petition one of the providers listed in §104.2 of this title to offer continuing education.

(8) Providers cited in §104.2 of this title will approve individual courses and/or instructors.

(9) A consultant for the SBDE who is also a licensee of the SBDE is eligible to receive up to 12 hours of continuing education credit biennially to apply towards the biennial renewal continuing education requirement under this section.

(A) Continuing education credit hours shall be awarded for the issuance of an expert opinion based upon the review of SBDE cases and for providing assistance to the SBDE in the investigation and prosecution of cases involving violations of the Dental Practice Act and/or the Rules of the SBDE.

(B) The amount of continuing education credit hours to be granted for each consultant task performed shall be determined by the Executive Director, Division Director or manager that authorizes the consultant task to be performed. The award of continuing education credit shall be confirmed in writing and based upon a reasonable assessment of the time required to complete the task.

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

Filed with the Office of the Secretary of State on December 9, 2022.

TRD-202204902
Lauren Studdard
General Counsel
State Board of Dental Examiners
Earliest possible date of adoption: January 22, 2023
For further information, please call: (512) 305-8910

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22 TAC §104.2

The State Board of Dental Examiners (Board) proposes this amendment to 22 TAC §104.2, concerning continuing education providers. The proposed amendment reflects the merger of the regional examining board CDCA-WREB-CITA, and includes the States Resources for Testing and Assessments (SRTA) and Central Regional Dental Testing Services Inc. (CRDTS) as board approved continuing education providers.

FISCAL NOTE: Casey Nichols, Executive Director, has determined that for the first five-year period the proposed rule is in effect, the proposed rule does not have foreseeable implications relating to cost or revenues of the state or local governments.

PUBLIC BENEFIT-COST NOTE: Casey Nichols has also determined that for the first five-year period the proposed rule is in effect, the public benefit anticipated as a result of this rule will be the protection of public safety and welfare.

LOCAL EMPLOYMENT IMPACT STATEMENT: Casey Nichols has also determined that the proposed rule does not affect local economies and employment.

SMALL AND MICRO-BUSINESS, RURAL COMMUNITY IMPACT STATEMENT: Casey Nichols has determined that no economic impact statement and regulatory flexibility analysis for small businesses, micro-businesses, and rural communities is necessary for this rule.

GOVERNMENT GROWTH IMPACT STATEMENT: The Board has determined that for the first five-year period the proposed rule is in effect, the following government growth effects apply: (1) the rule does not create or eliminate a government program; (2) implementation of the proposed rule does not require the creation or elimination of employee positions; (3) the implementation of the proposed rule does not require an increase or decrease in future appropriations; (4) the proposed rule does not require an increase in fees paid to the agency; (5) the proposed rule does not create a new regulation; (6) the proposed rule does expand an existing regulation; (7) the proposed rule does not increase or decrease the number of individuals subject to it; and (8) the proposed rule does not positively or adversely affect the state's economy.

COST TO REGULATED PERSONS: This proposed rule does not impose a cost on a regulated person and, therefore, is not subject to Tex. Gov't. Code §2001.0045.

Comments on the proposed amendment may be submitted to Casey Nichols, Executive Director, 1801 Congress Avenue, Suite 8.600, Austin, Texas 78701, by fax to (512) 649-2482, or by email to official_rules_comments@tsbde.texas.gov for 30 days following the date that the proposed rule is published in the *Texas Register.* To be considered for purposes of this rulemaking, comments must be: (1) postmarked or shipped by the last day of the comment period; or (2) faxed or emailed by midnight on the last day of the comment period.

This rule is proposed under Texas Occupations Code §254.001(a), which gives the Board authority to adopt rules necessary to perform its duties and ensure compliance with state laws relating to the practice of dentistry to protect the public health and safety.

No statutes are affected by this proposed rule.

§104.2. Providers.

(a) The Board hereby establishes a list of providers for continuing education courses. Unless specifically required by state law or Board rule, the Board shall not accept or approve specific continuing education courses for requirements related to the issuance or renewal of licensure, registrations, or sedation/anesthesia permits.

(b) At least once per calendar year, the Board shall review the list of providers for continuing education and any applications submitted for continuing education providers, and shall consider additions or removals of providers from the list provided in this section.

(1) The Presiding Officer may establish an ad hoc committee pursuant to 22 TAC §100.8 (relating to Ad Hoc Committees of the Board) to review the addition or removal of providers and make recommendations to the full Board for approval.

(2) The Board and any ad hoc committee shall consider classifying each provider for full continuing education provider authorization, including clinical, scientific, and sedation/anesthesia provider courses, or for a limited continuing education provider authorization restricted to courses related to risk management, recordkeeping, ethics, and non-clinical dental assistant duties continuing education. If no classification is assigned to a provider, the provider shall be considered a full continuing education provider.

(3) Any addition, removal, or classification of providers shall require a majority vote of the full Board in an open meeting. Any provider being considered for addition, removal, or classification shall be given 10 business days notice of the consideration, and shall be provided an opportunity to appear and make a presentation or submit supporting documentation at the scheduled meeting of the Board or any ad hoc committee regarding the addition, removal, or classification.

(c) Board staff shall develop and provide an application form for continuing education providers. The application form shall provide instructions for submitting provider information and supporting documentation. The Board shall provide the application form for continuing education providers and general instructions on the continuing education provider application process on its public website. Any request to become an approved continuing education provider must be submitted on the application form provided by the Board; failure to utilize the Board's application form shall be grounds to reject the application request.

(d) The Board shall consider the following criteria when reviewing providers:

(1) the health, safety, and welfare of the residents of Texas;

(2) access to providers for licensees and registrants in all portions of Texas;

(3) competency of course providers, and quality of course materials;

(4) internal and external audits, guidelines, safeguards, and standards to ensure consistent and quality education; and

(5) demonstrable clinical, professional, and/or scientific education experience.

(e) Continuing Education courses endorsed by the following providers will meet the criteria for acceptable continuing education hours if such hours are certified by the following providers:

(1) American Dental Association--Continuing Education Recognition Program (CERP);

(2) American Dental Association, its component, and its constituent organizations;

(3) Academy of General Dentistry, and its constituents and approved sponsors;

(4) Dental/dental hygiene schools and programs accredited by the Commission on Dental Accreditation of the American Dental Association;

(5) American Dental Association approved specialty organizations;

(6) American Dental Hygienists' Association, its component, and its constituent organizations;

(7) American Medical Association approved specialty organizations;

(8) American Medical Association approved hospital courses;

(9) National Dental Association, its constituent, and its component societies;

(10) National Dental Hygienists' Association, its constituent, and its component societies;

(11) Medical schools and programs accredited by the Standards of the Medical Specialties, the American Medical Association, the Advisory Board for Osteopathic Specialists and Boards of Certification, or the American Osteopathic Association;

(12) The Commission on Dental Competency Assessments-The Western Regional Examining Board-The Council of Interstate Testing Agencies (CDCA-WREB-CITA), States Resources for Testing and Assessments (SRTA), and Central Regional Dental Testing Services Inc. (CRDTS) [~~Western Regional Examining Board~~];

(13) American Academy of Dental Hygiene;

(14) American Dental Education Association;

(15) American Heart Association;

(16) Texas Dental Hygiene Educators' Association;

(17) Dental Laboratory Association of Texas;

(18) Dental Assisting National Board;

(19) American Dental Assistants Association and its constituent organizations;

(20) The Compliance Division, LLC;

(21) Dental Compliance Specialists, LLC; and

(22) Other entities approved by the Board as shown in the attached graphic for this section.

Figure: 22 TAC §104.2(e)(22) (No change.)

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

Filed with the Office of the Secretary of State on December 9, 2022.

TRD-202204903
Lauren Studdard
General Counsel
State Board of Dental Examiners
Earliest possible date of adoption: January 22, 2023
For further information, please call: (512) 305-8910

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CHAPTER 114. EXTENSION OF DUTIES OF AUXILIARY PERSONNEL--DENTAL ASSISTANTS

22 TAC §114.1

The State Board of Dental Examiners (Board) proposes this amendment to 22 TAC §114.1, concerning permitted duties of a dental assistant. The proposed amendment updates the language with the applicable section of the Dental Practice Act. Specifically, Texas Occupations Code §265.005 was repealed and the applicable section is currently Texas Occupations Code §265.001.

FISCAL NOTE: Casey Nichols, Executive Director, has determined that for the first five-year period the proposed rule is in effect, the proposed rule does not have foreseeable implications relating to cost or revenues of the state or local governments.

PUBLIC BENEFIT-COST NOTE: Casey Nichols has also determined that for the first five-year period the proposed rule is in effect, the public benefit anticipated as a result of this rule will be the protection of public safety and welfare.

LOCAL EMPLOYMENT IMPACT STATEMENT: Casey Nichols has also determined that the proposed rule does not affect local economies and employment.

SMALL AND MICRO-BUSINESS, RURAL COMMUNITY IMPACT STATEMENT: Casey Nichols has determined that no economic impact statement and regulatory flexibility analysis for small businesses, micro-businesses, and rural communities is necessary for this rule.

GOVERNMENT GROWTH IMPACT STATEMENT: The Board has determined that for the first five-year period the proposed rule is in effect, the following government growth effects apply: (1) the rule does not create or eliminate a government program; (2) implementation of the proposed rule does not require the creation or elimination of employee positions; (3) the implementation of the proposed rule does not require an increase or decrease in future appropriations; (4) the proposed rule does not require an increase in fees paid to the agency; (5) the proposed rule does not create a new regulation; (6) the proposed rule does expand an existing regulation; (7) the proposed rule does not increase or decrease the number of individuals subject to it; and (8) the proposed rule does not positively or adversely affect the state's economy.

COST TO REGULATED PERSONS: This proposed rule does not impose a cost on a regulated person and, therefore, is not subject to Tex. Gov't. Code §2001.0045.

Comments on the proposed amendment may be submitted to Casey Nichols, Executive Director, 1801 Congress Avenue, Suite 8.600, Austin, Texas 78701, by fax to (512) 649-2482,

or by email to official_rules_comments@tsbde.texas.gov for 30 days following the date that the proposed rule is published in the *Texas Register.* To be considered for purposes of this rulemaking, comments must be: (1) postmarked or shipped by the last day of the comment period; or (2) faxed or emailed by midnight on the last day of the comment period.

This rule is proposed under Texas Occupations Code §254.001(a), which gives the Board authority to adopt rules necessary to perform its duties and ensure compliance with state laws relating to the practice of dentistry to protect the public health and safety.

No statutes are affected by this proposed rule.

§114.1. Permitted Duties.

(a) A dentist may delegate to a dental assistant the authority to perform only acts or procedures that are reversible. An act or procedure that is reversible is capable of being reversed or corrected.

(b) A dentist may not delegate or otherwise authorize a dental assistant to perform any task for which a certificate or additional training is required under this section, unless the dental assistant holds the required certificate or has obtained the additional training.

(c) A dental assistant may perform tasks under a dentist's general or direct supervision. For the purposes of this section:

(1) "General supervision" means that the dentist employs or is in charge of the dental assistant and is responsible for supervising the services to be performed by the dental assistant. The dentist may or may not be present on the premises when the dental assistant performs the procedures.

(2) "Direct supervision" means that the dentist employs or is in charge of the dental assistant and is physically present in the office when the task is performed. Physical presence does not require that the supervising dentist be in the treatment room when the dental assistant performs the service as long as the dentist is in the dental office.

(d) The dentist shall remain responsible for any delegated act.

(e) The clinical tasks that a dental assistant can perform under general supervision are limited to:

(1) the making of dental x-rays in compliance with the Occupations Code, §265.001 [~~§265.005~~]; and

(2) the provision of interim treatment of a minor emergency dental condition to an existing patient of the treating dentist in accordance with the Occupations Code, §265.003(a-1). For purposes of this paragraph only, "existing patient" means a patient that the supervising dentist has examined in the twelve (12) months prior to the interim treatment. A treating dentist who delegates the provision of interim treatment of a minor emergency condition to a dental assistant shall schedule a follow-up appointment with the patient within 30 days. It is not a violation if the dentist makes a good faith attempt to schedule a follow-up appointment with the patient within 30 days but is unable to because of circumstances outside the dentist's control and those circumstances are clearly noted in the patient's record.

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

Filed with the Office of the Secretary of State on December 9, 2022.

TRD-202204905

Lauren Studdard
General Counsel
State Board of Dental Examiners
Earliest possible date of adoption: January 22, 2023
For further information, please call: (512) 305-8910

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22 TAC §114.6

The State Board of Dental Examiners (Board) proposes this amendment to 22 TAC §114.6, concerning general qualifications for registration or certification of a dental assistant. The proposed amendment updates the language with the applicable section of the Dental Practice Act. Specifically, Texas Occupations Code §265.005 was repealed and the applicable section is currently Texas Occupations Code §265.001(d). The amendment also removes certain portions of subsection (g) of this rule because it contains language from 22 Texas Administrative Code §101.8 that is duplicative or no longer in effect.

FISCAL NOTE: Casey Nichols, Executive Director, has determined that for the first five-year period the proposed rule is in effect, the proposed rule does not have foreseeable implications relating to cost or revenues of the state or local governments.

PUBLIC BENEFIT-COST NOTE: Casey Nichols has also determined that for the first five-year period the proposed rule is in effect, the public benefit anticipated as a result of this rule will be the protection of public safety and welfare.

LOCAL EMPLOYMENT IMPACT STATEMENT: Casey Nichols has also determined that the proposed rule does not affect local economies and employment.

SMALL AND MICRO-BUSINESS, RURAL COMMUNITY IMPACT STATEMENT: Casey Nichols has determined that no economic impact statement and regulatory flexibility analysis for small businesses, micro-businesses, and rural communities is necessary for this rule.

GOVERNMENT GROWTH IMPACT STATEMENT: The Board has determined that for the first five-year period the proposed rule is in effect, the following government growth effects apply: (1) the rule does not create or eliminate a government program; (2) implementation of the proposed rule does not require the creation or elimination of employee positions; (3) the implementation of the proposed rule does not require an increase or decrease in future appropriations; (4) the proposed rule does not require an increase in fees paid to the agency; (5) the proposed rule does not create a new regulation; (6) the proposed rule does expand an existing regulation; (7) the proposed rule does not increase or decrease the number of individuals subject to it; and (8) the proposed rule does not positively or adversely affect the state's economy.

COST TO REGULATED PERSONS: This proposed rule does not impose a cost on a regulated person and, therefore, is not subject to Tex. Gov't. Code §2001.0045.

Comments on the proposed amendment may be submitted to Casey Nichols, Executive Director, 1801 Congress Avenue, Suite 8.600, Austin, Texas 78701, by fax to (512) 649-2482, or by email to official_rules_comments@tsbde.texas.gov for 30 days following the date that the proposed rule is published in the *Texas Register.* To be considered for purposes of this rulemaking, comments must be: (1) postmarked or shipped by the last day of the comment period; or (2) faxed or emailed by midnight on the last day of the comment period.

This rule is proposed under Texas Occupations Code §254.001(a), which gives the Board authority to adopt rules necessary to perform its duties and ensure compliance with state laws relating to the practice of dentistry to protect the public health and safety.

No statutes are affected by this proposed rule.

§114.6. General Qualifications for Registration or Certification.

(a) Any person who desires to provide dental assistant services requiring registration or certification must obtain the proper registration or certification issued by the Board before providing the services, except as provided in Texas Occupations Code §265.001(d) [~~§265.005(l)~~] and §114.11 of this chapter.

(b) Any applicant for registration or certification must meet the requirements of this chapter.

(c) To be eligible for registration or certification, an applicant must provide with an application form approved by the Board satisfactory proof to the Board that the applicant:

(1) has fulfilled all requirements for registration or certification outlined in this chapter;

(2) has met the requirements of §101.8 of this title;

(3) has not had any disciplinary action taken in this state or any other jurisdiction;

(4) has successfully completed a current course in basic life support;

(5) has taken and passed the jurisprudence assessment administered by the Board or an entity designated by the Board within one year immediately prior to application;

(6) has paid all application, examination and fees required by law and Board rules and regulations; and

(7) has completed a course in human trafficking prevention approved by the executive commissioner of the Texas Health and Human Services Commission.

(d) Applications for dental assistant registration and certification must be delivered to the office of the State Board of Dental Examiners.

(e) An application for dental assistant registration or certification is filed with the Board when it is actually received, date-stamped, and logged-in by the Board along with all required documentation and fees. An incomplete application will be returned to the applicant with an explanation of additional documentation or information needed.

(f) The Board may refuse to issue registration or certificate or may issue a conditional registration or certificate to any individual who does not meet the requirements of subsections (c)(2) or (c)(3) of this section, or who:

(1) presents to the Board fraudulent or false evidence of the person's qualification for registration or certification;

(2) is guilty of any illegality, fraud, or deception during the process to secure a registration or certification;

(3) is habitually intoxicated or is addicted to drugs;

(4) commits a dishonest or illegal practice in or connected to dentistry;

(5) is convicted of a felony under federal law or law of this state; or

(6) is found to have violated a law of this state relating to the practice of dentistry within the 12 months preceding the date the person filed an application for a registration or certification.

(g) If the Board chooses to issue a conditional registration or certificate, the individual may be required to enter into an agreed settlement order with the Board at the time the registration or certificate is issued. [~~In determining whether to issue a conditional registration or certificate, the Board shall consider the following factors, as applicable:~~]

[~~(1) the nature and seriousness of the crime or violation;~~]

[~~(2) the relationship of the crime or violation to the purposes for requiring a registration/certification to engage in the occupation;~~]

[~~(3) the extent to which a registration/certification might offer an opportunity to engage in further criminal activity or violations of the same type as that in which the person previously had been involved;~~]

[~~(4) the relationship of the crime or violation to the ability, capacity, or fitness required to perform the duties and discharge the responsibilities of the registered occupation;~~]

[~~(5) the extent and nature of the person's past criminal activity or disciplinary history;~~]

[~~(6) the age of the person when the crime or violation was committed;~~]

[~~(7) the amount of time that has elapsed since the person's last criminal activity or violation;~~]

[~~(8) the conduct and work activity of the person before and after the criminal activity or violation;~~]

[~~(9) evidence of the person's rehabilitation or rehabilitative effort while incarcerated or after release; and~~]

[~~(10) other evidence of the person's fitness, including letters of recommendation from:~~]

[~~(A) prosecutors and law enforcement and correctional officers who prosecuted, arrested, or had custodial responsibility for the person;~~]

[~~(B) the sheriff or chief of police in the community where the person resides; and~~]

[~~(C) any other person in contact with the convicted person.~~]

[~~(11) The applicant shall, to the extent possible, obtain and provide to the Board the recommendations of the prosecution, law enforcement, and correctional authorities. The applicant shall also furnish proof in such form as may be required by the Board that he or she has maintained a record of steady employment and has supported his or her dependents and has otherwise maintained a record of good conduct and has paid all outstanding court costs, supervision fees, fines, and restitution as may have been ordered in all criminal cases in which he or she has been convicted or received a deferred order or in all administrative cases in which the applicant has been the subject of a final disciplinary action.~~]

(1) [~~(12)~~] The order may include limitations including, but not limited to, practice limitations, stipulations, compliance with court ordered conditions, notification to employer or any other requirements the Board recommends to ensure public safety.

(2) [~~(13)~~] In the event an applicant is uncertain whether he or she is qualified to obtain a dental assistant registration or certification

due to criminal conduct, the applicant may request a Criminal History Evaluation Letter in accordance with §114.9 of this chapter, prior to application.

(3) [~~(14)~~] Should the individual violate the terms of his or her conditional registration or certificate, the Board may take additional disciplinary action against the individual.

(h) An applicant whose application is denied by the Board may appeal the decision to the State Office of Administrative Hearings.

(i) An individual whose application for dental assistant registration/certification is denied is not eligible to file another application for registration/certification until the expiration of one year from the date of denial or the date of the Board's order denying the application for registration/certification, whichever date is later.

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

Filed with the Office of the Secretary of State on December 9, 2022.

TRD-202204906
Lauren Studdard
General Counsel
State Board of Dental Examiners
Earliest possible date of adoption: January 22, 2023
For further information, please call: (512) 305-8910

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22 TAC §114.21

The State Board of Dental Examiners (Board) proposes this amendment to 22 TAC §114.21, concerning requirements for dental assistant registration courses and examinations. The proposed amendment removes language pertaining to the Dental Assistant Advisory Committee because the committee is no longer required by the Dental Practice Act and the Board does not currently have a need for the committee.

FISCAL NOTE: Casey Nichols, Executive Director, has determined that for the first five-year period the proposed rule is in effect, the proposed rule does not have foreseeable implications relating to cost or revenues of the state or local governments.

PUBLIC BENEFIT-COST NOTE: Casey Nichols has also determined that for the first five-year period the proposed rule is in effect, the public benefit anticipated as a result of this rule will be the protection of public safety and welfare.

LOCAL EMPLOYMENT IMPACT STATEMENT: Casey Nichols has also determined that the proposed rule does not affect local economies and employment.

SMALL AND MICRO-BUSINESS, RURAL COMMUNITY IMPACT STATEMENT: Casey Nichols has determined that no economic impact statement and regulatory flexibility analysis for small businesses, micro-businesses, and rural communities is necessary for this rule.

GOVERNMENT GROWTH IMPACT STATEMENT: The Board has determined that for the first five-year period the proposed rule is in effect, the following government growth effects apply: (1) the rule does not create or eliminate a government program; (2) implementation of the proposed rule does not require the creation or elimination of employee positions; (3) the implementation of the proposed rule does not require an increase or decrease in future appropriations; (4) the proposed rule does not require an increase in fees paid to the agency; (5) the proposed rule does not create a new regulation; (6) the proposed rule does expand an existing regulation; (7) the proposed rule does not increase or decrease the number of individuals subject to it; and (8) the proposed rule does not positively or adversely affect the state's economy.

COST TO REGULATED PERSONS: This proposed rule does not impose a cost on a regulated person and, therefore, is not subject to Tex. Gov't. Code §2001.0045.

Comments on the proposed amendment may be submitted to Casey Nichols, Executive Director, 1801 Congress Avenue, Suite 8.600, Austin, Texas 78701, by fax to (512) 649-2482, or by email to official_rules_comments@tsbde.texas.gov for 30 days following the date that the proposed rule is published in the *Texas Register.* To be considered for purposes of this rulemaking, comments must be: (1) postmarked or shipped by the last day of the comment period; or (2) faxed or emailed by midnight on the last day of the comment period.

This rule is proposed under Texas Occupations Code §254.001(a), which gives the Board authority to adopt rules necessary to perform its duties and ensure compliance with state laws relating to the practice of dentistry to protect the public health and safety.

No statutes are affected by this proposed rule.

§114.21. Requirements for Dental Assistant Registration Courses and Examinations.

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

(1) "Dental industry professional organization"--any organization, the primary mission of which is to represent and support dentists, dental hygienists, and/or dental assistants;

[~~(2) "Dental Assistant Advisory Committee"--a committee consisting of dental professionals and educators, created by the Board under the authority of Tex. Occ. Code §265.005;~~]

(2) [~~(3)~~] "Jurisprudence"--the body of statutes and regulations pertaining to and governing practice by dental assistants, including relevant portions of the Texas Occupations Code, and the rules enacted by the SBDE.

(b) Any school or program accredited by the Commission on Dental Accreditation of the American Dental Association or any dental industry professional organization may offer a course and examination to fulfill the requirements for dental assistant registration outlined in this chapter, so long as the course and examination are compliant with the requirements of this section, and have been approved by the SBDE.

(c) Courses administered to fulfill the requirements of this chapter must:

(1) Cover all the course objectives outlined by the SBDE [~~and the Dental Assistant Advisory Committee~~] and set forth in this chapter; and,

(2) Comply with other requirements established by the SBDE [~~and the Dental Assistant Advisory Committee~~].

(d) Course providers administering examinations to fulfill the requirements of this chapter must:

(1) Employ a minimum of 50 questions per examination that adequately cover the course objectives [~~identified by the Dental Assistant Advisory Committee and~~] set forth in this chapter;

(2) Establish a minimum passing score of 70%; and,

(3) Maintain safeguards to ensure the integrity and security of the examinations, their content, and the physical examination environment, as outlined in this chapter.

(e) Any course and examination administered under this section may be offered through self-study, interactive computer courses, or lecture courses, and may be offered through the Internet.

(f) Course and examination approval. A provider seeking approval of a dental assistant course must submit the following materials to the SBDE prior to offering the course:

(1) A complete, signed, and notarized Dental Assistant Course Provider Application, as promulgated by the SBDE;

(2) An application fee in the amount established by the SBDE, payable by check or money order made payable to the State Board of Dental Examiners; and

(3) Documentation pertaining to the course, including:

(A) All course materials to be provided to course attendees;

(B) The complete pool of examination questions to be drawn from;

(C) An examination integrity plan that meets the requirements of this chapter;

(D) A copy of the certificate to be issued on course completion; and,

(E) A copy of the provider's reexamination policy, which notifies course attendees in advance how many reexaminations shall be allowed without retaking the course, the cost of reexamination, and other pertinent information.

(g) Following course approval, the following information must be submitted to the SBDE:

(1) An internet URL address for a website containing information about the approved course, or, if no such website exists, contact information for the course provider;

(2) A schedule of courses to be offered, including dates, times and locations for each;

(3) Prompt notification of any changes to the published course schedule; and,

(4) Notification of any substantive changes to the course curriculum or materials following SBDE approval. Such changes must be submitted in writing to the SBDE for approval prior to their implementation in the course.

(h) The course provider shall provide all course registrants with their examination results within 30 days of completion of the examination.

(i) All course providers are subject to audit by the State Board of Dental Examiners for purposes of ensuring compliance with the requirements of this chapter.

(j) Documentation of course attendance and course completion shall be kept by the course provider for a period of not less than two (2) years.

(k) Failure to comply with any of the requirements of this section may result in withdrawal of course approval.

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

Filed with the Office of the Secretary of State on December 9, 2022.

TRD-202204907
Lauren Studdard
General Counsel
State Board of Dental Examiners
Earliest possible date of adoption: January 22, 2023
For further information, please call: (512) 305-8910

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CHAPTER 115. EXTENSION OF DUTIES OF AUXILIARY PERSONNEL--DENTAL HYGIENE

22 TAC §115.2

The State Board of Dental Examiners (Board) proposes this amendment to 22 TAC §115.2, concerning permitted duties of a dental hygienist. The proposed amendment updates the language to reflect that the Board no longer issues certificates to dental hygienists to apply pit and fissure sealants or to monitor nitrous oxide. Dental hygienists must continue to ensure they meet all qualifications required by the Dental Practice Act and Board rules before performing a service or procedure.

FISCAL NOTE: Casey Nichols, Executive Director, has determined that for the first five-year period the proposed rule is in effect, the proposed rule does not have foreseeable implications relating to cost or revenues of the state or local governments.

PUBLIC BENEFIT-COST NOTE: Casey Nichols has also determined that for the first five-year period the proposed rule is in effect, the public benefit anticipated as a result of this rule will be the protection of public safety and welfare.

LOCAL EMPLOYMENT IMPACT STATEMENT: Casey Nichols has also determined that the proposed rule does not affect local economies and employment.

SMALL AND MICRO-BUSINESS, RURAL COMMUNITY IMPACT STATEMENT: Casey Nichols has determined that no economic impact statement and regulatory flexibility analysis for small businesses, micro-businesses, and rural communities is necessary for this rule.

GOVERNMENT GROWTH IMPACT STATEMENT: The Board has determined that for the first five-year period the proposed rule is in effect, the following government growth effects apply: (1) the rule does not create or eliminate a government program; (2) implementation of the proposed rule does not require the creation or elimination of employee positions; (3) the implementation of the proposed rule does not require an increase or decrease in future appropriations; (4) the proposed rule does not require an increase in fees paid to the agency; (5) the proposed rule does not create a new regulation; (6) the proposed rule does expand an existing regulation; (7) the proposed rule does not increase or decrease the number of individuals subject to it; and (8) the proposed rule does not positively or adversely affect the state's economy.

COST TO REGULATED PERSONS: This proposed rule does not impose a cost on a regulated person and, therefore, is not subject to Tex. Gov't. Code §2001.0045.

Comments on the proposed amendment may be submitted to Casey Nichols, Executive Director, 1801 Congress Avenue, Suite 8.600, Austin, Texas 78701, by fax to (512) 649-2482, or by email to official_rules_comments@tsbde.texas.gov for 30 days following the date that the proposed rule is published in the *Texas Register.* To be considered for purposes of this rulemaking, comments must be: (1) postmarked or shipped by the last day of the comment period; or (2) faxed or emailed by midnight on the last day of the comment period.

This rule is proposed under Texas Occupations Code §254.001(a), which gives the Board authority to adopt rules necessary to perform its duties and ensure compliance with state laws relating to the practice of dentistry to protect the public health and safety.

No statutes are affected by this proposed rule.

§115.2. Permitted Duties.

(a) In addition to the duties that a dentist may delegate pursuant to the Dental Practice Act and Board Rules, a Texas-licensed dental hygienist (hygienist) may perform the following services and procedures in the dental office of his/her supervising Texas-licensed dentist (dentist) or dentists who are legally engaged in the practice of dentistry in this state or under the supervision of a supervising dentist in an alternate setting:

(1) remove accumulated matter, tartar, deposits, accretions, or stains, other than mottled enamel stains, from the natural and restored surface of exposed human teeth and restorations in the human mouth;

(2) smooth roughened root surfaces;

(3) polish exposed human teeth, restorations in the human mouth, or roughened root surfaces;

(4) topically apply drugs to the surface tissues of the human mouth or the exposed surface of human teeth;

(5) make dental x-rays; [~~and~~]

(6) apply pit and fissure sealants; and[~~.~~]

[~~(A) dental hygienists who graduated from a dental or dental hygiene school accredited by the Commission on Dental Accreditation of the American Dental Association after December 31, 1980 may do so without obtaining a certificate from the SBDE;~~]

[~~(B) dental hygienists who graduated from a dental or dental hygiene school accredited by the Commission on Dental Accreditation of the American Dental Association before December 31, 1980, must obtain certification from the SBDE to apply sealants. Certification to apply pit and fissure sealants in Texas may be obtained by submitting a written request to the SBDE accompanied by proof of course completion.~~]

(7) monitor patients receiving nitrous oxide/oxygen inhalation conscious sedation only after obtaining approval from the board, and only under the direct supervision of a Texas licensed dentist. The board will issue a nitrous oxide monitoring endorsement after a hygienist provides proof of successful completion of a board approved course, that includes examination, on the monitoring of the administration of nitrous oxide. [~~obtaining certification issued by the State Board of Dental Examiners and only under the direct supervision of a Texas licensed dentist. Certification may be obtained by successful completion of a board-approved course, that includes examination, on the monitoring of the administration of nitrous oxide.~~]

(b) Dental hygienists may use lasers in the practice of dental hygiene under the direct supervision of a dentist, so long as they do not perform any procedure that is irreversible or involves the intentional cutting of soft or hard tissue.

(1) Prior to using a laser for non-diagnostic purposes, dental hygienists must complete no less than twelve hours of in-person continuing education in laser utilization specific to the procedures to be performed by the dental hygienist using the laser. Three of the twelve required hours must include clinical simulation laser training similar to the procedures to be performed by the dental hygienist. The continuing education must be provided by an educational course provider recognized by the Board. Dental hygienists must maintain documentation of the satisfactory completion of the required continuing education courses.

(2) Use of lasers by dental hygienists must be in accordance with the minimum standard of care and limited to the dental hygienist's scope of practice.

(3) A dentist who supervises a dental hygienist in the use of lasers must have laser education and training sufficient to adequately supervise the dental hygienist, including but not limited to meeting the continuing education requirements required of dental hygienists in subsection (b)(1) of this section. Pursuant to §258.003 of the Dental Practice Act, the delegating dentist is responsible for all dental acts delegated to the dental hygienist, including the use of lasers.

(4) The dental hygienist must comply with the Dental Practice Act and Board Rules in the use of lasers. The dental hygienist may be subject to disciplinary action for any act that violates the Dental Practice Act or Board Rules.

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

Filed with the Office of the Secretary of State on December 9, 2022.

TRD-202204909
Lauren Studdard
General Counsel
State Board of Dental Examiners
Earliest possible date of adoption: January 22, 2023
For further information, please call: (512) 305-8910

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PART 15. TEXAS STATE BOARD OF PHARMACY

CHAPTER 291. PHARMACIES
SUBCHAPTER D. INSTITUTIONAL PHARMACY (CLASS C)

22 TAC §291.76

The Texas State Board of Pharmacy proposes amendments to §291.76, concerning Class C Pharmacies Located in a Freestanding Ambulatory Surgical Center. The amendments, if adopted, clarify that a pharmacist must verify the completeness and reconciliation of the perpetual inventory of controlled substances for an ASC pharmacy.

Timothy L. Tucker, Pharm.D., Executive Director/Secretary, has determined that, for the first five-year period the rules are in effect, there will be no fiscal implications for state or local government as a result of enforcing or administering the rule. Dr. Tucker has determined that, for each year of the first five-year period the rule will be in effect, the public benefit anticipated as a result of enforcing the amendments will be clear and grammatically correct regulations. There is no anticipated adverse economic impact on large, small or micro-businesses (pharmacies), rural communities, or local or state employment. Therefore, an economic impact statement and regulatory flexibility analysis are not required.

For each year of the first five years the proposed amendments will be in effect, Dr. Tucker has determined the following:

(1) The proposed amendments do not create or eliminate a government program;

(2) Implementation of the proposed amendments does not require the creation of new employee positions or the elimination of existing employee positions;

(3) Implementation of the proposed amendments does not require an increase or decrease in the future legislative appropriations to the agency;

(4) The proposed amendments do not require an increase or decrease in fees paid to the agency;

(5) The proposed amendments do not create a new regulation;

(6) The proposed amendments do not limit or expand an existing regulation;

(7) The proposed amendments do not increase or decrease the number of individuals subject to the rule's applicability; and

(8) The proposed amendments do not positively or adversely affect this state's economy.

Written comments on the amendments may be submitted to Eamon D. Briggs, Assistant General Counsel, Texas State Board of Pharmacy, 1801 Congress Avenue, Suite 13.100, Austin, Texas, 78701-1319, FAX (512) 305-8061. Comments must be received by 5:00 p.m., January 30, 2023.

The amendments are proposed under §551.002 and §554.051 of the Texas Pharmacy Act (Chapters 551 - 569, Texas Occupations Code). The Board interprets §551.002 as authorizing the agency to protect the public through the effective control and regulation of the practice of pharmacy. The Board interprets §554.051(a) as authorizing the agency to adopt rules for the proper administration and enforcement of the Act.

The statutes affected by these amendments: Texas Pharmacy Act, Chapters 551 - 569, Texas Occupations Code.

§291.76. Class C Pharmacies Located in a Freestanding Ambulatory Surgical Center.

(a) Purpose. The purpose of this section is to provide standards in the conduct, practice activities, and operation of a pharmacy located in a freestanding ambulatory surgical center that is licensed by the Texas Department of State Health Services. Class C pharmacies located in a freestanding ambulatory surgical center shall comply with this section, in lieu of §§291.71 - 291.75 of this title (relating to Purpose; Definitions; Personnel; Operational Standards; and Records).

(b) Definitions. The following words and terms, when used in these sections, shall have the following meanings, unless the context clearly indicates otherwise.

(1) Act--The Texas Pharmacy Act, Occupations Code, Subtitle J, as amended.

(2) Administer--The direct application of a prescription drug by injection, inhalation, ingestion, or any other means to the body of a patient by:

(A) a practitioner, an authorized agent under his supervision, or other person authorized by law; or

(B) the patient at the direction of a practitioner.

(3) Ambulatory surgical center (ASC)--A freestanding facility that is licensed by the Texas Department of State Health Services that primarily provides surgical services to patients who do not require overnight hospitalization or extensive recovery, convalescent time or observation. The planned total length of stay for an ASC patient shall not exceed 23 hours. Patient stays of greater than 23 hours shall be the result of an unanticipated medical condition and shall occur infrequently. The 23-hour period begins with the induction of anesthesia.

(4) Automated medication supply system--A mechanical system that performs operations or activities relative to the storage and distribution of medications for administration and which collects, controls, and maintains all transaction information.

(5) Board--The Texas State Board of Pharmacy.

(6) Consultant pharmacist--A pharmacist retained by a facility on a routine basis to consult with the ASC in areas that pertain to the practice of pharmacy.

(7) Controlled substance--A drug, immediate precursor, or other substance listed in Schedules I - V or Penalty Groups 1 - 4 of the Texas Controlled Substances Act, as amended, or a drug immediate precursor, or other substance included in Schedules I - V of the Federal Comprehensive Drug Abuse Prevention and Control Act of 1970, as amended (Public Law 91-513).

(8) Dispense--Preparing, packaging, compounding, or labeling for delivery a prescription drug or device in the course of professional practice to an ultimate user or his agent by or pursuant to the lawful order of a practitioner.

(9) Distribute--The delivery of a prescription drug or device other than by administering or dispensing.

(10) Downtime--Period of time during which a data processing system is not operable.

(11) Electronic signature--A unique security code or other identifier which specifically identifies the person entering information into a data processing system. A facility which utilizes electronic signatures must:

(A) maintain a permanent list of the unique security codes assigned to persons authorized to use the data processing system; and

(B) have an ongoing security program which is capable of identifying misuse and/or unauthorized use of electronic signatures.

(12) Floor stock--Prescription drugs or devices not labeled for a specific patient and maintained at a nursing station or other ASC department (excluding the pharmacy) for the purpose of administration to a patient of the ASC.

(13) Formulary--List of drugs approved for use in the ASC by an appropriate committee of the ambulatory surgical center.

(14) Hard copy--A physical document that is readable without the use of a special device (i.e., data processing system, computer, etc.).

(15) Investigational new drug--New drug intended for investigational use by experts qualified to evaluate the safety and effectiveness of the drug as authorized by the federal Food and Drug Administration.

(16) Medication order--An order from a practitioner or his authorized agent for administration of a drug or device.

(17) Pharmacist-in-charge--Pharmacist designated on a pharmacy license as the pharmacist who has the authority or responsibility for a pharmacy's compliance with laws and rules pertaining to the practice of pharmacy.

(18) Pharmacy--Area or areas in a facility, separate from patient care areas, where drugs are stored, bulk compounded, delivered, compounded, dispensed, and/or distributed to other areas or departments of the ASC, or dispensed to an ultimate user or his or her agent.

(19) Prescription drug--

(A) A substance for which federal or state law requires a prescription before it may be legally dispensed to the public;

(B) A drug or device that under federal law is required, prior to being dispensed or delivered, to be labeled with either of the following statements:

(i) Caution: federal law prohibits dispensing without prescription or "Rx only" or another legend that complies with federal law; or

(ii) Caution: federal law restricts this drug to use by or on order of a licensed veterinarian; or

(C) A drug or device that is required by any applicable federal or state law or regulation to be dispensed on prescription only or is restricted to use by a practitioner only.

(20) Prescription drug order--

(A) An order from a practitioner or his authorized agent to a pharmacist for a drug or device to be dispensed; or

(B) An order pursuant to Subtitle B, Chapter 157, Occupations Code.

(21) Full-time pharmacist--A pharmacist who works in a pharmacy from 30 to 40 hours per week or if the pharmacy is open less than 60 hours per week, one-half of the time the pharmacy is open.

(22) Part-time pharmacist--A pharmacist who works less than full-time.

(23) Pharmacy technician--An individual who is registered with the board as a pharmacy technician and whose responsibility in a pharmacy is to provide technical services that do not require professional judgment regarding preparing and distributing drugs and who works under the direct supervision of and is responsible to a pharmacist.

(24) Pharmacy technician trainee--An individual who is registered with the board as a pharmacy technician trainee and is authorized to participate in a pharmacy's technician training program.

(25) Texas Controlled Substances Act--The Texas Controlled Substances Act, Health and Safety Code, Chapter 481, as amended.

(c) Personnel.

(1) Pharmacist-in-charge.

(A) General. Each ambulatory surgical center shall have one pharmacist-in-charge who is employed or under contract, at least on a consulting or part-time basis, but may be employed on a full-time basis.

(B) Responsibilities. The pharmacist-in-charge shall have the responsibility for, at a minimum, the following:

(i) establishing specifications for procurement and storage of all materials, including drugs, chemicals, and biologicals;

(ii) participating in the development of a formulary for the ASC, subject to approval of the appropriate committee of the ASC;

(iii) distributing drugs to be administered to patients pursuant to the practitioner's medication order;

(iv) filling and labeling all containers from which drugs are to be distributed or dispensed;

(v) maintaining and making available a sufficient inventory of antidotes and other emergency drugs, both in the pharmacy and patient care areas, as well as current antidote information, telephone numbers of regional poison control center and other emergency assistance organizations, and such other materials and information as may be deemed necessary by the appropriate committee of the ASC;

(vi) maintaining records of all transactions of the ASC pharmacy as may be required by applicable state and federal law, and as may be necessary to maintain accurate control over and accountability for all pharmaceutical materials;

(vii) participating in those aspects of the ASC's patient care evaluation program which relate to pharmaceutical material utilization and effectiveness;

(viii) participating in teaching and/or research programs in the ASC;

(ix) implementing the policies and decisions of the appropriate committee(s) relating to pharmaceutical services of the ASC;

(x) providing effective and efficient messenger and delivery service to connect the ASC pharmacy with appropriate areas of the ASC on a regular basis throughout the normal workday of the ASC;

(xi) labeling, storing, and distributing investigational new drugs, including maintaining information in the pharmacy and nursing station where such drugs are being administered, concerning the dosage form, route of administration, strength, actions, uses, side effects, adverse effects, interactions, and symptoms of toxicity of investigational new drugs;

(xii) meeting all inspection and other requirements of the Texas Pharmacy Act and this subsection;

(xiii) maintaining records in a data processing system such that the data processing system is in compliance with the requirements for a Class C (institutional) pharmacy located in a free-standing ASC; and

(xiv) ensuring that a pharmacist visits the ASC at least once each calendar week that the facility is open.

(2) Consultant pharmacist.

(A) The consultant pharmacist may be the pharmacist-in-charge.

(B) A written contract shall exist between the ASC and any consultant pharmacist, and a copy of the written contract shall be made available to the board upon request.

(3) Pharmacists.

(A) General.

(i) The pharmacist-in-charge shall be assisted by a sufficient number of additional licensed pharmacists as may be required to operate the ASC pharmacy competently, safely, and adequately to meet the needs of the patients of the facility.

(ii) All pharmacists shall assist the pharmacist-in-charge in meeting the responsibilities as outlined in paragraph (1)(B) of this subsection and in ordering, administering, and accounting for pharmaceutical materials.

(iii) All pharmacists shall be responsible for any delegated act performed by pharmacy technicians or pharmacy technician trainees under his or her supervision.

(iv) All pharmacists while on duty shall be responsible for complying with all state and federal laws or rules governing the practice of pharmacy.

(B) Duties. Duties of the pharmacist-in-charge and all other pharmacists shall include, but need not be limited to, the following:

(i) receiving and interpreting prescription drug orders and oral medication orders and reducing these orders to writing either manually or electronically;

(ii) selecting prescription drugs and/or devices and/or suppliers; and

(iii) interpreting patient profiles.

(C) Special requirements for compounding non-sterile preparations. All pharmacists engaged in compounding non-sterile preparations shall meet the training requirements specified in §291.131 of this title (relating to Pharmacies Compounding Non-Sterile Preparations).

(4) Pharmacy technicians and pharmacy technician trainees.

(A) General. All pharmacy technicians and pharmacy technician trainees shall meet the training requirements specified in §297.6 of this title (relating to Pharmacy Technician and Pharmacy Technician Trainee Training).

(B) Duties. Pharmacy technicians and pharmacy technician trainees may not perform any of the duties listed in paragraph (3)(B) of this subsection. Duties may include, but need not be limited to, the following functions, under the direct supervision of a pharmacist:

(i) prepacking and labeling unit and multiple dose packages, provided a pharmacist supervises and conducts a final check and affixes his or her name, initials, or electronic signature to the appropriate quality control records prior to distribution;

(ii) preparing, packaging, compounding, or labeling prescription drugs pursuant to medication orders, provided a pharmacist supervises and checks the preparation;

(iii) compounding non-sterile preparations pursuant to medication orders provided the pharmacy technicians or pharmacy technician trainees have completed the training specified in §291.131 of this title;

(iv) bulk compounding, provided a pharmacist supervises and conducts in-process and final checks and affixes his or her name, initials, or electronic signature to the appropriate quality control records prior to distribution;

(v) distributing routine orders for stock supplies to patient care areas;

(vi) entering medication order and drug distribution information into a data processing system, provided judgmental decisions are not required and a pharmacist checks the accuracy of the information entered into the system prior to releasing the order or in compliance with the absence of pharmacist requirements contained in subsection (d)(6)(D) and (E) of this section;

(vii) maintaining inventories of drug supplies;

(viii) maintaining pharmacy records; and

(ix) loading drugs into an automated medication supply system. For the purpose of this clause, direct supervision may be accomplished by physically present supervision or electronic monitoring by a pharmacist.

(C) Procedures.

(i) Pharmacy technicians and pharmacy technician trainees shall handle medication orders in accordance with standard written procedures and guidelines.

(ii) Pharmacy technicians and pharmacy technician trainees shall handle prescription drug orders in the same manner as pharmacy technicians or pharmacy technician trainees working in a Class A pharmacy.

(D) Special requirements for compounding non-sterile preparations. All pharmacy technicians and pharmacy technician trainees engaged in compounding non-sterile preparations shall meet the training requirements specified in §291.131 of this title.

(5) Owner. The owner of an ASC pharmacy shall have responsibility for all administrative and operational functions of the pharmacy. The pharmacist-in-charge may advise the owner on administrative and operational concerns. The owner shall have responsibility for, at a minimum, the following, and if the owner is not a Texas licensed pharmacist, the owner shall consult with the pharmacist-in-charge or another Texas licensed pharmacist:

(A) establishing policies for procurement of prescription drugs and devices and other products dispensed from the ASC pharmacy;

(B) establishing and maintaining effective controls against the theft or diversion of prescription drugs;

(C) if the pharmacy uses an automated medication supply system, reviewing and approving all policies and procedures for system operation, safety, security, accuracy and access, patient confidentiality, prevention of unauthorized access, and malfunction;

(D) providing the pharmacy with the necessary equipment and resources commensurate with its level and type of practice; and

(E) establishing policies and procedures regarding maintenance, storage, and retrieval of records in a data processing system such that the system is in compliance with state and federal requirements.

(6) Identification of pharmacy personnel. All pharmacy personnel shall be identified as follows:

(A) Pharmacy technicians. All pharmacy technicians shall wear an identification tag or badge that bears the person's name and identifies him or her as a pharmacy technician.

(B) Pharmacy technician trainees. All pharmacy technician trainees shall wear an identification tag or badge that bears the person's name and identifies him or her as a pharmacy technician trainee.

(C) Pharmacist interns. All pharmacist interns shall wear an identification tag or badge that bears the person's name and identifies him or her as a pharmacist intern.

(D) Pharmacists. All pharmacists shall wear an identification tag or badge that bears the person's name and identifies him or her as a pharmacist.

(d) Operational standards.

(1) Licensing requirements.

(A) An ASC pharmacy shall register annually or biennially with the board on a pharmacy license application provided by the board, following the procedures specified in §291.1 of this title (relating to Pharmacy License Application).

(B) An ASC pharmacy which changes ownership shall notify the board within 10 days of the change of ownership and apply for a new and separate license as specified in §291.3 of this title (relating to Required Notifications).

(C) An ASC pharmacy which changes location and/or name shall notify the board of the change within 10 days and file for an amended license as specified in §291.3 of this title.

(D) An ASC pharmacy owned by a partnership or corporation which changes managing officers shall notify the board in writing of the names of the new managing officers within 10 days of the change, following the procedures in §291.3 of this title.

(E) An ASC pharmacy shall notify the board in writing within 10 days of closing, following the procedures in §291.5 of this title (relating to Closing a Pharmacy).

(F) A fee as specified in §291.6 of this title (relating to Pharmacy License Fees) will be charged for issuance and renewal of a license and the issuance of an amended license.

(G) A separate license is required for each principal place of business and only one pharmacy license may be issued to a specific location.

(H) An ASC pharmacy, licensed under the Act, §560.051(a)(3), concerning institutional pharmacy (Class C), which also operates another type of pharmacy which would otherwise be required to be licensed under the Act, §560.051(a)(1), concerning community pharmacy (Class A), or the Act, §560.051(a)(2), concerning nuclear pharmacy (Class B), is not required to secure a license for the other type of pharmacy; provided, however, such license is required to comply with the provisions of §291.31 of this title (relating to Definitions), §291.32 of this title (relating to Personnel), §291.33 of this title (relating to Operational Standards), §291.34 of this title (relating to Records), and §291.35 of this title (relating to Official Prescription Requirements), or §291.51 of this title (relating to Purpose), §291.52 of this title (relating to Definitions), §291.53 of this title (relating to Personnel), §291.54 of this title (relating to Operational Standards), and §291.55 of this title (relating to Records), contained in Nuclear Pharmacy (Class B), to the extent such sections are applicable to the operation of the pharmacy.

(I) An ASC pharmacy engaged in the compounding of non-sterile preparations shall comply with the provisions of §291.131 of this title.

(J) ASC pharmacy personnel shall not compound sterile preparations unless the pharmacy has applied for and obtained a Class C-S pharmacy license.

(K) An ASC pharmacy engaged in the provision of remote pharmacy services, including storage and dispensing of prescription drugs, shall comply with the provisions of §291.121 of this title (relating to Remote Pharmacy Services).

(L) An ASC pharmacy engaged in centralized prescription dispensing and/or prescription drug or medication order processing shall comply with the provisions of §291.123 of this title (relating to Central Prescription Drug or Medication Order Processing) and/or §291.125 of this title (relating to Centralized Prescription Dispensing).

(2) Environment.

(A) General requirements.

(i) Each ambulatory surgical center shall have a designated work area separate from patient areas, and which shall have space adequate for the size and scope of pharmaceutical services and shall have adequate space and security for the storage of drugs.

(ii) The ASC pharmacy shall be arranged in an orderly fashion and shall be kept clean. All required equipment shall be clean and in good operating condition.

(B) Special requirements.

(i) The ASC pharmacy shall have locked storage for Schedule II controlled substances and other controlled drugs requiring additional security.

(ii) The ASC pharmacy shall have a designated area for the storage of poisons and externals separate from drug storage areas.

(C) Security.

(i) The pharmacy and storage areas for prescription drugs and/or devices shall be enclosed and capable of being locked by key, combination, or other mechanical or electronic means, so as to prohibit access by unauthorized individuals. Only individuals authorized by the pharmacist-in-charge may enter the pharmacy or have access to storage areas for prescription drugs and/or devices.

(ii) The pharmacist-in-charge shall consult with ASC personnel with respect to security of the drug storage areas, including provisions for adequate safeguards against theft or diversion of dangerous drugs and controlled substances, and to security of records for such drugs.

(iii) The pharmacy shall have locked storage for Schedule II controlled substances and other drugs requiring additional security.

(3) Equipment and supplies. Ambulatory surgical centers supplying drugs for postoperative use shall have the following equipment and supplies:

(A) data processing system including a printer or comparable equipment;

(B) adequate supply of child-resistant, moisture-proof, and light-proof containers; and

(C) adequate supply of prescription labels and other applicable identification labels.

(4) Library. A reference library shall be maintained that includes the following in hard copy or electronic format and that pharmacy personnel shall be capable of accessing at all times:

(A) current copies of the following:

(i) Texas Pharmacy Act and rules;

(ii) Texas Dangerous Drug Act and rules;

(iii) Texas Controlled Substances Act and rules;

(iv) Federal Controlled Substances Act and rules or official publication describing the requirements of the Federal Controlled Substances Act and rules;

(B) at least one current or updated general drug information reference which is required to contain drug interaction information including information needed to determine severity or significance of the interaction and appropriate recommendations or actions to be taken; and

(C) basic antidote information and the telephone number of the nearest regional poison control center.

(5) Drugs.

(A) Procurement, preparation, and storage.

(i) The pharmacist-in-charge shall have the responsibility for the procurement and storage of drugs, but may receive input from other appropriate staff of the facility, relative to such responsibility.

(ii) The pharmacist-in-charge shall have the responsibility for determining specifications of all drugs procured by the facility.

(iii) ASC pharmacies may not sell, purchase, trade, or possess prescription drug samples, unless the pharmacy meets the requirements as specified in §291.16 of this title (relating to Samples).

(iv) All drugs shall be stored at the proper temperatures, as defined in the USP/NF and in §291.15 of this title (relating to Storage of Drugs).

(v) Any drug bearing an expiration date may not be dispensed or distributed beyond the expiration date of the drug.

(vi) Outdated drugs shall be removed from dispensing stock and shall be quarantined together until such drugs are disposed of.

(B) Formulary.

(i) A formulary may be developed by an appropriate committee of the ASC.

(ii) The pharmacist-in-charge or consultant pharmacist shall be a full voting member of any committee which involves pharmaceutical services.

(iii) A practitioner may grant approval for pharmacists at the ASC to interchange, in accordance with the facility's formulary, for the drugs on the practitioner's medication orders provided:

(I) a formulary has been developed;

(II) the formulary has been approved by the medical staff of the ASC;

(III) there is a reasonable method for the practitioner to override any interchange; and

(IV) the practitioner authorizes a pharmacist in the ASC to interchange on his/her medication orders in accordance with the facility's formulary through his/her written agreement to abide by the policies and procedures of the medical staff and facility.

(C) Prepackaging and loading drugs into automated medication supply system.

(i) Prepackaging of drugs.

(I) Drugs may be prepackaged in quantities suitable for distribution to other Class C pharmacies under common ownership or for internal distribution only by a pharmacist or by pharmacy technicians or pharmacy technician trainees under the direction and direct supervision of a pharmacist.

(II) The label of a prepackaged unit shall indicate:

(-a-) brand name and strength of the drug; or if no brand name, then the generic name, strength, and name of the manufacturer or distributor;

(-b-) facility's lot number;

(-c-) expiration date;

(-d-) quantity of the drug, if quantity is greater than one; and

(-e-) if the drug is distributed to another Class C pharmacy, name of the facility responsible for prepackaging the drug.

(III) Records of prepackaging shall be maintained to show:

(-a-) the name of the drug, strength, and dosage form;

(-b-) facility's lot number;

(-c-) manufacturer or distributor;

(-d-) manufacturer's lot number;

(-e-) expiration date;

(-f-) quantity per prepackaged unit;

(-g-) number of prepackaged units;

(-h-) date packaged;

(-i-) name, initials, or electronic signature of the prepacker;

(-j-) signature or electronic signature of the responsible pharmacist; and

(-k-) if the drug is distributed to another Class C pharmacy, name of the facility receiving the prepackaged drug.

(IV) Stock packages, repackaged units, and control records shall be quarantined together until checked/released by the pharmacist.

(ii) Loading bulk unit of use drugs into automated medication supply systems. Automated medication supply systems may be loaded with bulk unit of use drugs only by a pharmacist, by pharmacy technicians or pharmacy technician trainees under the direction and direct supervision of a pharmacist, or by a licensed nurse who is authorized by the pharmacist to perform the loading of the automated medication supply system. For the purpose of this clause, direct supervision may be accomplished by physically present supervision or electronic monitoring by a pharmacist. In order for the pharmacist to electronically monitor, the medication supply system must allow for bar code scanning to verify the loading of drugs, and a record of the loading must be maintained by the system and accessible for electronic review by the pharmacist.

(6) Medication orders.

(A) Drugs may be administered to patients in ASCs only on the order of a practitioner. No change in the order for drugs may be made without the approval of a practitioner except as authorized by the practitioner in compliance with paragraph (5)(B) of this subsection.

(B) Drugs may be distributed only pursuant to the practitioner's medication order.

(C) ASC pharmacies shall be exempt from the labeling provisions and patient notification requirements of §562.006 and §562.009 of the Act, as respects drugs distributed pursuant to medication orders.

(D) In ASCs with a full-time pharmacist, if a practitioner orders a drug for administration to a bona fide patient of the facility when the pharmacy is closed, the following is applicable:

(i) prescription drugs and devices only in sufficient quantities for immediate therapeutic needs of a patient may be removed from the ASC pharmacy;

(ii) only a designated licensed nurse or practitioner may remove such drugs and devices;

(iii) a record shall be made at the time of withdrawal by the authorized person removing the drugs and devices. The record shall contain the following information:

(I) name of the patient;

(II) name of device or drug, strength, and dosage form;

(III) dose prescribed;

(IV) quantity withdrawn;

(V) time and date; and

(VI) signature or electronic signature of the person making the withdrawal;

(iv) the medication order in the patient's chart may substitute for such record, provided the medication order meets all the requirements of clause (iii) of this subparagraph;

(v) the pharmacist shall verify the withdrawal of a controlled substance as soon as practical, but in no event more than 72 hours from the time of such withdrawal; and

(vi) the pharmacist shall verify the withdrawal of a dangerous drug at a reasonable interval, but such verification must occur at least once in every calendar week.

(E) In ASCs with a part-time or consultant pharmacist, if a practitioner orders a drug for administration to a bona fide patient of the ASC when the pharmacist is not on duty, or when the pharmacy is closed, the following is applicable:

(i) prescription drugs and devices only in sufficient quantities for therapeutic needs may be removed from the ASC pharmacy;

(ii) only a designated licensed nurse or practitioner may remove such drugs and devices;

(iii) a record shall be made at the time of withdrawal by the authorized person removing the drug or device as described in subparagraph (D)(iii) and (iv) of this subsection; and

(iv) the pharmacist shall verify withdrawals at a reasonable interval, but such verification must occur at least once in every calendar week that the pharmacy is open.

(7) Floor stock. In facilities using a floor stock method of drug distribution, the pharmacy shall establish designated floor stock areas outside of the central pharmacy where drugs may be stored, in accordance with the pharmacy's policies and procedures. The following is applicable for removing drugs or devices in the absence of a pharmacist:

(A) prescription drugs and devices may be removed from the pharmacy only in the original manufacturer's container or prepackaged container;

(B) only a designated licensed nurse or practitioner may remove such drugs and devices;

(C) a record shall be made at the time of withdrawal by the authorized person removing the drug or device and the record shall contain the following information:

(i) name of the drug, strength, and dosage form;

(ii) quantity removed;

(iii) location of floor stock;

(iv) date and time; and

(v) signature or electronic signature of person making the withdrawal;

(D) the medication order in the patient's chart may substitute for the record required in subparagraph (C) of this paragraph, provided the medication order meets all the requirements of subparagraph (C) of this paragraph; and

(E) if a stored drug or device is returned to the pharmacy from floor stock areas, a record shall be made by the authorized person returning the drug or device. The record shall contain the following information:

(i) drug name, strength, and dosage form, or device name;

(ii) quantity returned;

(iii) previous floor stock location for the drug or device;

(iv) date and time; and

(v) signature or electronic signature of person returning the drug or device.

(8) Policies and procedures. Written policies and procedures for a drug distribution system, appropriate for the ambulatory surgical center, shall be developed and implemented by the pharmacist-in-charge with the advice of the appropriate committee. The written policies and procedures for the drug distribution system shall include, but not be limited to, procedures regarding the following:

(A) controlled substances;

(B) investigational drugs;

(C) prepackaging and manufacturing;

(D) medication errors;

(E) orders of physician or other practitioner;

(F) floor stocks;

(G) adverse drug reactions;

(H) drugs brought into the facility by the patient;

(I) self-administration;

(J) emergency drug tray;

(K) formulary, if applicable;

(L) drug storage areas;

(M) drug samples;

(N) drug product defect reports;

(O) drug recalls;

(P) outdated drugs;

(Q) preparation and distribution of IV admixtures;

(R) procedures for supplying drugs for postoperative use, if applicable;

(S) use of automated medication supply systems;

(T) use of data processing systems; and

(U) drug regimen review.

(9) Drugs supplied for postoperative use. Drugs supplied to patients for postoperative use shall be supplied according to the following procedures.

(A) Drugs may only be supplied to patients who have been admitted to the ASC.

(B) Drugs may only be supplied in accordance with the system of control and accountability established for drugs supplied from the ambulatory surgical center; such system shall be developed and supervised by the pharmacist-in-charge or staff pharmacist designated by the pharmacist-in-charge.

(C) Only drugs listed on the approved postoperative drug list may be supplied; such list shall be developed by the pharmacist-in-charge and the medical staff and shall consist of drugs of the nature and type to meet the immediate postoperative needs of the ambulatory surgical center patient.

(D) Drugs may only be supplied in prepackaged quantities not to exceed a 72-hour supply in suitable containers and appropriately prelabeled (including name, address, and phone number of the facility, and necessary auxiliary labels) by the pharmacy provided, however, that topicals and ophthalmics in original manufacturer's containers may be supplied in a quantity exceeding a 72-hour supply.

(E) At the time of delivery of the drug, the practitioner shall complete the label, such that the prescription container bears a label with at least the following information:

(i) date supplied;

(ii) name of practitioner;

(iii) name of patient;

(iv) directions for use;

(v) brand name and strength of the drug; or if no brand name, then the generic name of the drug dispensed, strength, and the name of the manufacturer or distributor of the drug; and

(vi) unique identification number.

(F) After the drug has been labeled, the practitioner or a licensed nurse under the supervision of the practitioner shall give the appropriately labeled, prepackaged medication to the patient.

(G) A perpetual record of drugs which are supplied from the ASC shall be maintained which includes:

(i) name, address, and phone number of the facility;

(ii) date supplied;

(iii) name of practitioner;

(iv) name of patient;

(v) directions for use;

(vi) brand name and strength of the drug; or if no brand name, then the generic name of the drug dispensed, strength, and the name of the manufacturer or distributor of the drug; and

(vii) unique identification number.

(H) The pharmacist-in-charge, or a pharmacist designated by the pharmacist-in-charge, shall review the records at least once in every calendar week that the pharmacy is open.

(10) Drug regimen review.

(A) A pharmacist shall evaluate medication orders and patient medication records for:

(i) known allergies;

(ii) rational therapy--contraindications;

(iii) reasonable dose and route of administration;

(iv) reasonable directions for use;

(v) duplication of therapy;

(vi) drug-drug interactions;

(vii) drug-food interactions;

(viii) drug-disease interactions;

(ix) adverse drug reactions;

(x) proper utilization, including overutilization or underutilization; and

(xi) clinical laboratory or clinical monitoring methods to monitor and evaluate drug effectiveness, side effects, toxicity, or adverse effects, and appropriateness to continued use of the drug in its current regimen.

(B) A retrospective, random drug regimen review as specified in the pharmacy's policies and procedures shall be conducted on a periodic basis to verify proper usage of drugs not to exceed 31 days between such reviews.

(C) Any questions regarding the order must be resolved with the prescriber and a written notation of these discussions made and maintained.

(e) Records.

(1) Maintenance of records.

(A) Every inventory or other record required to be kept under the provisions of this section (relating to Class C Pharmacies Located in a Freestanding Ambulatory Surgical Center) shall be:

(i) kept by the pharmacy and be available, for at least two years from the date of such inventory or record, for inspecting and copying by the board or its representative, and other authorized local, state, or federal law enforcement agencies; and

(ii) supplied by the pharmacy within 72 hours, if requested by an authorized agent of the board. If the pharmacy maintains the records in an electronic format, the requested records must be provided in a mutually agreeable electronic format if specifically requested by the board or its representative. Failure to provide the records set out in this subsection, either on site or within 72 hours, constitutes prima facie evidence of failure to keep and maintain records in violation of the Act.

(B) Records of controlled substances listed in Schedule II shall be maintained separately and readily retrievable from all other records of the pharmacy.

(C) Records of controlled substances listed in Schedules III - V shall be maintained separately or readily retrievable from all other records of the pharmacy. For purposes of this subparagraph, "readily retrievable" means that the controlled substances shall be asterisked, redlined, or in some other manner readily identifiable apart from all other items appearing on the record.

(D) Records, except when specifically required to be maintained in original or hard copy form, may be maintained in an alternative data retention system, such as a data processing or direct imaging system provided:

(i) the records in the alternative data retention system contain all of the information required on the manual record; and

(ii) the alternative data retention system is capable of producing a hard copy of the record upon the request of the board, its representative, or other authorized local, state, or federal law enforcement or regulatory agencies.

(E) Controlled substance records shall be maintained in a manner to establish receipt and distribution of all controlled substances.

(F) An ASC pharmacy shall maintain a perpetual inventory of controlled substances listed in Schedules II - V which shall be verified by a pharmacist for completeness and reconciled at least once in every calendar week that the pharmacy is open.

(G) Distribution records for controlled substances, listed in Schedules II - V, shall include the following information:

(i) patient's name;

(ii) practitioner's name who ordered the drug;

(iii) name of drug, dosage form, and strength;

(iv) time and date of administration to patient and quantity administered;

(v) signature or electronic signature of individual administering the controlled substance;

(vi) returns to the pharmacy; and

(vii) waste (waste is required to be witnessed and cosigned, manually or electronically, by another individual).

(H) The record required by subparagraph (G) of this paragraph shall be maintained separately from patient records.

(I) A pharmacist shall conduct an audit by randomly comparing the distribution records required by subparagraph (G) with the medication orders in the patient record on a periodic basis to verify proper administration of drugs not to exceed 30 days between such reviews.

(2) Patient records.

(A) Each medication order or set of orders issued together shall bear the following information:

(i) patient name;

(ii) drug name, strength, and dosage form;

(iii) directions for use;

(iv) date; and

(v) signature or electronic signature of the practitioner or that of his or her authorized agent, defined as an employee or consultant/full or part-time pharmacist of the ASC.

(B) Medication orders shall be maintained with the medication administration record in the medical records of the patient.

(3) General requirements for records maintained in a data processing system.

(A) If an ASC pharmacy's data processing system is not in compliance with the board's requirements, the pharmacy must maintain a manual recordkeeping system.

(B) The facility shall maintain a backup copy of information stored in the data processing system using disk, tape, or other electronic backup system and update this backup copy on a regular basis to assure that data is not lost due to system failure.

(C) A pharmacy that changes or discontinues use of a data processing system must:

(i) transfer the records to the new data processing system; or

(ii) purge the records to a printout which contains:

(I) all of the information required on the original document; or

(II) for records of distribution and return for all controlled substances, the same information as required on the audit trail printout as specified in subparagraph (F) of this paragraph. The information on the printout shall be sorted and printed by drug name and list all distributions and returns chronologically.

(D) Information purged from a data processing system must be maintained by the pharmacy for two years from the date of initial entry into the data processing system.

(E) The pharmacist-in-charge shall report to the board in writing any significant loss of information from the data processing system within 10 days of discovery of the loss.

(F) The data processing system shall have the capacity to produce a hard copy printout of an audit trail of drug distribution and return for any strength and dosage form of a drug (by either brand or generic name or both) during a specified time period. This printout shall contain the following information:

(i) patient's name and room number or patient's facility identification number;

(ii) prescribing or attending practitioner's name;

(iii) name, strength, and dosage form of the drug product actually distributed;

(iv) total quantity distributed from and returned to the pharmacy;

(v) if not immediately retrievable via electronic image, the following shall also be included on the printout:

(I) prescribing or attending practitioner's address; and

(II) practitioner's DEA registration number, if the medication order is for a controlled substance.

(G) An audit trail printout for each strength and dosage form of the drugs distributed during the preceding month shall be produced at least monthly and shall be maintained in a separate file at the

facility. The information on this printout shall be sorted by drug name and list all distributions/returns for that drug chronologically.

(H) The pharmacy may elect not to produce the monthly audit trail printout if the data processing system has a workable (electronic) data retention system which can produce an audit trail of drug distribution and returns for the preceding two years. The audit trail required in this clause shall be supplied by the pharmacy within 72 hours, if requested by an authorized agent of the Texas State Board of Pharmacy, or other authorized local, state, or federal law enforcement or regulatory agencies.

(I) In the event that an ASC pharmacy which uses a data processing system experiences system downtime, the pharmacy must have an auxiliary procedure which will ensure that all data is retained for online data entry as soon as the system is available for use again.

(4) Distribution of controlled substances to another registrant. A pharmacy may distribute controlled substances to a practitioner, another pharmacy, or other registrant, without being registered to distribute, under the following conditions.

(A) The registrant to whom the controlled substance is to be distributed is registered under the Controlled Substances Act to possess that controlled substance.

(B) The total number of dosage units of controlled substances distributed by a pharmacy may not exceed 5.0% of all controlled substances dispensed by the pharmacy during the 12-month period in which the pharmacy is registered; if at any time it does exceed 5.0%, the pharmacy is required to obtain an additional registration to distribute controlled substances.

(C) If the distribution is for a Schedule III, IV, or V controlled substance, a record shall be maintained which indicates:

(i) the actual date of distribution;

(ii) the name, strength, and quantity of controlled substances distributed;

(iii) the name, address, and DEA registration number of the distributing pharmacy; and

(iv) the name, address, and DEA registration number of the pharmacy, practitioner, or other registrant to whom the controlled substances are distributed.

(D) A pharmacy shall comply with 21 CFR 1305 regarding the DEA order form (DEA 222) requirements when distributing a Schedule II controlled substance.

(5) Other records. Other records to be maintained by the pharmacy include:

(A) a log of the initials or identification codes which identifies each pharmacist by name. The initials or identification code shall be unique to ensure that each pharmacist can be identified, i.e., identical initials or identification codes cannot be used. Such log shall be maintained at the pharmacy for at least seven years from the date of the transaction;

(B) suppliers' invoices of dangerous drugs and controlled substances dated and initialed or signed by the person receiving the drugs;

(i) a pharmacist shall verify that the controlled substances listed on the invoices were added to the pharmacy's perpetual inventory by clearly recording his/her initials and the date of review of the perpetual inventory; and

(ii) for controlled substances, the documents retained must contain the name, strength, and quantity of controlled substances distributed, and the name, address, and DEA number of both the supplier and the receiving pharmacy;

(C) supplier's credit memos for controlled substances and dangerous drugs;

(D) a copy of inventories required by §291.17 of this title (relating to Inventory Requirements) except that a perpetual inventory of controlled substances listed in Schedule II may be kept in a data processing system if the data processing system is capable of producing a copy of the perpetual inventory on-site;

(E) reports of surrender or destruction of controlled substances and/or dangerous drugs to an appropriate state or federal agency or reverse distributor;

(F) records of distribution of controlled substances and/or dangerous drugs to other pharmacies, practitioners, or registrants; and

(G) a copy of any notification required by the Texas Pharmacy Act or these rules, including, but not limited to, the following:

(i) reports of theft or significant loss of controlled substances to DEA and the board;

(ii) notification of a change in pharmacist-in-charge of a pharmacy; and

(iii) reports of a fire or other disaster which may affect the strength, purity, or labeling of drugs, medications, devices, or other materials used in the diagnosis or treatment of injury, illness, and disease.

(6) Permission to maintain central records. Any pharmacy that uses a centralized recordkeeping system for invoices and financial data shall comply with the following procedures.

(A) Controlled substance records. Invoices and financial data for controlled substances may be maintained at a central location provided the following conditions are met:

(i) Prior to the initiation of central recordkeeping, the pharmacy submits written notification by registered or certified mail to the divisional director of DEA as required by the Code of Federal Regulations, Title 21, §1304(a), and submits a copy of this written notification to the board. Unless the registrant is informed by the divisional director of DEA that permission to keep central records is denied, the pharmacy may maintain central records commencing 14 days after receipt of notification by the divisional director;

(ii) The pharmacy maintains a copy of the notification required in this subparagraph; and

(iii) The records to be maintained at the central record location shall not include executed DEA order forms, prescription drug orders, or controlled substance inventories, which shall be maintained at the pharmacy.

(B) Dangerous drug records. Invoices and financial data for dangerous drugs may be maintained at a central location.

(C) Access to records. If the records are kept in any form requiring special equipment to render the records easily readable, the pharmacy shall provide access to such equipment with the records.

(D) Delivery of records. The pharmacy agrees to deliver all or any part of such records to the pharmacy location within

two business days of written request of a board agent or any other authorized official.

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

Filed with the Office of the Secretary of State on December 12, 2022.

TRD-202204918
Timothy L. Tucker, Pharm.D.
Executive Director
Texas State Board of Pharmacy
Earliest possible date of adoption: January 22, 2023
For further information, please call: (512) 305-8097

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SUBCHAPTER F. NON-RESIDENT PHARMACY (CLASS E)

22 TAC §291.104

The Texas State Board of Pharmacy proposes amendments to §291.104, concerning Operational Standards. The amendments, if adopted, correct a drafting error by adding an omitted word.

Timothy L. Tucker, Pharm.D., Executive Director/Secretary, has determined that, for the first five-year period the rules are in effect, there will be no fiscal implications for state or local government as a result of enforcing or administering the rule. Dr. Tucker has determined that, for each year of the first five-year period the rule will be in effect, the public benefit anticipated as a result of enforcing the amendments will be clear and grammatically correct regulations. There is no anticipated adverse economic impact on large, small or micro-businesses (pharmacies), rural communities, or local or state employment. Therefore, an economic impact statement and regulatory flexibility analysis are not required.

For each year of the first five years the proposed amendments will be in effect, Dr. Tucker has determined the following:

(1) The proposed amendments do not create or eliminate a government program;

(2) Implementation of the proposed amendments does not require the creation of new employee positions or the elimination of existing employee positions;

(3) Implementation of the proposed amendments does not require an increase or decrease in the future legislative appropriations to the agency;

(4) The proposed amendments do not require an increase or decrease in fees paid to the agency;

(5) The proposed amendments do not create a new regulation;

(6) The proposed amendments do not limit or expand an existing regulation;

(7) The proposed amendments do not increase or decrease the number of individuals subject to the rule's applicability; and

(8) The proposed amendments do not positively or adversely affect this state's economy.

Written comments on the amendments may be submitted to Eamon D. Briggs, Assistant General Counsel, Texas State Board of Pharmacy, 1801 Congress Avenue, Suite 13.100, Austin, Texas, 78701-1319, FAX (512) 305-8061. Comments must be received by 5:00 p.m., January 30, 2023.

The amendments are proposed under §§551.002 and 554.051 of the Texas Pharmacy Act (Chapters 551 - 569, Texas Occupations Code). The Board interprets §551.002 as authorizing the agency to protect the public through the effective control and regulation of the practice of pharmacy. The Board interprets §554.051(a) as authorizing the agency to adopt rules for the proper administration and enforcement of the Act.

The statutes affected by these amendments: Texas Pharmacy Act, Chapters 551 - 569, Texas Occupations Code.

§291.104. Operational Standards.

(a) Licensing requirements.

(1) A Class E pharmacy shall register with the board on a pharmacy license application provided by the board, following the procedures specified in §291.1 of this title (relating to Pharmacy License Application).

(2) On initial application, the pharmacy shall follow the procedures specified in §291.1 of this title and then provide the following additional information specified in §560.052(c) and (f) of the Act (relating to Qualifications):

(A) evidence that the applicant holds a pharmacy license, registration, or permit issued by the state in which the pharmacy is located;

(B) the name of the owner and pharmacist-in-charge of the pharmacy for service of process;

(C) evidence of the applicant's ability to provide to the board a record of a prescription drug order dispensed by the applicant to a resident of this state not later than 72 hours after the time the board requests the record;

(D) an affidavit by the pharmacist-in-charge which states that the pharmacist has read and understands the laws and rules relating to a Class E pharmacy;

(E) proof of creditworthiness; and

(F) an inspection report issued not more than two years before the date the license application is received and conducted by the pharmacy licensing board in the state of the pharmacy's physical location.

(i) A Class E pharmacy may submit an inspection report issued by an entity other than the pharmacy licensing board of the state in which the pharmacy is physically located if the state's licensing board does not conduct inspections as follows:

(I) an individual approved by the board who is not employed by the pharmacy but acting as a consultant to inspect the pharmacy;

(II) an agent of the National Association of Boards of Pharmacy;

(III) an agent of another State Board of Pharmacy; or

(IV) an agent of an accrediting body, such as the Joint Commission on Accreditation of Healthcare Organizations.

(ii) The inspection must be substantively equivalent to an inspection conducted by the board.

(3) On renewal of a license, the pharmacy shall complete the renewal application provided by the board and, as specified in §561.0031 of the Act, provide an inspection report issued not more than three years before the date the renewal application is received and conducted by the pharmacy licensing board in the state of the pharmacy's physical location.

(A) A Class E pharmacy may submit an inspection report issued by an entity other than the pharmacy licensing board of the state in which the pharmacy is physically located if the state's licensing board does not conduct inspections as follows:

(i) an individual approved by the board who is not employed by the pharmacy but acting as a consultant to inspect the pharmacy;

(ii) an agent of the National Association of Boards of Pharmacy;

(iii) an agent of another State Board of Pharmacy; or

(iv) an agent of an accrediting body, such as the Joint Commission on Accreditation of Healthcare Organizations.

(B) The inspection must be substantively equivalent to an inspection conducted by the board.

(4) A Class E pharmacy which changes ownership shall notify the board within ten days of the change of ownership and apply for a new and separate license as specified in §291.3 of this title (relating to Required Notifications).

(5) A Class E pharmacy which changes location and/or name shall notify the board of the change as specified in §291.3 of this title.

(6) A Class E pharmacy owned by a partnership or corporation which changes managing officers shall notify the board in writing of the names of the new managing officers within ten days of the change, following the procedures in §291.3 of this title.

(7) A Class E pharmacy shall notify the board in writing within ten days of closing.

(8) A separate license is required for each principal place of business and only one pharmacy license may be issued to a specific location.

(9) A fee as specified in §291.6 of this title (relating to Pharmacy License Fees) will be charged for the issuance and renewal of a license and the issuance of an amended license.

(10) The board may grant an exemption from the licensing requirements of this Act on the application of a pharmacy located in a state of the United States other than this state that restricts its dispensing of prescription drugs or devices to residents of this state to isolated transactions.

(11) A Class E pharmacy engaged in the centralized dispensing of prescription drug or medication orders or outsourcing of prescription drug order dispensing to a central fill pharmacy shall comply with the provisions of §291.125 of this title (relating to Centralized Prescription Dispensing).

(12) A Class E pharmacy engaged in central processing of prescription drug or medication orders shall comply with the provisions of §291.123 of this title (relating to Central Prescription or Medication Order Processing).

(13) A Class E pharmacy engaged in the compounding of non-sterile preparations shall comply with the provisions of §291.131 of this title (relating to Pharmacies Compounding Non-Sterile Preparations).

(14) Class E pharmacy personnel shall not compound sterile preparations unless the pharmacy has applied for and obtained a Class E-S pharmacy license.

(15) A Class E pharmacy, which operates as a community type of pharmacy which would otherwise be required to be licensed under the Act §560.051(a)(1) (Community Pharmacy (Class A)), shall comply with the provisions of §291.31 of this title (relating to Definitions), §291.32 of this title (relating to Personnel), §291.33 of this title (relating to Operational Standards), §291.34 of this title (relating to Records), and §291.35 of this title (relating to Official Prescription Requirements), contained in Community Pharmacy (Class A); or which operates as a nuclear type of pharmacy which would otherwise be required to be licensed under the Act §560.051(a)(2) (Nuclear Pharmacy (Class B)), shall comply with the provisions of §291.51 of this title (relating to Purpose), §291.52 of this title (relating to Definitions), §291.53 of this title (relating to Personnel), §291.54 of this title (relating to Operational Standards), and §291.55 of this title (relating to Records), contained in Nuclear Pharmacy (Class B), to the extent such sections are applicable to the operation of the pharmacy.

(b) Prescription dispensing and delivery.

(1) General.

(A) All prescription drugs and/or devices shall be dispensed and delivered safely and accurately as prescribed.

(B) The pharmacy shall maintain adequate storage or shipment containers and use shipping processes to ensure drug stability and potency. Such shipping processes shall include the use of packaging material and devices to ensure that the drug is maintained at an appropriate temperature range to maintain the integrity of the medication throughout the delivery process.

(C) The pharmacy shall utilize a delivery system which is designed to assure that the drugs are delivered to the appropriate patient.

(D) All pharmacists shall exercise sound professional judgment with respect to the accuracy and authenticity of any prescription drug order they dispense. If the pharmacist questions the accuracy or authenticity of a prescription drug order, he/she shall verify the order with the practitioner prior to dispensing.

(E) Prior to dispensing a prescription, pharmacists shall determine, in the exercise of sound professional judgment, that the prescription is a valid prescription. A pharmacist may not dispense a prescription drug if the pharmacist knows or should have known that the prescription was issued on the basis of an Internet-based or telephonic consultation without a valid patient-practitioner relationship.

(F) Subparagraph (E) of this paragraph does not prohibit a pharmacist from dispensing a prescription when a valid patient-practitioner relationship is not present in an emergency situation (e.g. a practitioner taking calls for the patient's regular practitioner).

(2) Drug regimen review.

(A) For the purpose of promoting therapeutic appropriateness, a pharmacist shall, prior to or at the time of dispensing a prescription drug order, review the patient's medication record. Such review shall at a minimum identify clinically significant:

(i) inappropriate drug utilization;

(ii) therapeutic duplication;

(iii) drug-disease contraindications;

(iv) drug-drug interactions;

(v) incorrect drug dosage or duration of drug treatment;

(vi) drug-allergy interactions; and

(vii) clinical abuse/misuse.

(B) Upon identifying any clinically significant conditions, situations, or items listed in subparagraph (A) of this paragraph, the pharmacist shall take appropriate steps to avoid or resolve the problem including consultation with the prescribing practitioner. The pharmacist shall document such occurrences.

(3) Patient counseling and provision of drug information.

(A) To optimize drug therapy, a pharmacist shall communicate to the patient or the patient's agent information about the prescription drug or device which in the exercise of the pharmacist's professional judgment the pharmacist deems significant, such as the following:

(i) the name and description of the drug or device;

(ii) dosage form, dosage, route of administration, and duration of drug therapy;

(iii) special directions and precautions for preparation, administration, and use by the patient;

(iv) common severe side or adverse effects or interactions and therapeutic contraindications that may be encountered, including their avoidance and the action required if they occur;

(v) techniques for self-monitoring of drug therapy;

(vi) proper storage;

(vii) refill information; and

(viii) action to be taken in the event of a missed dose.

(B) Such communication shall be:

(i) provided to new and existing patients of a pharmacy with each new prescription drug order. A new prescription drug order is one that has not been dispensed by the pharmacy to the patient in the same dosage and strength within the last year;

(ii) provided for any prescription drug order dispensed by the pharmacy on the request of the patient or patient's agent;

(iii) communicated orally in person unless the patient or patient's agent is not at the pharmacy or a specific communication barrier prohibits such oral communication; and

(iv) reinforced with written information. The following is applicable concerning this written information:

(I) Written information must be in plain language designed for the patient and printed in an easily readable font comparable to but no smaller than ten-point Times Roman. This information may be provided to the patient in an electronic format, such as by e-mail, if the patient or patient's agent requests the information in an electronic format and the pharmacy documents the request.

(II) When a compounded product is dispensed, information shall be provided for the major active ingredient(s), if available.

(III) For new drug entities, if no written information is initially available, the pharmacist is not required to provide information until such information is available, provided:

(-a-) the pharmacist informs the patient or the patient's agent that the product is a new drug entity and written information is not available;

(-b-) the pharmacist documents the fact that no written information was provided; and

(-c-) if the prescription is refilled after written information is available, such information is provided to the patient or patient's agent.

(IV) The written information accompanying the prescription or the prescription label shall contain the statement Do not flush unused medications or pour down a sink or drain. A drug product on a list developed by the Federal Food and Drug Administration of medicines recommended for disposal by flushing is not required to bear this statement.

(C) Only a pharmacist may orally provide drug information to a patient or patient's agent and answer questions concerning prescription drugs. Non-pharmacist personnel may not ask questions of a patient or patient's agent which are intended to screen and/or limit interaction with the pharmacist.

(D) If prescriptions are routinely delivered outside the area covered by the pharmacy's local telephone service, the pharmacy shall provide a toll-free telephone line which is answered during normal business hours to enable communication between the patient and a pharmacist.

(E) The pharmacist shall place on the prescription container or on a separate sheet delivered with the prescription container in both English and Spanish the local and toll-free telephone number of the pharmacy and the statement: Written information about this prescription has been provided for you. Please read this information before you take the medication. If you have questions concerning this prescription, a pharmacist is available during normal business hours to answer these questions at (insert the pharmacy's local and toll-free telephone numbers).

(F) The provisions of this paragraph do not apply to patients in facilities where drugs are administered to patients by a person required to do so by the laws of the state (i.e., nursing homes).

(G) Upon delivery of a refill prescription, a pharmacist shall ensure that the patient or patient's agent is offered information about the refilled prescription and that a pharmacist is available to discuss the patient's prescription and provide information.

(H) Nothing in this subparagraph shall be construed as requiring a pharmacist to provide consultation when a patient or patient's agent refuses such consultation. The pharmacist shall document such refusal for consultation.

(4) Labeling. At the time of delivery, the dispensing container shall bear a label that contains the following information:

(A) the name, physical address, and phone number of the pharmacy;

(B) if the drug is dispensed in a container other than the manufacturer's original container, the date after which the prescription should not be used or beyond-use-date. Unless otherwise specified by the manufacturer, the beyond-use-date shall be one year from the date the drug is dispensed or the manufacturer's expiration date, whichever is earlier. The beyond-use-date may be placed on the prescription label or on a flag label attached to the bottle. A beyond-use-date is not required on the label of a prescription dispensed to a person at the time of release from prison or jail if the prescription is for not more than a 10-day supply of medication;

(C) either on the prescription label or the written information accompanying the prescription, the statement, Do not flush unused medications or pour down a sink or drain. A drug product on a list developed by the Federal Food and Drug Administration of medicines recommended for disposal by flushing is not required to bear this statement; and

(D) any other information that is required by the pharmacy or drug laws or rules in the state in which the pharmacy is located.

(c) Substitution requirements.

(1) Unless compliance would violate the pharmacy or drug laws or rules in the state in which the pharmacy is located a pharmacist in a Class E pharmacy may dispense a generically equivalent drug or interchangeable biological product and shall comply with the provisions of §309.3 of this title (relating to Substitution Requirements) and §309.7 of this title (relating to Dispensing Responsibilities).

(2) The pharmacy must include on the prescription order form completed by the patient or the patient's agent information that clearly and conspicuously:

(A) states that if a less expensive generically equivalent drug or interchangeable biological product is available for the brand prescribed, the patient or the patient's agent may choose between the generically equivalent drug or interchangeable biological product and the brand prescribed; and

(B) allows the patient or the patient's agent to indicate the choice of the generically equivalent drug or interchangeable biological product or the brand prescribed.

(d) Therapeutic Drug Interchange. A switch to a drug providing a similar therapeutic response to the one prescribed shall not be made without prior approval of the prescribing practitioner. This subsection does not apply to generic substitution. For generic substitution, see the requirements of subsection (c) of this section.

(1) The patient shall be notified of the therapeutic drug interchange prior to, or upon delivery of, the dispensed prescription to the patient. Such notification shall include:

(A) a description of the change;

(B) the reason for the change;

(C) whom to notify with questions concerning the change; and

(D) instructions for return of the drug if not wanted by the patient.

(2) The pharmacy shall maintain documentation of patient notification of therapeutic drug interchange which shall include:

(A) the date of the notification;

(B) the method of notification;

(C) a description of the change; and

(D) the reason for the change.

(e) Transfer of Prescription Drug Order Information. Unless compliance would violate the pharmacy or drug laws or rules in the state in which the pharmacy is located, a pharmacist in a Class E pharmacy may not refuse to transfer prescriptions to another pharmacy that is making the transfer request on behalf of the patient. The transfer of original prescription information must be done within four business hours of the request.

(f) Prescriptions for Schedules II - V controlled substances. Unless compliance would violate the pharmacy or drug laws or rules in the state in which the pharmacy is located, a pharmacist in a Class E pharmacy who dispenses a prescription for a Schedules II - V controlled substance for a resident of Texas shall electronically send the prescription information to the Texas State Board of Pharmacy as specified in §315.6 of this title (relating to Pharmacy Responsibility - Electronic Reporting) not later than the next business day after the prescription is dispensed.

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

Filed with the Office of the Secretary of State on December 12, 2022.

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Timothy L. Tucker, Pharm.D.
Executive Director
Texas State Board of Pharmacy
Earliest possible date of adoption: January 22, 2023
For further information, please call: (512) 305-8097

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CHAPTER 303. DESTRUCTION OF DRUGS

22 TAC §303.1

The Texas State Board of Pharmacy proposes amendments to §303.1, concerning Destruction of Dispensed Drugs. The amendments, if adopted, remove the inventory requirements for destruction using a waste disposal service of dangerous drugs dispensed in health care facilities or institutions and clarify dangerous drugs may be comingled with controlled substances in a shared container prior to destruction as allowed by federal laws and regulations.

Timothy L. Tucker, Pharm.D., Executive Director/Secretary, has determined that, for the first five-year period the rules are in effect, there will be no fiscal implications for state or local government as a result of enforcing or administering the rule. Dr. Tucker has determined that, for each year of the first five-year period the rule will be in effect, the public benefit anticipated as a result of enforcing the amendments will be clear, efficient, and grammatically correct regulations. There is no anticipated adverse economic impact on large, small or micro-businesses (pharmacies), rural communities, or local or state employment. Therefore, an economic impact statement and regulatory flexibility analysis are not required.

For each year of the first five years the proposed amendments will be in effect, Dr. Tucker has determined the following:

(1) The proposed amendments do not create or eliminate a government program;

(2) Implementation of the proposed amendments does not require the creation of new employee positions or the elimination of existing employee positions;

(3) Implementation of the proposed amendments does not require an increase or decrease in the future legislative appropriations to the agency;

(4) The proposed amendments do not require an increase or decrease in fees paid to the agency;

(5) The proposed amendments do not create a new regulation;

(6) The proposed amendments do limit an existing regulation by removing inventory requirements;

(7) The proposed amendments do not increase or decrease the number of individuals subject to the rule's applicability; and

(8) The proposed amendments do not positively or adversely affect this state's economy.

Written comments on the amendments may be submitted to Eamon D. Briggs, Assistant General Counsel, Texas State Board of Pharmacy, 1801 Congress Avenue, Suite 13.100, Austin, Texas, 78701-1319, FAX (512) 305-8061. Comments must be received by 5:00 p.m., January 30, 2023.

The amendments are proposed under §§551.002 and 554.051 of the Texas Pharmacy Act (Chapters 551 - 569, Texas Occupations Code). The Board interprets §551.002 as authorizing the agency to protect the public through the effective control and regulation of the practice of pharmacy. The Board interprets §554.051(a) as authorizing the agency to adopt rules for the proper administration and enforcement of the Act.

The statutes affected by these amendments: Texas Pharmacy Act, Chapters 551 - 569, Texas Occupations Code.

§303.1. Destruction of Dispensed Drugs.

(a) Drugs dispensed to patients in health care facilities or institutions.

(1) Destruction by the consultant pharmacist. The consultant pharmacist, if in good standing with the Texas State Board of Pharmacy, is authorized to destroy dangerous drugs dispensed to patients in health care facilities or institutions. A consultant pharmacist may destroy controlled substances as allowed to do so by federal laws or rules of the Drug Enforcement Administration. Dangerous drugs may be destroyed provided the following conditions are met.

(A) A written agreement exists between the facility and the consultant pharmacist.

(B) The drugs are inventoried and such inventory is verified by the consultant pharmacist. The following information shall be included on this inventory:

(i) name and address of the facility or institution;

(ii) name and pharmacist license number of the consultant pharmacist;

(iii) date of drug destruction;

(iv) date the prescription was dispensed;

(v) unique identification number assigned to the prescription by the pharmacy;

(vi) name of dispensing pharmacy;

(vii) name, strength, and quantity of drug;

(viii) signature of consultant pharmacist destroying drugs;

(ix) signature of the witness(es); and

(x) method of destruction.

(C) The signature of the consultant pharmacist and witness(es) to the destruction and the method of destruction specified in subparagraph (B) of this paragraph may be on a cover sheet attached to the inventory and not on each individual inventory sheet, provided the cover sheet contains a statement indicating the number of inventory pages that are attached and each of the attached pages are initialed by the consultant pharmacist and witness(es).

(D) The drugs are destroyed in a manner to render the drugs unfit for human consumption and disposed of in compliance with all applicable state and federal requirements.

(E) The actual destruction of the drugs is witnessed by one of the following:

(i) a commissioned peace officer;

(ii) an agent of the Texas State Board of Pharmacy;

(iii) an agent of the Texas Health and Human Services Commission, authorized by the Texas State Board of Pharmacy to destroy drugs;

(iv) an agent of the Texas Department of State Health Services, authorized by the Texas State Board of Pharmacy to destroy drugs; or

(v) any two individuals working in the following capacities at the facility:

(I) facility administrator;

(II) director of nursing;

(III) acting director of nursing; or

(IV) licensed nurse.

(F) If the actual destruction of the drugs is conducted at a location other than the facility or institution, the consultant pharmacist and witness(es) shall retrieve the drugs from the facility or institution, transport, and destroy the drugs at such other location.

(2) Destruction by a waste disposal service. A consultant pharmacist may utilize a waste disposal service to destroy dangerous drugs dispensed to patients in health care facilities or institutions. A consultant pharmacist may destroy controlled substances, including any dangerous drugs comingled with the controlled substances in a shared container, as allowed to do so by federal laws or rules of the Drug Enforcement Administration. Dangerous drugs not comingled with controlled substances may be transferred to a waste disposal service for destruction provided the following conditions are met.

(A) The waste disposal service is in compliance with applicable rules of the Texas Commission on Environmental Quality and United States Environmental Protection Agency relating to waste disposal.

~~[(B) The drugs are inventoried and such inventory is verified by the consultant pharmacist prior to placing the drugs in an appropriate container, and sealing the container. The following information must be included on this inventory:]~~

~~*[(i)* name and address of the facility or institution;]~~

~~*[(ii)* name and pharmacist license number of the consultant pharmacist;]~~

~~*[(iii)* date of packaging and sealing of the container;]~~

~~*[(iv)* date the prescription was dispensed;]~~

~~*[(v)* unique identification number assigned to the prescription by the pharmacy;]~~

~~*[(vi)* name of dispensing pharmacy;]~~

~~*[(vii)* name, strength, and quantity of drug;]~~

~~*[(viii)* signature of consultant pharmacist packaging and sealing the container; and]~~

[(ix) ~~signature of the witness(es).~~]

(B) [~~(C)~~] The consultant pharmacist seals the container of drugs in the presence of the facility administrator and the director of nursing or one of the other witnesses listed in paragraph (1)(E) of this subsection as follows:

(i) tamper resistant tape is placed on the container in such a manner that any attempt to reopen the container will result in the breaking of the tape; and

(ii) the signature of the consultant pharmacist is placed over this tape seal.

(C) [~~(D)~~] The sealed container is maintained in a secure area at the facility or institution until transferred to the waste disposal service by the consultant pharmacist, facility administrator, director of nursing, or acting director of nursing.

(D) [~~(E)~~] A record of the transfer to the waste disposal service is maintained [~~and attached to the inventory of drugs specified in subparagraph (B) of this paragraph~~]. Such record shall contain the following information:

(i) date of the transfer;

(ii) signature of the person who transferred the drugs to the waste disposal service;

(iii) name and address of the waste disposal service; and

(iv) signature of the employee of the waste disposal service who receives the container.

(E) [~~(F)~~] The waste disposal service shall provide the facility with proof of destruction of the sealed container. Such proof of destruction shall contain the date, location, and method of destruction of the container [~~and shall be attached to the inventory of drugs specified in subparagraph (B) of this paragraph~~].

(3) Record retention. All records required in this subsection shall be maintained by the consultant pharmacist at the health care facility or institution for two years from the date of destruction.

(b) Drugs returned to a pharmacy. A pharmacist in a pharmacy may accept and destroy dangerous drugs that have been previously dispensed to a patient and returned to a pharmacy by the patient or an agent of the patient. A pharmacist may accept controlled substances that have been previously dispensed to a patient as allowed by federal laws of the Drug Enforcement Administration. The following procedures shall be followed in destroying dangerous drugs.

(1) The dangerous drugs shall be destroyed in a manner to render the drugs unfit for human consumption and disposed of in compliance with all applicable state and federal requirements.

(2) Documentation shall be maintained that includes the following information:

(A) name and address of the dispensing pharmacy;

(B) unique identification number assigned to the prescription, if available;

(C) name and strength of the dangerous drug; and

(D) signature of the pharmacist.

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

Filed with the Office of the Secretary of State on December 12, 2022.

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Timothy L. Tucker, Pharm.D.
Executive Director
Texas State Board of Pharmacy
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For further information, please call: (512) 305-8097

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CHAPTER 315. CONTROLLED SUBSTANCES

22 TAC §315.6

The Texas State Board of Pharmacy proposes amendments to §315.6, concerning Pharmacy Responsibility - Electronic Reporting. The amendments, if adopted, specify that a pharmacy must report the data elements indicated as required by the board's Data Submission Guide for Dispensers.

Timothy L. Tucker, Pharm.D., Executive Director/Secretary, has determined that, for the first five-year period the rules are in effect, there will be no fiscal implications for state or local government as a result of enforcing or administering the rule. Dr. Tucker has determined that, for each year of the first five-year period the rule will be in effect, the public benefit anticipated as a result of enforcing the amendments will be clear instruction for pharmacies regarding the reporting requirements for dispensations of controlled substance prescriptions. There is no anticipated adverse economic impact on large, small or micro-businesses (pharmacies), rural communities, or local or state employment. Therefore, an economic impact statement and regulatory flexibility analysis are not required.

For each year of the first five years the proposed amendments will be in effect, Dr. Tucker has determined the following:

(1) The proposed amendments do not create or eliminate a government program;

(2) Implementation of the proposed amendments does not require the creation of new employee positions or the elimination of existing employee positions;

(3) Implementation of the proposed amendments does not require an increase or decrease in the future legislative appropriations to the agency;

(4) The proposed amendments do not require an increase or decrease in fees paid to the agency;

(5) The proposed amendments do not create a new regulation;

(6) The proposed amendments do expand an existing regulation by requiring pharmacies to report additional data elements;

(7) The proposed amendments do not increase or decrease the number of individuals subject to the rule's applicability; and

(8) The proposed amendments do not positively or adversely affect this state's economy.

Written comments on the amendments may be submitted to Eamon D. Briggs, Assistant General Counsel, Texas State Board of Pharmacy, 1801 Congress Avenue, Suite 13.100, Austin, Texas, 78701-1319, FAX (512) 305-8061. Comments must be received by 5:00 p.m., January 30, 2023.

The amendments are proposed under §551.002 and §554.051 of the Texas Pharmacy Act (Chapters 551 - 569, Texas Occupations Code). The Board interprets §551.002 as authorizing the agency to protect the public through the effective control and regulation of the practice of pharmacy. The Board interprets §554.051(a) as authorizing the agency to adopt rules for the proper administration and enforcement of the Act.

The statutes affected by these amendments: Texas Pharmacy Act, Chapters 551 - 569, Texas Occupations Code.

§315.6. Pharmacy Responsibility - Electronic Reporting.

(a) Not later than the next business day after the date a controlled substance prescription is dispensed, a pharmacy must electronically submit to the board any[~~the following~~] data elements indicated as required by the board's Data Submission Guide for Dispensers.[:]

[~~(1) the prescribing practitioner's DEA registration number including the prescriber's identifying suffix of the authorizing hospital or other institution's DEA number when applicable;~~

~~(2) the official prescription form control number if dispensed from a written official prescription form for a Schedule II controlled substance;~~

~~(3) the board's designated placeholder entered into the control number field if the prescription is electronic and meets the requirements of Code of Federal Regulations, Title 21, Part 1311;~~

~~(4) the patient's name, date of birth, and address including city, state, and zip code; or such information on the animal's owner if the prescription is for an animal;~~

~~(5) the date the prescription was issued and dispensed;~~

~~(6) the NDC # of the controlled substance dispensed;~~

~~(7) the quantity of controlled substance dispensed;~~

~~(8) the pharmacy's prescription number; and~~

~~(9) the pharmacy's DEA registration number.~~]

(b) A pharmacy must electronically correct dispensing data submitted to the board within seven business days of identifying an omission, error, or inaccuracy in previously submitted dispensing data.

(c) If a pharmacy does not dispense any controlled substance prescriptions, the pharmacy must electronically submit to the board a zero report indicating that no controlled substances were dispensed every seven days. If the pharmacy subsequently begins dispensing controlled substances, the pharmacy must begin reporting as specified in subsection (a) of this section.

(d) A pharmacy that does not dispense controlled substances may request a waiver of the zero reporting requirements by submitting a waiver request form and providing any information requested on the form. If the pharmacy subsequently begins dispensing controlled substances, the waiver is no longer valid, and the pharmacy must begin reporting as specified in subsection (a) of this section.

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

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Timothy L. Tucker, Pharm.D.
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Texas State Board of Pharmacy
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PART 24. TEXAS BOARD OF VETERINARY MEDICAL EXAMINERS

CHAPTER 575. PRACTICE AND PROCEDURE

22 TAC §575.29

The Texas Board of Veterinary Medical Examiners (Board) proposes this amendment to §575.29, concerning Informal Conference.

The purpose of the proposed amendment is to give veterinarians more clarification on what the Board expects from them going into informal conferences. The current rule is not specific enough.

Fiscal Note

John Hargis, General Counsel, has determined that for each year of the first five years that the rule is in effect, there are no anticipated increases or reductions in costs to the state and local governments as a result of enforcing or administering the rule.

Mr. Hargis has also determined that for each year of the first five years that the rule is in effect, there is no anticipated impact in revenue to state government as a result of enforcing or administering the rule.

Public Benefit and Cost Note

Mr. Hargis has also determined that for each year of the first five years the rule is in effect, the anticipated public benefit will be to protect the public by establishing and maintaining a high standard of integrity, skills, and practice in the veterinary medicine profession.

Local Employment Impact Statement

Mr. Hargis has determined that the rule will have no impact on local employment or a local economy. Thus, the board is not required to prepare a local employment impact statement pursuant to §2001.022, Government Code.

Economic Impact Statement and Regulatory Flexibility Analysis

Mr. Hargis has determined that there are no anticipated adverse economic effects on small business, micro-businesses, or rural communities as a result of the rule. Thus, the Board is not required to prepare an economic impact statement or a regulatory flexibility analysis pursuant to §2006.002, Government Code.

Takings Impact Assessment

Mr. Hargis has determined that there are no private real property interests affected by the rule. Thus, the board is not required to prepare a takings impact assessment pursuant to §2007.043, Government Code.

Government Growth Impact Statement

For the first five years that the rule would be in effect, it is estimated that; the proposed rule would not create or eliminate a government program; implementation of the proposed rule would not require the creation of new employee positions or the

elimination of existing employee positions; implementation of the proposed rule would not require an increase or decrease in future legislative appropriations to the agency; the proposed rule would not require an increase in the fees paid to the agency; the proposed rule would not create a new regulation; the proposed rule would not expand, limit, or repeal an existing regulation; the proposed rule would not increase or decrease the number of individuals subject to the rule's applicability; and the proposed rule would not positively or adversely affect the state's economy.

Request for Public Comments

The Texas Board of Veterinary Medical Examiners invites comments on the proposed amendment to the rule from any interested persons, including any member of the public. A written statement should be mailed or delivered to John Hargis, Texas Board of Veterinary Medical Examiners, 1801 Congress, Ste. 8.800, Austin, Texas 78701, by e-mail to *John.Hargis@veterinary.texas.gov.* Comments will be accepted for 30 days following publication in the *Texas Register.* Comments must be received within 30 days after publication of this proposal in order to be considered.

Statutory Authority

The rule is proposed under the authority of Occupations Code, §801.151(a), (b), and (c) Occupations Code, which states that the Board may adopt rules necessary to administer the chapter, that the Board may adopt rules of professional conduct appropriate to establish and maintain a high standard of integrity, skills, and practice in the veterinary medicine profession, and that the Board may adopt rules to protect the public. Cross-reference to Statute: Occupations Code, §801.408.

No other statutes, articles, or codes are affected by the proposal.

§575.29. Informal Conferences.

(a) Informal conferences requiring medical expertise, shall be conducted to provide the opportunity to both complainant and respondent to be heard by a panel of two veterinarians and one public member of the TBVME, and may be represented by counsel. Informal conferences that do not require medical expertise will be conducted by one veterinarian, one member of the legal staff and one member of the staff or public member designated by the executive director. [~~Reasonable written notice of the time, date, and location of an informal conference shall be provided to the respondent and complainant, if applicable. The notice shall include a statement of the alleged violations(s) to be considered by the informal conference panel.~~]

(b) Respondent has until 7 days from the date of receipt of medical review to submit any additional evidence for review by the TBVME. [~~The respondent and complainant shall each be provided with an opportunity to be heard by the informal conference panel, and may be represented by counsel. Deliberations by the informal conference panel are confidential.~~]

(c) The complainant and respondent and any legal counsel, will receive all information regarding potential outcomes of an informal conference prior to the informal conference. [~~The general counsel or a representative of the attorney general shall be present during an informal conference to advise the informal conference panel.~~]

~~[(d) Informal conferences regarding complaints requiring medical expertise shall be conducted by an informal conference panel comprised of two veterinarian Board members and one public Board member.]~~

~~[(e) Informal conferences regarding complaints not requiring medical expertise may be conducted by an informal conference panel comprised of Board Staff. The Executive Director may designate the members of this panel.]~~

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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TRD-202204939
John Hargis
General Counsel
Texas Board of Veterinary Medical Examiners
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For further information, please call: (512) 305-7565

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PART 41. TEXAS BEHAVIORAL HEALTH EXECUTIVE COUNCIL

CHAPTER 882. APPLICATIONS AND LICENSING

SUBCHAPTER D. CRIMINAL HISTORY AND LICENSE ELIGIBILITY

22 TAC §882.42

The Texas Behavioral Health Executive Council proposes amendments to §882.42, relating to Ineligibility Due to Criminal History.

Overview and Explanation of the Proposed Rule. This proposed amendment clarifies that if a criminal offense took place in some other jurisdiction, besides Texas, it can be a basis for the denial of an application or revocation or suspension of a license if the offense is substantially similar to a Texas offense listed in 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 applicants, licensees, and the general public because the proposed rule will provide greater clarity and efficiency 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 by mail to Brenda Skiff, Executive Assistant, Texas Behavioral Health Executive Council, 1801 Congress Ave., Ste. 7.300, Austin, Texas 78701 or via the Council's Contact Us webpage (https://www.bhec.texas.gov/contact-us/index.html). To submit a comment via the Contact Us webpage simply click on the "Email Us" link on that page and select "Submission of Public Comment for Proposed Rule(s) or Open Meeting" from the drop-down menu. Please use the subject line "Public Comment for (enter rule number here)" to ensure your comments are associated with the correct rule and directed accordingly. The deadline for receipt of comments is 5:00 p.m., Central Time, on January 23, 2023, which is at least 30 days from the date of publication of this proposal in the *Texas Register.*

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 adopts this rule pursuant to the authority found in §507.156 of the Tex. Occ. Code which requires the Executive Council to adopt rules necessary to comply with Chapter 53 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.

§882.42. Ineligibility Due to Criminal History.

(a) The Council may revoke or suspend a license, disqualify a person from receiving or renewing a license, or deny a person the opportunity to be examined for a license due to a felony or misdemeanor conviction, or a plea of guilty or nolo contendere followed by deferred adjudication, if the offense:

(1) is listed in Article 42A.054 of the Code of Criminal Procedure;

(2) was a sexually violent offense, as defined by Article 62.001 of the Code of Criminal Procedure; or

(3) directly relates to the duties and responsibilities of a licensee.

(b) In determining whether a criminal conviction directly relates to the duties and responsibilities of a licensee, the agency shall consider the factors listed in §53.022 of the Occupations Code. Each member board shall determine which crimes are directly related to the duties and responsibilities of its licensees.

(c) If the agency determines that a criminal conviction directly relates to the duties and responsibilities of a licensee, the agency must consider the factors listed in §53.023 of the Occupations Code when determining whether to suspend or revoke a license, disqualify a person from receiving a license, or deny a person the opportunity to take a licensing examination. It shall be the responsibility of the applicant or licensee to provide documentation or explanations concerning each of the factors listed in the law. Any documentation or explanations received will be considered by the agency when deciding whether to suspend or revoke a license, disqualify a person from receiving a license, or deny a person the opportunity to take a licensing examination.

(d) Notwithstanding any schedule of sanctions adopted by the Council or a member board, the Council shall:

(1) revoke a license due to a felony conviction under §35A.02 of the Penal Code, concerning Medicaid fraud, in accordance with §36.132 of the Human Resources Code;

(2) revoke or suspend a license for unprofessional conduct in accordance with §105.002 of the Occupations Code; and

(3) revoke a license due to a license holder's imprisonment following a felony conviction, felony community supervision revocation, revocation of parole, or revocation of mandatory supervision.

(e) In accordance with Chapter 108 of the Occupations Code, an application for licensure as a psychologist or social worker will be denied if the applicant:

(1) is required to register as a sex offender under Chapter 62 of the Code of Criminal Procedure;

(2) has been previously convicted of or placed on deferred adjudication for the commission of a felony offense involving the use or threat of force; or

(3) has been previously convicted of or placed on deferred adjudication for the commission of an offense:

(A) under §§22.011, 22.02, 22.021 or 22.04 of the Penal Code, or an offense under the laws of another state or federal law that is equivalent to an offense under one of those sections;

(B) during the course of providing services as a health care professional; and

(C) in which the victim of the offense was a patient.

(f) A person whose application was denied under subsection (e) of this section may reapply for licensure if the person meets the requirements of §108.054 of the Occupations Code.

(g) In accordance with §108.053 of the Occupations Code, the Council shall revoke the license of a psychologist or social worker if the licensee is:

(1) convicted or placed on deferred adjudication for an offense described by subsection (e)(2) or (3) of this section; or

(2) required to register as a sex offender under Chapter 62 of the Code of Criminal Procedure.

(h) The Council will provide notice to a person whose application has been denied due to criminal history as required by §53.0231 and §53.051 of the Occupations Code.

(i) A criminal offense committed in another state, tribal, territorial, or commonwealth jurisdiction or under federal law is subject to this rule if the offense is substantially similar to an offense listed in this rule.

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

Filed with the Office of the Secretary of State on December 8, 2022.

TRD-202204862
Darrel D. Spinks
Executive Director
Texas Behavioral Health Executive Council
Earliest possible date of adoption: January 22, 2023
For further information, please call: (512) 305-7706

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TITLE 28. INSURANCE

PART 1. TEXAS DEPARTMENT OF INSURANCE

CHAPTER 26. EMPLOYER-RELATED HEALTH BENEFIT PLAN REGULATIONS

The Texas Department of Insurance (TDI) proposes amendments to 28 TAC §26.5(g) and §26.301(j), concerning employer-related health benefit plan regulations. The amendments to the sections are proposed to clarify that the requirements and mandates of Senate Bill 1264, 86th Legislature, 2019, including Insurance Code Chapter 1467, apply to certificates of insurance (COIs) issued to certain Texas residents.

EXPLANATION. TDI has historically applied Texas insurance laws and mandates to COIs issued to Texas-resident employees under a group accident or health plan that is issued to the employee's out-of-state employer by an insurer that is licensed and doing business in Texas. *See* the adoption order for §26.5 and §26.301 at 42 Tex Reg 2545 (stating in response to a comment that the language adopted in §26.5(g) and §26.301(j) "is not a change and reflects how TDI has consistently applied the statutory and regulatory requirements"). TDI has, however, received questions from interested persons about whether the requirements of SB 1264 apply to these COIs.

SB 1264 amended the Insurance Code to establish consumer protections against balance billing by certain out-of-network providers. The bill (1) prohibits those providers from billing health benefit plan enrollees for certain covered health care services or supplies in an amount greater than an applicable copayment, coinsurance, or deductible under the plan; (2) provides for the right of those providers to receive payment for those services or supplies at the usual and customary rate or at an agreed rate; and (3) establishes requirements for the inclusion of a balance billing prohibition notice in an explanation of benefits. *See, e.g.,* Tex. Ins. Code §§1271.008, 1271.157, 1301.010, and 1301.164. The bill also establishes procedures for out-of-network claim dispute resolution through arbitration or mediation, depending on the type of provider at issue. *See id.;* Tex. Ins. Code Chapter 1467.

The proposed amendments to §26.5(g) and §26.301(j) are intended to clarify that carriers that are licensed and doing business in Texas and that issue group accident or health plans to an out-of-state employer and deliver COIs to Texas-resident employees are subject to SB 1264, including Insurance Code Chapter 1467. But note that by expressly listing SB 1264 in §26.5(g) and §26.301(j), it is not TDI's intent to otherwise limit the applicability of other laws and mandates to carriers licensed in this state that issue COIs covering Texas residents.

The proposed amendments also implement Insurance Code Art. 21.42, which provides, "Any contract of insurance payable to any citizen or inhabitant of this State by any insurance company or corporation doing business within this State shall be held to be a contract made and entered into under and by virtue of the laws of this State relating to insurance, and governed thereby, notwithstanding such policy or contract of insurance may provide that the contract was executed and the premiums and policy (in case it becomes a demand) should be payable without this State, or at the home office of the company or corporation issuing the same." *See Howell v. Am. Live Stock Ins. Co.,* 483 F.2d 1354, 1360 n.4 (5th Cir. 1973) (in the context of group policies, "the fact that the insurer does any business in Texas is sufficient to require that Texas law apply to any contract between it and a Texas resident, regardless of the intention or expectation of the parties"); *General Am. Life Ins. Co. v. Rodriguez,* 641 S.W.2d 264, 266-67 (Tex. App.-Houston [14th Dist.] 1982, no writ) (Art. 21.42 applies where group life policy issued to out-of-state employer covered employee residing in Texas).

An additional change is proposed to §26.5 to conform to agency style for a reference to a code chapter.

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 amendments are in effect, there will be no measurable fiscal impact on state and local governments as a result of enforcing or administering them, other than that imposed by statute. Ms. Bowden made this determination because the amendments as proposed do not add to or decrease state revenues or expenditures, and because local governments are not involved in enforcing or complying with the proposed amendments.

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 amendments are in effect, Ms. Bowden expects that administering them will have the public benefit of clarifying the applicability of SB 1264 to certain carriers and COIs, which in turn will provide strong consumer protections for Texas residents and providers.

Ms. Bowden expects that the proposed amendments will not increase the cost of compliance because they do not impose requirements beyond those in statute. The proposed amendments simply clarify the applicability of SB 1264, and do not add any new requirements. As a result, any resulting cost is attributable to SB 1264 and not the proposed amendments.

ECONOMIC IMPACT STATEMENT AND REGULATORY FLEXIBILITY ANALYSIS. TDI has determined that the proposed amendments will not have an adverse economic effect on small or micro businesses, or on rural communities. Because the proposed amendments simply clarify the applicability of SB 1264, any economic impact results from the law and not the proposed amendments. As a result, and in accordance with Government Code §2006.002(c), TDI is not required to prepare a regulatory flexibility analysis.

EXAMINATION OF COSTS UNDER GOVERNMENT CODE §2001.0045. TDI has determined that this proposal does not impose a possible cost on regulated persons.

GOVERNMENT GROWTH IMPACT STATEMENT. TDI has determined that for each year of the first five years that the proposed amendments are in effect, the proposal:

- will not create or eliminate a government program;

- will not require the creation of new employee positions or the elimination of existing employee positions;

- will not require an increase or decrease in future legislative appropriations to the agency;

- will not require an increase or decrease in fees paid to the agency;

- will not create a new regulation;

- will not expand, limit, or repeal an existing regulation;

- will not increase or decrease the number of individuals subject to the rule's applicability; and

- will not positively or adversely 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 by TDI no later than 5:00 p.m., central time, on January 23, 2023. Send your comments to ChiefClerk@tdi.texas.gov or to the Office of the Chief Clerk, MC: GC-CCO, Texas Department of Insurance, P.O. Box 12030, Austin, Texas 78711-2030.

To request a public hearing on the proposal, submit a request before the end of the comment period to ChiefClerk@tdi.texas.gov or to the Office of the Chief Clerk, MC: GC-CCO, Texas Department of Insurance, P.O. Box 12030, Austin, Texas 78711-2030. The request for public hearing must be separate from any comments and received by TDI no later than 5:00 p.m., central time, on January 23, 2023. If TDI holds a public hearing, TDI will consider written and oral comments presented at the hearing.

SUBCHAPTER A. DEFINITIONS, SEVERABILITY, AND SMALL EMPLOYER HEALTH REGULATIONS

28 TAC §26.5

STATUTORY AUTHORITY. TDI proposes amendments to §26.5 under Insurance Code Art. 21.42 and §§843.151, 1301.007, 1467.003, 1501.010, and 36.001.

Insurance Code Article 21.42 provides that any insurance payable to any citizen or inhabitant of this state by a company doing business within this state is held to be a contract made and entered into and governed by Texas insurance law despite execution of the contract or payment of the premiums outside of this state.

Insurance Code §843.151 authorizes the Commissioner to adopt rules as necessary and proper to implement laws applicable to health maintenance organizations, including Chapters 843 and 1271.

Insurance Code §1301.007 authorizes the Commissioner to adopt rules as necessary to implement Chapter 1301 and ensure reasonable accessibility and availability of preferred provider services to residents of Texas.

Insurance Code §1467.003 requires the Commissioner to adopt rules as necessary to implement the Commissioner's powers and duties under Insurance Code Chapter 1467, concerning Out-of-Network Claim Dispute Resolution.

Insurance Code §1501.010 authorizes the Commissioner to adopt rules necessary to implement Chapter 1501, concerning the Health Insurance Portability and Availability Act.

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. Section 26.5(g) implements Texas Insurance Code Art. 21.42 and SB 1264.

§26.5. Applicability and Scope.

(a) Insurance Code Chapter 1501, [{]concerning Health Insurance Portability and Availability Act,[}] and this subchapter regulate all health benefit plans sold to small employers, whether sold directly or through associations or other groupings of small employers.

(b) - (f) (No change.)

(g) A carrier licensed in this state that issues a certificate of insurance covering a Texas resident is responsible for ensuring that the

certificate complies with applicable Texas insurance laws and rules, including Senate Bill 1264, 86th Legislature, 2019, and other mandated benefits, regardless of whether the group policy underlying the certificate was issued outside the state.

(h) - (i) (No change.)

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

Filed with the Office of the Secretary of State on December 8, 2022.

TRD-202204874
Allison Eberhart
Deputy General Counsel
Texas Department of Insurance
Earliest possible date of adoption: January 22, 2023
For further information, please call: (512) 676-6587

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SUBCHAPTER C. LARGE EMPLOYER HEALTH INSURANCE REGULATIONS

28 TAC §26.301

STATUTORY AUTHORITY. TDI proposes amendments to §26.301 under Insurance Code Art. 21.42 and §§843.151, 1301.007, 1467.003, 1501.010, and 36.001.

Insurance Code Article 21.42 provides that any insurance payable to any citizen or inhabitant of this state by a company doing business within this state is held to be a contract made and entered into and governed by Texas insurance law despite execution of the contract or payment of the premiums outside of this state.

Insurance Code §843.151 authorizes the Commissioner to adopt rules as necessary and proper to implement laws applicable to health maintenance organizations, including Chapters 843 and 1271.

Insurance Code §1301.007 authorizes the Commissioner to adopt rules as necessary to implement Chapter 1301 and ensure reasonable accessibility and availability of preferred provider services to residents of Texas.

Insurance Code §1467.003 requires the Commissioner to adopt rules as necessary to implement the Commissioner's powers and duties under Insurance Code Chapter 1467, concerning Out-of-Network Claim Dispute Resolution.

Insurance Code §1501.010 authorizes the Commissioner to adopt rules necessary to implement Chapter 1501, concerning the Health Insurance Portability and Availability Act.

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. Section 26.301(j) implements Texas Insurance Code Art. 21.42 and SB 1264.

§26.301. Applicability, Definitions, and Scope.

(a) - (i) (No change.)

(j) A carrier licensed in this state that issues a certificate of insurance covering a Texas resident is responsible for ensuring that the certificate complies with applicable Texas insurance laws and rules, including Senate Bill 1264, 86th Legislature, 2019, and other mandated benefits, regardless of whether the group policy underlying the certificate was issued outside 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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Allison Eberhart
Deputy General Counsel
Texas Department of Insurance
Earliest possible date of adoption: January 22, 2023
For further information, please call: (512) 676-6587

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CHAPTER 34. STATE FIRE MARSHAL

The Texas Department of Insurance (TDI) proposes amendments to 28 TAC §§34.303, 34.507, 34.607, and 34.707. The proposed amendments primarily update various National Fire Protection Association (NFPA) code standards that are adopted by reference in the noted rules. Specifically, the amendments to Section 34.303 update the NFPA Fire Code and Life Safety Code; the amendments to Section 34.507 update 14 NFPA codes that establish standards related to fire extinguisher systems; the amendments to Section 34.607 update 17 NFPA codes that establish standards related to fire alarm and fire detection systems; and the amendments to Section 34.707 update 16 NFPA codes that establish standards related to fire protection sprinkler systems.

EXPLANATION. Under Government Code §417.008(e), the Commissioner may adopt by rule any appropriate standard developed by a nationally recognized standards-making association under which the state fire marshal may enforce state laws related to firefighting, fire prevention, and inspection of dangerous conditions. The NFPA is a nationally recognized standards-making association, and the State Fire Marshal's Office (SFMO) has relied on NFPA codes since at least the 1990s. *See, e.g.,* 21 TexReg 1286 (adopting the 1994 edition of the NFPA Life Safety Code). Insurance Code Chapters 6001, 6002, and 6003 also specifically authorize the Commissioner to adopt NFPA code standards applicable to fire extinguisher systems, fire alarm and fire detection systems, and fire protection sprinkler systems.

NFPA codes are generally updated every three or five years, depending on the revision cycle of the particular code. However, TDI has not adopted updated NFPA standards since 2017. Therefore, the proposed amendments will ensure that SFMO is using the most up-to-date NFPA codes when performing its duties under the law. NFPA codes can be accessed at: https://www.nfpa.org/Codes-and-Standards/All-Codes-and-Standards/Free-access

TDI intends to delay the effective date of the proposed rule, if adopted, for four months from the filing of the adoption order. This would give stakeholders additional time to prepare for the possible change in adopted code standards.

The proposed amendments to the sections are described in the following paragraphs.

Section 34.303. Adopted Standards. Amendments to §34.303 adopt the 2021 NFPA Fire Code (NFPA 1) and Life Safety Code 101 (NFPA 101) and make other changes to the rule text to adhere to current agency style. Specifically, the proposed amendments:

- revise references to the two applicable NFPA codes;

- capitalize the words "commissioner" and "subchapter" and lowercase "state fire marshal";

- narrow the scope of the exception of NFPA Chapter 60. Chapter 60 provides important safety standards applicable across laboratories. NFPA 45 (Standard on Fire Protection for Laboratories Using Chemicals) will generally apply to university laboratories;

- substitute the NFPA's physical address for its web address where the public can access the NFPA standards;

- modify language regarding the adoption of the NFPA standards to be consistent with the other adopted standards sections of this proposal. In particular, the associated annexes to the NFPA standards are included in the proposal to assist with clarifying the code language; and

- make changes to code, including requiring mandatory sprinklers in new-build daycares with occupancies of more than 12 clients, and carbon monoxide detection for existing hotels and dormitories.

The adoption of NFPA 1 and NFPA 101 provides SFMO inspectors with more comprehensive standards than are currently adopted in §34.303. For example, NFPA 1 is a national consensus fire code that references many other NFPA standards. NFPA 1 allows a fire inspector to inspect a premises and the sufficiency of its fire sprinklers, egress of occupants, compliance with electrical standards, need for fire extinguishers, and storage of products that cause increased fire hazards. NFPA 1 requirements also minimize risk exposure for people at the premises and in the surrounding community. NFPA 1 is similar to the International Fire Code that most municipalities in Texas use.

Section 34.507. Adopted Standards. Amendments to §34.507 adopt current NFPA standards and make text changes to adhere to current agency style. Specifically, the proposed amendments revise references to the following standards:

- NFPA 10-2018, Standard for Portable Fire Extinguishers;

- NFPA 11-2016, Standard for Low-, Medium-, and High-Expansion Foam;

- NFPA 12-2018, Standard on Carbon Dioxide Extinguishing Systems;

- NFPA 12A-2018, Standard on Halon 1301 Fire Extinguishing Systems;

- NFPA 15-2017, Standard for Water Spray Fixed Systems for Fire Protection;

- NFPA 16-2019; Standard for the Installation of Foam-Water Sprinkler and Foam-Water Spray Systems;

- NFPA 17-2021, Standard for Dry Chemical Extinguishing Systems;

- NFPA 17A-2021, Standard for Wet Chemical Extinguishing Systems;

- NFPA 18-2021, Standard on Wetting Agents;

- NFPA 25-2020, Standard for the Inspection, Testing, and Maintenance of Water-Based Fire Protection Systems;

- NFPA 33-2018, Standard for Spray Application Using Flammable or Combustible Materials;

- NFPA 96-2021, Standard for Ventilation Control and Fire Protection of Commercial Cooking Operations;

- NFPA 2001-2018, Standard on Clean Agent Fire Extinguisher Systems; and

- NFPA 2010-2020, Standard for Fixed Aerosol Fire-Extinguishing Systems.

For consistency with current agency style, the word "commissioner" is revised to be capitalized. The amendments to this section also substitute the NFPA's physical address for its web address where the public can access the NFPA standards.

Section 34.607. Adopted Standards. Amendments to §34.607 adopt current NFPA codes and standards and make text changes to adhere to current agency style. Specifically, the proposed amendments revise references to the following codes and standards:

- NFPA 11-2016, Standard for Low-, Medium-, High-Expansion Foam;

- NFPA 12-2018, Standard on Carbon Dioxide Extinguishing Systems;

- NFPA 12A-2018, Standard on Halon 1301 Fire Extinguishing Systems;

- NFPA 13-2019, Standard for the Installation of Sprinkler Systems;

- NFPA 13D-2019, Standard for the Installation of Sprinkler Systems in One- and Two-Family Dwellings and Manufactured Homes;

- NFPA 13R-2019, Standard for the Installation of Sprinkler Systems in Low-Rise Residential Occupancies;

- NFPA 15-2017, Standard for Water Spray Fixed Systems for Fire Protection;

- NFPA 16-2019, Standard for the Installation of Foam-Water Sprinkler and Foam-Water Spray Systems;

- NFPA 17-2021, Standard for Dry Chemical Extinguishing Systems;

- NFPA 17A-2021, Standard for Wet Chemical Extinguishing Systems;

- NFPA 25-2020, Standard for the Inspection, Testing, and Maintenance of Water-Based Fire Protection Systems;

- NFPA 70-2020, National Electrical Code;

- NFPA 72-2019, National Fire Alarm and Signaling Code;

- NFPA 90A-2021, Standard for the Installation of Air Conditioning and Ventilating Systems;

- NFPA 101-2021, Life Safety Code;

- UL 827 December 3, 2021, Standard for Central Station Alarm Services; and

- NFPA 2001-2018, Standard on Clean Agent Fire Extinguisher Systems.

For consistency with current agency style, the word "commissioner" is revised to be capitalized. The amendments to this section also substitute the NFPA's physical address for its web address where the public can access the NFPA standards. The amendments also correct the name of NFPA 101 by removing "(r)" from the reference to the standard in the rule text.

Section 34.707. Adopted Standards. Amendments to §34.707 adopt current NFPA codes and standards and make text changes to adhere to current agency style. Specifically, the proposed amendments revise references to the following codes and standards:

- NFPA 13-2019, Standard for the Installation of Sprinkler Systems;

- NFPA 25-2020, Standard for the Inspection, Testing, and Maintenance of Water-Based Fire Protection Systems;

- NFPA 13D-2019, Standard for the Installation of Sprinkler Systems in One- and Two-Family Dwellings and Manufactured Homes;

- NFPA 13R-2019, Standard for the Installation of Sprinkler Systems in Low-Rise Residential Occupancies;

- NFPA 14-2019, Standard for the Installation of Standpipe and Hose Systems;

- NFPA 15-2017, Standard for Water Spray Fixed Systems for Fire Protection;

- NFPA 16-2019, Standard for the Installation of Foam-Water Sprinkler and Foam-Water Spray Systems;

- NFPA 20-2019, Standard for the Installation of Stationary Pumps for Fire Protection;

- NFPA 22-2018, Standard for Water Tanks for Private Fire Protection;

- NFPA 24-2019, Standard for the Installation of Private Fire Service Mains and Their Appurtenances;

- NFPA 30-2021, Flammable and Combustible Liquids Code;

- NFPA 30B-2019, Code for the Manufacture and Storage of Aerosol Products;

- NFPA 307-2021, Standard for the Construction and Fire Protection of Marine Terminals, Piers, and Wharves;

- NFPA 214-2021, Standard on Water-Cooling Towers;

- NFPA 409-2016, Standard on Aircraft Hangers; and

- NFPA 750-2019, Standard on Water Mist Fire Protection Systems.

The amendments delete an unnecessary subsection (a) designation. In addition, for consistency with current agency style, the word "commissioner" is revised to be capitalized. The amendments to this section also substitute the NFPA's physical address for its web address where the public can access the NFPA standards and capitalize "installation."

Summary of Changes to Adopted Standards

NFPA 1, Fire Code. Changes to the 2018 edition of NFPA 1, which are carried into the latest edition, include revisions to requirements for the application of referenced publications in Sections 1.4.1.1 and 2.1.1; references for the professional qualifications for fire inspectors, plan examiners, and fire marshals in Section 1.7.2; new minimum fire prevention inspection frequencies for existing occupancies in Section 10.2.7; updates to premises identification in Section 10.11.1; new and updated marking and access criteria for photovoltaic systems in Section 11.12; new provisions for rubberized asphalt melters in Section 16.7; listing requirements for electric gates used on fire department access roads in Section 18.2.4.2.6; new provisions on the outside storage of biomass feedstock in Section 31.3.10; and new requirements for the outdoor storage of wood and wood composite pallets or listed pallets equivalent to wood in Section 34.10.3.

Chapter 38 is created to address marijuana growing, processing, or extraction facilities, and the revisions to Chapter 40 replace extracts from NFPA 654 (Standard for the Prevention of Fire and Dust Explosions from the Manufacturing, Processing, and Handling of Combustible Particulate Solids) with extracted provisions from NFPA 652 (Standard on the Fundamentals of Combustible Dust). Section 42.10 addresses the reorganization of aircraft fuel servicing provisions in accordance with NFPA 407 (Standard for Aircraft Fuel Servicing); Section 50.7 is created to address mobile and temporary cooking operations, and there are extensive revisions of Chapter 52 on energy storage systems. A new Chapter 55 is created to address cleaning and purging of flammable gas piping systems with reference to NFPA 56 (Standard for Fire and Explosion Prevention During Cleaning and Purging of Flammable Gas Piping Systems), Section 63.9 is created to address provisions for insulated liquid carbon dioxide systems extracted from NFPA 55 (Compressed Gases and Cryogenic Fluids Code), and Annex E is created to address fire-fighter breathing-air replenishment systems.

Changes to the 2021 edition of NFPA 1 include updates to Section 11.10 to address in-building emergency responder communication enhancement system requirements for better alignment with NFPA 1221 (Standard for the Installation, Maintenance, and Use of Emergency Services Communications Systems), and there are new signage requirements for non-sprinklered high-rise buildings in Section 13.3.2.25.2.4. Chapter 38 has new provisions for carbon dioxide enrichment equipment, indoor horticultural grow structures, and listing requirements for extraction equipment as they relate to cannabis facilities; new Chapter 39 is created to address wastewater treatment and collection facilities; new Chapter 46 is created to address additive manufacturing (3D printing); and new Chapter 52 is created to address the energy storage system requirements extracted from NFPA 855 (Standard for the Installation of Stationary Energy Storage Systems).

NFPA 10, Standard for Portable Fire Extinguishers. Changes to the 2018 edition of NFPA 10 incorporate clarifications on a wide array of topics, including electronic monitoring, obsolete extinguishers, extinguishers installed in areas that contain oxidizers, extinguisher signs, and extinguisher mounting equipment and cabinets. The revisions also include a new requirement regarding maintenance of hose stations that are used in lieu of extinguishers. The fire classification marking system is expanded to include markings for extinguishers rated for Class AC and Class AK. The annexes are updated to address current extinguisher types and ratings, while removing information on obsolete equipment.

NFPA 11, Standard for Low-, Medium-, and High-Expansion Foam. Changes to the 2016 edition of NFPA 11 include the reorganization and clarification of piping requirements, addressing issues regarding acceptance criteria for annual foam concentrate testing, recognition of environmentally friendly

methods of testing foam proportioners, and changes to provide that seal-only protection is permitted for composite roofs that meet specific criteria.

NFPA 12, Standard on Carbon Dioxide Extinguishing Systems. Changes to the 2015 edition of NFPA 12, which are carried into the latest edition, incorporate a general update of references and other minor improvements. In addition, a new system acceptance report is added to permit compliance with the commissioning procedures of NFPA 3 (Standard for Commissioning of Fire Protection and Life Safety Systems).

Changes to the 2018 edition of NFPA 12 include the introduction of a new requirement to conduct testing of integrated fire protection and life safety systems in accordance with NFPA 4 (Standard for Integrated Fire Protection and Life Safety System Testing). In addition, the 2018 edition changes add a new section on pipe hangers and supports and a new annex on full discharge testing. Finally, there are revisions to the equivalency statement to use the standard text, which specifies that the authority having jurisdiction is responsible for approving an equivalent system, method, or device.

NFPA 12A, Standard on Halon 1301 Fire Extinguishing Systems. Changes to the 2015 edition of NFPA 12A, which are carried into the latest edition, incorporate support for electronic storage of system maintenance records.

Changes to the 2018 edition of NFPA 12A revise the annex on nozzle and piping calculations (Annex H) to correct errors, comply with the *Manual of Style for NFPA Technical Committee Documents,* and clarify the details of the procedure.

NFPA 13, Standard for the Installation of Sprinkler Systems. Changes to the 2016 edition of NFPA 13, which are carried into the latest edition, include revisions that review all metric conversions. Historically, the document has used an "exact" conversion process, but this revision uses an approximate conversion process. Another change includes a pipe venting requirement to eliminate as much air as possible from wet pipe systems. This requirement contemplates only a single vent in each wet system. New design criteria are included for the protection of exposed, expanded Group A plastics stored in racks. Also, this revision adds a ceiling and in-rack design approach, called an "alternative protection scheme," to Chapters 16 and 17. A similar concept has existed for sprinkler protection in NFPA 30 (Flammable and Combustible Liquids Code) for several revision cycles. The revisions also add a new section on sprinkler design where cloud ceilings are installed. This design scheme allows sprinklers to be omitted above cloud ceilings when the gap between clouds (or clouds and walls) meets a maximum allowable dimension based on the floor-to-cloud ceiling height. The revisions significantly revise Chapter 10, which is extracted from NFPA 24 (Standard for the Installation of Private Fire Service Mains and Their Appurtenances), based on the rewrite of NFPA 24.

Changes to the 2019 edition of NFPA 13 include revisions that reorganize NFPA 13; it is now reordered according to how one would approach the design of a sprinkler system. Users will now find hazard classifications, water supplies, and underground piping at the beginning of the standard. The revisions divide Chapter 8 into several new chapters, breaking out general rules for sprinkler locations into one chapter and several other chapters specific to sprinkler technology. The revisions also reorganize storage chapters by sprinkler technology and address ceiling-only design. The revisions also revise Chapter 25, which now contains all the requirements for in-rack sprinklers. And the revisions clarify requirements for vertical pipe chases and requirements for electrical equipment rooms where sprinklers can be omitted. Finally, the revisions add new beam rules for residential sprinklers and additional details.

NFPA 13D, Standard for the Installation of Sprinkler Systems in One- and Two-Family Dwellings and Manufactured Homes. Changes to the 2016 edition of NFPA 13D, which are carried into the latest edition, include revisions that add a new figure that addresses positioning of sprinklers to avoid obstructions where there are sloped ceilings. The revisions further clarify that once a sprinkler is removed from a fitting or welded outlet, it should not be reinstalled if torque was applied to the sprinkler itself. A new sketch shows an insulation practice using tenting in an attic or concealed space.

Changes to the 2019 edition of NFPA 13D include revisions that add beam rules for sprinklers installed under and adjacent to beams (along with new figures), requirements for closets where ventless clothes dryers are installed, and requirements where pressure-reducing and pressure-regulating valves are installed. The revisions add a section to Chapter 12 to address inactive systems in structures left vacant. The revisions clarify requirements for the use of well pumps as a water supply and add images to clarify sprinkler locations and clearances needed around fireplaces.

NFPA 13R, Standard for the Installation of Sprinkler Systems in Low-Rise Residential Occupancies. Changes to the 2016 edition of NFPA 13R, which are carried into the latest edition, include revisions that change the definition of "sprinkler system" to correlate with NFPA 13 (Standard for the Installation of Sprinkler Systems) and NFPA 25 (Standard for the Inspection, Testing, and Maintenance of Water-Based Fire Protection Systems), and to significantly update Annex A text for the Scope statement of the document to address mixed-use buildings and the applicability of NFPA 13R systems. The revisions also clarify that once a sprinkler is removed from a fitting or welded outlet, it should not be reinstalled if torque was applied to the sprinkler itself. The revisions update the nonmetallic piping compatibility language for consistency with NFPA 13 and reorganize and restructure the section addressing sprinkler protection outside dwelling units to make it easier for the user to follow. The revisions also add language to address sprinkler protection where the device is intended to protect a glazing assembly.

Changes to the 2019 edition of NFPA 13R include revisions that add a new definition for "carport" and add several new requirements that address where pipe and tube listed for light hazard can be used in an ordinary hazard application. There are revisions to sprinkler heads that are installed under and adjacent to beams (along with new figures); inside waste and linen systems; installation of fuel-fired equipment; and obstructions in hallways. The revisions reorganize Chapter 9 and move the domestic demand tables from the annex to the body of the standard and update values. In addition, the revisions add new images clarifying sprinkler locations and clearances needed around fireplaces.

NFPA 14, Standard for the Installation of Standpipe and Hose Systems. Changes to the 2016 edition of NFPA 14, which are carried into the latest edition, include revisions to Chapter 6 to clarify the building construction and building types under which standpipe system piping needs to be protected. The revisions add new definitions of construction types to Chapter 3. The revisions also change the horizontal exit requirements in Chapter 7 to align them with building code requirements and add new annex figures. The revisions update and reorganize Section

7.3.2 in its entirety. The revisions also clarify Section 7.6, stating that only partially sprinklered buildings require 6-inch standpipes, while all others, if in a fully sprinklered building, whether combined or not, require only 4-inch standpipes, where supported by hydraulic calculations. The revisions also change the requirement for pressure gauges to no longer require gauges to be listed, only approved.

Changes to the 2019 edition of NFPA 14 include revisions that update the terminology to make it consistent throughout the document by changing the terms "outlet(s)" and "hose outlet(s)" to "hose connection(s)." The revisions add definitions and requirements for "distance monitoring," "automated inspection," and "testing" because technology now allows for monitoring of certain conditions, as well as inspecting and testing standpipe systems from a remote location. The revisions also add a definition for "open parking garage" and a requirement that permits manual standpipes in open parking garages under a certain height.

The revisions no longer require the signage for pressure requirements when the pressure is 150 psi or less, as NFPA 13E (Recommended Practice for Fire Department Operations in Properties Protected by Sprinkler and Standpipe Systems) requires a standard pressure of 150 psi unless a sign indicates more pressure is required. The revisions increase the maximum pressure permitted at any point in the system from 350 psi to 400 psi. The revisions in Section 7.8.1 clarify that the required pressure is to be calculated at the outlet of the hose valve. The revisions revise the hydraulic calculation procedures to clarify that additional standpipes should be calculated at the point of connection rather than at the topmost outlet. The revisions to Section 7.11.2 delineate between a standpipe system main drain and individual standpipe drains. The revisions also change the required number of fire department connections because of the ease with which a single connection can be compromised. Finally, the revisions add a new Chapter 13 on maritime standpipe and hose systems.

NFPA 15, Standard for Water Spray Fixed Systems for Fire Protection.. Changes to the 2017 edition of NFPA 15 include revisions on pipe support requirements and the incorporation of several new tables. To align this standard with NFPA 13 and NFPA 20 (Standard for the Installation of Stationary Pumps for Fire Protection), the revisions add a 12-month limitation on water flow test information, in addition to requirements for hydraulic design information signs and general information signs. The revisions also add a requirement that a hazard analysis be performed on the physical and chemical properties of materials, layout, design, and installation be performed by qualified persons. Finally, the revisions add new definitions for the terms "hazard analysis" and "qualified."

NFPA 16, Standard for the Installation of Foam-Water Sprinkler and Foam-Water Spray Systems. Changes to the 2015 edition of NFPA 16, which are carried into the latest edition, include revisions that update several definitions for foam-water system types, including "foam-water sprinkler system," "foam-water deluge system," "foam-water dry pipe system," and "foam-water pre-action system." The revisions also update the strainer and galvanized piping C-factor requirements to correlate with NFPA 13. The revisions make multiple changes to the standard from a system acceptance perspective, add new language to the acceptance testing criteria to confirm that the proportioning system meets the actual calculated system discharge demand at the most remote four sprinklers, and make the Contactors Material and Test Certificate from NFPA 13 a requirement for correlation purposes.

Changes to the 2019 edition of NFPA 16 include revisions that make its organization consistent with that of the 2019 edition of NFPA 13 to present information in the order it is needed when planning and designing a foam-water sprinkler/spray system. Technical changes include the addition of requirements for working drawings using information from both NFPA 11 and NFPA 13 to provide a comprehensive list of information. The revisions also extract information about the type of foam concentrate piping from NFPA 11 to be consistent with that standard and information from NFPA 30 (Flammable and Combustible Liquids Code) to address containment, drainage, and spill control.

NFPA 17, Standard for Dry Chemical Extinguishing Systems. Changes to the 2017 edition of NFPA 17, which are carried into the latest edition, include revisions to clarify the intent of component and system requirements in Chapters 4 and 5, respectively. The revisions also include editorial changes to update the standard to comply with the *Manual of Style for NFPA Technical Committee Documents.*

Changes to the 2021 edition of NFPA 17 include revisions that provide new requirements consistent with NFPA 12 and NFPA 2001 (Standard on Clean Agent Fire Extinguishing Systems) on the methods for supporting pipe and addresses provisions on a common failure of special hazard fire extinguishing systems, consistent with NFPA 72® (National Fire Alarm and Signaling Code®) and NFPA 2001.

NFPA 17A, Standard for Wet Chemical Extinguishing Systems. Changes to the 2017 edition of NFPA 17A, which are carried into the latest edition, include revisions that eliminate redundant language within NFPA 17A and NFPA 96 (Standard for Ventilation Control and Fire Protection of Commercial Cooking Operations) for correlation purposes. The revisions delete other sections for correlation purposes with NFPA 96. The revisions add new annex material to identify the areas of protection for the discharge nozzles. The revisions made changes requiring the authority having jurisdiction to approve used components in the system. A requirement was added for a placard to be placed near all Class K portable fire extinguishers indicating that the fire protection system must be activated before a portable fire extinguisher is used.

Changes to the 2021 edition of NFPA 17A include revisions that add a new Chapter 6 that addresses wet chemical extinguishing systems for mobile equipment. Because the application in the previous editions of the standard was limited to the protection of cooking equipment and its exhaust systems, the new Chapter 6 parallels similar requirements in NFPA 17 and addresses issues specific to wet chemical extinguishing systems. Other revisions include new provisions on the methodology of how to test for blocked piping, a new requirement that impairments be communicated in a timely manner, and modified language throughout the standard to correlate provisions between NFPA 96 and NFPA 17A.

NFPA 18, Standard on Wetting Agents. Changes to the 2017 edition of NFPA 18, which are carried into the latest edition, include both technical and editorial revisions. Technical changes include clarification that all aspects of the listing for wetting agents must be observed and an explanation on the units of the corrosion rate equation in Chapter 5. The revisions create a new section in Chapter 5 to provide requirements for alternate viscosity test methods for situations where the viscosity is too

low to obtain meaningful results. Editorial changes include updating the standard to comply with the *Manual of Style for NFPA Technical Committee Documents.*

Changes to the 2021 edition of NFPA 18 include updated references and editorial changes to make the document more user friendly.

NFPA 20, Standard for the Installation of Stationary Pumps for Fire Protection. Changes to the 2016 edition of NFPA 20, which are carried into the latest edition, include revisions that provide new requirements for pumps in series relative to the protection of control wiring, status signals, and communications. NFPA 20 recognized the potential use of multistage, multiport pumps in fire suppression systems and provided requirements specific to that application. The revisions remove break tank criteria, which are now in accordance with NFPA 22 (Standard for Water Tanks for Private Fire Protection). The revisions add Annex C to provide guidance on controller security where a controller is connected to the internet. The revisions to Chapter 4 add new requirements to address use of an automatic fuel maintenance system with a diesel fire pump installation, and protection criteria for both a diesel fire pump room and an electric fire pump room.

Changes to the 2019 edition of NFPA 20 include revisions that recognize new technologies, including automated inspection and testing, distance monitoring, automated valves, and self-regulating variable speed fire pump units. The revisions add new provisions to require that a single entity be responsible for acceptable fire pump unit performance. The revisions add a new definition for "lowest permissible suction pressure" to provide a better understanding of the maximum available flow by connecting it to a suction pressure. The revisions add requirements to clarify where manifolding of fire pump test piping is permitted, as well as where combining fire pump test piping with relief valve discharge piping is permitted. The revisions also add new definitions to differentiate between "standby power" and "alternate power" and to ensure proper application of these terms throughout the document. The revisions define the term "very tall building" and expand the requirements pertaining to these buildings, including those for automatic tank refill valves. The revisions add new requirements and annex material to help package designers through the evaluation of mass elastic systems, as well as revise requirements for hydraulic cranking systems to distinguish between systems used as primary cranking systems and those used as secondary cranking systems. Finally, the revisions revise Annex C to make data formatting more universal.

NFPA 22, Standard for Water Tanks for Private Fire Protection Changes to the 2018 edition of NFPA 22 include revisions to Chapters 5 and 6 that remove duplicate requirements to American Water Works Association (AWWA) D100 (Welded Carbon Steel Tanks for Water Storage) and D103 (Factory-Coated Bolted Carbon Steel Tanks for Water Storage) and make references to AWWA D100 and D103 for the design, fabrication, and erection of water tanks, and requirements specific to fire protection remain. The revisions in Chapter 14 clarify requirements for check valves in the discharge pipe of a suction tank and modify tank repair requirements requiring the impairment procedures of NFPA 25 (Standard for the Inspection, Testing, and Maintenance of Water-Based Fire Protection Systems) to be followed. And the revisions in Chapter 16 add new criteria for electric immersion heaters and remove the lowest one-day mean temperature map in lieu of using calculations to determine tank heating needs.

NFPA 24, Standard for the Installation of Private Fire Service Mains and Their Appurtenances. Changes to the 2016 edition of NFPA 24, which are carried into the latest edition, include revisions that clarify the hydrant definitions to describe the type of hydrant in question, as opposed to describing when and where they would be used. The revisions rewrite the valve arrangement requirements for clarity, and annex figures are added to provide figures consistent with NFPA 13. The revisions change the title of Chapter 6 from "Valves" to "Water Supply Connections" to better describe the material in the chapter. Revisions in Section 6.1 more clearly describe the permitted exceptions to indicating valves and permit non-listed tapping sleeve and valve assemblies in connections to municipal water supplies. The revisions update the center of hose outlet measurements to include clear minimum and maximum values for the location of the outlet, along with the appropriate measurement for a hose house installation. The revisions remove steel underground piping references from the table in Chapter 10 because steel pipe is required to be listed other than in the fire department connection (FDC) line. The revisions also add a statement to allow underground fittings to be used above the ground to transition to aboveground piping.

Changes to the 2019 edition of NFPA 24 include revisions related to trenching and backfill. The revisions include acceptance testing requirements for aboveground piping and revise the standard to clarify the unacceptable use of steel piping for underground service.

NFPA 25, Standard for Inspection, Testing, and Maintenance of Water-Based Fire Protection Systems. Changes to the 2017 edition of NFPA 25, which are carried into the latest edition, include revisions that define the new fire pump terms to align with NFPA 20. The revisions also add criteria to Chapter 4 on automated inspections and testing. The revisions add residential sprinkler replacement requirements to address sprinklers that are no longer available; add new requirements regarding missing escutcheons or, if listed, escutcheons that are no longer available; update the inspection, testing, and maintenance tables throughout the chapters; and add new no-flow test requirements for fire pumps. Revisions to Chapter 13 add new requirements for the inspection, testing, and maintenance of waterflow alarm devices, and pre-action and deluge valves. The revisions also add criteria for air compressors. This edition contains all the general pressure gauge criteria. In addition, the revisions added two new annexes: one on connectivity and data collection and another on color-coded tagging programs.

Changes to the 2020 edition of NFPA 25 include revisions that define the term "electrically operated sprinklers," which is a new technology. The revisions add periodic inspection, testing, and maintenance requirements. The revisions add requirements addressing recalled sprinklers to Chapter 4 and a section on dry hydrants to Chapter 7. The revisions also modify dry sprinkler test requirements from 10 years to 15 years and clarify the automated testing requirements for waterflow alarm devices. The revisions to Chapter 8 clarify, for safety reasons, that energized pump controllers should not be opened and introduce the concept of an isolating switch in a separate compartment as part of the pump controller. The revisions also revise the fire pump annual flow test and evaluation requirements for the test and add new requirements to Chapter 12 regarding water mist systems.

NFPA 30, Flammable and Combustible Liquids Code. Changes to the 2015 edition of NFPA 30, which are carried into the latest edition, include revisions that impose a 12-foot (3.6 m) storage height restriction on unprotected storage in mercantile occupancies, to be consistent with the storage height restriction already in place for mercantile occupancies protected in accordance with NFPA 13, for ordinary hazard Group 2. The revisions revise Chapter 16 to clarify intent and to eliminate certain inconsistencies between NFPA 30 and NFPA 13, and to correlate terminology and specific requirements in NFPA 13. Revisions to Chapter 17 and 27 reflect recommendations submitted to NFPA by the U.S. Chemical Safety and Hazard Investigation Board. The revisions add a new Annex A item, A.21.7.2.2, to address security of storage tanks in remote unattended locations at the recommendation of the U.S. Chemical Safety and Hazard Investigation Board.

Changes to the 2018 edition of NFPA 30, which are carried into the latest edition, include revising 9.4.1, which sets forth the types of containers considered acceptable under the code, to add item (8), which recognizes nonmetallic intermediate bulk containers that can satisfy the fire exposure test protocols in Section 9.4.1.1. The revisions update Section 9.4.1.1 to specifically reference UL 2368 (UL Standard Sales Site) and FM Class 6020 (Approval Standard for Intermediate Bulk Containers). The revisions replace Section 12.8 with provisions that allow only specific liquid/container combinations to be stored in such facilities. These combinations are allowed in unlimited quantities, but they must be protected in accordance with the fire protection design criteria in Chapter 16. For consistency, the revisions update Section 12.3.1 and delete (former) Section 12.3.2.

Changes to the 2021 edition of NFPA 30 include revisions to the classification scheme for liquids. The term "ignitable liquid" has been introduced to initiate a process that no longer uses the terms "flammable liquid" and "combustible liquid." This causes the requirements in NFPA 30 and other codes and standards to adopt a scheme based exclusively on the liquid physical state and property (i.e., the liquid flash point) for all liquids that can be ignited. The revisions to Chapter 4 address the classification criteria, whereas Chapter 3 defines specific liquids. The revisions to Chapters 1, 3, and 4 make the requirements consistent with each other in terms of the scope of the code, specific terminology, and the evaluation of liquids within the classification scheme.

NFPA 30B, Code for the Manufacture and Storage of Aerosol Products. Changes to the 2015 edition of NFPA 30B, which are carried into the latest edition, include revisions in Chapters 6 and 7 to incorporate coverage of aerosol cooking spray products and coverage of "plastic aerosol 1" and "plastic aerosol X" products, including classification of such products and protection guidance. The revisions update Section 1.9 to accommodate aerosol cooking spray products and plastic aerosol products. The revisions in Chapter 3 redefine and add several new definitions and terms relating to the manufacture of aerosol products and delete definitions of sprinkler types to eliminate any potential conflict with NFPA 13. The revisions change provisions for the hazardous (classified) location area classification by combining the previous separate requirements for button tippers and test baths into a single set of requirements and by adding additional requirements applicable to button tippers.

The revisions clarify provisions of Section 5.8.2 for storing finished product in production areas and add new requirements for storing finished aerosol products in plastic containers in production areas. The revisions improve Section 5.13.2 by extending applicability to under-the-cup (UTC) propellant fillers and by eliminating redundant text. The revisions update Section 5.13.3 to consolidate changes made in prior editions into a single section, making these provisions more coherent. The revisions expand Section 5.13.4 to apply to propellant heaters as well as propellant pumps. The revisions change Section 5.15 to designate aerosol product laboratories that handle flammable gases or flammable liquids as Class A laboratory units, in accordance with NFPA 45 (Standard on Fire Protection for Laboratories Using Chemicals). The revisions add a new section to provide specific fire protection requirements for aerosol cooking spray products. The revisions to the existing fire protection requirements for Level 2 and Level 3 aerosol products allow the use of intermediate temperature sprinklers in unconditioned spaces. The revisions change the terminology to correlate with that used in NFPA 13. In many of the sprinkler system design tables, the revisions now allow larger orifice sprinklers to be used, based on demonstrated performance. The revisions change several paragraphs to correlate with provisions of NFPA 13. The revisions add a new section to provide specific fire protection requirements for aerosol products in plastic containers. The revisions also add a new section to establish quantity limitations on plastic aerosol X products in mercantile occupancies. The revisions clarify various portions of Annex A's text and remove redundant text. The revisions amend Annex B to clarify existing text and to correlate with changes in terminology in the body of the code.

Changes to the 2019 edition of NFPA 30B include revisions that add definitions for "palletized" and "solid-piled storage," provide Annex material for other definitions, modify the definition of "Aerosol Product" to include propellant-only products, and add a definition for "Aerosol Valve." The revisions add a new category of aerosol products, Plastic Aerosol X; reaffirms the language in TIA 15-1 (tentative interim amendment) on Aerosol Product Laboratories; and modifies the fire protection tables in Section 6.4.2.7 to provide clarification as to the application of ceiling-only protection. The revisions also clarify the provisions for in-rack sprinklers in solid shelves in Section 6.4.2.12. TIA 1369 provides newly developed fire protection criteria for Plastic Aerosol 3 products. The fact that these new products represent a fire hazard was not in the previous guidance in NFPA 30B.

NFPA 33, Standard for Spray Application Using Flammable or Combustible Materials. Changes to the 2016 edition of NFPA 33, which are carried into the latest edition, include revisions that update Chapter 1 to include indoor and outdoor spray application processes and operations within temporary membrane enclosures. The revisions also update Chapter 9 to allow for the use of water mist systems and to clarify the sprinkler design area requirement. The revisions also update a figure in Chapter 14 to improve consistency and to clarify the electrical classification requirements in the document. The revisions update Chapter 15 to incorporate the requirements for combustible dusts that are present in operations. Lastly, the revisions add new Chapter 18 to address the use of temporary membrane enclosures.

Changes to the 2018 edition of NFPA 33 include revisions that update Chapter 3 to include new or revised definitions for "automated spray application operations," "basement," "control area," "dry particulate scrubber spray booth," and "workstation." The revisions also update Chapter 5 to address the confusion between spray rooms and spray booths. The revisions update figures in Chapter 6 to improve consistency and to clarify electrical classification requirements in the document. The revisions update

Chapter 7 to provide clarification on the heating of recirculated air and the manifolding of exhaust ducts.

NFPA 70, National Electrical Code. Changes to the 2020 edition of NFPA 70 include revisions that provide the latest benchmark for safe electrical design, installation, and inspection to protect people and property from electrical hazards. The revisions include technical and editorial revisions.

NFPA 72, National Fire Alarm and Signaling Code. Changes to the 2016 edition of NFPA 72, which are carried into the latest edition, include revisions that make updates related to documentation. The revisions update Chapter 7 to add items to the minimum documentation, documentation for new emergency communications systems, and software documentation requirements, and to address review of electronic documentation media formats. The revisions clarify requirements for documentation of qualifications for the system designer and personnel who program systems while allowing for system design trainees and adds new criteria for plans examiners and inspectors.

In addition, the revisions add Class N, which addresses ethernet infrastructures for alarm and signaling systems, and pathway performance and installation criteria. The revisions update Class A and Class X pathway separation requirements to address emergency control function interface devices controlled by the fire alarm system on those circuits. The revisions also update Level 2 and Level 3 pathway survivability requirements, which provided flexibility of use and addressed other fire-resistive methods. The revisions add language relative to recalled equipment observed during inspection and testing and clarify the intent of periodic visual inspections relative to building or other changes that could affect the performance of the system. With the exception of reference and requirements pertaining to survivability, the revisions relocate requirements for the design, installation, testing, and maintenance of in-building emergency radio communications enhancement systems to NFPA 1221 (Standard for the Installation, Maintenance, and Use of Emergency Services Communications Systems). The revisions in Chapter 17 update the requirements for total coverage and expand its annex language to address general consideration for elevator shafts and enclosed stairways. The revisions update the requirements for placement of smoke detectors used for door release to provide additional flexibility in locating detectors.

Additional revisions restructure Chapter 24, providing greater user friendliness while expanding the section on risk analysis. The revisions emphasize the importance of effective message development. The revisions add Annex G, Guidelines for Emergency Communication Strategies for Buildings and Campuses, based on the National Institute of Standards and Technology and Fire Protection Research Foundation research. The revisions in Chapter 26 update the language to require that when multiple communication paths are used for performance-based technologies, or the two transmission means for a digital alarm communicator transmitter, they should be arranged to avoid a single point of failure. The revisions in Chapter 29 add requirements pertaining to remote resetting and silencing of a fire alarm control unit from other than the protected premises for a minimum of four minutes from the initial activation of the fire alarm signal. Smartphones and internet access to almost any device made remote access to residential equipment possible. The revisions also address the ability to establish remote access to a fire alarm system and create a new requirement that establishes that when a communication or transmission means other than digital alarm communicator transmitter is used, all equipment necessary to transmit an alarm signal must be provided with a minimum of 24 hours of secondary power capacity.

Changes to the 2019 edition of NFPA 72 include the addition of requirements for fire service access elevators and occupant evacuation elevators to coordinate with changes made in ASME A17.1/CSA B44 (Safety Code for Elevators and Escalators). The revisions update requirements for occupant evacuation operation. The revisions add Annex text for clarification, as was Figure A.21.6, Simplified Occupant Evacuation Operation (elevator system interface with the building fire alarm system based on ASME A17.1, Section 2.27.11; and NFPA 72, Section 21.6). In addition to the requirements for area of refuge (area of rescue assistance), the revisions update Chapter 24 to include requirements for stairway communications systems, elevator landing communications systems, and occupant evacuation elevator lobby communications systems.

The revisions include updates to technical references. For many years, when codes required visual (or visible) notification in addition to audible notification, strobe lights meeting the requirements of Chapter 18 were used. With newer LED products that can be used for fire alarms, the revisions change the terms "strobe," "light," and "visible" to "visual notification appliance." The revisions change the terms "speaker" and "high power speaker array" to "loudspeaker" and "high power loudspeaker array" for consistency. Material from NFPA 720 (Standard for the Installation of Carbon Monoxide (CO) Detection and Warning Equipment) is relocated to various chapters of NFPA 72. The revisions incorporate these requirements into Chapter 17 for carbon monoxide detectors; Chapter 14 for installation, testing, and maintenance; Chapter 29 for carbon monoxide alarms; and new Annex H. The revisions incorporate valve-regulated lead-acid batteries into Chapter 14. The revisions update the inspection and testing requirements in Tables 14.3.1 and 14.4.3.2. The revisions also expand the annex language to address use and testing of these batteries. Finally, the revisions introduce and define several new terms in Chapter 3.

NFPA 90A, Standard for the Installation of Air Conditioning and Ventilating Systems. Changes to the 2015 edition of NFPA 90A, which are carried into the latest edition, include revisions that primarily make editorial updates, reference updates, and clarify existing language. Also, the revisions add a section and test method for air dispersion systems.

Changes to the 2018 edition of NFPA 90A, which are carried into the latest edition, include revisions that primarily make editorial updates, reference updates, clarify existing language, and correct terminology. Also, the revisions add an option for testing flame spread of plastic pipe for use in plenums.

Changes to the 2021 edition of 90A include revisions that primarily make editorial updates, reference updates, and clarify existing language. In the referenced publications, the revisions update all UL publications to remove the term *ANSI* for clarification.

NFPA 96, Standard for Ventilation Control and Fire Protection of Commercial Cooking Operations. Changes to the 2017 edition of NFPA 96, which are carried into the latest edition, include revisions that add a new normative annex on mobile and temporary cooking operations. The normative annex was written in mandatory language but was not intended to be enforced unless specifically adopted by a jurisdiction or applied on a voluntary basis. This new annex includes requirements for clearance, hoods, ducts, terminations, fire extinguishing systems, carbon monoxide detectors, location, training, generators, and LP-gas, as well

as procedures for the use, inspection, testing, and maintenance of equipment. The language in the body of the standard clarifies that fixed and mobile cooking equipment is covered by NFPA 96. The revisions use the term "solid fuel" instead of "charcoal" to cover the different types of solid fuel. A device installed in a duct such as a pollution control device now must be protected by its own fire extinguishing system.

Changes to the 2021 edition of NFPA 96 include revisions that add a new chapter on mobile and temporary cooking operations. The revisions move this content, formerly located in normative Annex B, into the body of the standard to provide the minimum fire safety requirements for mobile and temporary cooking operations. The revisions remove duplicate requirements related to this subject and modify language throughout the standard to clarify the provisions for buildings as well as mobile and temporary cooking operations. Lastly, these changes replace the term "activate" with the proper term "actuate" throughout the standard.

NFPA 101, Life Safety Code. Changes to the 2018 edition of NFPA 101, which are carried into the latest edition, include revisions that expand the code's scope to include hazardous materials emergencies, injuries from falls, and emergency communications. The revisions to Chapter 4 add a reference to NFPA 241 (Standard for Safeguarding Construction, Alteration, and Demolition Operations) for construction, alteration, and demolition operations, and new requirements for fire-retardant-treated wood. The changes revise the terms "electrically controlled egress door assemblies," "delayed-egress locking systems," and "access-controlled egress door assemblies" in Chapter 7 to "door hardware release of electrically locked egress door assemblies," "delayed-egress electrical locking systems," and "sensor-release of electrical locking systems," respectively. Further changes in Chapter 7 add criteria that permits occupant loads to be reduced to available egress capacity as was previously permitted only for building rehabilitation.

Chapter 8's revisions add wall marking and identification provisions for fire barriers, smoke barriers, and smoke partitions. The revisions also reorganize opening protective requirements. The changes to Chapter 9 add a reference to NFPA 4 (Standard for Integrated Fire Protection and Life Safety System Testing) for integrated fire protection and life safety system testing and add new provisions for risk analyses for mass notification systems. The revisions to Chapter 10 change the interior finish requirements for expanded vinyl wall coverings, textile wall, and ceiling coverings. They also add new provisions for laminated products and facings or wood veneers. The changes in Chapter 11 revise the provisions for airport traffic control towers and reorganize the emergency lighting and standby power requirements for high-rise buildings. The changes classify Animal housing facilities as special structures. The changes also add carbon-monoxide detection requirements for new assembly occupancies to Chapter 12.

The revisions to Chapters 14 - 17, 38, and 39 add criteria for door locking to prevent unwanted entry in educational, daycare, and business occupancies. The changes revise the sprinkler requirement threshold for new educational occupancies in Chapter 14. The changes modify health care corridor projection allowances in Chapters 18 and 19 to correlate with accessibility standards and to permit the installation of emergency stair travel devices and self-retracting seats. The changes add new provisions to permit health care and ambulatory health care smoke compartments up to 40,000 square feet (3,720 square meters) in area. The changes also revise the door locking provisions for patient special needs in ambulatory health care occupancies in Chapters 20 and 21.

In Chapter 24, the changes add criteria for bathtub and shower grab bars. The changes also add attic protection requirements to Chapters 28 and 30 for certain new hotels and dormitories and apartment buildings. In Chapter 32, the revisions add carbon-monoxide detection requirements for new residential board and care occupancies were added. The changes also revise mall terminology in Chapters 36 and 37 and add new provisions to differentiate between open and enclosed mall concourses. In Chapters 38 and 39, the revisions add a reference to NFPA 99 for medical gases in business occupancies. The changes also add a new Annex C to provide guidance on several NFPA hazardous materials standards.

Changes to the 2021 edition of NFPA 101 include revisions that allow a second door lock/latch releasing motion on existing educational and daycare occupancy classroom doors to accommodate lockdown events; require mandatory sprinklers in new daycare occupancies with more than 12 clients; and modify sprinkler requirements for existing high-rise buildings containing ambulatory health care, business, industrial, or apartment building occupancies. The revisions also modify construction limits for existing nursing homes; clarify that non-required fire doors are not subject to the inspection requirements of NFPA 80 (Standard for Fire Doors and Other Opening Protectives); add provisions for temporary barriers to separate areas under construction in health care and ambulatory health care occupancies; and update criteria for special amusement buildings.

Further revisions require mandatory sprinkler requirement for new bars and restaurants with an occupant load of 50 or more; add a minimum requirement for fire department two-way communication signal strength in all new buildings; add a carbon monoxide detection requirement for existing hotels and dormitories; add a requirement for low-frequency fire alarm notification signals in new hotel, dormitory, and apartment building sleeping rooms per NFPA 72; and add provisions for burglar bars/grates on means of escape windows in residential occupancies.

NFPA 214, Standard on Water-Cooling Towers. Changes to the 2016 edition of NFPA 214, which are carried into the latest edition, include revisions that better align the sprinkler requirements within the standard with the types of systems defined in NFPA 13.

Changes to the 2021 edition of NFPA 214 include revisions that update the references in the document. Two notable exceptions are the updated definition for "fire-resistant partition" and the requirement to evaluate certain factors when determining proper fire protections in Chapter 4. Previously, the definition of "fire-resistant partition" directed the user to a mandatory requirement, which is not allowed by the *Manual of Style for NFPA Technical Committee Documents.* This provides clearer requirements for the authority having jurisdiction.

NFPA 307, Standard for the Construction and Fire Protection of Marine Terminals, Piers, and Wharves. Changes to the 2016 edition of NFPA 307, which are carried into the latest edition, include revisions that make references to NFPA 5000 (Building Construction and Safety Code®), wherever possible, particularly for requirements related to the design, materials, and workmanship of pier and wharf construction and other structures within the facility. The standard lets the authority having jurisdiction consider other codes or standards when approving marine terminal construction plans. Previous editions of the standard addressed

only cargo-handling facilities. The revisions also include construction requirements that apply to marine terminals designed for passenger vessels.

Changes to the 2021 edition of NFPA 307 include revisions that add a new annex to inform municipal and industrial firefighters about marine firefighting (MFF) requirements that vessel owners or operators (plan holders) must meet in their respective vessel response plans. The annex also provides details on specific responsibilities of plan holders and their contracted MFF service providers. The revisions direct users to NFPA 14, for requirements relating to standpipes and hose systems for marine terminals. NFPA 307 now requires that fire protection water supplies be inspected, tested, and maintained in accordance with NFPA 25, to ensure that water supply systems are operational when needed in the event of a fire or other emergency. Because marine terminal structures have specific fire safety challenges, a fire risk assessment should be performed in the design phase of construction, and it now provides a list of resources to facilitate this assessment process.

NFPA 409, Standard on Aircraft Hangars. Changes to the 2016 edition of NFPA 409 include revisions that relax the requirements for divided water reservoirs, redundant fire pumps, and reserve supplies of foam concentrate, among others. In addition, the revisions change the requirements for the zoning of low-level foam systems to permit Group I and Group II hangars and simplify Chapter 8 for Group III hangars.

NFPA 750, Standard on Water Mist Fire Protection Systems. Changes to the 2015 edition of NFPA 750, which are carried into the latest edition, include updates that provide additional information on design water mist systems for various defined occupancies. The revisions add two chapters to address the dynamics of occupancy classification in designing a water mist system: Chapter 5, Classification of Occupancies, and Chapter 10, Occupancy Protection Systems. In addition, the revisions remove the inspection, testing, and maintenance sections for water mist systems, other than those installed in one- and two-family dwellings and now reference NFPA 25.

Changes to the 2019 edition of NFPA 750 include revisions that clarify the definitions of a "gridded water mist system" and "twin-fluid system," which devices can be used as automatic means, which components can be used as provisions for cleaning, and the requirements for pressure-indicating devices used on a common manifold system. The revisions also clarify a listed system requirement that any mixed components or systems have been tested together and expand requirements to include configurations allowed in current listed solutions.

In addition, the revisions added new sections specifying design, testing, and installation of pre-action water mist systems. The revisions added another section to prevent debris and contaminants from entering a water mist system by requiring a strainer or filter after the FDC. The revisions also clarify the location of the FDC on a low-pressure water mist system. Throughout the standard, the revisions replace the terms "pressure container" and "pressurized container" with the newly defined term "pressure vessel," and replace the phrase "safety device to release excess pressure" with "pressure relief device" to maintain consistency with industry practices and terminology. Finally, the revisions also update referenced documents, extracts, and formatting to comply with the *Manual of Style for NFPA Technical Committee Documents.*

NFPA 2001, Standard on Clean Agent Fire Extinguisher Systems. The revisions to the 2015 edition of NFPA 2001, which are carried into the latest edition, add new content regarding recycling and disposal of clean agents and new system design criteria for 200-bar and 300-bar IG-01 systems. The revisions also add a sample system acceptance report to aid in conformance with commissioning practices. The revisions made by the committee include a completed update of all references and a review of the pipe design criteria against the referenced piping code. The revisions to this edition also revise the requirements for cylinder location, enclosure integrity, and unoccupied spaces.

Changes to the 2018 edition of NFPA 2001 include revisions that reorganize the chapter on inspection, testing, maintenance, and training to improve usability of the standard and to comply with the *Manual of Style for NFPA Technical Committee Documents.* These revisions are split into two distinct chapters: Chapter 7, Approval of Installations, and Chapter 8, Inspection, Servicing, Testing, Maintenance, and Training. The revisions also add definitions for "inspection," "maintenance," and "service," and add a requirement for integrated fire protection and life safety systems to be tested in accordance with NFPA 4. In addition, the revisions to the standard require an egress-time study for all clean agent systems, not just those where the design concentration is greater than the No Observed Adverse Effect Level. The revisions also add a definition of "abort switch" and revise the definition of "clean agent." The revisions also update the requirements for pipe and fittings in accordance with the latest reference standards. Lastly, the revisions add a new section on pipe hangers and supports.

NFPA 2010, Standard for Fixed Aerosol Fire Extinguishing Systems. Changes to the 2015 edition of NFPA 2010, which are carried into the latest edition, include revisions that revise the frequency of system inspections and add references to third-party approval standards.

Changes to the 2020 edition of NFPA 2010 include revisions that remove dispersed aerosol systems from the document scope and delete all requirements that are not relevant to condensed aerosol systems. New requirements address the use of aerosol extinguishing systems in normally occupied spaces. Revised text clarifies that an enclosure integrity test is not required and addresses compensation for leakage and enclosure ceiling height when determining the aerosol agent quantity. Lastly, the revisions made general improvements of readability and clarity throughout.

UL 827, Standard for Central Station Alarm Services. The revised standard for UL 827 makes technical and editorial revisions.

FISCAL NOTE AND LOCAL EMPLOYMENT IMPACT STATEMENT. Texas State Fire Marshal Orlando Hernandez has determined that during each year of the first five years the proposed amendments are in effect, there may be measurable fiscal impact on state and local governments as a result of enforcing or administering the sections. The cost analysis in the Public Benefit and Cost Note part of this proposal is applicable to these local and state governments should the state fire marshal conduct an examination and order the correction of a dangerous condition identified as a result of enforcing the proposed NFPA standards. Mr. Hernandez 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 amendments are in effect, Mr. Hernan-

dez expects that administrating the rules will have the public benefit of ensuring that TDI's rules are up to date and better protect the public from fire because the state fire marshal will be able to apply the most recent standards and recommendations for the inspection of buildings.

Mr. Hernandez expects that the proposed amendments will impose an economic cost on persons required to comply with the amendments. Because of revisions in the updated codes, building owners and licensees may be required to meet more stringent or altered code requirements, and building owners and licensees may have higher costs to comply with the more recent version of the standards. However, these costs will be individualized and based on the existing condition of the building, the number of buildings affected by the updated standards, and the work processes of licensees.

The NFPA offers instant digital access to NFPA codes and standards though its online service called NFPA LiNK. With NFPA LiNK, interested persons and entities can access a digital library of the most recent and the five previous editions of NFPA codes and standards for approximately $9.99 a month for individual access or $40.49 a month for up to 10 users. However, a free read-only version of the updated NFPA standards exists through the NFPA website, therefore TDI has not ascribed a cost to accessing the updated codes.

Because of revisions in the updated codes, building owners and licensees may be required to meet more stringent or altered code requirements, and building owners and licensees may have higher costs to comply with the more recent version of the standards. However, these costs will be individualized and based on the existing condition of the building, the number of buildings affected by the updated standards, and the work processes of licensees.

ECONOMIC IMPACT STATEMENT AND REGULATORY FLEXIBILITY ANALYSIS. TDI has determined that the proposed amendments may have an adverse economic effect on small or micro businesses and rural communities. The cost analysis in the Public Benefit and Cost Note section of this proposal also applies to these small and micro businesses and rural communities. TDI estimates that the proposed sections may affect approximately 20,000 small or micro businesses and potentially any rural community that owns a building subject to the revised code requirements. The primary objective of this proposal is to adopt revised NFPA standards. The updated standards are necessary to better protect the health and safety of the public. TDI has determined, in accord with Government Code §2006.002(c-1), that the proposal substantially contributes to the health and safety of Texas citizens by incorporating more current NFPA standards. There are no regulatory alternatives to the adoption of the updated standards in this proposal that will sufficiently protect the health and safety of Texas citizens affected by the rules.

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 amendments are necessary to protect the health, safety, and welfare of the residents of this state. The proposed amendments will better protect the public from fire because they will allow the state fire marshal to apply the most recent standards and recommendations for the inspection of buildings. This means that examinations conducted by the state fire marshal using these updated standards will result in better protection of individual citizens, fire fighters, buildings, and structures. In order to properly protect life and property, it is necessary that the current nationally recognized standards for inspection of buildings and premises be used.

GOVERNMENT GROWTH IMPACT STATEMENT. TDI has determined that for each year of the first five years that the proposed amendments are in effect, the proposed amendments:

- will not create or eliminate a government program;

- will not require the creation of new employee positions or the elimination of existing employee positions;

- will not require an increase or decrease in future legislative appropriations to the agency;

- will not require an increase or decrease in fees paid to the agency;

- will create a new regulation;

- will not expand, limit, or repeal an existing regulation;

- will increase or decrease the number of individuals subject to the rule's applicability; and

- will not positively or adversely 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 by TDI no later than 5:00 p.m., central time, on January 23, 2023. Send your comments to ChiefClerk@tdi.texas.gov or to the Office of the Chief Clerk, MC: GC-CCO, Texas Department of Insurance, P.O. Box 12030, Austin, Texas 78711-2030.

To request a public hearing on the proposal, submit a request before the end of the comment period to ChiefClerk@tdi.texas.gov or to the Office of the Chief Clerk, MC: GC-CCO, Texas Department of Insurance, P.O. Box 12030, Austin, Texas 78711-2030. The request for public hearing must be separate from any comments and received by TDI no later than 5:00 p.m., central time, on January 23, 2023. If TDI holds a public hearing, TDI will consider written and oral comments presented at the hearing.

SUBCHAPTER C. STANDARDS AND FEES FOR STATE FIRE MARSHAL INSPECTIONS

DIVISION 1. GENERAL PROVISIONS

28 TAC §34.303

STATUTORY AUTHORITY. TDI proposes amendments to §34.303 under Government Code §§417.005, 417.008(e), and 417.0081 and Insurance Code §36.001.

Government Code §417.005 states that the Commissioner, after consulting with the state fire marshal, may adopt rules necessary to guide the state fire marshal in the performance of other duties for the Commissioner.

Government Code §417.008(e) provides that the Commissioner may adopt by rule any appropriate standard related to fire danger developed by a nationally recognized standards-making association.

Government Code §417.0081 provides that the Commissioner by rule shall adopt guidelines for assigning potential fire safety risk to state-owned and state-leased buildings and providing for the inspection of each building to which this section applies.

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. Section 34.303 implements Government Code Chapter 417.

§34.303. Adopted Standards.

(a) The Commissioner [~~commissioner~~] adopts by reference:

(1) NFPA 1-2021 [~~1-2015~~] Fire Code, except for:

(A) Chapter 1 Administration, to the extent that subsections 1.6 Enforcement, 1.7 Authority, 1.8 Duties and Powers of the Incident Commander, 1.9 Liability, 1.10 Fire Code Board of Appeals, 1.11 Records and Reports, 1.12 Permits and Approvals, 1.13 Certificates of Fitness, 1.14 Plan Review, and 1.16 Notice of Violations and Penalties do not apply to state fire marshal [~~State Fire Marshal~~] inspections;

(B) Chapter 30 Motor Fuel Dispensing Facilities and Repair Garages, to the extent it conflicts with standards adopted in Subchapter A of this chapter and Health and Safety Code Chapter 753;

(C) Chapter 60 Hazardous Materials, to the extent it will not be applied to university laboratories and laboratories in health care occupancies; and

(D) Chapter 65 Explosives, Fireworks, and Model Rocketry, to the extent it conflicts with Subchapter [~~subchapter~~] H of this chapter and Occupations Code Chapter 2154;

(2) NFPA Life Safety Code 101-2021 [~~101-2015~~];

(b) These copyrighted standards and recommendations are adopted in their entirety for inspections performed under Government Code §417.008, except to the extent they are in conflict with sections of this chapter or any Texas statutes or federal law. The standards are published by and are available from the National Fire Protection Association Inc. (NFPA) on the NFPA website at www.nfpa.org. [~~,Batterymarch Park, Quincy, Massachusetts 02269, or by calling 1-800-344-3555. A copy of the standards is available for public inspection in the State Fire Marshal's Office.~~]

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

Filed with the Office of the Secretary of State on December 9, 2022.

TRD-202204881
Allison Eberhart
Deputy General Counsel
Texas Department of Insurance
Earliest possible date of adoption: January 22, 2023
For further information, please call: (512) 676-6587

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SUBCHAPTER E. FIRE EXTINGUISHER RULES

28 TAC §34.507

STATUTORY AUTHORITY. TDI proposes amendments to §34.507 under Government Code §417.004 and §417.005, and Insurance Code §§6001.051(a), (b); 6001.052(a) - (c); and 36.001.

Government Code §417.004 provides that the Commissioner performs the rulemaking functions previously performed by the Texas Commission on Fire Protection.

Government Code §417.005 provides that the Commissioner may, after consulting with the state fire marshal, adopt necessary rules to guide the state fire marshal in the investigation of arson, fire, and suspected arson and in the performance of other duties for the Commissioner.

Insurance Code §6001.051(a) provides that TDI administer Insurance Code Chapter 6001. Insurance Code §6001.051(b) provides that the Commissioner may issue rules the Commissioner considers necessary to administer Chapter 6001 through the state fire marshal.

Insurance Code §6001.052(a) provides that in adopting necessary rules, the Commissioner may use recognized standards, including standards published by the National Fire Protection Association. Insurance Code §6001.052(b) provides that the Commissioner adopt and administer rules determined essentially necessary for the protection and preservation of life and property regarding (1) registration of firms engaged in the business of installing or servicing portable fire extinguishers or planning, certifying, installing, or servicing fixed fire extinguisher systems, or hydrostatic testing of fire extinguisher cylinders; (2) the examination and licensing of individuals to install or service portable fire extinguishers and plan, certify, install, or service fixed fire extinguisher systems; and (3) requirements for installing or servicing portable fire extinguishers and planning, certifying, installing, or servicing fixed fire extinguisher systems. Insurance Code §6001.052(c) provides that the Commissioner by rule prescribe requirements for applications and qualifications for licenses, permits, and certificates issued under this chapter.

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. Section 34.507 implements Insurance Code §§6001.051, 6001.052, and 6001.157.

§34.507. Adopted Standards.

The Commissioner [~~commissioner~~] adopts by reference in their entirety, except as noted, the following copyrighted standards and recommendations in this subchapter. If a standard refers to a provision in a specific edition of another standard, the provision is applicable only if it does not conflict with the adopted standard shown in this section. The standards are published by and available from the National Fire Protection Association [,] Inc. (NFPA) on the NFPA website at www.nfpa.org. [~~, (NFPA), Batterymarch Park, Quincy, Massachusetts 02269. A copy of the standards will be available for public inspection in the State Fire Marshal's Office.~~]

(1) NFPA 10-2018 [~~10-2013~~], Standard for Portable Fire Extinguishers.

(2) NFPA 11-2016 [~~11-2010~~], Standard for Low-, Medium-, and High-Expansion Foam and Combined Agent Systems.

(3) NFPA 12-2018 [~~12-2011~~], Standard on Carbon Dioxide Extinguishing Systems.

(4) NFPA 12A-2018 [~~12A-2009~~], Standard on Halon 1301 Fire Extinguishing Systems.

(5) NFPA 15-2017 [~~15-2012~~], Standard for Water Spray Fixed Systems for Fire Protection.

(6) NFPA 16-2019 [~~16-2011~~], Standard for the Installation of Foam-Water Sprinkler and Foam-Water Spray Systems.

(7) NFPA 17-2021 [~~17-2013~~], Standard for Dry Chemical Extinguishing Systems.

(8) NFPA 17A-2021 [~~17A-2013~~], Standard for Wet Chemical Extinguishing Systems.

(9) NFPA 18-2021 [~~18-2011~~], Standard on Wetting Agents.

(10) NFPA 25-2020 [~~25-2014~~], Standard for the Inspection, Testing, and Maintenance of Water-Based Fire Protection Systems.

(11) NFPA 33-2018 [~~33-2011~~], Standard for Spray Application Using Flammable or Combustible Materials.

(12) NFPA 96-2021 [~~96-2014~~], Standard for Ventilation Control and Fire Protection of Commercial Cooking Operations.

(13) NFPA 2001-2018 [~~2001-2012~~], Standard on Clean Agent Fire Extinguishing Systems.

(14) NFPA 2010-2020 [~~2010-2010~~], Standard for Fixed Aerosol Fire-Extinguishing Systems.

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. FIRE ALARM RULES

28 TAC §34.607

STATUTORY AUTHORITY. TDI proposes amendments to §34.607 under Government Code §417.004 and §417.005, and Insurance Code §§6002.051(a), (b); 6002.052(a)-(c); 6002.054(a); and 36.001.

Government Code §417.004 provides that the Commissioner performs the rulemaking functions previously performed by the Texas Commission on Fire Protection.

Government Code §417.005 provides that the Commissioner may, after consulting with the state fire marshal, adopt necessary rules to guide the state fire marshal in the investigation of arson, fire, and suspected arson, and in the performance of other duties for the Commissioner.

Insurance Code §6002.051(a) provides that TDI administer Insurance Code Chapter 6002. Insurance Code §6002.051(b) provides that the Commissioner may issue rules necessary to administer Chapter 6002 through the state fire marshal.

Insurance Code §6002.052(a) provides that in adopting necessary rules, the Commissioner may use recognized standards, including standards adopted by the NFPA.

Insurance Code §6002.052(b) specifies that rules adopted under §6002.051 may create specialized licenses or registration certificates for an organization or individual engaged in the business of planning, certifying, leasing, selling, servicing, installing, monitoring, or maintaining fire alarm or fire detection devices or systems and that the rules must establish appropriate training and qualification standards for each kind of license and certificate. Insurance Code §6002.052(c) specifies that the Commissioner must also adopt standards applicable to fire alarm devices, equipment, or systems regulated under this chapter and that in adopting these standards, the Commissioner may allow the operation of a fire alarm monitoring station that relies on fire alarm devices or equipment approved or listed by a nationally-recognized testing laboratory without regard to whether the monitoring station is approved or listed by a nationally-recognized testing laboratory if the operator of the station demonstrates that the station operating standards are substantially equivalent to those required to be approved or listed.

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. Section 34.607 implements Insurance Code §§6002.051, 6002.052, and 6002.156.

§34.607. Adopted Standards.

(a) The Commissioner [~~commissioner~~] adopts by reference those sections of the following copyrighted minimum standards, recommendations, and appendices concerning fire alarm, fire detection, or supervisory services or systems, except to the extent they are at variance with sections of this subchapter, Insurance Code Chapter 6002, or other state statutes. The standards are published by and are available from the National Fire Protection Association Inc. (NFPA) on the NFPA website at www.nfpa.org. [~~, Batterymarch Park, Quincy, Massachusetts 02269. A copy of the standards will be available for public inspection at the State Fire Marshal's Office.~~]

(1) NFPA 11-2016 [~~11-2010~~], Standard for Low-, Medium-, and High-Expansion Foam.

(2) NFPA 12-2018 [~~12-2011~~], Standard on Carbon Dioxide Extinguishing Systems.

(3) NFPA 12A-2018 [~~12A-2009~~], Standard on Halon 1301 Fire Extinguishing Systems.

(4) NFPA 13-2019 [~~13-2013~~], Standard for the Installation of Sprinkler Systems.

(5) NFPA 13D-2019 [~~13D-2013~~], Standard for the Installation of Sprinkler Systems in One- and Two-Family Dwellings and Manufactured Homes.

(6) NFPA 13R-2019 [~~13R-2013~~], Standard for the Installation of Sprinkler Systems in Low-Rise Residential Occupancies.

(7) NFPA 15-2017 [~~15-2012~~], Standard for Water Spray Fixed Systems for Fire Protection.

(8) NFPA 16-2019 [~~16-2011~~], Standard for the Installation of Foam-Water Sprinkler and Foam-Water Spray Systems.

(9) NFPA 17-2021 [~~17-2013~~], Standard for Dry Chemical Extinguishing Systems.

(10) NFPA 17A-2021 [~~17A-2013~~], Standard for Wet Chemical Extinguishing Systems.

(11) NFPA 25-2020 [~~25-2014~~], Standard for the Inspection, Testing, and Maintenance of Water-Based Fire Protection Systems.

(12) NFPA 70-2020 [~~70-2014~~], National Electrical Code.

(13) NFPA 72-2019 [~~72-2013~~], National Fire Alarm Code.

(14) NFPA 90A-2021 [~~90A-2012~~], Standard for the Installation of Air Conditioning and Ventilating Systems.

(15) NFPA 101-2021, Life Safety Code [~~101(r) 2012, or later editions, Code for Safety to Life from Fire in Buildings and Structures (Life Safety Code)®~~], or a local jurisdiction may adopt one set of the model codes listed in subsection (b) of this section instead of NFPA 101.

(16) UL 827 December 3, 2021 [~~October 1, 2008~~], Standard for Central Station Alarm Services.

(17) NFPA 2001-2018 [~~2001-2012~~], Standard on Clean Agent Fire Extinguisher Systems.

(b) The acceptable alternative model code sets are:

(1) the International Building Code®-2003 or later editions, and the International Fire Code-2003 or later editions; or

(2) the International Residential Code® for One- and Two-Family Dwellings-2003 or later editions.

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 G. FIRE SPRINKLER RULES

28 TAC §34.707

STATUTORY AUTHORITY. TDI proposes amendments to §34.707 under Government Code §417.004 and §417.005, and Insurance Code §§6003.051(a), (b); 6003.052(a); 6003.054(a); and 36.001.

Government Code §417.004 provides that the Commissioner perform the rulemaking functions previously performed by the Texas Commission on Fire Protection.

Government Code §417.005 provides that the Commissioner may, after consulting with the state fire marshal, adopt necessary rules to guide the state fire marshal in the investigation of arson, fire, and suspected arson, and in the performance of other duties for the Commissioner.

Insurance Code §6003.051(a) provides that TDI administer Chapter 6003. Insurance Code §6003.051(b) provides that the Commissioner may issue rules necessary to administer Chapter 6003 through the state fire marshal.

Insurance Code §6003.052(a) provides that in adopting necessary rules, the Commissioner may use recognized standards, including standards adopted by the NFPA.

Insurance Code §6003.054(a) provides that the state fire marshal must implement the rules adopted by the Commissioner for the protection and preservation of life and property in controlling (1) the registration of an individual or an organization engaged in the business of planning, selling, installing, maintaining, or servicing fire protection sprinkler systems; and (2) the requirements for the plan, sale, installation, maintenance, or servicing of fire protection sprinkler systems by determining the criteria and qualifications for registration certificate and license holders; evaluating the qualifications of an applicant for a registration certificate to engage in the business of planning, selling, installing, maintaining, or servicing fire protection sprinkler systems; conducting examinations and evaluating the qualifications of a license applicant; and issuing registration certificates and licenses to qualified applicants.

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. Section 34.707 implements Insurance Code §§6003.051, 6003.052, 6003.054, and 6003.156.

§34.707. Adopted Standards.

[~~(a)~~] The Commissioner [~~commissioner~~] adopts by reference in their entirety the following copyrighted standards and recommended practices published by and available from the National Fire Protection Association [~~,~~] Inc. (NFPA) on the NFPA website at www.nfpa.org. [~~, Batterymarch Park, Quincy, Massachusetts 02269. A copy of the standards will be available for public inspection in the State Fire Marshal's Office.~~]

(1) NFPA 13-2019 [~~13-2013~~], Standard for the Installation of Sprinkler Systems;

(2) NFPA 25-2020 [~~25-2014~~], Standard for the Inspection, Testing, and Maintenance of Water-Based Fire Protection Systems;

(3) NFPA 13D-2019 [~~13D-2013~~], Standard for the Installation of Sprinkler Systems in One- and Two-Family Dwellings and Manufactured Homes;

(4) NFPA 13R-2019 [~~13R-2013~~], Standard for the Installation of Sprinkler Systems in Low-Rise Residential Occupancies;

(5) NFPA 14-2019 [~~14-2013~~], Standard for the Installation of Standpipe and Hose Systems;

(6) NFPA 15-2017 [~~15-2012~~], Standard for Water Spray Fixed Systems for Fire Protection;

(7) NFPA 16-2019 [~~16-2011~~], Standard for the Installation of Foam-Water Sprinkler and Foam-Water Spray Systems;

(8) NFPA 20-2019 [~~20-2013~~], Standard for the Installation of Stationary Pumps for Fire Protection;

(9) NFPA 22-2018 [~~22-2013~~], Standard for Water Tanks for Private Fire Protection;

(10) NFPA 24-2019 [~~24-2013~~], Standard for the Installation [~~installation~~] of Private Fire Service Mains and Their Appurtenances;

(11) NFPA 30-2021 [~~30-2012~~], Flammable and Combustible Liquids Code;

(12) NFPA 30B-2019 [~~30B-2011~~], Code for the Manufacture and Storage of Aerosol Products;

(13) NFPA 307-2021 [~~307-2011~~], Standard for the Construction and Fire Protection of Marine Terminals, Piers, and Wharves;

(14) NFPA 214-2021 [~~214-2011~~], Standard on Water-Cooling Towers;

(15) NFPA 409-2016 [~~409-2011~~], Standard on Aircraft Hangars; and

(16) NFPA 750-2019 [~~750-2010~~], Standard on Water Mist Fire Protection Systems.

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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PART 2. TEXAS DEPARTMENT OF INSURANCE, DIVISION OF WORKERS' COMPENSATION

CHAPTER 127. DESIGNATED DOCTOR PROCEDURES AND REQUIREMENTS

INTRODUCTION. The Texas Department of Insurance, Division of Workers' Compensation (DWC) proposes to amend Subchapter A §§127.1, 127.5, 127.10, 127.15, 127.20, and 127.25; the title of Subchapter B; Subchapter B §§127.100, 127.120, 127.130, and 127.140; and Subchapter C §§127.200, 127.210, and 127.220; and to repeal 28 TAC §127.110. The sections DWC proposes to amend concern how the designated doctor program operates. The section DWC proposes to repeal, §127.110, has been incorporated into amended §127.100. The proposed amendments and repeal implement Texas Labor Code §§408.0041 and 408.1225, which directs DWC on the operation of the designated doctor program.

EXPLANATION. The amendments are necessary to maintain and increase participation in the designated doctor program and to allow better access to certain types of specialized examinations. DWC evaluated the program and identified several possible areas of improvement, including changes to address training and testing requirements; designated doctor qualifications, certification, and renewals; multiple certifications; and administrative burdens.

To that end, the proposed amendments move the substance of the repealed section into another section to reduce duplication and streamline and clarify the process involved, make changes to revise training and testing requirements, reduce administrative burdens, and update designated doctor qualifications to enable better access to traumatic brain injury and multiple fracture examinations for injured employees.

The amendments add new subsection headers throughout the chapter that enable readers to identify and navigate subsections more easily. They remove unnecessary and obsolete section-specific applicability and effective dates to avoid confusion and streamline rule language. They make editorial changes that clarify the rule language and organization by removing unnecessary words, simplifying sentence structure, adding references, and breaking long paragraphs into shorter paragraphs and lists. The amendments also correct typographic, grammar, and punctuation errors in the current rule text; make changes to update obsolete references; and make updates for plain language and agency style. Some examples of these amendments include changing "shall" to "must," "facsimile" to "fax," and adding "insurance" before "carrier."

Section 127.1 concerns requesting designated doctor examinations. The amendments remove language related to the multiple certification requirement to harmonize with amendments to the multiple certification process in §127.10. The amendments also update and simplify DWC's website and physical addresses, and clarify DWC's requirements for a case-specific good cause determination for scheduling an examination within 60 days. The amendments remove the provision that formerly required the requester to list all compensable injuries, because the designated doctor will be determining what injuries are compensable when performing an extent of injury examination, rather than relying on information from the requester.

Section 127.5 concerns scheduling designated doctor appointments. The amendments relocate existing rule language about designated doctor certification from §127.130 for better placement in the chapter.

Section 127.10 concerns general procedures for designated doctor examinations. The amendments add a reference to Labor Code §408.0041(c), clarify that testing and referral doctors for designated doctor examinations do not have to be in the same workers' compensation network for health care as the injured employee, and clarify that the insurance carrier must pay benefits on the condition to which the designated doctor determines the compensable injury extends.

The amendments also divide subsection (d) into two subsections, remove the requirement for a designated doctor to provide multiple certifications, and add language that specifies that, for examinations conducted under subsection (d) on or after June 5, 2023, a designated doctor may provide multiple certifications of maximum medical improvement (MMI) and impairment ratings only when DWC directs.

DWC analyzed data about designated doctor examinations, benefit review conferences, and contested case hearings involving the issues of MMI, impairment rating, and extent of injury in 2019, and determined that only about 20% of designated doctor reports with multiple certifications were involved in DWC dispute resolution processes. In addition, of the 20% of claims where the parties disputed MMI, impairment rating, and extent of injury in a DWC contested case hearing, DWC administrative law judges requested new certifications from designated doctors about 50% of the time, since the multiple certifications the designated doctor previously produced did not represent the compensable injury determined during the proceeding. DWC concluded that where multiple certifications are appropriate, DWC administrative law

judges are already directing designated doctors to provide them. As a result, the amendment that specifies that designated doctors may provide multiple certifications of MMI and impairment ratings only when directed by DWC will reduce the number of unnecessary multiple certifications that consume time and resources, while continuing to allow for necessary multiple certifications without causing unnecessary delay.

Section 127.15 concerns undue influence on a designated doctor. The amendments make editorial changes and remove obsolete and unnecessary language.

Section 127.20 concerns requesting a letter of clarification regarding designated doctor reports. The amendments make editorial changes and remove obsolete and unnecessary language.

Section 127.25 concerns failure to attend a designated doctor examination. The amendments clarify that the requirement applies to a designated doctor examination or a referral examination under §127.10(c).

Subchapter B concerns designated doctor certification, renewal, and qualifications. The amendments change the title of the subchapter by changing "recertification," which referred to the section being repealed, to "renewal" to describe the procedure more accurately.

Section 127.100 concerns designated doctor certification. The amendments merge the language in §127.110, which is being repealed, with §127.100 to eliminate redundancy, reduce confusion and inconsistencies, update terminology, and clarify the process for certification and renewal.

The amendments specify that the requirements for certification and renewal are now combined into §127.100, and modify the requirement for certification testing by requiring that a designated doctor complete certification on or after May 13, 2013. Designated doctors that pass or have previously passed the certification test on or after May 13, 2013, are no longer required to retest every two years when they renew their certification. However, the amendments also add §127.100(d), which allows DWC to require testing of all designated doctors on renewal of their certification if needed. Examples of when testing might be required include, but are not limited to, individual need for retesting based on substandard performance, changes in the duties of a designated doctor, updates to the guidelines, and legislative changes.

The amendments clarify that the disclosure questions on the certification application require detailed explanations, add suspension and revocation to the certification actions that require DWC to send the designated doctor written notice, and relocate existing rule requirements for certification effective and expiration dates.

The amendments add §127.100(g), which relocates existing rule requirements from §127.110. Subsection (g) explains that a designated doctor seeking to renew their certification immediately after their current term expires, without interruption, must apply for certification no later than 45 days before the end of the term. Subsection (g) also explains that DWC will not assign examinations to the designated doctor during the last 45 days of an expiring term if it does not receive an application 45 days before the end of the term, but that designated doctors may still provide services on claims DWC had previously assigned to them during this 45-day period.

The amendments add §127.100(h), which allows DWC to approve a designated doctor certification but restrict some or all appointments until the designated doctor completes additional training, testing, or other requirements. This is necessary for DWC to ensure that designated doctors are adequately trained and able to perform their duties as the Labor Code and DWC rules and guidelines require. Subsection (h) also provides a way for the designated doctor to dispute the restriction.

The amendments reletter existing subsection (f) as subsection (i). They clarify the range of possible actions that, under existing statutes, the commissioner may take on a designated doctor's certification to ensure the quality of the designated doctor's decisions and reviews. The amendments also add failure to comply with the requirements of §180.24 (relating to Financial Disclosure) as a ground for action under the subsection.

The amendments add §127.100(k), which relocates existing rule requirements for certification renewal from §127.110, to ensure consistency in the restructured process. The amendments change "informal hearing" to "informal conference" to clarify the informal nature of the discussion about a denial, suspension, or revocation of a designated doctor certification or application for certification or renewal. Subsection (k) details the procedure for designated doctors to request an informal conference.

The amendments remove existing §127.100(h) because this subsection was added in 2012 when designated doctors were transitioning to the then-new rules for examination qualification criteria. Only one doctor used that process during that transition, and there is no longer a need for it.

The amendments remove existing §127.100(i) because DWC transitioned all designated doctor certification terms to a two-year cycle in 2012. There is no longer a need for this provision in the rules.

Section 127.110 is repealed. The proposal combines certification and renewal requirements in amended §127.100 to reduce redundancy and inconsistency, and to make the requirements easier to understand and follow.

Section 127.120 concerns exception to certification as a designated doctor for out-of-state doctors. The amendments make editorial changes and remove obsolete and unnecessary language.

Section 127.130 concerns qualification standards for designated doctor examinations. The amendments specify an applicability date for the section for designated doctor examination assignments made on or after June 5, 2023, to clarify which standards apply to a given assignment.

The amendments to §127.130(b)(9)(A) also update the qualification requirements for physicians examining traumatic brain injuries, including concussion and post-concussion syndrome, by adding to the list of qualifying American Board of Medical Specialties and American Osteopathic Association Bureau of Osteopathic Specialists board certifications. These amendments are necessary to ensure that injured employees with traumatic brain injuries can continue to access designated doctor examinations.

Over the past several years, DWC has experienced a marked decrease in the number of qualified board-certified physicians to examine injured employees with traumatic brain injuries. Current §127.130(d) allows DWC to exempt a designated doctor from the applicable qualification standard if no other designated doctor is qualified and available to perform the examination. All physicians are trained and tested to be able to handle designated doctor assignments for non-musculoskeletal injuries, and to recognize when an injured employee needs to be referred for ancillary testing. Due to lack of availability, within a seven-month

period, DWC selected a physician with a board certification other than those currently listed in §127.130(b)(9)(A) to examine an injured employee with a traumatic brain injury 26% of the time. These designated doctors coordinated testing and referral examinations with other health care practitioners to complete their reports. Their reports were comparable to reports submitted by qualified, board-certified physicians.

As a result, DWC acknowledges the need for the rule to increase the number of board-certified physicians available to examine injured employees with traumatic brain injuries, as well as to improve the ability of physicians with a broader range of board certifications to use testing and referral resources to produce reports that meet the requirements of the designated doctor program. Board-certified physicians are all capable of coordinating referrals of injured employees to other specialists, when necessary, regardless of the types of patients the physicians may see in their medical practice. Should a situation arise where any designated doctor does not believe they have the knowledge or training to address a specific issue in an exam, designated doctors may return the examination to DWC for reassignment.

To support those doctors, DWC would provide additional training, focused on coordinating additional testing and referrals necessary when examining injured employees, and techniques for incorporating the results of the testing and referral examinations into the overall report effectively. This would preserve the quality of the reports on traumatic brain injuries while expanding the pool of doctors able to conduct those examinations.

The amendments to §127.130(b)(9)(B) also update the qualification requirements for physicians examining injured employees with spinal cord injuries and diagnoses, a spinal fracture with documented neurological deficit, or cauda equina syndrome. The amendments change the phrase "documented neurological deficit" to "documented neurological injury, or vascular injury," to clarify what types of conditions require a designated doctor examination by a qualified, board-certified specialist. The amendments also clarify that an injured employee with more than one spinal fracture must be examined by a qualified, board-certified specialist to harmonize with the amendments to the types of multiple fractures, joint dislocation, and pelvis or hip fractures in §127.130(b)(9)(E).

The amendments to §127.130(b)(9)(E) clarify the certifications required for complex fractures. They no longer require a board-certified specialist for multiple fractures unless they are accompanied by vascular injury or are more than one spinal fracture. Currently, a board-certified physician must examine an injured employee with multiple fractures (more than one fracture). That can create unnecessary administrative problems and delays. Sometimes, a chiropractor or physician without a board specialty listed in §127.130(b)(9)(E) is selected as a designated doctor to examine an injured employee with a single fracture. But when the designated doctor gets the medical records, they may show more than one simple, resolved fracture, which means that the designated doctor must return the examination for reassignment.

As a result, the amendments to §127.130(b)(9)(E) are necessary to clarify that an injured employee with one or more fractures with vascular injury, including crush injuries to bones, must be examined by a physician qualified under §127.130(b)(9)(E). An injured employee with more than one simple, resolved fracture (without vascular injury) may be examined by a chiropractor or a physician with a different board certification or no board certification. This amendment will reduce wasted time and resources, and increase efficiency in assigning and conducting designated doctor examinations.

The amendments also allow a chiropractor or a physician with a different board certification or no board certification to examine an injured employee with a hip fracture without vascular injury; and add multiple rib fractures, with or without vascular injury, to the types of injuries that require examination by a physician qualified under §127.130(b)(9)(E). Because multiple rib fractures may be accompanied by damage to internal organs, clarifying that their examination requires a board-certified physician is necessary.

The amendments to §127.130(c) remove language related to disqualification of a designated doctor under Labor Code §408.0041(b-1) for clarity.

The amendments to §127.130(g) remove a reference to §127.110(b) that the proposed repeal of §127.110 makes obsolete.

Section 127.140 concerns disqualifying associations. The amendments make editorial changes.

Section 127.200 concerns duties of a designated doctor. The amendments add the requirement for a designated doctor to complete required training or pass required testing detailed in the designated doctor's approval of certification to harmonize with the proposed language in §127.100(h) that allows DWC to approve a designated doctor certification but restrict some or all appointments for a designated doctor until the designated doctor completes additional training, testing, or other requirements. The amendments are necessary to enhance and preserve the integrity of the program.

Section 127.210 concerns designated doctor administrative violations. The amendments clarify that a designated doctor's failure to attend an examination or comply with rescheduling requirements may be grounds for revoking or suspending a certification or sanctioning a designated doctor. The amendments are necessary to ensure the quality and efficiency of the designated doctor program.

Section 127.220 concerns designated doctor reports. The amendments add the requirements for a designated doctor to specify the date the additional testing or referral examination was completed, and to provide the total amount of time required for the designated doctor to review the medical records. They are necessary for DWC to administer the designated doctor program effectively by ensuring a more complete and descriptive record that provides the required information and better reflects the amount of work involved in producing the report.

Informal Comments. DWC posted two informal working drafts and held a stakeholder meeting while developing this proposal. DWC posted the first informal working draft on March 3, 2022, and received 12 comments; and the second on June 1, 2022, and received six comments; and held a stakeholder meeting on June 7, 2022, to discuss the drafts. DWC considered those comments when drafting this proposal. One comment that was repeated several times in the written comments and in the meeting was that stakeholders did not want DWC to simplify reporting by retiring DWC Form-068, *Designated Doctor Examination Data Report* and replacing it with an optional template. As a result, this proposal retains the designated doctor examination data report.

FISCAL NOTE AND LOCAL EMPLOYMENT IMPACT STATEMENT. Deputy Commissioner of Business Process Joseph

McElrath has determined that during each year of the first five years the proposed amendments and repeal are in effect, there will be no measurable fiscal impact on state and local governments as a result of enforcing or administering the sections, other than that imposed by the statute. This determination was made because the proposed amendments do not add to or decrease state revenues or expenditures, and because local governments are not involved in enforcing or complying with the proposed amendments.

Deputy Commissioner McElrath 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 amendments and repeal are in effect, Deputy Commissioner McElrath expects that enforcing and administering the proposed amendments and repeal will have the public benefits of ensuring that DWC's rules conform to Labor Code §§408.0041 and 408.1225 and are current, accurate, and readable, which promotes transparent and efficient regulation. The proposed amendments will also have the public benefit of increasing doctor participation in the designated doctor program because they revise certification testing requirements and reduce administrative burdens. The proposed amendments will also increase the number and types of physicians available to examine injured employees with certain complex injuries and diagnoses. That change will reduce injured employees' wait time and increase their access to examinations.

Deputy Commissioner McElrath expects that the proposed amendments and repeal will not increase the cost to comply with Labor Code §§408.0041 and 408.1225 because they do not impose requirements beyond those in the statute or that currently exist in the rules. In contrast, the proposed amendments and repeal should decrease the net cost and increase the benefits of participation in the designated doctor program by streamlining the procedure, reducing administrative burdens, and enabling better access to examinations.

Labor Code §408.0041 governs designated doctor examinations to resolve questions about an employee's injury. It also includes requirements for doctors' and insurance carriers' duties and obligations, assignments, reporting, and payment of benefits; and requires rulemaking. Labor Code §408.1225 requires in part that the commissioner by rule develop a process for certification of a designated doctor, and that those rules must require standard training and testing. Section 408.1225 also requires that DWC develop guidelines for certification training programs to ensure a designated doctor's competency in providing assessments, and allows DWC to authorize an independent training and testing provider to conduct the certification program under those guidelines.

The proposed amendments and repeal implement and conform with the requirements in Labor Code §§408.0041 and 408.1225, and do not impose new substantive duties or affect additional people. Instead, they aim to preserve and increase participation in and access to the designated doctor program by streamlining and clarifying requirements and reducing administrative burdens, while maintaining program quality. As a result, any cost associated with the proposed amendments does not result from the enforcement or administration of the proposed amendments.

ECONOMIC IMPACT STATEMENT AND REGULATORY FLEXIBILITY ANALYSIS. DWC has determined that the proposed amendments and repeal will not have an adverse economic effect or a disproportionate economic impact on small or micro businesses, or on rural communities. They are intended to maintain and increase participation in the designated doctor program. To that end, the proposed amendments move the substance of the repealed section into another section to reduce duplication and streamline and clarify the process involved, make changes to revise training and testing requirements, reduce administrative burdens, and update designated doctor qualifications to enable better access to traumatic brain injury and multiple fracture examinations for injured employees. They also make editorial changes, changes to update obsolete references, and updates for plain language and agency style. The proposed amendments do not change the people the rule affects or impose additional costs. As a result, and in accordance with Government Code §2006.002(c), DWC is not required to prepare a regulatory flexibility analysis.

EXAMINATION OF COSTS UNDER GOVERNMENT CODE §2001.0045. DWC has determined that this proposal does not impose a possible cost on regulated persons. Instead, DWC expects that the reduced administrative burdens and other designated doctor retention efforts in the proposal would reduce the cost of compliance with the existing rule. As a result, no additional rule amendments are required under Government Code §2001.0045. Even if the rule did impose a possible cost on regulated persons, no additional rule amendments would be required under Government Code §2001.0045 because the proposed amendments are necessary to implement Labor Code §§408.0041 and 408.1225 by maintaining a functioning designated doctor program.

GOVERNMENT GROWTH IMPACT STATEMENT. DWC has determined that for each year of the first five years that the proposed amendments are in effect, the proposed rule:

- will not create or eliminate a government program;

- will not require the creation of new employee positions or the elimination of existing employee positions;

- will not require an increase or decrease in future legislative appropriations to the agency;

- will not require an increase or decrease in fees paid to the agency;

- will not create a new regulation;

- will expand, limit, or repeal an existing regulation;

- will not increase or decrease the number of individuals subject to the rule's applicability; and

- will not positively or adversely affect the Texas economy.

DWC made these determinations because the proposal includes a repeal. The proposal moves the substance of the repealed section into another section to reduce duplication and streamline and clarify the process involved. The proposed amendments also make changes to revise training and testing requirements, reduce administrative burdens, and update designated doctor qualifications to enable better access to traumatic brain injury examinations for injured employees; as well as editorial changes, changes to update obsolete references, and updates for plain language and agency style. They do not change the people the rule affects or impose additional costs.

TAKINGS IMPACT ASSESSMENT. DWC has determined that no private real property interests are affected by this proposal, and 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. DWC will consider any written comments on the proposal that DWC receives no later than 5:00 p.m., Central time, on January 30, 2023. Send your comments to RuleComments@tdi.texas.gov; or to Texas Department of Insurance, Division of Workers' Compensation, Legal Services, MC-LS, P.O. Box 12050, Austin, Texas 78711-2050.

DWC will also consider written and oral comments on the proposal at a public hearing at 10:00 a.m., Central time, on January 18, 2023. The hearing will take place remotely. DWC will publish details of how to view and participate in the hearing on the agency website at www.tdi.texas.gov//alert/event/index.html.

SUBCHAPTER A. DESIGNATED DOCTOR SCHEDULING AND EXAMINATIONS

28 TAC §§127.1, 127.5, 127.10, 127.15, 127.20, 127.25

STATUTORY AUTHORITY. DWC proposes §§127.1, 127.5, 127.10, 127.15, 127.20, and 127.25 under Labor Code §§408.0041, 408.1225, 402.00111, 402.00116, and 402.061.

Labor Code §408.0041 provides in part that, at the request of an insurance carrier or an employee, or on the commissioner's own order, the commissioner may order a medical examination (a designated doctor examination) to resolve any question about the impairment caused by the compensable injury, the attainment of MMI, the extent of the employee's compensable injury, whether the injured employee's disability is a direct result of the work-related injury, the ability of the employee to return to work, or other similar issues. It also includes requirements for doctors' and insurance carriers' duties and obligations, assignments, reporting, and payment of benefits; and requires rulemaking.

Labor Code §408.1225 requires in part that the commissioner by rule develop a process for certification of a designated doctor, and that those rules must require standard training and testing. Section 408.1225 also requires that DWC develop guidelines for certification training programs to ensure a designated doctor's competency in providing assessments, and allows DWC to authorize an independent training and testing provider to conduct the certification program under those guidelines.

Labor Code §402.00111 provides that the commissioner of workers' compensation shall exercise all executive authority, including rulemaking authority under Title 5 of the Labor Code.

Labor Code §402.00116 provides that the commissioner of workers' compensation shall administer and enforce this title, other workers' compensation laws of this state, and other laws granting jurisdiction to or applicable to DWC or the commissioner.

Labor Code §402.061 provides that the commissioner of workers' compensation shall adopt rules as necessary to implement and enforce the Texas Workers' Compensation Act.

CROSS-REFERENCE TO STATUTE. Sections 127.1, 127.5, 127.10, 127.15, 127.20, and 127.25 implement Labor Code §§408.0041 and 408.1225. Section 408.0041 was enacted by House Bill (HB) 2600, 77th Legislature, Regular Session (2001); and amended by HB 7, 79th Legislature, Regular Session (2005); Senate Bill (SB) 1169, 80th Legislature, Regular Session (2007); HB 2004, 80th Legislature, Regular Session (2007); and HB 2605, 82nd Legislature, Regular Session (2011). Section 408.1225 was enacted by HB 7, 79th Legislature, Regular Session (2005); and amended by HB 2004, 80th Legislature, Regular Session (2007); HB 2605, 82nd Legislature, Regular Session (2011); and HB 2056, 85th Legislature, Regular Session (2017).

§127.1. Requesting Designated Doctor Examinations.

(a) Initiating an examination. At the request of the insurance carrier, an injured employee, the injured employee's representative, or on its own motion, the division may order a medical examination by a designated doctor to resolve questions about [~~the following~~]:

(1) the impairment caused by the injured employee's compensable injury;

(2) the attainment of maximum medical improvement (MMI);

(3) the extent of the injured employee's compensable injury;

(4) whether the injured employee's disability is a direct result of the work-related injury;

(5) the ability of the injured employee to return to work; or

(6) issues similar to those described by paragraphs (1) - (5) of this subsection.

(b) Requirements for a request. To request a designated doctor examination, a requester [~~requestor~~] must:

(1) provide a specific reason for the examination;

(2) report the injured employee's current diagnosis or diagnoses and body part or body parts affected by the injury;

[~~(3) list all injuries determined to be compensable by the division or court, or all injuries accepted as compensable by the insurance carrier;~~]

(3) [~~(4)~~] provide general information about [~~regarding~~] the identity of the requester [~~requestor~~], injured employee, [~~employer,~~] treating doctor, and insurance carrier;

(4) [~~(5)~~] identify the workers' compensation health care network certified under Insurance Code[~~,~~] Chapter 1305 through which the injured employee is receiving treatment, if applicable;

(5) [~~(6)~~] identify whether the claim involves medical benefits provided through a political subdivision under Labor Code §504.053(b)(2) and the name of the health plan, if applicable;

(6) [~~(7)~~] submit the request on the form prescribed by the division under this section. A copy of the prescribed form is [~~can be obtained from~~]:

(A) on the division's website at www.tdi.texas.gov/wc [~~www.tdi.texas.gov/wc/indexwc.html~~]; or

(B) at the division's headquarters in Austin, Texas [~~the Texas Department of Insurance, Division of Workers' Compensation, 7551 Metro Center Drive, Suite 100, Austin, Texas 78744~~] or any [~~local~~] division field office location;

(7) [~~(8)~~] submit the request to the division and a copy of the request to each party listed in subsection (a) of this section who did not request the designated doctor examination;

(8) [~~(9)~~] provide all information listed in subparagraphs (A) - (G) of this paragraph that applies [~~below applicable~~] to the type of examination the requester [~~requestor~~] seeks:

(A) if the requester [requestor] seeks an examination on the attainment of MMI, include the statutory date of MMI [maximum medical improvement], if any;

(B) if the requester [requestor] seeks an examination on the impairment rating of the injured employee, include the date of MMI that has been determined to be valid by a final decision of the division or a court or by agreement of the parties, if any;

(C) if the requester [requestor] seeks an examination on the extent of the compensable injury, include a description of the accident or incident that caused the claimed injury and a list of all injuries in question;

(D) if the requester [requestor] seeks an examination on whether the injured employee's disability is a direct result of the work-related injury, include the beginning and ending dates for the claimed periods of disability and[;] state if the injured employee is either not working or is earning less than pre-injury wages as defined by Labor Code §401.011(16);

(E) if the requester [requestor] seeks an examination on [regarding] the injured employee's ability to return to work in any capacity and the [what] activities the injured employee can perform, include the beginning and ending dates for the periods to be addressed. If no dates are included, [if the requestor is requesting for] the designated doctor must [to] examine the injured employee's work status as of the date of the examination [during a period other than the current period];

(F) if the requester [requestor] seeks an examination to determine whether [or not] an injured employee entitled to supplemental income benefits may return to work in any capacity for the identified period, include the beginning and ending dates for the qualifying periods to be addressed and whether [or not] this period involves the ninth quarter or a subsequent quarter of supplemental income benefits;

(G) if the requester [requestor] seeks an examination on topics under subsection (a)(6) of this section, specify the issue in sufficient detail for the designated doctor to identify and answer the questions [question(s)]; and

(9) [(10)] provide a signature to attest that every reasonable effort has been made to ensure the accuracy and completeness of the information [provided] in the request.

(c) Scheduling an examination within 60 days. The division will not schedule [If a party submits a request for] a designated doctor examination [under subsection (b) of this section that would require the division to schedule an examination] within 60 days of the most recent designated doctor [a previous] examination absent a showing of [the injured employee that party must provide] good cause. [for scheduling that designated doctor examination in order for the division to approve the party's request. For the purposes of this subsection, the commissioner or the commissioner's designee shall determine good cause on a case by case basis and will require at a minimum:]

(1) Good cause requires the requester to show that the requested examination [if that requestor also requested the previous examination, a showing by the requestor that the submitted questions could not have reasonably been included in the prior examination and a designated doctor examination] is reasonably necessary to resolve the submitted questions [question(s)] and that it will affect entitlement to benefits.[; or]

(2) If the requester already asked for an examination on the claim, they must also show that the submitted questions could not reasonably have been included in the previous examination. [if that requestor did not request the previous examination, a showing by the requestor a designated doctor examination is reasonably necessary to resolve the submitted question(s) and will affect entitlement to benefits.]

(d) Denial of a request. The division will determine whether good cause exists on a case-by-case basis. The division will [shall] deny a request for a designated doctor examination and provide a written explanation for the denial to the requester if [requestor]:

(1) [if] the request does not comply with any of the requirements of subsection (b) or (c) of this section;

(2) [if] the request would require the division to schedule an examination that violates [in violation of] Labor Code §§408.0041, 408.123, or 408.151;

(3) there is an unresolved dispute about compensability reported under §124.2 of this title (relating to Insurance Carrier Reporting and Notification Requirements); or

(4) [3] [if the commissioner or the commissioner's designee determines] the request [to be frivolous because it] lacks [either] any legal or [any] factual basis that would reasonably merit approval.[; or]

[(4) if the insurance carrier has denied the compensability of the claim or otherwise denied liability for the claim as a whole and reported the denial to the division in accordance with §124.2 of this title (relating to Carrier Reporting and Notification Requirements) and the dispute is not yet resolved.]

(e) Examination ordered during a dispute. During a dispute on the compensability of a claim as a whole, if [If] a division administrative law judge or benefit review officer determines [during a dispute regarding the compensability of a claim as a whole] that an expert medical opinion would be necessary to resolve a dispute about [as to] whether the claimed injury resulted from the claimed incident, the administrative law judge or benefit review officer may order the injured employee to attend a designated doctor examination to address that issue.

(f) Disputes about designated doctor requests. The [A party may dispute the division's approval or denial of a designated doctor request through the] dispute resolution processes in Chapters 140-144 [outlined in Chapters 140 - 144] and 147 of this title (relating to dispute resolution [Dispute Resolution] processes, proceedings, and procedures) govern disputes about designated doctor requests.

(1) The insurance carrier, an injured employee, or the injured employee's representative may dispute the division's approval or denial of a designated doctor examination request.

(2) Until the division has either approved or denied the request, a party [Parties] may not dispute the [a] designated doctor examination request itself or the accuracy of any information on the request [until the division has either approved or denied the request].

(3) To dispute an approved or denied request for a designated doctor examination [Additionally], a party may [is entitled to] seek an expedited contested case hearing under §140.3 of this title (relating to Expedited Proceedings). The party must file the request within three working days of receiving the order under §127.5(b) of this title (relating to Scheduling Designated Doctor Appointments). [to dispute an approved or denied request for a designated doctor examination.]

(4) If the division receives and approves a timely [The division, upon timely receipt and approval of the] request for expedited proceedings to dispute a designated doctor examination, the division will [shall] stay the disputed examination pending the outcome [decision and order] of the expedited contested case hearing [Parties seeking expedited proceedings and the stay of an ordered examination must file their request for expedited proceedings with the division within three

working days of receiving the order of designated doctor examination under §127.5(b) of this title (relating to Scheduling Designated Doctor Appointments)].

[(g) This section will become effective on December 6, 2018.]

§127.5. Scheduling Designated Doctor Appointments.

[(a) Applicability. This section applies to designated doctor examination requests made on or after the effective date of this section.]

(a) [(b)] Order assigning a designated doctor. Within [The division, within] 10 days after approving [approval of] a valid request, the division will [shall] issue an order that assigns a designated doctor and will [shall] notify the designated doctor, the treating doctor, if any, the injured employee, the injured employee's representative, if any, and the insurance carrier that the designated doctor is [will be] directed to examine the injured employee. The order will [shall]:

(1) indicate the designated doctor's name, license number, examination address, fax number, [and] telephone number, and the date and time of the examination or the date range for the examination to be conducted;

(2) explain the purpose of the designated doctor examination;

(3) require the injured employee to submit to an examination by the designated doctor;

(4) require the designated doctor to perform the examination at the indicated examination address; and

(5) require the treating doctor, if any, and insurance carrier to forward all medical records to the designated doctor in compliance with §127.10(a)(3) of this title (relating to General Procedures for Designated Doctor Examinations).

(b) [(c)] Change of examination address. The examination address indicated on the order in subsection (a)(4) [(b)(4)] of this section may not be changed by any party or by an agreement of any parties without good cause and the division's approval [of the division].

(c) [(d)] Availability of designated doctor. Except as provided in subsection (g) [(h)] of this section, the division will [shall] select the next available doctor on the designated doctor list for a medical examination requested under §127.1 of this title (relating to Requesting Designated Doctor Examinations). A designated doctor is available to perform an examination at any address the doctor has filed with the division if the doctor:

(1) does not have any disqualifying associations as described in §127.140 of this title (relating to Disqualifying Associations);

(2) is appropriately qualified to perform the examination in accordance with §127.130 of this title (relating to Qualification Standards for Designated Doctor Examinations);

(3) is [a] certified [designated doctor] on the day the examination is offered and has not failed to timely file for renewal [recertification] under §127.100 of this title (relating to Designated Doctor Certification) [§127.110 of this title (relating to Designated Doctor Recertification)], if applicable; [and]

(4) has not treated or examined the injured employee in a different health care provider role: [non-designated doctor capacity]

(A) within the past 12 months; or

(B) for [and has not examined or treated the injured employee in a non-designated doctor capacity with regard to] a medical condition being evaluated in the designated doctor examination.

(d) [(e)] Designated doctor lists. To select the next available doctor, the division will maintain two independent designated doctor lists for each county in Texas [this state].

(1) One list will consist of designated doctors qualified to perform examinations under §127.130(b)(1) - (4)] of this title.[, and the]

(2) The other list will consist of designated doctors qualified to perform examinations under §127.130(b)(5) - (9) of this title.

(3) Nothing in this section prevents a qualified designated doctor from being on both lists.

(4) [(1)] A designated doctor will be added to the appropriate designated doctor list for the county of each address the doctor has filed with the division.

(5) [(2)] When a designated doctor adds an address for a county the doctor is not currently listed in, the doctor will be placed at the bottom of the appropriate list for that county.

(6) [(3)] When a designated doctor removes the only address for a county the doctor is currently listed in, the designated doctor will be removed from the list for that county.

(e) [(f)] Assignment of designated doctor examinations. Except as provided in subsection (f) [(h)] of this section, the division will assign designated doctor examinations as follows:

(1) Each working day, all examination requests within a [given] county will be sorted and distributed to the appropriate list based on the designated doctor qualification standards.

(2) Depending on the volume of requested examinations, the division will [then] assign up to five examinations to the next available designated doctor at the top of the appropriate list.

(3) An [Assignment of an] examination assignment moves the designated doctor receiving the assignment to the bottom of the list from which the designated doctor was selected. Receipt of an assignment on one list does not change a designated doctor's position on the other list.

(4) The division may choose not to offer a designated doctor an examination if it is reasonably probable that the designated doctor will not be certified on the date of the examination.

(f) [(g)] Exemptions. Nothing in this section prevents the division from exempting a designated doctor from the applicable qualification standard under §127.130(d) of this title. If there is no available designated doctor in the county of the injured employee, the [The] division may assign a designated doctor as necessary [if there is no available designated doctor in the county of the injured employee].

(g) [(h)] Subsequent examinations. If the division has previously assigned a designated doctor to the claim at the time a request is made, the division will assign the same [shall reassign that] doctor to a subsequent examination for that claim [again] unless the division has authorized or required the doctor to stop providing services on the claim in accordance with §127.130 of this title. Examinations under this subsection must be conducted at the same examination address as the designated doctor's previous examination of the injured employee or at another examination address approved by the division.

(h) [(i)] Mutual agreement required to reschedule. The designated doctor's office and the injured employee must [shall] contact each other if there is a scheduling conflict [exists for the designated doctor appointment]. The designated doctor or the injured employee who has the scheduling conflict must [make the] contact the other at least one working day before [prior to] the appointment. The one working day

requirement is [will be] waived in an emergency situation. An examination cannot be rescheduled without the mutual agreement of [both] the designated doctor and the injured employee. The designated doctor must maintain and document:

(1) the date and time of the designated doctor examination listed on the division's order;

(2) the date and time of the agreement to reschedule with the injured employee;

(3) how contact was made to reschedule, indicating [indicate] the telephone number, fax [facsimile] number, or email [address] used to make contact;

(4) the reason for the scheduling conflict; and

(5) the date and time of the rescheduled designated doctor examination.

(i) [(j)] Documentation required. Failure to document and maintain the information in subsection (h) [(i)] of this section[,] creates a rebuttable presumption that the examination was rescheduled without mutual agreement of [both] the designated doctor and injured employee.

(j) [(k)] Rescheduling timeframes. The rescheduled examination must [shall] be set to occur no later than 21 days after the originally scheduled examination date. [of the originally scheduled examination and]. It may not be rescheduled to occur before the originally scheduled examination date.

(1) Within one working day of rescheduling, the designated doctor must provide the time and date of the rescheduled examination to [shall contact] the division, the injured employee or the injured employee's representative, if any, the injured employee's treating doctor, and the insurance carrier [with the time and date of the rescheduled examination].

(2) If the examination cannot be rescheduled to occur within [no later than] 21 days of [after] the originally scheduled examination date, [of the originally scheduled examination] or if the injured employee fails to attend the rescheduled examination, the designated doctor must [shall] notify the division within [as soon as possible but not later than] 21 days of [after] the originally scheduled examination date [of the originally scheduled examination].

(3) After receiving this notice, the division may select a new designated doctor.

[(l) This section will become effective on December 6, 2018.]

§127.10. General Procedures for Designated Doctor Examinations.

(a) Authorization to receive documents. The designated doctor is authorized under Labor Code §408.0041(c) to receive the injured employee's confidential medical records and analyses of the injured employee's medical condition, functional abilities, and return-to-work opportunities without a signed release from the injured employee to help resolve [to assist in the resolution of] a dispute under this subchapter [without a signed release from the injured employee]. The following requirements apply to the designated doctor's receipt of medical records and analyses [by the designated doctor]:

(1) The treating doctor and insurance carrier must [shall] provide [to] the designated doctor copies of all the injured employee's medical records in their possession relating to the medical condition to be evaluated by the designated doctor.

(A) For subsequent examinations with the same designated doctor, the treating doctor and insurance carrier must provide only those medical records not previously sent [must be provided].

(B) The cost of copying must [shall] be reimbursed in accordance with §134.120 of this title (relating to Reimbursement for Medical Documentation).

(2) The treating doctor and insurance carrier may also send the designated doctor an analysis of the injured employee's medical condition, functional abilities, and return-to-work opportunities.

(A) The analysis sent by any party may only cover the injured employee's medical condition, functional abilities, and return-to-work opportunities as provided in Labor Code §408.0041. The analysis may include supporting information, such as videotaped activities of the injured employee and[, as well as] marked copies of medical records.

(B) If the insurance carrier sends an analysis to the designated doctor, the insurance carrier must [shall] send a copy to the treating doctor, the injured employee, and the injured employee's representative, if any.

(C) If the treating doctor sends an analysis to the designated doctor, the treating doctor must [shall] send a copy to the insurance carrier, the injured employee, and the injured employee's representative, if any [The analysis sent by any party may only cover the injured employee's medical condition, functional abilities, and return-to-work opportunities as provided in Labor Code §408.0041].

(3) The treating doctor and insurance carrier must [shall] ensure that the designated doctor receives the required records and analyses (if any) [are received by the designated doctor] no later than three working days before [prior to] the date of the designated doctor examination.

(A) If the designated doctor has not received the medical records or any part of them [thereof] at least three working days before [prior to] the examination, the designated doctor must [shall] report this violation to the division within one working day of not timely receiving the records.

(B) Once notified, the division will [shall] take action necessary to ensure that the designated doctor receives the records.

(C) If the designated doctor does not receive the medical records within one working day of the examination or [if the designated doctor] does not have sufficient time to review the late medical records before the examination, the designated doctor must [shall] reschedule the examination to occur no later than 21 days after receiving [receipt of] the records.

(b) Requirement to review information. Before examining an injured employee, the designated doctor must [shall] review the injured employee's medical records, including any analysis of the injured employee's medical condition, functional abilities, and return to work opportunities that [provided by] the insurance carrier and treating doctor provide in accordance with subsection (a) of this section, and any materials the division submits [submitted] to the doctor [by the division].

(1) The designated doctor must [shall] also review the injured employee's medical condition, [and] history, and any medical records [as provided by] the injured employee provides[, any medical records provided by the injured employee,] and must [shall] perform a complete physical examination of the injured employee.

(2) The designated doctor must [shall] give the medical records reviewed the weight the designated doctor determines to be appropriate.

(c) Additional testing and referrals. The designated doctor must [shall] perform additional testing when necessary to resolve the issue in question. The designated doctor must [shall] also refer an in-

jured employee to other health care providers when the referral is necessary to resolve the issue in question, and the designated doctor is not qualified to fully resolve it [~~the issue in question~~].

(1) Any additional testing or referrals [~~referral~~] required for the evaluation are [~~is~~] not subject to preauthorization requirements.

(2) Payment for additional testing or referrals that the designated doctor has determined are necessary under this subsection must not [~~nor shall those services~~] be denied prospectively or retrospectively, regardless of any potential disagreements about [~~based on~~] medical necessity, extent of injury, or compensability [~~in accordance with the Labor Code §408.027and §413.014, Insurance Code Chapter 1305, or Chapters 10, 19, 133, or 134 of this title (relating to Workers' Compensation Health Care Networks, Agents' Licensing, General Medical Provisions, and Benefits--Guidelines for Medical Services, Charges, and Payments, respectively) but is~~].

(3) Any additional testing or referrals required for the evaluation are subject to the requirements of §180.24 of this title (relating to Financial Disclosure).

(4) Any additional testing or referrals required for the evaluation of an injured employee under a certified workers' compensation network under Insurance Code Chapter 1305 or a political subdivision under Labor Code §504.053(b):

(A) are not required to use a provider in the same network as the injured employee; and

(B) are not subject to the network or out-of-network restrictions in Insurance Code §1305.101 (relating to Providing or Arranging for Health Care).

(5) Any additional testing or referral examination and the designated doctor's report must be completed within 15 working days of the designated doctor's physical examination of the injured employee unless the designated doctor receives division approval for additional time before the [~~expiration of the~~] 15 working days expire.

(6) If the injured employee fails or refuses to attend the designated doctor's requested additional testing or referral examination within 15 working days or within the additional time [~~approved by~~] the division approved, the designated doctor must [~~shall~~] complete the [~~doctor's~~] report based on the designated doctor's examination of the injured employee, the medical records received, and other information available to the doctor and indicate the injured employee's failure or refusal to attend the testing or referral examination in the report.

(d) MMI and impairment ratings. Any evaluation relating to either MMI [~~maximum medical improvement (MMI)~~], an impairment rating, or both, must [~~shall~~] be conducted in accordance with §130.1 of this title (relating to Certification of Maximum Medical Improvement and Evaluation of Permanent Impairment). For examinations conducted under this subsection on or after June 5, 2023, the [~~If a~~] designated doctor may [~~is simultaneously requested to address MMI or impairment rating and the extent of the compensable injury in a single examination, the designated doctor shall~~] provide multiple certifications of MMI and impairment ratings only when directed by the division [~~that take into account each reasonable outcome for the extent of the injury~~].

(e) Reports on MMI and impairment ratings. A designated doctor who determines the injured employee has reached MMI, [~~or who~~] assigns an impairment rating, or [~~who~~] determines the injured employee has not reached MMI, must [~~shall~~] complete and file a report as required by §130.1 and §130.3 [~~§130.1 of this title and §130.3~~] of this title (relating to Certification of Maximum Medical Improvement and Evaluation of Permanent Impairment by a Doctor Other than the Treating Doctor).

(1) If the designated doctor provides [~~provided~~] multiple certifications of MMI and impairment ratings, the designated doctor must file a Report of Medical Evaluation under §130.1(d) of this title for each assigned impairment rating [~~assigned~~] and a designated doctor examination data report under [~~Designated Doctor Examination Data Report pursuant to~~] §127.220 of this title (relating to the Designated Doctor Reports) for the doctor's extent of injury determination.

(2) The designated doctor must[~~, however, shall only~~] submit only one narrative report required by §130.1(d)(1)(B) of this title on [~~for~~] all assigned impairment ratings [~~assigned~~] and extent of injury findings.

(3) All designated doctor narrative reports submitted under this subsection must [~~shall also~~] comply with the requirements of §127.220(a) of this title (relating to Designated Doctor Reports).

(f) [~~(e)~~] Reports on return to work. A designated doctor who examines an injured employee for [~~pursuant to~~] any question relating to return to work must complete [~~is required to file~~] a Work Status Report that complies with [~~meets the required elements of these reports described in~~] §129.5 of this title (relating to Work Status Reports) and a narrative report that complies with the requirements of §127.220(a) of this title. The designated doctor must file the work status report and the narrative report together within seven working days of the date the designated doctor examines [~~of the examination of~~] the injured employee.

(1) The designated doctor must file the reports [~~This report shall be filed~~] with the treating doctor, the division, and the insurance carrier by fax [~~facsimile~~] or electronic transmission.

(2) The [~~In addition, the~~] designated doctor must [~~shall~~] file the reports with the injured employee and the injured employee's representative (if any) by fax [~~facsimile~~] or [~~by~~] electronic transmission if the designated doctor has a fax [~~been provided with a facsimile~~] number or email [~~address~~] for the recipient.[~~, otherwise,~~]

(3) If the designated doctor has no fax number or email for a recipient, the designated doctor must [~~shall~~] send them the reports [~~report~~] by other verifiable means.

(g) [~~(f)~~] Report on other issues. A designated doctor who resolves questions on issues other than those listed in subsections (d), [~~and~~] (e), and (f) of this section must file[~~, shall file~~] a designated doctor examination data report [~~Designated Doctor Examination Data Report~~] that complies with §127.220(c) of this title and a narrative report that complies with §127.220(a) of this title within seven working days of the date the designated doctor examines [~~of the examination of~~] the injured employee.

(1) The designated doctor must file these reports [~~These reports shall be filed~~] with the treating doctor, the division, and the insurance carrier by fax [~~facsimile~~] or electronic transmission.

(2) The [~~In addition, the~~] designated doctor must [~~shall~~] provide these reports to the injured employee and the injured employee's representative (if any) by fax [~~facsimile~~] or [~~by~~] electronic transmission if the designated doctor has a fax [~~been provided with a facsimile~~] number or email [~~address~~] for the recipient.[~~, otherwise,~~]

(3) If no fax number or email is provided for the recipient, the designated doctor must [~~shall~~] send the reports by other verifiable means.

(h) [~~(g)~~] Presumptive weight. The designated doctor's report [~~of the designated doctor~~] is given presumptive weight on the issue or issues [~~regarding the issue(s) in question~~] the designated doctor was

properly appointed to address, unless the preponderance of the evidence is to the contrary.

(i) [(h)] Payment of benefits during dispute. The insurance carrier must [shall] pay all benefits, including medical benefits, in accordance with the designated doctor's report for the issue or issues [issue(s)] in dispute.

(1) If the designated doctor provides multiple certifications of MMI and impairment ratings [MMI/impairment ratings under subsection (d) of this section because the designated doctor was also ordered to address the extent of the injured employee's compensable injury], the insurance carrier must [shall] pay benefits based on the conditions to which the designated doctor determines the compensable injury extends.

(2) For medical benefits, the insurance carrier has [shall have] 21 days from receipt of the designated doctor's report to reprocess all medical bills previously denied for reasons inconsistent with the designated doctor's findings [of the designated doctor's report]. By the end of this period, insurance carriers must pay [shall tender payment on] these medical bills in accordance with the Labor Code [Act] and Chapters 133 and 134 of this title.

(3) The [For all other benefits, the] insurance carrier must pay all other benefits [shall tender payment] no later than five days after receiving [receipt of] the report.

(j) [(i)] Record retention. The designated doctor must [shall] maintain accurate records for, at a minimum, five years from the anniversary date of the date of the designated doctor's last examination of the injured employee.

(1) This requirement does not reduce or replace any other record retention requirements imposed on [upon] a designated doctor by an appropriate licensing board.

(2) These records must [shall] include the injured employee's medical records, any analysis [submitted by] the insurance carrier or treating doctor submits (including supporting information), reports the designated doctor generates [generated by the designated doctor] as a result of the examination, and narratives [provided by] the insurance carrier and treating doctor[,] provide, to reflect:

(A) [(1)] the date and time of any designated doctor appointments scheduled with an injured employee;

(B) [(2)] the circumstances for [regarding] a cancellation, no-show, or other situation where the examination did not occur as initially scheduled or rescheduled, and[,] if applicable, documentation of the agreement [of the designated doctor and the injured employee] to reschedule the examination and the notice that the doctor provided to the division, the injured employee's treating doctor, and the insurance carrier within 24 hours of rescheduling an appointment;

(C) [(3)] the date of the examination;

(D) [(4)] the date the designated doctor received medical records [were received] from the treating doctor or any other person;

(E) [(5)] the date the designated doctor submitted the reports described in subsections (d), (e), and (f) of this section [were submitted] to all required parties and documentation that these reports were submitted to the division, treating doctor, and insurance carrier by fax [facsimile] or electronic transmission and to other required parties by verifiable means;

(F) [(6)] if applicable, the names [name(s)] of any referral health care providers the designated doctor used, [by the designated doctor, if any;] the dates [date] of referral health care provider appointments, [by referral health care providers;] and the reason the designated doctor referred them [for referral by the designated doctor]; and

(G) [(7)] if applicable, the date [, if any,] the doctor contacted the division for assistance in getting [obtaining] medical records from the insurance carrier or treating doctor.

(k) [(j)] Dispute resolution. Parties may dispute any entitlement to benefits affected by a designated doctor's report through the dispute resolution processes outlined in Chapters 140-144 [140 - 144] and 147 of this title (relating to dispute resolution [Dispute Resolution] processes, proceedings, and procedures).

[(k) This section will become effective on December 6, 2018.]

§127.15. Undue Influence on a Designated Doctor.

(a) Communication about medical condition or history. To avoid undue influence on the designated doctor:

(1) except as provided by §127.10(a) of this title (relating to General Procedures for Designated Doctor Examinations), only the injured employee or appropriate division staff may communicate with the designated doctor about [prior to the examination of the injured employee by the designated doctor regarding] the injured employee's medical condition or history before the designated doctor examines the injured employee;

(2) after the examination is completed, only appropriate division staff may communicate [communication] with the designated doctor about [regarding] the injured employee's medical condition or history [may be made only through appropriate division staff]; and

(3) the designated doctor may initiate communication with:

(A) any health care provider who [has] previously treated or examined the injured employee for the work-related injury; or [with]

(B) a peer review doctor that [identified by] the insurance carrier identifies as having [who] reviewed the injured employee's claim or any information about that [regarding the injured employee's] claim.

(b) Communication about administrative matters. The insurance carrier, treating doctor, injured employee, or injured employee's representative, if any, may contact the designated doctor's office to ask about administrative matters, including, but not limited to, whether the designated doctor received the records, whether the exam took place, or whether the designated doctor has filed the report [has been filed], or other similar matters.

[(c) This section becomes effective on February 1, 2011.]

§127.20. Requesting a Letter of Clarification Regarding Designated Doctor Reports.

(a) Filing a clarification request. Parties may file a request with the division for clarification of the designated doctor's report.

(1) The requesting party must provide copies of the request to all parties [A copy of the request must be provided to the opposing party].

(2) The division may contact the designated doctor if it determines that clarification is necessary to resolve an issue regarding the designated doctor's report.

(3) Parties may only request clarification on issues already addressed by the designated doctor's report or on issues that the designated doctor was ordered to address but did not [address].

(4) A [Additionally, a] designated doctor must [shall] only respond to the questions or requests submitted to the designated doctor

in the request for clarification and must [~~shall~~] not [~~otherwise~~] reconsider their [~~the doctor's~~] previous decision, issue a new or amended decision, or provide clarification on their [~~the doctor's~~] previous decision.

(b) Requirements. Requests for clarification must:

(1) include the name of the designated doctor, the reason for the [~~designated doctor's~~] examination, the date of the examination, and the requester's name and signature [~~of the requestor~~];

(2) explain why clarification of the designated doctor's report is necessary and appropriate to resolve a future or pending dispute;

(3) include questions for the designated doctor to answer that are not [~~neither~~] inflammatory or [~~nor~~] leading; and

(4) provide any medical records that were not previously provided to the designated doctor and explain why these records are necessary for the designated doctor to respond to the request for clarification.

(c) Requests by the division. At its discretion, the division [~~The division, at its discretion,~~] may also request clarification from the designated doctor on any issue or issues [~~the division deems appropriate~~].

(d) Responses to requests. To respond to a [~~the~~] request for clarification, the designated doctor must be on the division's designated doctor list on the date of the request [~~at the time the request is received by the division~~].

(1) The designated doctor must [~~shall~~] respond[~~,~~] in writing[~~,~~] to the request for clarification within five working days of receipt and send copies of the response to the parties listed in §127.10(g) [~~§127.10(f)~~] of this title (relating to General Procedures for Designated Doctor Examinations).

(2) If the designated doctor must [~~If, in order to respond to the request for clarification, the designated doctor has to~~] reexamine the injured employee to respond to the request for clarification, the doctor must [~~shall~~]:

(A) [~~(1)~~] respond[~~, in writing,~~] to the request for clarification in writing, advising of the need for an additional examination within five working days of receiving [~~receipt of~~] the request and provide copies of the response to the parties specified in §127.10(g) [~~§127.10(f)~~] of this title;

(B) [~~2~~] [~~if the division orders the reexamination,~~] conduct the reexamination within 21 days from the date the division issues the order for the reexamination at the same [~~is issued by the division at the same examination~~] address as the original examination; and

(C) [~~(3)~~] respond[~~,~~] in writing[~~,~~] to the request for clarification based on the additional examination within seven working days of the examination and provide copies of the response to the parties specified in §127.10(g) [~~§127.10(f)~~] of this title.

(e) Administrative violation. Any refusal or failure by a designated doctor to conduct a reexamination that is necessary to respond to a request for clarification is an administrative violation.

~~[(f) This section will become effective September 1, 2012.]~~

§127.25. Failure to Attend a Designated Doctor Examination.

(a) Suspension of benefits. An insurance carrier may suspend temporary income benefits (TIBs) if an injured employee [~~, without good cause,~~] fails, without good cause, to attend a designated doctor examination or a referral examination under §127.10(c) of this title.

(b) No good cause. If there is no division finding that good cause exists [~~In the absence of a finding by the division to the contrary~~], an insurance carrier may presume that the injured employee did not have good cause to fail to attend the examination if, by the day the examination was originally scheduled to occur, the injured employee has both:

(1) failed to submit to the examination; and

(2) failed to contact the designated doctor's office to reschedule the examination.

(c) Rescheduling timeframe. If the injured employee contacts the designated doctor within 21 days of the scheduled date of the missed examination to reschedule the examination, the designated doctor must [~~shall~~] schedule the examination to occur as soon as possible, but no [~~not~~] later than 21 days [~~the 21st day~~] after the injured employee contacted the doctor.

(d) New examination request required. If the injured employee fails to contact the designated doctor within 21 days of the [~~scheduled date of the~~] missed examination date but wishes to reschedule the examination, the injured employee must request a new examination under §127.1 of this title (relating to Requesting [~~a~~] Designated Doctor Examinations [~~Examination~~]).

(e) Reinitiation of benefits. The insurance carrier must [~~shall~~] reinstate TIBs effective on [~~as of~~] the date the injured employee submitted to the rescheduled examination under subsection (c) of this section or the date the examination was scheduled at [~~pursuant to~~] the injured employee's request under subsection (d) of this section, unless the designated doctor's report [~~of the designated doctor~~] indicates that the injured employee has reached MMI or is otherwise not eligible for income benefits. The reinitiation [~~re-initiation~~] of TIBs must [~~shall~~] occur no later than the seventh day following:

(1) the date the insurance carrier was notified that the injured employee submitted to the examination; or

(2) the date [~~that~~] the insurance carrier was notified that the division found [~~that~~] the injured employee had good cause for not attending the examination.

(f) Benefits during suspension. An injured employee is not entitled to TIBs during the [~~for a~~] period when [~~during which~~] the insurance carrier suspended benefits under [~~pursuant to~~] this section unless the injured employee later submits to the examination, and:

(1) the division finds that the injured employee had good cause for not attending the examination; or

(2) the insurance carrier determines that the injured employee had good cause for not attending [~~failure to attend~~] the examination.

~~[(g) This section will become effective September 1, 2012.]~~

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

Filed with the Office of the Secretary of State on December 9, 2022.

TRD-202204889
Kara Mace
Deputy Commissioner for Legal Services
Texas Department of Insurance, Division of Workers' Compensation
Earliest possible date of adoption: January 22, 2023
For further information, please call: (512) 804-4703

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SUBCHAPTER B. DESIGNATED DOCTOR CERTIFICATION, RENEWAL [~~RECERTIFICATION~~], AND QUALIFICATIONS

28 TAC §§127.100, 127.120, 127.130, 127.140

STATUTORY AUTHORITY. DWC proposes amending the title of Subchapter B and amending §§127.100, 127.120, 127.130, and 127.140 under Labor Code §§408.0041, 408.1225, 402.00111, 402.00116, and 402.061.

Labor Code §408.0041 provides in part that, at the request of an insurance carrier or an employee, or on the commissioner's own order, the commissioner may order a medical examination (a designated doctor examination) to resolve any question about the impairment caused by the compensable injury, the attainment of MMI, the extent of the employee's compensable injury, whether the injured employee's disability is a direct result of the work-related injury, the ability of the employee to return to work, or other similar issues. It also includes requirements for doctors' and insurance carriers' duties and obligations, assignments, reporting, and payment of benefits; and requires rulemaking.

Labor Code §408.1225 requires in part that the commissioner by rule develop a process for certification of a designated doctor, and that those rules must require standard training and testing. Section 408.1225 also requires that DWC develop guidelines for certification training programs to ensure a designated doctor's competency in providing assessments, and allows DWC to authorize an independent training and testing provider to conduct the certification program under those guidelines.

Labor Code §402.00111 provides that the commissioner of workers' compensation shall exercise all executive authority, including rulemaking authority under Title 5 of the Labor Code.

Labor Code §402.00116 provides that the commissioner of workers' compensation shall administer and enforce this title, other workers' compensation laws of this state, and other laws granting jurisdiction to or applicable to DWC or the commissioner.

Labor Code §402.061 provides that the commissioner of workers' compensation shall adopt rules as necessary to implement and enforce the Texas Workers' Compensation Act.

CROSS-REFERENCE TO STATUTE. Sections 127.100, 127.120, 127.130, and 127.140 implement Labor Code §§408.0041 and 408.1225. Section 408.0041 was enacted by HB 2600, 77th Legislature, Regular Session (2001); and amended by HB 7, 79th Legislature, Regular Session (2005); SB 1169, 80th Legislature, Regular Session (2007); HB 2004, 80th Legislature, Regular Session (2007); and HB 2605, 82nd Legislature, Regular Session (2011). Section 408.1225 was enacted by HB 7, 79th Legislature, Regular Session (2005); and amended by HB 2004, 80th Legislature, Regular Session (2007); HB 2605, 82nd Legislature, Regular Session (2011); and HB 2056, 85th Legislature, Regular Session (2017).

§127.100. Designated Doctor Certification.

[~~(a) Applicability. This section applies to designated doctor applications received on or after the effective date of this section.~~]

(a) [~~(b)~~] Qualifications to get or renew certification. The division will not assign examinations to a designated doctor who does not meet all requirements for certification or renewal. All designated doctors [~~In order to serve as a designated doctor, a doctor must be certified as a designed doctor. To be certified as a designated doctor, a doctor~~] must:

(1) Have [~~submit~~] a complete designated doctor certification application as described in [~~by~~] subsection (b) [~~(c)~~] of this section on file with the division.[~~;~~]

(2) Complete all division-required trainings [~~submit a certificate or certificates certifying that the doctor has~~] within [~~the past~~] 12 months of the date of application and have current documentation confirming their completion on file with the division. [~~successfully completed all division required trainings and~~]

(3) Pass [~~passed~~] all division-required [~~division required~~] testing on the specific duties of a designated doctor under the Labor Code [~~Act~~] and division rules and have current documentation confirming their passage on file with the division. Required testing must have been completed on or after May 13, 2013, and includes[~~, including~~] demonstrated proficient knowledge of the currently adopted edition of:

(A) the American Medical Association Guides to the Evaluation of Permanent Impairment; and

(B) the division's adopted:

(i) treatment guidelines; and

(ii) return-to-work guidelines.[~~;~~]

[~~(3) be licensed in Texas;~~]

(4) Have [~~have~~] maintained an active practice for at least three years during the doctor's career. For the purposes of this subsection, a doctor has an active practice if the doctor maintains or has maintained routine office hours of at least 20 hours per week for 40 weeks per year to treat [~~for the treatment of~~] patients.[~~; and~~]

(5) For the duration of the doctor's term as a designated doctor:

(A) be licensed in Texas;

(B) [~~(5)~~] own or subscribe to [~~, for the duration of the doctor's term as a certified designated doctor,~~] the current edition of the American Medical Association Guides to the Evaluation of Permanent Impairment adopted by the division to assign [~~for the assignment of~~] impairment ratings and all return-to-work and treatment guidelines adopted by the division; and

(C) comply with financial disclosure requirements in §180.24 (relating to Financial Disclosure) of this title.

(b) [~~(c)~~] Application. To be considered complete, an application for certification [~~A complete designated doctor certification application must be completed on the division's required form for certification applications and~~] must include, and a renewal application must update or confirm:

(1) contact information for the doctor;

(2) information on the doctor's education;

(3) a description of the doctor's license or licenses [~~license(s)~~], certifications, and professional specialty, if any;

(4) a description of the doctor's work history and hospital or other health care provider affiliations;

(5) a description of any affiliations the doctor has with a workers' compensation health care network certified under Insurance Code Chapter 1305[~~, Insurance Code~~] or political subdivision under Labor Code §504.053(b)(2);

(6) information on [regarding] the doctor's current practice locations;

(7) detailed answers to disclosure questions on [regarding] the doctor's professional background, education, training, and fitness to perform the duties of a designated doctor, including disclosure and summary of any disciplinary actions taken against the doctor by any state licensing board or other appropriate state or federal agency;

(8) the identity [identities] of any person [person(s) with whom] the doctor has contracted with to assist in performing or administering [performance or administration of] the doctor's designated doctor duties;

(9) an attestation that:

(A) all information provided in the application is accurate and complete to the best of the doctor's knowledge;

(B) the doctor will inform the division of any changes to this information as required by §127.200(a)(8) of this title (relating to Duties of a Designated Doctor); and

(C) the doctor will [shall] consent to any on-site visits, as provided by §127.200(a)(15) of this title, by the division at facilities that the designated doctor uses or intends to use [used or intended to be used by the designated doctor] to perform designated doctor examinations for the duration of the doctor's certification.

(c) [(d)] Retesting. If a doctor passes a division-required test, the doctor may not retest within a twelve-month [twelve month] period. If a doctor fails a division-required test, the doctor may not retest more than three times within a six-month [six month] period.

(1) After the first or second attempt, the doctor must wait 14 days before retaking the test.[; or]

(2) After the third attempt, the doctor must wait six months before retaking the test.

(d) Additional certification testing. On receipt of an application for designated doctor certification renewal, the division may require a designated doctor to complete additional certification testing to demonstrate proficient knowledge on the specific duties of a designated doctor under the Labor Code and division rules. Examples of circumstances that may require additional certification testing include, but are not limited to, individual need for retesting based on substandard performance, changes in the duties of a designated doctor, updates to the guidelines, and legislative changes.

(e) Notice of approval, denial, suspension, or revocation. The division will [shall] notify a doctor in writing of the commissioner's approval or denial of the doctor's application to be certified or renewed as a designated doctor; or of the division's suspension or revocation of the doctor's certification [in writing. Denials will include the reason(s) for the denial].

(f) Term and qualification. Approvals certify a doctor for a term of two years and will include:

(1) the effective date of the certification; [and]

(2) the expiration date of the certification; and[.]

(3) the designated doctor's [Approvals will also include the] examination qualifications [qualification criteria] under §127.130 of this title (relating to Qualification Standards for Designated Doctor Examinations) [that the division has assigned to the designated doctor as part of the doctor's certification].

(g) Renewal. A designated doctor who seeks to renew their certification immediately after their current term expires, without interruption, must apply for certification no later than 45 days before the end of the term.

(1) If the division does not receive all of the information required under subsection (b)(1) - (9) above no later than 45 days before the end of the designated doctor's term, the division will not assign examinations to the designated doctor during the last 45 days of an expiring term.

(2) The designated doctor may still provide services on claims the division had previously assigned to them during this 45-day period.

(h) Approval of renewal application with restrictions. An application for renewal may be approved with restrictions. The division may restrict a designated doctor's certification until the doctor complies with the requirements in the designated doctor's approval of certification. Designated doctors whose certification is restricted may dispute the restriction through the procedure described in subsection (k) of this section.

(i) [(f)] Adverse certification actions. The division may deny, suspend, or revoke a designated doctor's certification for any of the following reasons [Doctors may be denied certification as a designated doctor]:

[(1) if the doctor did not submit the information and documentation required by subsection (b) of this section;]

(1) [(2)] if the doctor did not submit a complete application for certification as required under [by] subsection (b) [(c)] of this section;

(2) [(3)] for having a relevant restriction on their practice imposed by a state licensing board, certification authority, or other appropriate state or federal agency, including the division; [or]

(3) if the doctor failed to update their application for certification properly; or

(4) for other activities, events, or occurrences that the commissioner determines [to] warrant denial of a doctor's application for certification as a designated doctor, including, but not limited to:

(A) the quality of the designated doctor's past reports [as a certified designated doctor, if any];

(B) the [a history of complaints as a certified] designated doctor's history of complaints [doctor, if any];

(C) excess requests for deferral from the designated doctor list by the designated doctor [as a certified designated doctor, if any];

(D) a pattern of overturned reports by the division or a court [as a certified designated doctor, if any];

(E) a demonstrated lack of ability to apply or properly consider the American Medical Association Guides to the Evaluation of Permanent Impairment adopted by the division to assign [for the assignment of] impairment ratings and all return-to-work and treatment guidelines adopted by the division [as a certified designated doctor, if any];

(F) a demonstrated lack of ability to consistently perform designated doctor examinations in a timely manner [as a certified designated doctor, if any];

(G) a demonstrated failure to identify disqualifying associations [as a certified designated doctor, if any];

(H) a demonstrated lack of ability to ensure the confidentiality of injured employee medical records and claim information provided to or generated by a [certified] designated doctor[, if any];

(I) a history of unnecessary referral examinations or testing;

(J) a failure to comply with the requirements of §180.24 of this title (relating to Financial Disclosure) when they requested referral examinations or additional testing;

(K) [(I)] applying for certification less than a year from denial of a previous designated doctor certification [or recertification] application; or

(L) [(J)] any grounds that would allow the division to sanction a health care provider under the Labor Code [Act] or division rules.

(j) [(g)] Response to denial of certification. Within 15 working days after receiving a written denial, a doctor may file a written response with the division addressing[, which addresses] the reasons the division gave [given] to the doctor for its denial.

(1) If the division does not receive a written response [is not received] by the 15th working day after the date the doctor received the notice, the denial will be final effective the next [following] day. The division will not send further notice [No further notice will be sent].

(2) If the division timely receives a written response that [which] disagrees with the denial [is timely received], the division will [shall] review the response and [shall] notify the doctor in writing of the commissioner's final decision.

(A) If the final decision is still a denial, the division's final notice will [shall] provide the reasons [reason(s) why] the doctor's response did not change the commissioner's decision to deny the doctor's application for certification as a designated doctor.

(B) The denial will be effective the day after [following the date] the doctor receives notice of the denial, unless the notice specifies otherwise [specified in the notice].

(k) Request for informal conference. A designated doctor whose renewal application is denied, or whose certification is suspended or revoked, may either respond in writing using the procedure in subsection (j) of this section or submit a written request for an informal conference before the division to address those reasons.

(1) If the division does not receive a written request for an informal conference by the 15th working day after the date the doctor received the notice, the denial, suspension, or revocation will be final effective the next day. The division will not send further notice.

(2) If the division timely receives a written request for an informal conference, it will set the informal conference to occur no later than 31 days after it received the request.

(A) At the informal conference, the designated doctor may present evidence that addresses the reasons the doctor was denied certification, or the reasons the doctor's certification was suspended or revoked, to the commissioner's designated representatives.

(B) The designated doctor may have an attorney present.

(C) At the end of the informal conference, the commissioner's designated representatives will provide the designated doctor with their final recommendation on the doctor's certification.

(i) If the final recommendation is still a denial, suspension, or revocation, the commissioner's designated representatives will provide the reasons for not certifying the doctor as a designated doctor.

(ii) After the informal conference, the commissioner's designated representatives will send their final recommendation to the commissioner, who will review it and all evidence presented at the informal conference and make a final decision.

(iii) The division will notify the designated doctor of the commissioner's final decision in writing.

(iv) The decision will be effective the day after the doctor receives notice of the decision, unless the notice specifies otherwise.

[(h) Designated doctors whose application for certification is approved but wish to dispute the examination qualification criteria under §127.130 of this title that the division assigned to the doctor may do so through the procedures described in subsection (g) of this section. Designated doctors must include in their response to the division the specific criteria they believe should be modified and documentation to justify the requested change.]

[(i) Designated doctors who are designated doctors on the effective date of this section shall be considered certified for the duration of the designated doctor's current certification. Before the expiration of the designated doctor's current certification, the designated doctor must timely apply for recertification under the applicable requirements of §127.110 of this title (relating to Designated Doctor Recertification).]

[(j) This section will become effective on December 6, 2018.]

§127.120. Exception to Certification as a Designated Doctor for Out-of-State Doctors.

[(a)] If [When necessary because] the injured employee is temporarily located or resides out of state [is residing out-of-state], the division may waive any of the requirements [as specified] in this chapter for an out-of-state doctor to serve as a designated doctor to help timely resolve a [facilitate a timely resolution of the] dispute or perform a particular examination.

[(b) This section will become effective on September 1, 2012.]

§127.130. Qualification Standards for Designated Doctor Examinations.

(a) Applicability. This section applies to designated doctor assignments made on or after June 5, 2023 [the effective date of this section].

(b) Qualification standards by type of injury or diagnosis. A designated doctor is qualified to perform a designated doctor examination on an injured employee if the designated doctor meets the appropriate qualification standard [criteria] for the area of the body affected by the injury and the injured employee's diagnosis and has no disqualifying associations under §127.140 of this title (relating to Disqualifying Associations). A designated doctor's qualification standards [criteria] are [determined] as follows:

(1) To examine injuries and diagnoses relating to the hand and upper extremities, a designated doctor must be a licensed medical doctor, doctor of osteopathy, or doctor of chiropractic.

(2) To examine injuries and diagnoses relating to the lower extremities excluding feet, a designated doctor must be a licensed medical doctor, doctor of osteopathy, or doctor of chiropractic.

(3) To examine injuries and diagnoses relating to the spine and musculoskeletal structures of the torso, a designated doctor must be a licensed medical doctor, doctor of osteopathy, or doctor of chiropractic.

(4) To examine injuries and diagnoses relating to feet, including toes and heel, a designated doctor must be a licensed medical doctor, doctor of osteopathy, doctor of chiropractic, or doctor of podiatric medicine.

(5) To examine injuries and diagnoses relating to the teeth and jaw, including a temporomandibular joint, a designated doctor must be a licensed medical doctor, doctor of osteopathy, or doctor of dental surgery.

(6) To examine injuries and diagnoses relating to the eyes, including the eye and adnexal structures of the eye, a designated doctor must be a licensed medical doctor, doctor of osteopathy, or doctor of optometry.

(7) To examine injuries and diagnoses relating to mental and behavioral disorders, a designated doctor must be a licensed medical doctor or doctor of osteopathy.

(8) A designated doctor must be a licensed medical doctor or doctor of osteopathy to [~~To~~] examine injuries and diagnoses relating to other body areas or systems, including, but not limited to:

(A) internal systems;

(B) ear, nose, and throat;

(C) head and face;

(D) skin;

(E) cuts to skin involving underlying structures;

(F) non-musculoskeletal structures of the torso;

(G) hernia;

(H) respiratory;

(I) endocrine;

(J) hematopoietic; and

(K) urologic[~~; a designated doctor must be a licensed medical doctor or doctor of osteopathy~~].

(9) Notwithstanding paragraphs (1) - (8) of this subsection, a designated doctor must be a licensed medical doctor or doctor of osteopathy with [~~who has~~] the required board certification to examine any of the following diagnoses.

(A) For purposes of this section, a designated doctor is "board-certified" [~~"board certified"~~] in a required specialty or subspecialty, as applicable, if they hold or previously held: [~~the designated doctor holds or previously held~~]

(i) a general certificate in the required specialty or a subspecialty certificate in the required subspecialty from the American Board of Medical Specialties (ABMS); or

(ii) [~~if the designated doctor holds or previously held~~] a primary certificate in the required specialty and a certificate of special qualifications or certificate of added qualifications in the required subspecialty from the American Osteopathic Association Bureau of Osteopathic Specialists (AOABOS).

(B) [~~(A)~~] To examine traumatic brain injuries, including concussion and post-concussion syndrome, a designated doctor must be board-certified by the ABMS or AOABOS. [~~board certified~~]

(i) Qualifying ABMS certifications are: [~~in~~]

(I) neurological surgery;[~~,~~]

(II) neurology;[~~,~~]

(III) physical medicine and rehabilitation;[~~, or~~]

(IV) psychiatry; [~~by the ABMS.~~]

(V) orthopaedic surgery;

(VI) occupational medicine;

(VII) dermatology;

(VIII) plastic surgery;

(IX) surgery;

(X) anesthesiology with a subspecialty in pain medicine;

(XI) emergency medicine;

(XII) internal medicine;

(XIII) thoracic and cardiac surgery; or

(XIV) family medicine.

(ii) Qualifying AOABOS certifications are: [~~board certified in~~]

(I) neurological surgery;[~~,~~]

(II) neurology;[~~,~~]

(III) physical medicine and rehabilitation;[~~, or~~]

(IV) psychiatry; [~~by the AOABOS.~~]

(V) orthopedic surgery;

(VI) preventive medicine/occupational-environmental medicine;

(VII) preventive medicine/occupational;

(VIII) dermatology;

(IX) plastic and reconstructive surgery;

(X) surgery (general);

(XI) anesthesiology with certificate of added qualifications in pain management;

(XII) emergency medicine;

(XIII) internal medicine;

(XIV) thoracic and cardiovascular surgery; or

(XV) family practice and osteopathic manipulative treatment.

(C) [~~(B)~~] To examine spinal cord injuries and diagnoses, including a spinal fracture with documented neurological injury [~~deficit~~], or vascular injury, more than one spinal fracture, or cauda equina syndrome, a designated doctor must be board-certified by the ABMS or AOABOS. [~~board certified in~~]

(i) Qualifying ABMS certifications are:

(I) neurological surgery;[~~,~~]

(II) neurology;[~~,~~]

(III) physical medicine and rehabilitation;[~~,~~]

(IV) orthopaedic surgery;[~~,~~] or

(V) occupational medicine. [~~by the ABMS or board certified in~~]

(ii) Qualifying AOABOS certifications are:

(I) neurological surgery;[,]

(II) neurology;[,]

(III) physical medicine and rehabilitation;[,]

(IV) orthopedic surgery;[,]

(V) preventive medicine/occupational-environmental medicine;[,] or

(VI) preventive medicine/occupational [~~by the AOABOS~~].

(D) [~~(C)~~] To examine severe burns, including chemical burns[,] defined as deep partial or full thickness burns, also known as second, third, or fourth-degree [~~2nd, 3rd, or 4th degree~~] burns, a designated doctor must be board-certified by the ABMS or AOABOS. [~~board certified in~~]

(i) Qualifying ABMS certifications are:

(I) dermatology;[,]

(II) physical medicine and rehabilitation;[,]

(III) plastic surgery;[,]

(IV) orthopaedic surgery;[,]

(V) surgery;[,] or

(VI) occupational medicine. [~~by the ABMS or~~]

(ii) Qualifying AOABOS certifications are: [~~board certified in~~]

(I) dermatology;[,]

(II) physical medicine and rehabilitation;[,]

(III) plastic and reconstructive surgery;[,]

(IV) orthopedic surgery;[,]

(V) surgery (general);[,]

(VI) preventive medicine/occupational-environmental medicine;[,] or

(VII) preventive medicine/occupational [~~by the AOABOS~~].

(E) [~~(D)~~] To examine complex regional pain syndrome (reflex sympathetic dystrophy), a designated doctor must be board-certified by the ABMS or AOABOS. [~~board certified in~~]

(i) Qualifying ABMS certifications are:

(I) neurological surgery;[,]

(II) neurology;[,]

(III) orthopaedic surgery;[,]

(IV) plastic surgery;[,]

(V) anesthesiology with a subspecialty in pain medicine;[,]

(VI) occupational medicine;[,] or

(VII) physical medicine and rehabilitation. [~~by the ABMS~~]

(ii) Qualifying AOABOS certifications are: [~~or board certified in~~]

(I) neurological surgery;[,]

(II) neurology;[,]

(III) orthopedic surgery;[,]

(IV) plastic surgery;[,]

(V) preventive medicine/occupational-environmental medicine;[,]

(VI) preventive medicine/occupational;[,]

(VII) anesthesiology with certificate of added qualifications in pain management;[,] or

(VIII) physical medicine and rehabilitation [~~by the AOABOS~~].

(F) [~~(E)~~] To examine any joint dislocation, one or more fractures with vascular injury, one or more pelvis fractures, or multiple rib fractures, [~~joint dislocation, and pelvis or hip fracture,~~] a designated doctor must be board-certified by the ABMS or AOABOS. [~~board certified in~~]

(i) Qualifying ABMS certifications are:

(I) emergency medicine;[,]

(II) orthopaedic surgery;[,]

(III) plastic surgery;[,]

(IV) physical medicine and rehabilitation;[,] or

(V) occupational medicine. [~~by the ABMS or~~]

(ii) Qualifying AOABOS certifications are: [~~board certified in~~]

(I) emergency medicine;[,]

(II) orthopedic surgery;[,]

(III) plastic surgery;[,]

(IV) physical medicine and rehabilitation;[,]

(V) preventive medicine/occupational-environmental medicine;[,] or

(VI) preventive medicine/occupational [~~by the AOABOS~~].

(G) [~~(F)~~] To examine complicated infectious diseases requiring hospitalization or prolonged intravenous antibiotics, including blood borne pathogens, a designated doctor must be board-certified by the ABMS or AOABOS. [~~board certified in~~]

(i) Qualifying ABMS certifications are:

(I) internal medicine; or

(II) occupational medicine. [~~by the ABMS or~~]

(ii) Qualifying AOABOS certifications are: [~~board certified in~~]

(I) internal medicine;[,]

(II) preventive medicine/occupational-environmental medicine; [,] or

(III) preventive medicine/occupational [~~by the AOABOS~~].

(H) [~~(G)~~] To examine chemical exposure, excluding chemical burns, a designated doctor must be board-certified by the ABMS or AOABOS. [~~board certified in~~]

(i) Qualifying ABMS certifications are:

(I) internal medicine;[,]

(II) emergency medicine;[,] or

(III) occupational medicine. [by the ABMS or]

(ii) Qualifying AOABOS certifications are: [board certified in]

(I) internal medicine;[,]

(II) emergency medicine;[,]

(III) preventive medicine/occupational-environmental medicine;[,] or

(IV) preventive medicine/occupational [by the AOABOS].

(I) [(II)] To examine heart or cardiovascular conditions, a designated doctor must be board-certified by the ABMS or AOABOS. [board certified in]

(i) Qualifying ABMS certifications are:

(I) internal medicine;[,]

(II) emergency medicine;[,]

(III) occupational medicine;[,]

(IV) thoracic and cardiac surgery;[,] or

(V) family medicine. [by the ABMS or]

(ii) Qualifying AOABOS certifications are: [board certified in]

(I) internal medicine;[,]

(II) emergency medicine;[,]

(III) preventive medicine/occupational-environmental medicine;[,]

(IV) preventive medicine/occupational;[,]

(V) thoracic and cardiovascular surgery; or

(VI) family practice and osteopathic manipulative treatment [by the AOABOS].

(c) Qualification to perform initial examination. To be qualified to perform an initial examination on an injured employee, a designated doctor, other than a chiropractor, must be qualified under Labor Code §408.0043. A designated doctor who is a chiropractor must be qualified to perform an initial designated doctor examination under Labor Code §408.0045. [If, however, the requirements of this subsection would disqualify a designated doctor otherwise qualified under subsection (b) of this section, pursuant to Labor Code §408.0041(b-1), does not apply.]

(d) Exemption from qualification standards. If a designated doctor is not available with the qualifications listed in subsection (b)(9)(A) - (I) [For any particular designated doctor examination], the division may exempt a medical doctor or doctor of osteopathy [designated doctor] from any of the qualification standards specified in this chapter to serve as a designated doctor to help timely resolve a dispute or perform a particular examination [the applicable qualification standard if no other designated doctor is qualified and available to perform the examination. Additionally, the division may not offer a qualified designated doctor an examination if it is reasonably probable that the designated doctor will not be qualified on the date of the examination].

(e) Continuity of examinations. A designated doctor who performs an initial designated doctor examination of an injured employee and meets [had] the appropriate qualification standard [criteria] to perform that examination under subsection (b) of this section will[, shall] remain assigned to that claim and perform all subsequent examinations of that injured employee unless the division authorizes or requires the designated doctor to discontinue providing services on that claim.

(f) Removal of designated doctor from a claim. The division may authorize a designated doctor to stop providing services on a claim if the doctor:

(1) decides to stop practicing in the workers' compensation system;

(2) decides to stop practicing as a designated doctor in the workers' compensation system;

(3) relocates their [the doctor's] residence or practice;

(4) asks [has asked] the division to indefinitely defer the doctor's availability on the designated doctor list;

(5) determines that examining the injured employee would [require the designated doctor to] exceed the scope of practice authorized by their [the doctor's] license; or

(6) can otherwise demonstrate to the division that their [the doctor's] continued service on the claim would be impracticable or could impair the quality of examinations performed on the claim.

(g) Prohibition. The division will prohibit a designated doctor from providing services on a claim if:

(1) the doctor has failed to become certified [recertified] as a designated doctor [under §127.110(b) of this title (relating to Designated Doctor Recertification)];

(2) the doctor no longer meets [has] the appropriate qualification standard [criteria] under subsection (b) of this section[,] to perform examinations on the claim;

(3) the doctor has a disqualifying association [, as] specified in §127.140 of this title that is[,] relevant to the claim;

(4) the doctor has repeatedly failed to respond to division appointment, clarification, or document requests[,] or other division inquiries about [regarding] the claim;

(5) the doctor's continued service on the claim could endanger the health, safety, or welfare of either the injured employee or doctor; or

(6) the division has revoked or suspended the designated doctor's certification.

(h) License revoked or suspended. The division will prohibit a designated doctor from performing examinations on all new or existing claims if the designated doctor's [doctor has had the doctor's] license has been revoked or suspended, and the suspension has not been probated by an appropriate licensing authority.

[(i) This section will become effective on December 6, 2018.]

§127.140. Disqualifying Associations.

(a) Definition. A disqualifying association is any association that may reasonably be perceived as having potential to influence the conduct or decision of a designated doctor. Disqualifying associations may include:

(1) receipt of income, compensation, or payment of any kind not related to health care the doctor provides [provided by the doctor];

(2) shared investment or ownership interest;

(3) contracts or agreements that provide incentives, such as referral fees, payments based on volume or value, and waiver of beneficiary coinsurance and deductible amounts;

(4) contracts or agreements for space or equipment rentals, personnel services, management contracts, referral services, billing services agents, documentation management or storage services or warranties, or any other services related to managing or operating [~~the management or operation of~~] the doctor's practice;

(5) personal or family relationships;

(6) a contract with the same workers' compensation health care network certified under Insurance Code Chapter 1305[~~, Insurance Code~~] or a contract with the same political subdivision or political subdivision health plan under Labor Code §504.053(b)(2) that is responsible for providing [~~the provision of~~] medical benefits to the injured employee; or

(7) any other financial arrangement that would require disclosure under the Labor Code, the Insurance Code, or applicable [~~division~~] rules, [~~the Insurance Code or applicable department rules,~~] or any other association with the injured employee, the employer, or insurance carrier that may give the appearance of preventing the designated doctor from rendering an unbiased opinion.

(b) Disqualification of agent. A designated doctor also has [~~For examinations performed after January 1, 2013, a designated doctor shall also have~~] a disqualifying association relevant to an examination or claim if an agent of the designated doctor has an association relevant to the claim that would constitute a disqualifying association under subsection (a) of this section.

(c) Prohibition. A designated doctor must [~~shall~~] not perform an examination if that doctor has a disqualifying association relevant to that claim.

(1) If a designated doctor learns of a disqualifying association relevant to a claim after accepting the examination, the designated doctor must notify the division of that disqualifying association within two working days of learning of the disqualifying association.

(2) A designated doctor who performs an examination even though the doctor has a disqualifying association relevant to that claim commits an administrative violation.

(d) Notice required. Within five days of receiving the division's order of designated doctor examination under §127.5(b) of this title (relating to Scheduling Designated Doctor Appointments), insurance [~~Insurance~~] carriers must [~~shall~~] notify the division of any disqualifying associations between the designated doctor and injured employee because of the network affiliations described under subsection (a)(6) of this section [~~within five days of receiving the division's order of designated doctor examination under §127.5(b) of this title (relating to Scheduling Designated Doctor Appointments)~~].

(e) Effect of disqualifying association. If the division determines that a designated doctor with a disqualifying association performed a designated doctor examination, all reports produced by that designated doctor as a result of that examination are [~~shall be~~] stripped of their presumptive weight.

(f) Disputes about disqualifying associations. A party that seeks to dispute the selection of a designated doctor for a particular examination based on a disqualifying association or [~~to~~] dispute the presumptive weight of a designated doctor's report based on a disqualifying association must do so through the division's dispute resolution processes in Labor Code Chapter 410[~~, Labor Code~~] and Chapters 140-144 [~~140 - 144~~] and 147 of this title (relating to dispute resolution [~~Dispute Resolution~~] processes, proceedings, and procedures).

[~~(g) This section will become effective on December 6, 2018.~~]

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

Filed with the Office of the Secretary of State on December 9, 2022.

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Kara Mace
Deputy Commissioner for Legal Services
Texas Department of Insurance, Division of Workers' Compensation
Earliest possible date of adoption: January 22, 2023
For further information, please call: (512) 804-4703

♦ ♦ ♦

SUBCHAPTER B. DESIGNATED DOCTOR CERTIFICATION, RECERTIFICATION, AND QUALIFICATIONS

28 TAC §127.110

STATUTORY AUTHORITY. DWC proposes repealing §127.110 under Labor Code §§408.0041, 408.1225, 402.00111, 402.00116, and 402.061.

Labor Code §408.0041 provides in part that, at the request of an insurance carrier or an employee, or on the commissioner's own order, the commissioner may order a medical examination (a designated doctor examination) to resolve any question about the impairment caused by the compensable injury, the attainment of MMI, the extent of the employee's compensable injury, whether the injured employee's disability is a direct result of the work-related injury, the ability of the employee to return to work, or other similar issues. It also includes requirements for doctors' and insurance carriers' duties and obligations, assignments, reporting, and payment of benefits; and requires rulemaking.

Labor Code §408.1225 requires in part that the commissioner by rule develop a process for certification of a designated doctor, and that those rules must require standard training and testing. Section 408.1225 also requires that DWC develop guidelines for certification training programs to ensure a designated doctor's competency in providing assessments, and allows DWC to authorize an independent training and testing provider to conduct the certification program under those guidelines.

Labor Code §402.00111 provides that the commissioner of workers' compensation shall exercise all executive authority, including rulemaking authority under Title 5 of the Labor Code.

Labor Code §402.00116 provides that the commissioner of workers' compensation shall administer and enforce this title, other workers' compensation laws of this state, and other laws granting jurisdiction to or applicable to DWC or the commissioner.

Labor Code §402.061 provides that the commissioner of workers' compensation shall adopt rules as necessary to implement and enforce the Texas Workers' Compensation Act.

CROSS-REFERENCE TO STATUTE. Repealing §127.110 implements Labor Code §§408.0041 and 408.1225. Section 408.0041 was enacted by HB 2600, 77th Legislature, Regular Session (2001); and amended by HB 7, 79th Legislature, Regular Session (2005); SB 1169, 80th Legislature, Regular Session (2007); HB 2004, 80th Legislature, Regular Session (2007); and

HB 2605, 82nd Legislature, Regular Session (2011). Section 408.1225 was enacted by HB 7, 79th Legislature, Regular Session (2005); and amended by HB 2004, 80th Legislature, Regular Session (2007); HB 2605, 82nd Legislature, Regular Session (2011); and HB 2056, 85th Legislature, Regular Session (2017).

§127.110. Designated Doctor Recertification.

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

Filed with the Office of the Secretary of State on December 9, 2022.

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Kara Mace
Deputy Commissioner for Legal Services
Texas Department of Insurance, Division of Workers' Compensation
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For further information, please call: (512) 804-4703

SUBCHAPTER C. DESIGNATED DOCTOR DUTIES AND RESPONSIBILITIES

28 TAC §§127.200, 127.210, 127.220

STATUTORY AUTHORITY. DWC proposes §§127.200, 127.210, and 127.220 under Labor Code §§408.0041, 408.1225, 402.00111, 402.00116, and 402.061.

Labor Code §408.0041 provides in part that, at the request of an insurance carrier or an employee, or on the commissioner's own order, the commissioner may order a medical examination (a designated doctor examination) to resolve any question about the impairment caused by the compensable injury, the attainment of MMI, the extent of the employee's compensable injury, whether the injured employee's disability is a direct result of the work-related injury, the ability of the employee to return to work, or other similar issues. It also includes requirements for doctors' and insurance carriers' duties and obligations, assignments, reporting, and payment of benefits; and requires rulemaking.

Labor Code §408.1225 requires in part that the commissioner by rule develop a process for certification of a designated doctor, and that those rules must require standard training and testing. Section 408.1225 also requires that DWC develop guidelines for certification training programs to ensure a designated doctor's competency in providing assessments, and allows DWC to authorize an independent training and testing provider to conduct the certification program under those guidelines.

Labor Code §402.00111 provides that the commissioner of workers' compensation shall exercise all executive authority, including rulemaking authority under Title 5 of the Labor Code.

Labor Code §402.00116 provides that the commissioner of workers' compensation shall administer and enforce this title, other workers' compensation laws of this state, and other laws granting jurisdiction to or applicable to DWC or the commissioner.

Labor Code §402.061 provides that the commissioner of workers' compensation shall adopt rules as necessary to implement and enforce the Texas Workers' Compensation Act.

CROSS-REFERENCE TO STATUTE. Sections 127.200, 127.210, and 127.220 implement Labor Code §§408.0041 and 408.1225. Section 408.0041 was enacted by HB 2600, 77th Legislature, Regular Session (2001); and amended by HB 7, 79th Legislature, Regular Session (2005); SB 1169, 80th Legislature, Regular Session (2007); HB 2004, 80th Legislature, Regular Session (2007); and HB 2605, 82nd Legislature, Regular Session (2011). Section 408.1225 was enacted by HB 7, 79th Legislature, Regular Session (2005); and amended by HB 2004, 80th Legislature, Regular Session (2007); HB 2605, 82nd Legislature, Regular Session (2011); and HB 2056, 85th Legislature, Regular Session (2017).

§127.200. Duties of a Designated Doctor.

(a) Duties. All designated doctors must [~~shall~~]:

(1) Perform [~~perform~~] designated doctor examinations in a facility:

(A) currently used and properly equipped for medical examinations or other similar health care services; and

(B) that ensures safety, privacy, and accessibility for injured employees, [~~and~~] injured employee medical records, and other records containing confidential claim information.[;]

(2) Ensure [~~ensure~~] the confidentiality of medical records, analyses, and forms provided to or generated by the designated doctor in the doctor's capacity as a designated doctor for the duration of the retention period specified in §127.10(i) of this title (relating to General Procedures for Designated Doctor Examinations) and ensure the destruction of these medical records after both this retention period expires and the designated doctor determines the information is no longer needed.[;]

(3) Ensure [~~ensure~~] that all agreements with persons [~~person(s)~~] that permit those parties to perform designated doctor administrative duties, including, but not limited to, billing and scheduling duties, on the designated doctor's behalf:

(A) are in writing and signed by the designated doctor and the persons [~~person(s)~~] with whom the designated doctor is contracting;

(B) define the administrative duties that the person may perform on behalf of the designated doctor;

(C) require the [~~person or~~] persons to comply with all confidentiality provisions of the Labor Code [~~Act~~] and other applicable laws;

(D) comply with all medical billing and payment requirements under Chapter 133 of this title (relating to General Medical Provisions [~~Benefits~~]);

(E) do not constitute an improper inducement relating to the delivery of benefits to an [~~and~~] injured employee under Labor Code §§415.0036 [~~§415.0036~~] and §180.25 of this title (relating to Improper Inducements, Influence and Threats); and

(F) are made available to the division on [~~upon~~] request.[;]

(4) Notify [~~notify~~] the division in writing and in advance if the designated doctor voluntarily defers their [~~decides to defer the designated doctor's~~] availability to receive any offers of examinations for personal or other reasons. The [~~and the~~] notice must specify the duration [~~of~~] and reason for the deferral.[;]

(5) Notify [~~notify~~] the division in writing and in advance if the designated doctor no longer wishes to practice as a designated

doctor before the doctor's current certification as a designated doctor expires. A[; a] designated doctor who no longer wishes to practice [as a designated doctor] before their [the doctor's] current certification expires must expressly surrender their [the designated doctor's] certification in a signed, written statement to the division.[;]

(6) Be [be] physically present in the same room as the injured employee for the designated doctor examination or any other health care service provided to the injured employee that is not referred to another health care provider under §127.10(c) of this title.[;]

(7) Apply [apply] the appropriate edition of the American Medical Association Guides to the Evaluation of Permanent Impairment and division-adopted return-to-work guidelines under §137.10 (relating to Return to Work Guidelines) and consider division-adopted treatment guidelines under §137.100 (relating to Treatment Guidelines) or other evidence-based medicine when appropriate.[;]

(8) Provide [provide] the division with updated information within 10 working days of a change in any [of the] information they provide [provided] to the division on their [the doctor's] application for certification. [or recertification as a designated doctor;]

(9) Maintain [maintain] a professional and courteous demeanor when performing the duties of a designated doctor, including, but not limited to, explaining the purpose of a designated doctor examination to an injured employee at the beginning of the examination and using non-inflammatory, appropriate language in all reports and documents they produce. [produced by the designated doctor;]

(10) Bill [bill] for designated doctor examinations and receive payment for those examinations in accordance with Chapters [Chapter] 133 [of this title] and [Chapter] 134 of this title (relating to Benefits--Guidelines for Medical Services, Charges, and Payments).[;]

(11) Respond [respond] timely to all division appointments, clarifications, [appointment, clarification, or] document requests, or other division inquiries.[;]

(12) Notify [notify] the division if their [a designated doctor's] continued participation on a claim they have [to which the designated doctor has] already been assigned would [required the doctor to] exceed the scope of practice authorized by their [the doctor's] license.[;]

(13) Not [not] perform required medical examinations, utilization reviews, or peer reviews on a claim they have [to which the designated doctor has] been assigned as a designated doctor.[;]

(14) Identify [identify] themselves at the beginning of every designated doctor examination.[;]

(15) Consent [consent] to and cooperate during any on-site visits by the division under [pursuant to] §180.4 of this title (relating to On-Site Visits).[;]

(A) Notwithstanding [notwithstanding] §180.4(e)(2) of this title, the division's purpose for these visits is [will be] to ensure the designated doctor's compliance with the Labor Code [Act] and applicable division rules.[, and the]

(B) The notice provided to the designated doctor under [in accordance with] §180.4 of this title, either in advance [of] or at the time of the on-site visit, will specify the duties the division will investigate [being investigated by the division] during that visit.[;]

(16) Cooperate [cooperate] with all division compliance audits and[,] quality reviews.[; and]

(17) Complete required training or pass required testing detailed in the designated doctor's approval of certification.

(18) Comply [otherwise comply] with all applicable laws and rules.

(b) Agents. For the purposes of this chapter, Chapter 180 of this title (relating to Monitoring and Enforcement), and all other applicable laws and division rules, any person with whom a designated doctor contracts or otherwise permits to perform designated doctor administrative duties on behalf of the designated doctor qualifies as the doctor's "agent" as defined under §180.1 of this title (relating to Definitions).

[(c) This section will become effective on September 1, 2012.]

§127.210. Designated Doctor Administrative Violations.

(a) Grounds for sanctions. In addition to the grounds for issuing sanctions against a doctor under §180.26 of this title (relating to Criteria for Imposing, Recommending[,] and Determining Sanctions; Other Remedies), other division rules, or the Labor Code [Texas Workers' Compensation Act], the commissioner may revoke or suspend a designated doctor's certification as a designated doctor or [otherwise] sanction a designated doctor for noncompliance with requirements of this chapter [or] for [any of the following]:

(1) refusing four times [refusals] within a 90-day period to accept or perform a division-offered [division offered] appointment or division-ordered [ordered] appointment for which the doctor is qualified and that relates to a claim to which the doctor has not been previously assigned;

(2) refusing four consecutive times [refusals] to perform a division-offered appointment within the required time frames or a division-ordered [division ordered] appointment for which the doctor is qualified and [that] relates to a claim the doctor [to which the doctor] has not been previously assigned to;

(3) failing to attend a designated doctor examination;

(4) not complying with the rescheduling requirements of this chapter;

(5) [(3)] refusing at any time [any refusal] to accept or perform a division-offered [division offered] appointment or division-ordered [ordered] appointment that relates to a claim on which the doctor has previously performed an examination;

(6) [(4)] misrepresenting or omitting [misrepresentation or omission of] pertinent facts in medical evaluation and narrative reports;

(7) [(5)] submitting unnecessary referrals to other health care providers to answer [for the answering of] any question that the division submits [submitted] to the designated doctor [by the division];

(8) [(6)] ordering or performing unnecessary testing of an injured employee as part of a designated doctor's examination;

(9) [(7)] submitting [submission of] inaccurate or inappropriate reports due to insufficient medical history or physical examination and analysis of medical records;

(10) [(8)] submitting [submission of] designated doctor reports that fail to include all elements required by §127.220 of this title (relating to Designated Doctor Reports), §127.10 of this title (relating to General Procedures for Designated Doctor Examinations), and other division rules;

(11) [(9)] failing [failure] to timely respond to a request for clarification from the division about [regarding] an examination or any other information the division requests [request by the division];

(12) [~~(10)~~] failing [~~failure~~] to successfully complete training and testing requirements as specified in §127.100 of this title (relating to Designated Doctor Certification) [~~§127.110 of this title (relating to Designated Doctor Recertification)~~];

(13) [~~(11)~~] self-referring, including referring [~~referral~~] to another health care provider with whom the designated doctor has a disqualifying association, for treatment or becoming the employee's treating doctor for the medical condition the designated doctor evaluated [~~by the designated doctor~~];

(14) [~~(12)~~] behaving in an abusive or assaultive manner toward an injured employee, the division, or other system participant;

(15) [~~(13)~~] failing to maintain the confidentiality of patient medical and claim file information;

(16) [~~(14)~~] performing a designated doctor examination that the division did not order the doctor [~~which the designated doctor was not ordered by the division~~] to perform;

(17) failing to complete required training or pass required testing detailed in the designated doctor's approval of certification; or

(18) [~~(15)~~] violating other [~~violations of~~] applicable statutes or rules while serving as a designated doctor.

(b) Responsibility for agents' actions. Designated doctors are liable for all administrative violations committed by their agents on the designated doctor's behalf under this section, other division rules, or any other applicable law.

(c) Notification and appeal. The process for notification and opportunity for appeal of a sanction is governed by §180.27 of this title (relating to Restoration) except that suspension, revocation, or other sanctions [~~sanction~~] relating to a designated doctor's certification will be in effect during the pendency of any appeal.

[~~(d) This section will become effective on September 1, 2012.~~]

§127.220. Designated Doctor Reports.

(a) Format and submission. Designated doctor narrative reports must be filed in the form and manner required by the division. At [~~and at~~] a minimum, they must do all of the following:

(1) Identify the question or questions [~~identify the question(s)~~] the division ordered to be addressed by the designated doctor examination.[~~;~~]

(2) Provide [~~provide~~] a clearly defined answer for each question to be addressed by the designated doctor examination and only for each of those questions.[~~;~~]

(3) Sufficiently [~~sufficiently~~] explain how the designated doctor determined the answer to each question within a reasonable degree of medical probability.[~~;~~]

(4) Demonstrate [~~demonstrate~~], as appropriate, application or consideration of the American Medical Association Guides to the Evaluation of Permanent Impairment, division-adopted return-to-work and treatment guidelines, and other evidence-based medicine, if available.[~~;~~]

(5) Include [~~include~~] general information about [~~regarding~~] the identity of the designated doctor, injured employee, employer, treating doctor, and insurance carrier.[~~;~~]

(6) State [~~state~~] the date of the examination and the address where it [~~the examination~~] took place.[~~;~~]

(7) Summarize [~~summarize~~] any additional testing conducted or referrals made as part of the evaluation, including:

(A) the identity of any health care providers to which the designated doctor referred the injured employee under §127.10(c) of this title (relating to General Procedures for Designated Doctor Examinations);[~~,~~]

(B) the types of tests conducted or referrals made; [~~and~~]

(C) the dates the testing or referral examinations occurred;[~~, and~~]

(D) an explanation of [~~explain~~] why the testing or referral was necessary to resolve a question at issue in the examination; and

(E) the date the testing or referral examination was completed.

(8) Include [~~include~~] a narrative description of the medical history, physical examination, and medical decisions the designated doctor made [~~decision making performed by the designated doctor~~], including the time the designated doctor began taking the medical history of the injured employee, physically examined [~~examining~~] the employee, and engaged [~~engaging~~] in medical decision making, and the time the designated doctor completed these tasks.[~~;~~]

(9) List [~~list~~] the specific medical records or other documents the designated doctor reviewed as part of the evaluation, including the dates of those documents and which[~~, if any,~~] medical records were provided by the injured employee.[~~;~~]

(10) Provide the total amount of time required for the designated doctor to review the medical records.

(11) [~~(10)~~] Be [~~be~~] signed by the designated doctor who performed the examination.[~~;~~]

(12) [~~(11)~~] Include [~~include~~] a statement that there is no known disqualifying association as described in §127.140 of this title (relating to Disqualifying Associations) between the designated doctor and the injured employee, the injured employee's treating doctor, the insurance carrier, the insurance carrier's certified workers' compensation health care network, or a network established under Labor Code Chapter 504.[~~, Labor Code;~~]

(13) [~~(12)~~] Certify [~~certify~~] the date that the report was sent to all recipients as required [~~by~~] and in the manner required by §127.10 of this title.[~~; and~~]

(14) [~~(13)~~] Indicate [~~indicate~~] on the report that the designated doctor reviewed and approved the final version of the report.

(b) Additional forms required. Designated doctors who perform examinations under §127.10(d) or (e) of this title must [~~shall~~] also complete and file the division forms required by those subsections with their narrative reports. Designated doctors must [~~shall~~] complete and file these forms in the manner required by applicable division rules.

(c) Designated doctor examination data report. Designated doctors who perform examinations under §127.10(f) of this title must, in addition to filing a narrative report that complies with subsection (a) of this section, also file a designated doctor examination data report [~~Designated Doctor Examination Data Report~~] in the form and manner required by the division [~~Division~~]. A designated doctor examination data report [~~Designated Doctor Examination Data Report~~] must:

(1) include general information regarding the identity of the designated doctor, injured employee, insurance carrier, as well as the identity of the certified workers' compensation healthcare network under Insurance Code Chapter 1305, [~~Insurance Code,~~] if applicable, or whether the injured employee is receiving medical benefits through a political subdivision health care plan under Labor Code §504.053(b)(2) and the identity of that plan, if applicable;

(2) identify the question or questions [~~question(s)~~] the division ordered to be addressed by the designated doctor examination;

(3) provide a clearly defined answer for each question to be addressed by the designated doctor examination and only for each of those questions. For extent of injury examinations, the designated doctor should also provide, for informational purposes only, a diagnosis code for each disputed injury;

(4) state the date of the examination, the time the examination began, and the address where the examination took place;

(5) list any additional testing conducted or referrals made as part of the evaluation, including the identity of any healthcare providers to which the designated doctor referred the injured employee under §127.10(c) of this title, the types of tests conducted or referrals made and the dates the testing or referral examinations occurred; and

(6) be signed by the designated doctor who performed the examination.

[~~(d) This section will become effective on December 6, 2018.~~]

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

Filed with the Office of the Secretary of State on December 9, 2022.

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Kara Mace
Deputy Commissioner for Legal Services
Texas Department of Insurance, Division of Workers' Compensation
Earliest possible date of adoption: January 22, 2023
For further information, please call: (512) 804-4703

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CHAPTER 180. MONITORING AND ENFORCEMENT
SUBCHAPTER B. MEDICAL BENEFIT REGULATION

28 TAC §180.23

INTRODUCTION. The Texas Department of Insurance, Division of Workers' Compensation (DWC) proposes to amend 28 TAC §180.23, concerning division-required training for doctors. Section 180.23 implements Labor Code §408.1225, concerning designated doctor certification and training.

EXPLANATION. The amendments make editorial changes, updates for plain language and agency style, and updates to conform the rule to related rules in 28 Texas Administrative Code (TAC) Chapter 127. The amendments also make the rule easier to navigate by adding subsection headers. The purpose of the amendments is to attract and retain doctors in the maximum medical improvement (MMI) and impairment rating certification program by revising training and testing requirements to ensure that they are consistent, reducing confusion and administrative burdens.

Amending §180.23 is necessary to remove references to recertification training requirements under 28 TAC Chapter 127 because DWC's proposed changes to Chapter 127 include a combined process for certification and recertification under §127.100. As a result, any references to recertification under §127.110 will soon be obsolete. The amendments to §180.23 also align the testing requirements for MMI and impairment rating certifications with the updated procedure in DWC's Chapter 127 proposal.

Informal Comments. DWC posted two informal working drafts of text for §180.23 and related text for Chapter 127. DWC posted the first informal working draft on March 3, 2022, and the second on June 1, 2022, and held a stakeholder meeting on June 7, 2022, to discuss the drafts. DWC received comments on Chapter 127, but no comments on §180.23 at the meeting or on either informal working draft of §180.23.

FISCAL NOTE AND LOCAL EMPLOYMENT IMPACT STATEMENT. Deputy Commissioner of Business Process Joseph McElrath has determined that during each year of the first five years the proposed amendments are in effect, there will be no measurable fiscal impact on state and local governments as a result of enforcing or administering the sections, other than that imposed by the statute. This determination was made because the proposed amendments do not add to or decrease state revenues or expenditures, and because local governments are not involved in enforcing or complying with the proposed amendments.

Deputy Commissioner McElrath 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 amendments are in effect, Deputy Commissioner McElrath expects that enforcing and administering the proposed amendments will have the public benefits of ensuring that DWC's rules conform to Labor Code §§408.0041 and 408.1225, and 28 TAC Chapter 127, and that they are current and accurate, which promotes transparent and efficient regulation. The proposed amendments will also have the public benefit of increasing doctor participation rates in the MMI and impairment rating certification program by ensuring that the certification training requirements are consistent with current related rules and practices, which reduces confusion and administrative burdens.

Deputy Commissioner McElrath expects that the proposed amendments will not increase the cost to comply with Labor Code §§408.0041 and 408.1225, or with 28 TAC Chapter 127, because they do not impose requirements beyond those in the statutes and associated rules, and because the proposed amendments do not create obligations beyond those in the current rule.

Labor Code §408.0041 governs designated doctor examinations to resolve questions about an employee's injury, including questions about MMI and impairment. Labor Code §408.1225 requires in part that the commissioner by rule develop a process for certification of a designated doctor, and that those rules must require standard training and testing. Section 408.1225 also requires that DWC develop guidelines for certification training programs to ensure a designated doctor's competency in providing assessments, and allows DWC to authorize an independent training and testing provider to conduct the certification program under those guidelines. 28 TAC Chapter 127 sets specific procedures and requirements for the designated doctor program. Section 180.23 governs authorization for certification of MMI, determination of impairment, and assignment of impairment ratings, which complies with Labor Code §§408.0041 and 408.1225, and conforms with 28 TAC Chapter 127.

The proposed amendments implement and conform with the requirements in Labor Code §§408.0041 and 408.1225, and in 28 TAC Chapter 127, and do not impose new substantive duties or affect additional people. As a result, any cost associated with the proposed amendments to §180.23 does not result from the enforcement or administration of the proposed amendments.

ECONOMIC IMPACT STATEMENT AND REGULATORY FLEXIBILITY ANALYSIS. DWC has determined that the proposed amendments will not have an adverse economic effect or a disproportionate economic impact on small or micro businesses, or on rural communities, because the proposed amendments make editorial changes, updates for plain language and agency style, and updates to conform the rule to related rules in 28 TAC Chapter 127 only. The proposed amendments do not change the people the rule affects or impose additional costs. As a result, and in accordance with Government Code §2006.002(c), DWC is not required to prepare a regulatory flexibility analysis.

EXAMINATION OF COSTS UNDER GOVERNMENT CODE §2001.0045. DWC has determined that this proposal does not impose a possible cost on regulated persons. As a result, no additional rule amendments are required under Government Code §2001.0045.

GOVERNMENT GROWTH IMPACT STATEMENT. DWC has determined that for each year of the first five years that the proposed amendments are in effect, the proposed rule:

- will not create or eliminate a government program;

- will not require the creation of new employee positions or the elimination of existing employee positions;

- will not require an increase or decrease in future legislative appropriations to the agency;

- will not require an increase or decrease in fees paid to the agency;

- will not create a new regulation;

- will not expand, limit, or repeal an existing regulation;

- will not increase or decrease the number of individuals subject to the rule's applicability; and

- will not positively or adversely affect the Texas economy.

DWC made these determinations because the proposed amendments make editorial changes, updates for plain language and agency style, and updates to conform the rule to related rules in 28 TAC Chapter 127. They do not change the people the rule affects or impose additional costs.

TAKINGS IMPACT ASSESSMENT. DWC has determined that no private real property interests are affected by this proposal, and 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. DWC will consider any written comments on the proposal that DWC receives no later than 5:00 p.m., Central time, on January 30, 2023. Send your comments to RuleComments@tdi.texas.gov; or to Texas Department of Insurance, Division of Workers' Compensation, Legal Services, MC-LS, P.O. Box 12050, Austin, Texas 78711-2050.

DWC will also consider written and oral comments on the proposal at a public hearing at 10 a.m., Central time, on January 18, 2023. The hearing will take place remotely. DWC will publish details of how to view and participate in the hearing on the agency website at www.tdi.texas.gov//alert/event/index.html.

STATUTORY AUTHORITY. DWC proposes amended §180.23 under Labor Code §§408.0041, 408.1225, 402.00111, 402.00116, and 402.061.

Labor Code §408.0041 provides in part that, at the request of an insurance carrier or an employee, or on the commissioner's own order, the commissioner may order a medical examination (a designated doctor examination) to resolve any question about the impairment caused by the compensable injury, the attainment of MMI, the extent of the employee's compensable injury, whether the injured employee's disability is a direct result of the work-related injury, the ability of the employee to return to work, or other similar issues.

Labor Code §408.1225 requires in part that the commissioner by rule develop a process for certification of a designated doctor, and that those rules must require standard training and testing. Section 408.1225 also requires that DWC develop guidelines for certification training programs to ensure a designated doctor's competency in providing assessments, and allows DWC to authorize an independent training and testing provider to conduct the certification program under those guidelines.

Labor Code §402.00111 provides that the commissioner of workers' compensation shall exercise all executive authority, including rulemaking authority under Title 5 of the Labor Code.

Labor Code §402.00116 provides that the commissioner of workers' compensation shall administer and enforce this title, other workers' compensation laws of this state, and other laws granting jurisdiction to or applicable to DWC or the commissioner.

Labor Code §402.061 provides that the commissioner of workers' compensation shall adopt rules as necessary to implement and enforce the Texas Workers' Compensation Act.

CROSS-REFERENCE TO STATUTE. Section 180.23 implements Labor Code §408.1225, enacted by HB 7, 79th Legislature, Regular Session (2005); and amended by HB 2004, 80th Legislature, Regular Session (2007); HB 2605, 82nd Legislature, Regular Session (2011); and HB 2056, 85th Legislature, Regular Session (2017).

§180.23. Division-Required Training for Doctors.

(a) Applicability. This section governs authorization relating to certification of maximum medical improvement (MMI), determination of permanent impairment, and assignment of impairment ratings in the event that a doctor finds permanent impairment exists.

(b) Authorization. Full authorization to assign an impairment rating and certify MMI in an instance where the injured employee is found to have permanent impairment requires a doctor to obtain division certification by [~~successfully~~] completing the division-prescribed impairment rating training and passing the test or meeting the training and testing requirements for designated doctor certification [~~or recertification~~] under §127.100 [~~and §127.110~~] of this title (relating to Designated Doctor Certification [~~and Designated Doctor Recertification, respectively~~]). To remain certified, a doctor is required to [~~successfully~~] complete follow-up training [~~and testing~~] at least every two years.

(c) Training. A doctor who has not completed the required training under subsection (b) of this section but who has had similar training in the American Medical Association Guides from a division-

approved vendor within the prior two years may submit the syllabus and training materials from that course to the division for review. If the division determines that the training is substantially the same as the division-required training and the doctor passes the division-required test, the doctor is fully authorized under this section. The ability to substitute training only applies to the initial training requirement[~~, not the follow-up training~~].

(d) Exceptions. Notwithstanding any other provision of this section, a doctor who has not successfully completed training and testing required by this section for authorization to assign impairment ratings and certify MMI when there is permanent impairment may receive permission by exception to do so from the division on a specific case-by-case basis.

[~~(e) This section is effective September 1, 2012.~~]

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

Filed with the Office of the Secretary of State on December 8, 2022.

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TITLE 37. PUBLIC SAFETY AND CORRECTIONS

PART 13. TEXAS COMMISSION ON FIRE PROTECTION

CHAPTER 433. DRIVER/OPERATOR

SUBCHAPTER A. MINIMUM STANDARDS FOR DRIVER/OPERATOR-PUMPER

37 TAC §433.5

The Texas Commission on Fire Protection (commission) proposes amendments to 37 Texas Administrative Code Chapter 433, Driver/Operator, concerning proposed §433.5(b) grammar change.

BACKGROUND AND PURPOSE

The purpose of the proposed title change is to reflect the new title of the head of agency.

FISCAL NOTE IMPACT ON STATE AND LOCAL GOVERNMENT

There is no impact on state and local government.

PUBLIC BENEFIT AND COST NOTE

There is no impact on public benefit and cost note.

LOCAL ECONOMY IMPACT STATEMENT

There is no anticipated effect on the local economy for the first five years that the proposed amendments are is in effect; therefore, no local employment impact statement is required under Texas Government Code §2001.022 and 2001.024(a)(6).

ECONOMIC IMPACT ON SMALL BUSINESSES, MICRO-BUSINESSES AND RURAL COMMUNITIES

Mr. Wisko has determined there will be no impact on rural communities, small businesses, or micro-businesses as a result of implementing these amendments. As a result, the commission asserts that the preparation of an economic impact statement and a regulatory flexibility analysis, as provided by Texas Government Code §2006.002, is not required.

GOVERNMENT GROWTH IMPACT STATEMENT

The agency has determined under Texas Government Code §2006.0221 that during the first five years the amendments are in effect:

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

(2) the rules will not create or eliminate any existing employee positions;

(3) the rules will not require an increase or decrease in future legislative appropriation;

(4) the rules will result in a decrease in fees paid to the agency by reducing the fees collected for certification renewals;

(5) the rules will not create a new regulation;

(6) the rules will not expand a regulation;

(7) the rules will not increase the number of individuals subject to the rule; and

(8) the rules are not anticipated to have an adverse impact on the state's economy.

TAKINGS IMPACT ASSESSMENT

The commission has determined that no private real property interests are affected by this proposal and this proposal does not restrict, limit, or impose a burden on an owner's rights to his or her private real property that would otherwise exist in the absence of government action. As a result, this proposal does not constitute a taking or require a takings impact assessment under Texas Government Code §2007.043.

COSTS TO REGULATED PERSONS

There is no impact on costs to regulated persons.

ENVIRONMENTAL IMPACT STATEMENT

The commission has determined that the proposed amendments do not require an environmental impact analysis because the amendments are not major environmental rules under Texas Government Code §2001.0225.

REQUEST FOR PUBLIC COMMENT

Comments regarding the proposed amendments may be submitted, in writing, within 30 days following the publication of this notice in the *Texas Register,* to Michael Wisko, Executive Director, Texas Commission on Fire Protection, P.O. Box 2286, Austin, Texas 78768 or e-mailed to *amanda.khan@tcfp.texas.gov.*

STATUTORY AUTHORITY

The amended rule is proposed under Texas Government Code, §419.008, which authorizes the commission to adopt or amend rules to perform the duties assigned to the commission. The rule is also proposed under Texas Government Code §419.026,

which authorizes the commission to adopt rules establishing fees for certifications.

CROSS REFERENCE TO STATUTE

No other statutes, articles, or codes are affected by these amendments.

§433.5. Examination Requirements.

(a) Examination requirements of Chapter 439 of this title (relating to Examinations for Certification) must be met in order to receive driver/operator-pumper certification.

(b) Individuals will be permitted to take the commission examination for Driver/Operator-Pumper [~~driver/operator-pumper~~] by documenting, as a minimum, completion of the NFPA 1001 Fire Fighter I training, and completing a commission approved driver/operator-pumper curriculum.

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

Filed with the Office of the Secretary of State on December 12, 2022.

TRD-202204924
Mike Wisko
Agency Chief
Texas Commission on Fire Protection
Earliest possible date of adoption: January 22, 2023
For further information, please call: (512) 936-3841

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CHAPTER 443. CERTIFICATION CURRICULUM MANUAL

37 TAC §§443.1, 443.3, 443.5, 443.7, 443.9

The Texas Commission on Fire Protection (commission) proposes amendments to 37 Texas Administrative Code Chapter 443, Certification Curriculum Manual, concerning proposed §443.1, §443.3, §443.5, §443.7, §443.9 shifting authority from the Fire Fighter Advisory Committee to the Commission.

BACKGROUND AND PURPOSE

The purpose of the proposed title change is to reflect the new title of the head of agency.

FISCAL NOTE IMPACT ON STATE AND LOCAL GOVERNMENT

There is no impact on state and local government.

PUBLIC BENEFIT AND COST NOTE

There is no impact on public benefit and cost note.

LOCAL ECONOMY IMPACT STATEMENT

There is no anticipated effect on the local economy for the first five years that the proposed amendments are is in effect; therefore, no local employment impact statement is required under Texas Government Code §2001.022 and 2001.024(a)(6).

ECONOMIC IMPACT ON SMALL BUSINESSES, MICRO-BUSINESSES AND RURAL COMMUNITIES

Mr. Wisko has determined there will be no impact on rural communities, small businesses, or micro-businesses as a result of implementing these amendments. As a result, the commission asserts that the preparation of an economic impact statement and a regulatory flexibility analysis, as provided by Texas Government Code §2006.002, is not required.

GOVERNMENT GROWTH IMPACT STATEMENT

The agency has determined under Texas Government Code §2006.0221 that during the first five years the amendments are in effect:

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

(2) the rules will not create or eliminate any existing employee positions;

(3) the rules will not require an increase or decrease in future legislative appropriation;

(4) the rules will result in a decrease in fees paid to the agency by reducing the fees collected for certification renewals;

(5) the rules will not create a new regulation;

(6) the rules will not expand a regulation;

(7) the rules will not increase the number of individuals subject to the rule; and

(8) the rules are not anticipated to have an adverse impact on the state's economy.

TAKINGS IMPACT ASSESSMENT

The commission has determined that no private real property interests are affected by this proposal and this proposal does not restrict, limit, or impose a burden on an owner's rights to his or her private real property that would otherwise exist in the absence of government action. As a result, this proposal does not constitute a taking or require a takings impact assessment under Texas Government Code §2007.043.

COSTS TO REGULATED PERSONS

There is no impact on costs to regulated persons.

ENVIRONMENTAL IMPACT STATEMENT

The commission has determined that the proposed amendments do not require an environmental impact analysis because the amendments are not major environmental rules under Texas Government Code §2001.0225.

REQUEST FOR PUBLIC COMMENT

Comments regarding the proposed amendments may be submitted, in writing, within 30 days following the publication of this notice in the *Texas Register,* to Michael Wisko, Executive Director, Texas Commission on Fire Protection, P.O. Box 2286, Austin, Texas 78768 or e-mailed to *amanda.khan@tcfp.texas.gov.*

STATUTORY AUTHORITY

The amended rule is proposed under Texas Government Code, §419.008, which authorizes the commission to adopt or amend rules to perform the duties assigned to the commission. The rule is also proposed under Texas Government Code §419.026, which authorizes the commission to adopt rules establishing fees for certifications.

CROSS REFERENCE TO STATUTE

No other statutes, articles, or codes are affected by these amendments.

§443.1. Approval by an [~~the Fire Fighter~~] Advisory Committee.

[(a) All proposals for new or revised curricula and training programs must be submitted to the Fire Fighter Advisory Committee for approval.]

[(b) The Fire Fighter Advisory Committee may:]

[(1) submit proposals to a subcommittee formed of members of the Fire Fighter Advisory Committee for study and review before approval; or]

[(2) submit proposals to an advisory committee formed of members of the fire service who are recommended by the Fire Fighter Advisory Committee and appointed by the commission to report to the Fire Fighter Advisory Committee, for study and review before approval.]

[(c)] All proposals approved by the Commission [Fire Fighter Advisory Committee] shall be placed on the next scheduled meeting agenda of the Texas Commission on Fire Protection.

§443.3. Approval by the Texas Commission on Fire Protection.

(a) All proposals for new or revised curricula and training programs approved [by the Fire Fighter Advisory Committee] must receive final approval by the Texas Commission on Fire Protection.

(b) Proposals not approved by the Commission [commission] may [shall] be sent back to a [the] committee for further development. The Commission [commission] shall indicate to the committee the reasons that the proposals were not approved.

§443.5. Effective Date of New or Revised Curricula and Training Programs Required by Law or Rule.

(a) New curricula and training programs will become effective on January 1 of the year following final approval by the commission or on the date specified by the Commission [commission].

(b) Changes to curricula and training programs will become effective on January 1 of the year following final approval by the Commission [commission] or on the date specified by the Commission [commission].

(c) Changes to curricula and training programs which involve reference materials will become effective on January 1 of the year following final approval by the Commission [commission] or on the date specified by the Commission [commission], [as recommended by the Fire Fighter Advisory Committee,] depending on the impact the change will have on the curricula or training programs.

(d) Changes to curricula and training programs that involve a safety consideration as determined by the Fire Fighter Advisory Committee shall become effective immediately following final approval by the commission.

§443.7. Effective Date of New or Revised Curricula and Training Programs Which Are Voluntary.

(a) New curricula and training programs will become effective on the date [recommended by the Fire Fighter Advisory Committee and] specified by the commission.

(b) Changes to curricula and training programs will become effective on the date [recommended by the Fire Fighter Advisory Committee and] specified by the commission.

(c) Changes to curricula and training programs that involve a safety consideration as determined by the Commission [Fire Fighter Advisory Committee] shall become effective immediately following final approval by the Commission [commission].

§443.9. National Fire Protection Association Standard.

(a) All curricula and training programs must, as a minimum, meet the standards, to include manipulative skills objectives and knowledge objectives, of the current NFPA standard pertaining to the discipline, if such a standard exists and subject to subsection (c) of this section.

(b) New curricula and training programs presented to the Commission [Fire Fighter Advisory Committee] must, as a minimum, meet the standards of the current edition of the applicable NFPA standard for the discipline, if such a standard exists.

(c) If a NFPA standard is adopted or an existing NFPA standard is revised, all curricula and training programs must meet the standards of the new or revised applicable NFPA standard within three years of the official adoption date of the applicable NFPA standard.

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

Filed with the Office of the Secretary of State on December 12, 2022.

TRD-202204941
Mike Wisko
Agency Chief
Texas Commission on Fire Protection
Earliest possible date of adoption: January 22, 2023
For further information, please call: (512) 936-3841

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TITLE 43. TRANSPORTATION

PART 10. TEXAS DEPARTMENT OF MOTOR VEHICLES

CHAPTER 206. MANAGEMENT

INTRODUCTION. The Texas Department of Motor Vehicles (department) proposes amendments to 43 TAC §§206.94 - 206.97 concerning Advisory Committees. These amendments are necessary to extend the expiration date for four advisory committees, to expand the scope of the Consumer Protection Advisory Committee (CPAC) to include the scope from the Customer Service Advisory Committee (CSAC), and to rename the combined advisory committee as the Customer Service and Protection Advisory Committee (CSPAC). In conjunction with this proposal, the department is proposing the repeal of §206.98, concerning CSAC, which is also published in this issue of the *Texas Register.*

EXPLANATION.

Amend §206.94

An amendment to §206.94 extends the expiration date of the Motor Vehicle Industry Regulation Advisory Committee (MVIRAC) by four (4) years to July 7, 2027.

Amend §206.95

An amendment to §206.95 extends the expiration date of the Motor Carrier Regulation Advisory Committee (MCRAC) by four (4) years to July 7, 2027.

Amend §206.96

An amendment to §206.96 extends the expiration date of the Vehicle Titles and Registration Advisory Committee (VTRAC) by four (4) years to July 7, 2027.

Amend §206.97

Amendments to §206.97 extend the expiration date of CPAC by four (4) years to July 7, 2027, expand the scope of CPAC to include the scope from CSAC due to the proposed repeal of §206.98, and renames the combined advisory committee as CSPAC.

The department created the current advisory committees to implement the Sunset Advisory Commission's recommendation number 1.7 from the Sunset Advisory Commission Staff Report with Final Results, Texas Department of Motor Vehicles, 2018-2019, 86th Legislature. Recommendation number 1.7 directed the department to establish advisory committees to provide independent, external expertise for rulemaking and other issues. The Sunset Advisory Commission stated that having standing advisory committees would create more structure around the department's stakeholder input processes and a more inclusive, independent, and transparent process for vetting issues and developing rules. The department needs to extend the expiration date of its advisory committees so they are available to provide input on the department's rulemaking and policy development.

Repeal §206.98

The repeal of §206.98 is necessary because the specific work that CSAC was formed to undertake has been completed. Any future topics relating to improving and enhancing customer service by the department, including, but not limited to the following, can be addressed by CSPAC: infrastructure; new customer service initiatives; policy and process improvements; and technology. The repeal of §206.98 is also necessary to combine CSAC and CPAC into one advisory committee, the CSPAC. Combining CSAC and CPAC into one advisory committee will maximize the efficiencies and expertise concerning customer service and consumer protection topics.

FISCAL NOTE AND LOCAL EMPLOYMENT IMPACT STATEMENT. Glenna Bowman, Chief Financial Officer, has determined that for each year of the first five years the amendments and repeal will be in effect, there will be no fiscal impact to state or local governments as a result of the enforcement or administration of the proposal. The department is prohibited from compensating its advisory committee members under Transportation Code §643.155(b) and §1001.031(e). The department does not reimburse advisory committee members for their expenses regarding their service on any advisory committees under §643.155, which prohibits reimbursement for advisory committee member expenses. The department does not currently reimburse advisory committee members for their expenses for their service on any advisory committees under §1001.031 because the department does not currently receive appropriations for the reimbursement under Government Code §2110.004. Elizabeth Brown Fore, General Counsel, has determined that there will be no measurable effect on local employment or the local economy as a result of the proposal.

PUBLIC BENEFIT AND COST NOTE. Anticipated Public Benefits. Ms. Fore has also determined that, for each year of the first five years the amendments and repeal are in effect, the public benefits anticipated as a result of enforcing or administering the proposal will be increased opportunities for stakeholders and the public to provide input into rulemaking and policy development by the department.

Anticipated Costs to Comply with the Proposal. Ms. Fore anticipates that there will be no costs to comply with the amendments and repeal because the amendments and repeal do not establish any additional requirements on regulated persons. Advisory committee members serve on a voluntary basis.

ECONOMIC IMPACT STATEMENT AND REGULATORY FLEXIBILITY ANALYSIS. As required by Government Code §2006.002, the department has determined that the proposed amendments and repeal will not have an adverse economic effect on small businesses, micro-businesses, and rural communities because the amendments merely extend the advisory committee expiration dates four (4) more years. The proposed amendments and repeal do not require small business, micro businesses, or rural communities to comply. Therefore, the department is not required to prepare a regulatory flexibility analysis under Government Code §2006.002.

TAKINGS IMPACT ASSESSMENT. The department has determined that no private real property interests are affected by the proposed amendments and repeal and that this proposal does not restrict or limit an owner's right to property that would otherwise exist in the absence of government action and, therefore, does not constitute a taking or require a takings impact assessment under the Government Code §2007.043.

GOVERNMENT GROWTH IMPACT STATEMENT. The department has determined that each year of the first five years the proposed new amendments and repeal are in effect, no government program would be created or eliminated. Implementation of the proposed new amendments and repeal would not require the creation of new employee positions or elimination of existing employee positions. Implementation would not require an increase or decrease in future legislative appropriations to the department or an increase or decrease of fees paid to the department. The proposed new amendments and repeal do not create a new regulation, or expand, limit, or repeal an existing regulation. Lastly, the proposed new amendments and repeal do not affect the number of individuals subject to the rule's applicability and will not affect this state's economy.

REQUEST FOR PUBLIC COMMENT.

If you want to comment on the proposal, submit your written comments by 5:00 p.m. CST on January 23, 2023. A request for a public hearing must be sent separately from your written comments. Send written comments or hearing requests by email to *rules@txdmv.gov* or by mail to Office of General Counsel, Texas Department of Motor Vehicles, 4000 Jackson Avenue, Austin, Texas 78731. If a hearing is held, the department will consider written comments and public testimony presented at the hearing.

SUBCHAPTER E. ADVISORY COMMITTEES

43 TAC §§206.94 - 206.97

STATUTORY AUTHORITY. The department proposes amendments to §§206.94 - 206.97 under Transportation Code §643.155 and §1002.001. 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. Transportation Code §643.155 authorizes the department to adopt rules to govern the operations of the rules advisory committee under §643.155.

CROSS REFERENCE TO STATUTE.

Transportation Code §643.155 and §1001.0031; and Government Code §2110.005 and §2110.008.

§206.94. Motor Vehicle Industry Regulation Advisory Committee (MVIRAC).

(a) The MVIRAC is created to make recommendations, as requested by the department and board, on topics related to regulation of the motor vehicle industry.

(b) The MVIRAC shall comply with the requirements of §206.93 of this title (relating to Advisory Committee Operations and Procedures).

(c) The MVIRAC shall expire on July 7, 2027 [~~2023~~].

§206.95. Motor Carrier Regulation Advisory Committee (MCRAC).

(a) The MCRAC is created to make recommendations, as requested by the department and board, on topics related to motor carrier registration and motor carrier regulation.

(b) The MCRAC shall comply with the requirements of §206.93 of this title (relating to Advisory Committee Operations and Procedures).

(c) The MCRAC shall expire on July 7, 2027 [~~2023~~].

§206.96. Vehicle Titles and Registration Advisory Committee (VTRAC).

(a) The VTRAC is created to make recommendations, as requested by the department and board, on topics related to vehicle titles and registration.

(b) The VTRAC shall comply with the requirements of §206.93 of this title (relating to Advisory Committee Operations and Procedures).

(c) The VTRAC shall expire on July 7, 2027 [~~2023~~].

§206.97. Customer Service and [~~Consumer~~] Protection Advisory Committee (CSPAC) [~~(CPAC)~~].

(a) The CSPAC [~~CPAC~~] is created to make recommendations, as requested by the department and board, on the following:

(1) [~~on~~] investigation and enforcement issues, including: vehicle titles and registration fraud; lemon law; the warranty performance program; and various other topics affecting consumers; and

(2) topics related to improving and enhancing customer service by the department, including, but not limited to the following: infrastructure; new customer service initiatives; policy and process improvements; and technology.

(b) The CSPAC [~~CPAC~~] shall comply with the requirements of §206.93 of this title (relating to Advisory Committee Operations and Procedures).

(c) The CSPAC [~~CPAC~~] shall expire on July 7, 2027 [~~2023~~].

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

Filed with the Office of the Secretary of State on December 8, 2022.

TRD-202204870
Elizabeth Brown Fore
General Counsel
Texas Department of Motor Vehicles
Earliest possible date of adoption: January 22, 2023
For further information, please call: (512) 465-4160

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43 TAC §206.98

STATUTORY AUTHORITY. The department proposes the repeal of §206.98 under Transportation Code §643.155 and §1002.001. 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. Transportation Code §643.155 authorizes the department to adopt rules to govern the operations of the rules advisory committee under §643.155.

CROSS REFERENCE TO STATUTE.

Transportation Code §643.155 and §1001.0031; and Government Code §2110.005 and §2110.008.

§206.98. Customer Service Advisory Committee (CSAC).

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

Filed with the Office of the Secretary of State on December 8, 2022.

TRD-202204915
Elizabeth Brown Fore
General Counsel
Texas Department of Motor Vehicles
Earliest possible date of adoption: January 22, 2023
For further information, please call: (512) 465-4160

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WITHDRAWN RULES

Withdrawn Rules include proposed rules and emergency rules. A state agency may specify that a rule is withdrawn immediately or on a later date after filing the notice with the Texas Register. A proposed rule is withdrawn six months after the date of publication of the proposed rule in the Texas Register if a state agency has failed by that time to adopt, adopt as amended, or withdraw the proposed rule. Adopted rules may not be withdrawn. (Government Code, §2001.027)

TITLE 22. EXAMINING BOARDS

PART 24. TEXAS BOARD OF VETERINARY MEDICAL EXAMINERS

CHAPTER 575. PRACTICE AND PROCEDURE

22 TAC §575.29

The Texas Board of Veterinary Medical Examiners withdraws the proposed amendment to, §575.29, which appeared in the August 12, 2022, issue of the *Texas Register* (47 TexReg 4802).

Filed with the Office of the Secretary of State on December 6, 2022.

TRD-202204849
John Hargis
General Counsel
Texas Board of Veterinary Medical Examiners
Effective date: December 6, 2022
For further information, please call: (512) 305-7565

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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 4. AGRICULTURE

PART 1. TEXAS DEPARTMENT OF AGRICULTURE

CHAPTER 13. PUBLIC GRAIN WAREHOUSES

4 TAC §§13.1 - 13.4, 13.6 - 13.15, 13.17, 13.18, 13.20

The Texas Department of Agriculture (Department) adopts amendments to 4 Texas Administrative Code §§13.1 - 13.4, 13.6 - 13.15, 13.17, 13.18, and 13.20. The amendments are adopted without changes to the proposed text as published in the October 7, 2022, issue of the *Texas Register* (47 TexReg 6534) and will not be republished. The Department identified the need for the amendments during its rule review conducted pursuant to Texas Government Code, §2001.039, the adoption of which was published in the October 7, 2022, issue of the *Texas Register* (47 TexReg 6637).

The amendments include a change to the chapter's title to "Public Grain Warehouses," to use terminology contained in Chapter 14 of the Texas Agriculture Code (Code).

The amendments to §13.1 remove several unnecessary definitions, add definitions for "open storage grain" and "terminal storage" to account for the use of these terms in this chapter, modify the definition of "temporary storage" to describe a particular location where grain might be stored, and make editorial changes to improve the rule's readability.

The amendments to §13.2 remove redundant language involving requirements related to Department inspections, clarify compliance requirements for warehouse operators, and correct grammatical and spelling errors.

The amendments to §§13.3 and 13.4 make editorial changes to improve the rules' readability and remove unnecessary or redundant language.

The amendments to §13.6 removes outdated language on financial statement requirements for licensees.

The amendments to §13.7 clarify that the fee for additional locations under combination public grain warehouse licenses applies to locations that have only one public grain warehouse, not just facilities, as facility is defined by section 14.022 of the Code as two or more public grain warehouses located in close proximity on the same general location.

The amendments to §§13.8 - 13.15, 13.17, and 13.18 make editorial changes, remove unnecessary or redundant language, and correct spelling errors.

The amendments to §13.20 clarify what would lead to the suspension of a grain warehouse license.

In addition, "warehouse receipt" and "grain warehouse receipt" are changed to "receipt" throughout the rules to standardize terminology and use a term defined in Chapter 14 of the Code. Similarly, the term "warehouse" and "grain warehouse" is changed to "public grain warehouse" throughout. The term "title" is also changed to "chapter" when referring to sections in this chapter, and rule headings are capitalized where they are not currently.

The Department received no comments regarding the proposed amendments.

The amendments are adopted pursuant to Section 14.015 of the Texas Agriculture Code, which provides the department with the authority to adopt rules necessary for the administration of requirements and procedures for the operation of public grain warehouses.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on December 7, 2022.

TRD-202204858
Skyler Shafer
Assistant General Counsel
Texas Department of Agriculture
Effective date: December 27, 2022
Proposal publication date: October 7, 2022
For further information, please call: (512) 936-9360

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CHAPTER 38. TRICHOMONIASIS

4 TAC §§38.1 - 38.4, 38.6, 38.8

The Texas Animal Health Commission (TAHC) in a duly noticed meeting on November 15, 2022, adopted amendments to §38.1, concerning Definitions, §38.2, concerning General Requirements, §38.3, concerning Infected Herds, §38.4, concerning Certified Veterinary Practitioners, §38.6, concerning Official Trichomoniasis Tests, and §38.8, concerning Herd Certification Program--Breeding Bulls. Sections 38.2, 38.3, 38.4 and 38.6 are adopted without changes and will not be republished. Section 38.1 and §38.8 are adopted with changes to the proposed text as published in the October 7, 2022, issue of the *Texas Register* (47 TexReg 6538). The changes to §38.1 and §38.8 make a correction and replace the word "*Trichomonas*" with "*Tritrichomonas*" and these sections will be republished.

JUSTIFICATION FOR RULE ACTION

The commission adopts amendments to Chapter 38 to clarify, correct, and update information and procedures regarding the

Trichomoniasis program and testing requirements. Changes in the adopted amendment respond to public comments and correct the term "*Trichomonas*" to "*Tritrichomonas.*"

The amendments are adopted pursuant to Agriculture Code § 161.041(a) and (b), which authorizes the commission to adopt any rules necessary to eradicate or control any disease or agent of transmission for any disease that affects livestock, exotic livestock, domestic fowl and exotic fowl. Bovine Trichomoniasis is a sexually transmitted disease that affects cattle and is caused by the organism *Tritrichomonas foetus.* Once a bull is infected with trichomoniasis, it is infected for life and is a reservoir for the organism. An infected bull will not show symptoms but will physically transmit the organism to female cattle during the breeding process. Clinical indications of the presence of trichomoniasis in female cattle include reduced pregnancy rates, changes in pregnancy pattern (shift towards more late calving cows), pus in the uterus (pyometras), and higher rates of abortion throughout the pregnancy.

HOW THE RULES WILL FUNCTION

The amendments to §38.1, Definitions, add that a certified veterinarian must meet the requirements and have authorized personnel status as listed in 4 Texas Administrative Code Chapter 47, clarify that the laboratory can pool samples for polymerase chain reaction (PCR) testing only, and make other updates to correct terminology and improve understanding and readability.

The amendments to §38.2, General Requirements, clarify Trichomoniasis testing requirements and timeframes. The amendments to §38.2(c) specify that requests for confirmatory testing be in writing to the TAHC Region Director and that confirmatory testing must be conducted within 30 days after the date of the original test; other non-substantive organizational changes to improve readability were made to the subsection. To reduce confusion, the amendment to §38.2(d)(2) changes the term "approved feedlot" to "Trichomoniasis certified facility" because the term "approved feedlot" has a different application and requirements that are more commonly associated with disease control efforts related to Tuberculosis and Brucellosis. The amendment to §38.2(d)(3) specifies a timeframe, seven days, to initiate the test for purchased, untested bulls to change status from a slaughter bull to a breeding bull.

The amendments to §38.3, Infected Herds, correct and clarify terminology, and requires additional testing for bulls that are part of an infected herd. The amendment to §38.3(a) corrects terminology and clarifies that breeding bulls "which test positive for Trichomoniasis" as opposed to "have been disclosed as reactor" may be retested under certain conditions. The same provision clarifies that to be released from hold order or quarantine, a bull that is retested must have two consecutive negative tests by PCR within 30 days of the initial test. The amendment adds §38.3(e) to require all bulls that are part of a herd one year after the date the hold order or quarantine on the herd was released to be officially tested for Trichomoniasis. Multiple amendments to Chapter 38, including §38.2, clarifies that PCR testing is conducted as opposed to RT PCR. Other non-substantive updates or grammatical corrections were made to the section to improve readability.

The amendment to §38.4, Certified Veterinary Practitioners, changes §38.4(a) to align with the amended definition of "Certified Veterinarians" in §38.1 and authorized personnel status requirements in 4 TAC Chapter 47.

The amendment to §38.6, Official Trichomoniasis Tests, changes §38.6(1)(B) to (1) allow Trichomoniasis samples to be submitted in sterile saline, in addition to phosphate buffered saline, (2) increase transport time to the laboratory from 96 to 120 hours, and (3) recognize that Trichomoniasis samples pooled at the laboratory at a ratio of up to five individually collected samples pooled for one test may qualify as official tests. To promote understanding and compliance, the amendment specifies that veterinary practitioners may not submit pooled samples for an official test.

The amendment to §38.8, Herd Certification Program--Breeding Bulls, originally proposed changing and italicizing the full scientific name of Trichomoniasis to *Trichomonas foetus,* the adopted change incorporates the correct scientific spelling, *Tritrichomonas foetus.*

SUMMARY OF COMMENTS RECEIVED AND COMMISSION RESPONSE

The 30-day comment period ended November 7, 2022.

During this period, the TAHC received comments regarding the proposed rules from three commenters, including the Texas Veterinary Medical Association, Texas A&M College of Veterinary and Biomedical Sciences, and one individual. A summary of comments relating to the rules and TAHC's responses follow.

Comment: An individual and the Texas A&M College of Veterinary and Biomedical Sciences commented against the use of the proposed term of *Trichomonas foetus* and stated the correct scientific spelling of the organism, *Tritrichomonas foetus,* should be used.

Response: The TAHC agrees and corrected the term to *Tritrichomonas foetus* in the changes to the adopted amendments.

Comment: The Texas Veterinary Medical Association is in support of the rule amendments.

Response: The TAHC thanks the commenter for the feedback. No changes were made as a result of this comment.

STATUTORY AUTHORITY

The Texas Animal Health Commission is vested by statute, §161.041(a), titled "Disease Control", to protect all livestock, exotic livestock, domestic fowl, and exotic fowl from disease. The commission is authorized, through §161.041(b), to act to eradicate or control any disease or agent of transmission for any disease that affects livestock, exotic livestock, domestic fowl, or exotic fowl. The commission may adopt any rules necessary to carry out the purposes of this subsection, including rules concerning testing, movement, inspection, and treatment.

Pursuant to §161.005, titled "Commission Written Instruments", the commission may authorize the executive director or another employee to sign written instruments on behalf of the commission. A written instrument, including a quarantine or written notice signed under that authority, has the same force and effect as if signed by the entire commission.

Pursuant to §161.006, titled "Documents to Accompany Shipment", if required that a certificate or permit accompany animals or commodities moved in this state, the document must be in the possession of the person in charge of the animals or commodities, if the movement is made by any other means.

Pursuant to §161.0417, titled "Authorized Personnel for Disease Control", a person, including a veterinarian, must be authorized by the commission in order to engage in an activity that is part

of a state or federal disease control or eradication program for animals.

Pursuant to §161.046, titled "Rules", the commission may adopt rules as necessary for the administration and enforcement of this chapter.

Pursuant to §161.048, titled "Inspection of Shipment of Animals or Animal Products", the commission may require testing, vaccination, or another epidemiologically sound procedure before or after animals are moved. An agent of the commission is entitled to stop and inspect a shipment of animals or animal products being transported in this state to determine if the shipment originated from a quarantined area or herd; or determine if the shipment presents a danger to the public health or livestock industry through insect infestation or through a communicable or noncommunicable disease.

Pursuant to §161.054, titled "Regulation of Movement of Animals; Exception", the commission, by rule, may regulate the movement of animals, and may restrict the intrastate movement of animals even though the movement of the animals is unrestricted in interstate or international commerce. The commission may require testing, vaccination, or another epidemiologically sound procedure before or after animals are moved. The commission is authorized, through §161.054(b), to prohibit or regulate the movement of animals into a quarantined herd, premise, or area. The Executive Director of the commission is authorized, through §161.054(d), to modify a restriction on animal movement, and may consider economic hardship.

Pursuant to §161.056(a), titled "Animal Identification Program", the commission, to provide for disease control and enhance the ability to trace disease-infected animals or animals that have been exposed to disease, may develop and implement an animal identification program that is no more stringent than a federal animal disease traceability or other federal animal identification program. Section 161.056(d) authorizes the commission to adopt rules to provide for an animal identification program more stringent than a federal program only for control of a specific animal disease or for animal emergency management.

Pursuant to §161.061, titled "Establishment", the commission may establish a quarantine against all or the portion of a state, territory, or country in which a disease listed in rules adopted under Section 161.041 exists. Under §161.061(b), a quarantine established may extend to any affected area, including a county, district, pasture, lot, ranch, farm, field, range, thoroughfare, building, stable, or stockyard pen. Under §161.061(c), the commission may establish a quarantine to prohibit or regulate the movement of infected animals and the movement of animals into an affected area. Section 161.061(d) allows the commission to delegate its authority to establish a quarantine to the Executive Director.

Pursuant to §161.065, titled "Movement from Quarantined Area; Movement of Quarantined Animals", the commission may provide a written certificate or written permit authorizing the movement of animals from quarantined places. If the commission finds animals have been moved in violation of an established quarantine or in violation of any other livestock sanitary law, the commission shall quarantine the animals until they have been properly treated, vaccinated, tested, dipped, or disposed of in accordance with the rules of the commission.

Pursuant to §161.101, titled "Duty to Report", a veterinarian, a veterinary diagnostic laboratory, or a person having care, custody, or control of an animal shall report the existence of the disease, if required by the commission, among livestock, exotic livestock, bison, domestic fowl, or exotic fowl to the commission within 24 hours after diagnosis of the disease.

Pursuant to §161.113, titled "Testing or Treatment of Livestock", if the commission requires testing or vaccination under this subchapter, the testing or vaccination must be performed by an accredited veterinarian or qualified person authorized by the commission. The state may not be required to pay the cost of fess charged for the testing or vaccination. The commission may require the owner or operator of a livestock market to furnish adequate equipment or facilities of have access to essential equipment or facilities within the immediate vicinity of the livestock market.

Pursuant to §161.114, titled "Inspection of Livestock", an authorized inspector may examine livestock consigned to and delivered on the premises of a livestock market before the livestock are offered for sale. If the inspector considers it necessary, the inspector may have an animal tested or vaccinated. Any testing or vaccination must occur before the animal is removed from the livestock market.

Pursuant to §161.148, titled "Administrative Penalty", the commission may impose an administrative penalty on a person who violates Chapter 161 or a rule or order adopted under Chapter 161. The penalty for a violation may be in an amount not to exceed $5,000, effective September 1, 2021.

§38.1. Definitions.

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

(1) Accredited Veterinarian--A licensed veterinarian who is approved to perform specified functions required by cooperative state-federal disease control and eradication programs pursuant to Title 9 of the Code of Federal Regulations, Parts 160 and 161.

(2) Affected Herd--A herd in which any cattle have been classified as *Tritrichomonas foetus* positive on an official test and has not completed the requirements for elimination of the disease from the herd.

(3) Cattle--All dairy and beef animals (genus Bos), excluding bison (genus Bison).

(4) Certified Veterinarians--Veterinarians certified with, and approved by the commission to collect Trichomoniasis samples for official Trichomoniasis testing and to perform any other official function under the Trichomoniasis program. To be a certified veterinarian, a veterinarian must meet the requirements and have authorized personnel status as listed in Chapter 47 of this title (related to Authorized Personnel).

(5) Commission--The Texas Animal Health Commission, or its designee.

(6) Executive Director--The Executive Director of the Texas Animal Health Commission, or the Executive Director's designee.

(7) Exempt Cattle (from testing requirements)--Cattle that have been physically rendered incapable of intromission at a facility recognized by the commission.

(8) Exposed Cattle--Cattle that are part of an affected herd or cattle that have been in contact with Trichomoniasis infected cattle.

(9) Herd--

(A) All cattle under common ownership or supervision or cattle owned by a spouse that are on one premise; or

(B) All cattle under common ownership or supervision or cattle owned by a spouse on two or more premises that are geographically separated, but on which the cattle have been interchanged or where there has been contact among the cattle on the different premises. Contact between cattle on the different premises will be assumed unless the owner establishes otherwise and the results of the epidemiological investigation are consistent with the lack of contact between premises; or

(C) All cattle on common premises, such as community pastures or grazing association units, but owned by different persons. Other cattle owned by the persons involved which are located on other premises are considered to be part of this herd unless the epidemiological investigation establishes that cattle from the affected herd have not had the opportunity for direct or indirect contact with cattle from that specific premises. Approved feedlots and approved pastures are not considered to be herds.

(10) Herd Test--An official test of all non-virgin bulls in a herd.

(11) Hold Order--A document restricting movement of a herd, unit, or individual animal pending the determination of disease status.

(12) Infected Cattle--Any cattle determined by an official test or diagnostic procedure to be infected with Trichomoniasis or diagnosed by a veterinarian as infected.

(13) Infected Herd--The non-virgin bulls in any herd in which any cattle have been determined by an official test or diagnostic procedure to be infected with Trichomoniasis or diagnosed by a veterinarian as being infected.

(14) Movement Permit--Authorization for movement of infected or exposed cattle from the farm or ranch of origin through marketing channels to slaughter or for movement of untested animals to a location where the animals will be held under hold order until testing has been accomplished.

(15) Movement Restrictions--A "Hold Order," "Quarantine," or other written document issued or ordered by the commission to restrict the movement of livestock or exotic livestock.

(16) Negative--Cattle that have been tested with official test procedures and found to be free from infection with Trichomoniasis.

(17) Official Identification/Officially Identified--The identification of livestock by means of an official identification device, official eartag, registration tattoo, or registration brand, or any other method approved by the commission and/or Administrator of the United States Department of Agriculture (USDA) Animal and Plant Health Inspection Service (APHIS) that provides unique identification for each animal. Official identification includes USDA alpha-numeric metal eartags (silver bangs tags), 840 Radio-frequency identification (RFID) tags, 840 bangle tags, official breed registry tattoos, and official breed registry individual animal brands.

(18) Official Trichomoniasis Test--A test for bovine Trichomoniasis, approved by the commission, applied and reported by TVMDL or any other laboratory approved as an official laboratory by the commission. The test document is valid for 60 days, provided the bull is isolated from female cattle at all times, and may be transferred within that timeframe with an original signature of the consignor.

(19) Official Laboratory Pooled Trichomoniasis test samples--Up to five samples individually collected by a veterinarian and packaged and submitted to an official laboratory which can then pool the samples for polymerase chain reaction (PCR) testing only.

(20) Positive--Cattle that have been tested with official test procedures and found to be infected with Trichomoniasis.

(21) Quarantine--A written commission document or a verbal order followed by a written order restricting movement of animals because of the existence of or exposure to Trichomoniasis. The commission may establish a quarantine on the affected animals or on the affected place. The quarantine of an affected place may extend to any affected area, including a county, district, pasture, lot, ranch, farm, field, range, thoroughfare, building, stable, or stockyard pen. The commission may establish a quarantine to prohibit or regulate the movement of any article or animal that the commission designates to be a carrier of Trichomoniasis and/or an animal into an affected area, including a county district, pasture, lot, ranch, farm, field, range, thoroughfare, building, stable, or stockyard pen.

(22) Registered Breeding Cattle--Cattle that belong to a breed registry, which maintains an official list of animals within a specific breed for which there is an association of unique identification for each head of cattle.

(23) Test-Eligible Cattle--All sexually intact non-virgin male cattle and all sexually intact male cattle which have erupting or erupted permanent incisor teeth (or older), which are being sold, leased, gifted or exchanged in the state of Texas for breeding purposes.

(24) Trichomoniasis--A venereal disease of cattle caused by the organism *Tritrichomonas foetus.*

(25) TVMDL--The official laboratory for testing is the Texas A&M Veterinary Medical Diagnostic Laboratory.

(26) Virgin Bull--Sexually intact male registered breeding cattle which have not serviced a cow and which are not more than 18 months of age as determined by the eruption of the two permanent central incisors or birth date on breed registry papers certified by the breeder; or not more than 30 months of age and certified by both the breeder based on birth date and confirmed by his veterinarian that the bull facility is sufficient to prevent contact with female cattle. The virgin certification by the breeder is valid for 60 days, provided the bull is isolated from female cattle at all times, and may be transferred within that timeframe with an original signature of the consignor.

§38.8. Herd Certification Program--Breeding Bulls.

Enrollment Requirements. Herd owners who enroll in the Trichomoniasis Herd Certification Program shall sign a herd agreement with the commission and maintain the herd in accordance with the herd agreement and following conditions:

(1) All non-virgin breeding bulls shall be tested annually for Tritrichomonas foetus for three consecutive years as required by the herd agreement.

(2) During the three year inception period, all non-virgin breeding bulls that are sold, leased, gifted, exchanged or otherwise change possession shall be tested for Tritrichomonas foetus within 30 days prior to such change in possession. The test must be completed and test results known prior to the time a bull(s) is physically transferred to the receiving premises or herd.

(3) Negative Tritrichomonas foetus bulls will be identified with official identification.

(4) All slaughter bulls removed from the herd must be tested for Tritrichomonas foetus. The test may be performed at a

slaughter facility if prior arrangement with a certified veterinarian and an appropriate agreement with the slaughter facility management is made.

(5) Bovine females added to a certified herd shall not originate from a known Tritrichomonas foetus infected herd. Female herd additions must originate from a certified Tritrichomonas foetus free herd or qualify in one of the following categories:

(A) calf at side and no exposure to other than known negative Tritrichomonas foetus bulls;

(B) checked by an accredited veterinarian, at least 120 days pregnant and so recorded;

(C) virgin; or

(D) heifers exposed as virgins only to known negative Tritrichomonas foetus infected bulls and not yet 120 days pregnant.

(6) Records must be maintained for all tests including all non-virgin bulls entering the herd and made available for inspection by a designated accredited veterinarian or state animal health official.

(7) All non-virgin bulls shall be tested for Tritrichomonas foetus every two years after the initial three year inception period to maintain certification status.

(8) Herd premises must have perimeter fencing adequate to prevent ingress or egress of cattle.

(9) All bulls originating from a Trichomoniasis Certified Free Herd that is maintained in accordance with this section and the herd agreement are exempt from the testing requirement found in §38.2 of this chapter (relating to General Requirements).

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on December 7, 2022.

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Myra Sines
Chief of Staff
Texas Animal Health Commission
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For further information, please call: (512) 719-0724

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TITLE 10. COMMUNITY DEVELOPMENT

PART 1. TEXAS DEPARTMENT OF HOUSING AND COMMUNITY AFFAIRS

CHAPTER 6. COMMUNITY AFFAIRS PROGRAMS

The Texas Department of Housing and Community Affairs (the Department) adopts amendments to Chapter 6, Community Affairs Programs, Subchapter B Community Services Block Grant, §6.201, Background and Definitions; §6.206, Strategic Plan, Community Assessment, and Community Action Plan; §6.207, Subrecipient Requirements; Subchapter C Comprehensive Energy Assistance Program, §6.304, Deobligation and Reobligation of CEAP Funds; §6.307, Subrecipient Requirements for Customer Eligibility Criteria, Provision of Services, and Establishing Priority for Eligible Households; §6.308, Allowable Subrecipient Administrative and Program Services Costs; §6.309, Types of Assistance and Benefit Levels; §6.310, Crisis Assistance Component; §6.311, Utility Assistance Component; §6.312, Payments to Subcontractors and Vendors; Subchapter D Weatherization Assistance Program, §6.402, Purpose and Goals; §6.403, Definitions; §6.406, Subrecipient Requirements for Establishing Household Eligibility and Priority Criteria; §6.407, Program Requirements; §6.408, Department of Energy Weatherization Requirements; §6.414, Eligibility for Multifamily Dwelling Units and Shelters; §6.416, Whole House Assessment; and §6.417, Blower Door Standards, without changes to the proposed text as published in the October 28, 2022, issue of the *Texas Register* (47 TexReg 7151). The rules will not be republished. The purpose of the amended sections is to make SNAP and TANF categorically eligible for LIHEAP, align CSBG and WAP with current requirements, improve clarity, and correct identified areas of concern.

Tex. Gov't Code §2001.0045(b) does not apply to the amendments because they are exempt under §2001.0045(c)(4), which exempts rule changes necessary to receive a source of federal funds or to comply with federal law.

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

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

Mr. Bobby Wilkinson, Executive Director, has determined that, for the first five years the amendments would be in effect:

1. The amendments do not create or eliminate a government program, but relates to the changes to existing regulations regarding the administration of Community Affairs programs.

2. The amendments do not require a change in work that would require the creation of new employee positions, nor are the amendments significant enough to reduce workload to a degree that any existing employee positions are eliminated.

3. The amendments do not require additional future legislative appropriations.

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

5. The amendments will not create a new regulation.

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

7. The amendments will not increase or decrease the number of individuals subject to the rule's applicability.

8. The amendments will not negatively or positively affect the state's economy.

b. ADVERSE ECONOMIC IMPACT ON SMALL OR MICRO-BUSINESSES OR RURAL COMMUNITIES AND REGULATORY FLEXIBILITY REQUIRED BY TEX. GOV'T CODE §2006.002. The Department has evaluated the amendments and determined that the amendments will not create an economic effect on small or micro-businesses or rural communities.

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

2. The Department has determined that because the rules apply only to existing Subrecipients, there will be no economic effect on small or micro-businesses or rural communities.

c. TAKINGS IMPACT ASSESSMENT REQUIRED BY TEX. GOV'T CODE §2007.043. The amendments do not contemplate or authorize a taking by the Department; therefore, no Takings Impact Assessment is required.

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

The Department has evaluated the amendments as to their possible effect on local economies and has determined that for the first five years the amendments will be in effect there would be no economic effect on local employment because the rules relate only to regulations which have already been in effect for existing Subrecipients; therefore, no local employment impact statement is required to be prepared for the amendments.

Tex. Gov't Code §2001.022(a) states that this "impact statement must describe in detail the probable effect of the rule on employment in each geographic region affected by this rule". Considering that the rules pertain to all Subrecipients throughout the state, regardless of location, there are no "probable" effects of the amendments on particular geographic regions.

e. PUBLIC BENEFIT/COST NOTE REQUIRED BY TEX. GOV'T CODE §2001.024(a)(5). Mr. Wilkinson has also determined that, for each year of the first five years the amendments are in effect, the public benefit anticipated as a result of the amendments would be an updated, more streamlined, and clearer version of the rules governing Community Affairs programs. There will not be economic costs to individuals required to comply with the amendments.

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

g. SUMMARY OF PUBLIC COMMENT AND REASONED RESPONSE. The Department accepted public comment from October 28, 2022, to November 18, 2022. Comments regarding the amendments were accepted in writing from:

(1) CEAP Grant Specialist, Travis County Health and Human Services

(2) Community Services Director, Community Council of South Central Texas

(3) Executive Director, Texas Association of Community Action Agencies

Section 6.201 Background and Definitions

COMMENT SUMMARY: Commenter 2 suggests that the use of the word "funds" in the definition of National Performance Indicator is confusing and recommends placing it elsewhere for clarity.

STAFF RESPONSE: The designation of "Subrecipient of funds" is used to distinguish subrecipients of CSBG discretionary funding from Eligible Entities. Eligible Entities receive 90% of annual CSBG funding while 5% of annual CSBG funding is allocated towards discretionary activities. In some cases, these discretionary funds are awarded to subrecipients who are not designated Eligible Entities. Accordingly, the use of the clause "of funds" is used to include subrecipients of both regular CSBG funding and discretionary funding. The Department appreciates the comment, but will make no change to the rule.

Section 6.307 Subrecipient Requirements for Customer Eligibility Criteria, Provision of Services, and Establishing Priority for Eligible Households

COMMENT SUMMARY: Commenter 1 recommends that the income threshold be increased from 150% to 200% of Federal Poverty Income Guidelines.

STAFF RESPONSE: Section 2605 of the Low Income Home Energy Assistance Act of 1981 (42 U.S.C. § 8624(b)(2)) limits states to making payments to households with incomes which do not exceed the greater of (i) an amount equal to 150% of the poverty level for such State; or (ii) an amount equal to 60% of the State Median Income. The Department does not have the authority to raise the threshold above 150%, and has determined that the 150% threshold serves more Texans than the 60% of State Median Income threshold. If in the future, the LIHEAP Act allows states to use a higher percentage of FPIG, the Department will consider such limits. No change to the rule in response to this comment is being made.

COMMENT SUMMARY: Commenter 1 supports making SNAP and TANF categorically eligible for CEAP.

STAFF RESPONSE: The Department appreciates the support.

Section 6.309 Types of Assistance and Benefit Levels

COMMENT SUMMARY: Commenter 1 recommends that a CEAP subrecipient be allowed to make a lump sum payment based on a household's previous 12-month billing history or alternative billing method, for both vulnerable and non-vulnerable households. Commenter 1 also recommends that lump sum payments be allowed to cover two separate fuel sources.

STAFF RESPONSE: 10 TAC Chapter 6 does not prohibit lump sum payments to be made in the manner recommended by Commenter 1. The Community Affairs Division Training Section has informed CEAP subrecipients through several training events in the past year that lump sum payments are allowable if a subrecipient believes this payment methodology to be of benefit to their operation. Many subrecipients have adopted lump sum payments as their method of payment in the past year. For more information on how to apply lump sum payments to energy bills, please contact Madison Lozano in the Community Affairs Division Training Section at (512) 936-7798. The Department appreciates the comment but will make no change to the rules.

COMMENT SUMMARY: Commenter 1 supports the amendment at §6.309(i)(9) allowing the payment of arrearages related to home energy costs with no maximum cost limit and that the arrearages do not count towards the annual household benefit.

STAFF RESPONSE: The Department appreciates the support.

General Comment

COMMENT SUMMARY: Commenter 3 supports the amendments and commends the Department for adopting a DOE Priority List as well as expanding the CEAP categorical eligibility criteria to include SNAP and TANF. Commenter 3 also agrees that the amendments achieve the intended purpose of aligning the Community Affairs programs with current requirements, improving clarity and correcting identified areas of concern.

STAFF RESPONSE: The Department appreciates the support.

SUBCHAPTER B. COMMUNITY SERVICES BLOCK GRANT

10 TAC §§6.201, 6.206, 6.207

STATUTORY AUTHORITY. The amendments are adopted pursuant to Tex. Gov't Code, §2306.053, which authorizes the Department to adopt rules.

Except as described herein the amendments affect no other code, article, or statute.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

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Bobby Wilkinson
Executive Director
Texas Department of Housing and Community Affairs
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For further information, please call: (512) 475-3959

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SUBCHAPTER C. COMPREHENSIVE ENERGY ASSISTANCE PROGRAM

10 TAC §§6.304, 6.307 - 6.312

STATUTORY AUTHORITY. The amendments are adopted pursuant to Tex. Gov't Code, §2306.053, which authorizes the Department to adopt rules.

Except as described herein the amendments affect no other code, article, or statute.

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SUBCHAPTER D. WEATHERIZATION ASSISTANCE PROGRAM

10 TAC §§6.402, 6.403, 6.406 - 6.408, 6.414, 6.416, 6.417

STATUTORY AUTHORITY. The amendments are adopted pursuant to Tex. Gov't Code, §2306.053, which authorizes the Department to adopt rules.

Except as described herein the amendments affect no other code, article, or statute.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

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CHAPTER 11. MULTIFAMILY DIRECT LOAN RULE

The Texas Department of Housing and Community Affairs (the "Department") adopts the repeal of 10 TAC Chapter 11, Qualified Allocation Plan (QAP) including Subchapter A, Definitions, Threshold Requirements and Competitive Scoring; Subchapter B, Site and Development Requirements and Restrictions; Subchapter C, Application Submission Requirements, Ineligibility Criteria, Board Decisions and Waiver of Rules; Subchapter D, Underwriting and Loan Policy; Subchapter E, Fee Schedule, Appeals, and Other Provisions, and Subchapter F Supplemental Housing Tax Credits without changes to the text as published in the September 23, 2022, issue of the *Texas Register* (47 TexReg 5945). The purpose of the repeal is to eliminate an outdated rule while adopting a new updated rule under separate action.

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

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

1. Mr. Bobby Wilkinson, Executive Director, has determined that, for the first five years the repeal would be in effect, the repeal does not create or eliminate a government program, but relates to the repeal, and simultaneous adoption making changes to an existing activity, concerning the application of Low Income Housing Tax Credits (LIHTC).

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

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

4. The repeal changes will not result in any increases in fees. The rule removes a Determination Notice Reinstatement Fee.

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

6. The action will repeal an existing regulation, but is associated with a simultaneous adoption making changes to an existing activity, concerning the allocation of LIHTC.

7. The repeal will not increase or decrease the number of individuals subject to the rule's applicability; and

8. The repeal will not negatively affect the state's economy, and may be considered to have a positive effect on the state's economy because changes at 10 TAC §11.9(c)(7), Proximity to Job Areas, may help to encourage the development of affordable multifamily housing in robust markets with strong and growing economies.

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

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

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

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

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

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

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

Mr. Wilkinson has also determined that, for each year of the first five years the new rule is in effect, the public benefit anticipated as a result of the new rule will be an updated and more germane rule for administering the allocation of LIHTC. There will not be economic costs to individuals required to comply with the repealed section.

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

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

SUMMARY OF PUBLIC COMMENT. The public comment period was held September 23, 2022, to October 14, 2022, to receive stakeholder comment on the repealed section. No comments on the repeal were received.

SUBCHAPTER A. PRE-APPLICATION, DEFINITIONS, THRESHOLD REQUIREMENTS AND COMPETITIVE SCORING

10 TAC §§11.1 - 11.10

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

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

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

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Bobby Wilkinson
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For further information, please call: (512) 475-3959

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SUBCHAPTER B. SITE AND DEVELOPMENT REQUIREMENTS AND RESTRICTIONS

10 TAC §11.101

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

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

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

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SUBCHAPTER C. APPLICATION SUBMISSION REQUIREMENTS, INELIGIBILITY CRITERIA, BOARD DECISIONS AND WAIVER OF RULES

10 TAC §§11.201 - 11.207

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

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

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

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SUBCHAPTER D. UNDERWRITING AND LOAN POLICY

10 TAC §§11.301 - 11.306

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

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

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on December 6, 2022.

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Bobby Wilkinson
Executive Director
Texas Department of Housing and Community Affairs
Effective date: December 26, 2022
Proposal publication date: September 23, 2022
For further information, please call: (512) 475-3959

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SUBCHAPTER E. FEE SCHEDULE, APPEALS, AND OTHER PROVISIONS

10 TAC §§11.901 - 11.907

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

The repealed sections affect no other code, article, or statute.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

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SUBCHAPTER F. SUPPLEMENTAL HOUSING TAX CREDITS

10 TAC §§11.1001 - 11.1009

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

The repealed sections affect no other code, article, or statute.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

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CHAPTER 11. QUALIFIED ALLOCATION PLAN (QAP)

The Texas Department of Housing and Community Affairs (the "Department") adopts new 10 TAC Chapter 11, Qualified Allocation Plan (QAP), §11.1-11.10, 11.101, 11.201-11.207, 11.301-11.306, 11.901-11.907, and 11.1001-11.1009 with changes to the proposed text as published in the September 23, 2022 issue of the *Texas Register* (47 TexReg 5947). The rules will be republished. The purpose of the new chapter is to provide compliance with Tex. Gov't Code §2306.67022 and to update the rule to: clarify multiple definitions and the Administrative Deficiency process; update the Program Calendar; reduce thresholds for Proximity to Jobs so that more potential Development sites will be competitive; increase Eligible building costs to response to growing expenses; eliminate subject and difficult to Review Neighborhood Risk Factors and Undesirable Site Features; create alternative criteria for obtaining an Experience Certificate; add automatic Supportive Housing and HUD Neighborhood Choice awards for specified regions of the State; and provide for the use of 2023 Competitive Housing Tax Credits to assist 2021 Competitive Housing Tax Applicants negatively impacted by the COVID-19 pandemic.

Tex. Gov't Code §2001.0045(b) does not apply to the rule for two reasons: 1) the state's adoption of the QAP is necessary to comply with IRC §42; and 2) the state's adoption of the QAP is necessary to comply with Tex. Gov't Code §2306.67022. The

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

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

Mr. Bobby Wilkinson, Executive Director, has determined that, for the first five years the new rule would be in effect:

1. The rule does not create or eliminate a government program, but relates to the readoption of this rule which makes changes to an existing activity, concerning the allocation of Low Income Housing Tax Credits (LIHTC) and other Multifamily Development programs.

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

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

4. The rule changes will not result in any increases in fees. The rule removes a Determination Notice Reinstatement Fee.

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

6. The rule will not limit or repeal an existing regulation, but can be considered to "expand" the existing regulations on this activity because the rule has sought to clarify Application requirements. Some "expansions" are offset by corresponding "contractions" in the rules, compared to the 2022 QAP. Notably, the Department has sought to remove superfluous language wherever possible and to consolidate rules to reflect current process. These additions, removals, and revisions to the QAP are necessary to ensure compliance with IRC §42 and Tex. Gov't Code §2306.67022.

7. The rule will not increase or decrease the number of individuals subject to the rule's applicability; and

8. The rule will not negatively affect the state's economy, and may be considered to have a positive effect on the state's economy because changes at 10 TAC §11.9(c)(7), Proximity to Job Areas, may help to encourage the development of affordable multifamily housing in robust markets with strong and growing economies.

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

The Department, in drafting this rule, has attempted to reduce any adverse economic effect on small or micro-business or rural communities while remaining consistent with the statutory requirements of Tex. Gov't Code, §2306.67022. Some stakeholders have reported that their average cost of filing an Application is between $50,000 and $60,000, which may vary depending on the specific type of Application, location of the Development Site, and other non-state of Texas funding sources utilized. The rules do not, on average, result in an increased cost of filing an application as compared to the existing program rules.

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

2. There are approximately 100 to 150 small or micro-businesses subject to the rule for which the economic impact of the rule may range from $480 to many thousands of dollars, just to submit an Application for Competitive or non-Competitive HTCs. The Department bases this estimate on the potential number of Applicants and their related parties who may submit applications to TDHCA for LIHTC. The fee for submitting an Application for LIHTC is $30 per unit, and all Applicants are required to propose constructing, at a minimum, 16 Units. While, in theory, there is no limit to the number of Units that could be proposed in a single Application, practically speaking, the Department sees few proposed Developments larger than 350 Units, which, by way of example, would carry a fee schedule of $10,500. These Application Fee costs are not inclusive of external costs required by the basic business necessities underlying any real estate transaction, from placing earnest money on land, conducting an Environmental Site Assessment, conducting a market study, potentially retaining counsel, hiring an architect and an engineer to construct basic site designs and elevations, and paying any other related, third-party fees for securing the necessary financing to construct multifamily housing. Nor does this estimate include fees from the Department for Applications that successfully attain an award. There are 1,285 rural communities potentially subject to the rule for which the economic impact of the rule is projected to be $0. The rule places no financial burdens on rural communities, as the costs associated with submitting an Application are born entirely by private parties. If anything, a rural community securing a LIHTC Development will experience an economic benefit, not least among which is the potential increased property tax revenue from a large multifamily Development.

3. The Department has determined that because there are rural tax credit awardees, this program helps promote construction activities and long term tax base in rural areas of Texas. Aside from the fees and costs associated with submitting an Application, there is a probable positive economic effect on small or micro-businesses or rural communities that receive LIHTC awards and successfully use those awards to construct multifamily housing, although the specific impact is not able to be quantified in advance.

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

The rule does not contemplate or authorize a takings by the Department. Therefore, no Takings Impact Assessment is required.

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

The Department has evaluated the rule as to its possible effects on local economies and has determined that for the first five years the rule will be in effect the rule may provide a possible positive economic effect on local employment in association with this rule since LIHTC Developments often involve a total input of, typically at a minimum, $5 million in capital, but often an input of $10 million - $30 million. Such a capital investment has concrete direct, indirect, and induced effects on the local and regional economies. However, because the exact location of where program funds and development are directed is not determined in rule, there is no way to determine during rulemaking where the positive effects may occur. Furthermore, while the Department knows that any and all impacts are positive, that impact is not able to be quantified for any given community until a proposed Development is actually awarded LIHTC, given the unique characteristics of each proposed multifamily Development and region in which it is being developed.

Texas Gov't Code §2001.022(a) states that this "impact statement must describe in detail the probable effect of the rule on employment in each geographic region affected by this rule..." Considering that significant construction activity is associated with any LIHTC Development and that each apartment community significantly increases the property value of the land being developed, there are no probable negative effects of the new rule on particular geographic regions. If anything, positive effects will ensue in those communities where developers receive LIHTC awards.

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

Mr. Wilkinson has determined that, for each year of the first five years the new sections are in effect, the public benefit anticipated as a result of the new section will be an updated and more germane rule for administering the allocation of LIHTC with considerations made for applicants as it relates to the impact of the COVID-19 pandemic on the application process. Other than the fees mentioned in section a4 above, there is no change to the economic cost to any individuals required to comply with the new section because the same processes described by the rule have already been in place through the rule found at this section being repealed. The average cost of filing an application remains between $50,000 and $60,000, which may vary depending on the specific type of application, location of the development site, and other non-state of Texas funding sources utilized. The rules do not, on average, result in an increased cost of filing an application as compared to the existing program rules.

f. FISCAL NOTE REQUIRED BY TEX GOV'T CODE §2001.024(a)(4). Mr. Wilkinson also has determined that for each year of the first five years the new sections are in effect, enforcing or administering the new section does not have any foreseeable implications related to costs or revenues of the state or local governments because the same processes described by the rule have already been in place through the rule found at this section being repealed. If anything, Departmental revenues may increase due to a comparatively higher volume of Applications, which slightly increases the amount of fees TDHCA receives.

SUMMARY OF PUBLIC COMMENT. The public comment period was held September 23, 2022, to October 14, 2022, to receive stakeholders comment on the new proposed sections. Comment was received from 27 commenters as listed below:

(1) Lakewood Property Management, (2) Purple Martin Real Estate, (3) Mark-Dana Corporation, (4) Jeremy Mears, (5) The Brownstone Group, (6) National Church Residences, (7) Dakota Courville, (8) Evolie Housing Partners, (9) Jennifer Hicks, (10) Nathan Kelly, (11) TAAHP, (12) Grace Ford, (13) Joan Hill, (14) Rural Rental Housing Association of Texas, (15) Denise Day, (16) Miranda Sprague, (17) Lincoln Avenue Capital, (18) BETCO, (19) Tropicana Properties, (20) Alyssa Carpenter, (21) Foundation Communities, (22) Disability Rights Texas, (23) Texas Housers, (24) ARX Advantage, (25) Sierra Club, (26) Katpody LLC, and (27) Dominium.

It should be noted that in the interest of brevity, some of the more extensive comments received have been summarized significantly. However, copies of all comments received have the commenter's number denoted, are all available on the Department Website.

§11.1(d)(38)(B) Requirement for Agreement with Local Jurisdiction for Sites Divided by Public Road

COMMENT SUMMARY: Commenter 2 suggests removing the requirement for developments divided by a public road to seek a LURA with a public entity ensuring a continuous accessible route. They suggest instead conditioning the award on providing the route and monitoring this during the compliance period.

STAFF RESPONSE: Staff believes more internal research is needed to determine the impact of this removal and the feasibility of Commenter 2's suggested alternative, as well as the potential statutory ramifications of this suggestion as it relates to accessibility. Additionally, Staff believes Commenter 2's proposed change would require additional public comment as this concept was not contemplated in the draft QAP. The timing of the QAP process does not allow for additional rounds of public comment. Staff has recommended no change at this time.

§11.1(c)(124) Definitions - Supplemental Credits

COMMENT SUMMARY: Commenter 18 recommends clarifying the language for the definition of Supplemental Credits to only apply to 2021 Competitive Housing Tax Credit Developments.

STAFF RESPONSE: Staff concurs with Commenter 18, a responsive revision has been made to the definition.

11.1(d)(125) Supportive Housing

COMMENT SUMMARY: Commenter 1 believes the requirement for certain supportive housing developments to be located within a half mile of public transportation limits eligibility to larger urban areas as many smaller cities and rural towns do not have services that qualify. Commenter 1 suggests amending this section to include on-demand transit services which would expand eligible areas. Commenter 9 supports the removal of §11.1(d)(125)(B)(v)(I) and (II) related to criminal history criteria. Commenter 9 suggests this is an easy and no impact way to help get more Supportive Housing on the ground in Texas. Commenter 9 points out the population intended to be served by Supportive Housing is in direct conflict with the criminal history criteria.

STAFF RESPONSE: In regards to Commenter 1's suggested revision of the public transportation requirement, Staff believes more internal discussion is needed. Staff believes this change cannot be made without additional research regarding what would constitute "on-demand transit" and its usability for this target population. On-demand transit services vary in scheduling procedures and availability. Staff requires more analysis and additional public input to determine if these services provide an equivalent service to the current requirement. Staff has recommended no change at this time.

Staff appreciates Commenter 9's suggestion to remove §11.1(d)(125)(B)(v)(I) in order to produce more supportive housing throughout the state; however, staff would like to emphasize that mitigation related to criminal screening criteria in accordance with §11.1(d)(125)(B)(v)(II) is available and required. Accordingly, staff does not believe that the criteria is a significant barrier to housing and recommends no change.

§11.1(d)(138) Unit Type

COMMENT SUMMARY: Commenter 2 suggests removing the word "features" from this section. They believe the term is too vague and will introduce ambiguity. Commenter 2 also suggests full bathrooms alone is a sufficient differentiator.

STAFF RESPONSE: Features are already a required part of Unit Type for the purposes of 10 TAC §11.101(b)(8)(E) and the term is referenced in the federal requirements for Direct Loan Devel-

opments pursuant to 24 CFR §§92.205(d) and 93.200(c)(1). No change is recommended.

§11.1(e) Data

COMMENT SUMMARY: Commenter 20 recommends removing language relating to "American Community Survey" within the section, as some data required is census data but not necessarily "ACS" data. Commenter 20 also proposes that the deadline for the final Site Demographics Report be published within the QAP, stating developers need time to use reports and determine potential development sites.

STAFF RESPONSE: While Commenter 20 is correct that some items do not rely on the American Community Survey, staff does not believe the use of this term impacts the interpretation of any key items. Staff also is concerned that a responsive change may cause additional inconsistencies. Staff recommends no changes.

Regarding a Site Demographics Report deadline, staff understands the desire for clarity on this matter but believes the suggested timeline may not always be feasible. Substantial revisions by the Governor's office, as provided for by the statutory method for adopting the QAP, can impact the site demographics report and may push back the publication date. Staff recommends no change based on this comment.

§11.2 Program Calendar

COMMENT SUMMARY: Commenter 2 requests the deadline for Multifamily Direct Loan Request for Preliminary Determination be added to the Program Calendar. Commenter 2 also requests the February 11th deadline be revised as it falls on a Saturday.

STAFF RESPONSE: A responsive revision has been made regarding both the February 11th deadline and the presence of the Multifamily Direct Loan Request for Preliminary Determination deadline on the Program Calendar.

§11.4(a) Credit Amount, Value Assigned to Supplemental Credits

COMMENT SUMMARY: Commenter 2 requests the amount assigned to Supplemental Credits be defined in the final QAP rather than in a later determination.

STAFF RESPONSE: Staff continues to monitor market conditions and will announce the final limit for Supplemental Credits in accordance with the QAP.

§11.5(3)(D)(ii) At-Risk Demolition and Relocation of Redevelopment Units

COMMENT SUMMARY: Commenter 2 suggests inserting the term "at least" into this section to allow developments that demolish existing units to create more than the original number.

STAFF RESPONSE: Staff agrees that this addition would improve flexibility and may provide an opportunity to create more affordable units. This addition is reflected in the attached rule, with the caveat that other rules, limitations, approvals, and potential conflicting requirements based on fund source, number and unit type may be implicated by creating more units than the original number.

§11.6(3)(C)(iv) HUD Choice Neighborhood Awards

COMMENT SUMMARY: Commenter 2 is supportive of this addition.

STAFF RESPONSE: No change is necessary as a result of this comment.

§11.6(3)(C)(iv) Highest Scoring Supportive Housing

COMMENT SUMMARY: Commenters 21, and 23 support the proposal of automatically awarding the highest scoring Supportive Housing application with an Urban Region.

STAFF RESPONSE: No change is necessary as a result of this comment.

§11.7 Tie Breaker Factors

COMMENT SUMMARY: Commenters 2 and 14 support the poverty rate metric changes proposed in this section. However, they suggest language changes to create three distinct tie-breakers.

Commenter 20 recommends not changing the current tiebreakers this late before an upcoming cycle, as it could potentially impact future development sites. Commenter 20 recommends Tiebreakers need more discussion and official public comments.

Commenter 21 recommends adding a tie breaker for the lowest average income, stating it would fit well with the 1st tie breaker of poverty and keep distance as the last tie breaker. Commenter 22 recommends adding a tie breaker incentivizing developers to create more affordable units to address the large demand for affordable living.

Commenter 24 supports the change of fixed poverty percentage of 20% with the additional increase for Regions 11 and 13.

STAFF RESPONSE: Staff understands the desire for more precise language, but believes the current rule is sufficiently clear. Staff will consider revisions for upcoming QAP planning cycles.

Regarding Commenters 21 and 22, staff appreciates the new suggestions for tie breakers, however Staff believes it would be too late to include additional ideas before the upcoming 9% Cycle. In this regard, Staff concurs with Commenter 20.

No change is necessary regarding Commenter 24.

§11.8(b)(2)(C) Pre-Application Notification Contents

COMMENT SUMMARY: Commenter 20 recommends removing the re-renotifciation requirement, as at the time of pre-application, development sites do not have a survey of Applicants. Commenter 20 called the new language a "gotcha" situation where the county or assumed acreage was incorrect and could result in a density change, which ultimately terminates an application.

STAFF RESPONSE: In response to Commenter 20, staff has included a responsive revision regarding the renotifciation requirement.

§11.9(c)(1) Income Levels of Residents

COMMENT SUMMARY: Commenters 12, and 15 suggest awarding more points to applications that offer deeper levels of affordability. Both commenters are current tenants in tax credit properties. As retirees, they struggle to afford their 60% units but could not easily find a unit with deeper restrictions despite qualifying. Commenter 13 is also a tenant in a tax credit property struggling to keep up with rent increases on a fixed retirement income.

STAFF RESPONSE: Staff appreciates the feedback from Commenters 12, 13, and 15 on the need for deeper affordability for those on a fixed income. Staff welcomes the participation of ten-

ants for the QAP planning, and encourages continued engagement; however, this matter was not considered during the 2023 QAP planning session, and will require more public comment for future roundtables. Staff will internally discuss this matter, and encourages participation from tenants next year.

§11.9(b)(2)(A) Sponsor Characteristics, HUB

COMMENT SUMMARY: Commenters 2, 10, 14, and 24 oppose changes to this section. Commenter 2 believes the additions of the terms "officer" and "regardless of Control." could be problematic for existing HUBS. Commenters 10 and 14 note that "officer" is not a defined term within the QAP or Section 2306 of the Local Government Code. Commenters 10 and 14 are concerned the addition of this term could result in existing HUBs being deemed ineligible to participate. Commenter 10 also suggests the current language is sufficient to meet TDHCA's Section 42 obligations and further narrowing does not provide material benefit.

STAFF RESPONSE: In regards to Commenters 2, 10, 14, and 24 on the proposed HUB language, Staff will be maintaining the current language for the 2023 QAP. Staff recommends to bring up terms such as "officer" and "regardless of Control" in a future QAP roundtable discussion should the expressed concern materialize in the upcoming round.

In response to Commenters 2, 10, and 14, Staff understands the concerns regarding of existing HUBs and the future of their participation.

§11.9(b)(6)(B)(iii) Energy and Water Efficiency Features

COMMENT SUMMARY: Commenter 21 recommends the Department to make EPA WaterSense or equivalent toilets, showerheads, and faucets mandatory as opposed to a scoring criteria. Commenter 21 states this would be a crucial strategy for energy efficiency and conservation.

STAFF RESPONSE: Staff appreciates the input of Commenter 21 regarding water conservation, and will consider further research.

§11.9(c)(4) Residents with Special Housing Needs

COMMENT SUMMARY: Commenter 2 suggests several language changes impacting grammar and syntax. Commenter 9 proposed new language that clarifies which subparagraphs can be combined. Regarding subparagraph B, Commenters 14 and 24 proposed a return to 2021 language as well as an exemption for USDA developments. USDA developments are often located in areas without the relevant services and thus units sit vacant for six months to stay in compliance.

STAFF RESPONSE: In response to Commenters 2 and 9, Staff has included a responsive revision regarding the grammar and syntax for this scoring item.

Staff acknowledges Commenters 14 and 24 on returning to previous QAP language and adding an exemption for USDA developments. Staff does not have current plans to make changes for this scoring item.

§11.9(c)(6) Underserved Area

COMMENT SUMMARY: Commenter 2 supports the clarifying language added regarding existing developments, but finds the meaning of subparagraph F confusing and requests further rewording.

Commenter 21 states current section is ok, but would like to propose conceptual changes in the 2024 QAP Planning Process. Commenter 21 states the Department should move towards a HTC density per census tract concept.

Commenter 14 proposes new language for a scoring item that awards points to At-Risk developments placed in service 20 or 25 years ago. They believe this change will allow older and aspiring properties to rise to the top of the scoring chart. Commenter 14 acknowledges this suggested change to be significant and believes it should be considered for the next QAP.

Commenter 24 supports RRHA comments. Commenter 24 states the changes would be a significant departure and believe discussing this further in the 2024 QAP Planning Cycle is necessary.

STAFF RESPONSE: In response to Commenter 2, staff has determined that the language is sufficiently clear and recommends no change.

In response to Commenter 14 and 24, proposed changes would require additional public comment as it proposes a new concept not contemplated in the draft or proposed QAP. The timing of the QAP process does not allow for additional rounds of public comment. Staff has recommended no change at this time, but encourages raising this matter again during the planning phase for the 2024 QAP.

11.9(c)(7) Opportunity Index

COMMENT SUMMARY: Commenters 9 and 18 suggest all references to physical barriers be removed from subparagraph (A)(ii)(III) for third quartile census tracts and identifies a sentence that is no longer applicable.

STAFF RESPONSE: Regarding all references to physical barriers, a responsive revision has been made and the relevant sentence has been removed from the item.

§11.9(c)(7)(C) Access to Jobs

COMMENT SUMMARY: Commenter 3 requests the Access to Jobs scoring criteria be removed in its entirety. Commenter 3 suggests public transportation offerings vary dramatically throughout the state, and the scoring criteria as written would be particularly unfavorable to urban areas that are not in metropolitan cities. Commenter 3 also supports public comments made by TAAHP during the Preliminary QAP Draft. Commenters 2, 10, 11, 18, 20, 21, 24, and 26 suggest the deletion of the requirement that the development site is located on an accessible route for pedestrians. They cite past cycles in which this requirement was in place and prone to frequent RFAD challenges. Commenters 2, 10, and 11 also suggested the language regarding employment and services is unnecessary.

Commenter 16 recommends removing the following language "on a route, with an accessible path for pedestrians that is" to better follow how the Opportunity Index points, which reads "... is located within one half-mile from the entrance..." in the current 2023 QAP Draft.

Commenter 23 recommends that once applications have been submitted, TDHCA should compile and analyze Proximity to Jobs to determine if frequency of services ensure meaningful mobility. The analysis should also be made public for review.

Commenter 22 supports the addition of pairing public transportation with Proximity to Jobs.

STAFF RESPONSE: While staff acknowledges public transportation offerings vary throughout the state, the department

believes the access to jobs criteria has value and it will remain in the 2023 QAP.

In regards to comments suggesting the deletion of the accessible route requirement, the department acknowledges the difficulty in enforcing this element and the potential for extensive RFADs. A responsive revision has been made. Similarly, the department concurs that language regarding employment and services is unnecessary. A responsive revision has been made and the language is struck. Staff believes these revisions also address the recommendations of Commenter 16.

Staff may consider the suggestions of Commenter 23 regarding future analysis of this item. Staff may consider publishing the results if such analysis takes place.

The Department appreciates the input and support of Commenter 22, and thanks them for the insight regarding the importance of this item to people with disabilities.

§11.9(e)(2) Cost of Development per Square Foot

COMMENT SUMMARY: Commenters 2, 21, and 24 approves of the proposed cost per square foot scoring adjustments. Commenter 21 however, warns that smaller projects may be eligible for more tax credits. Commenter 21 recommends adding a tax credit per unit Tie Breaker.

STAFF RESPONSE: Staff believes it would be too late to include additional ideas before the upcoming 9% Cycle, but encourages raising this matter again during the planning phase for the 2024 QAP, especially in light of any data revealed by the 2023 round.

§11.9(e)(9) Readiness to Proceed

COMMENT SUMMARY: Commenters 2, 6, 9, 10, 18, 20, 21, 24, and 26 propose the suspension or deletion of this scoring item, suggesting it is in contrast with the challenges of developing in the current environment. Commenters 10, 11, and 18 highlight the number of Force Majeure requests as a clear indication that the development community is facing significant challenges. Commenter 6 highlights the impacts of the SB19 fallout in addition to economic conditions. Commenters 7, 11, and 18 suggest the permitting process in certain regions make this timeline nonviable.

If removal does not occur Commenter 6 suggests exempting At-Risk applicants from this scoring item, as for certain HUD and USDA developments the timeline is infeasible. Commenter 14 also requests USDA developments be exempt from this item. Commenter 11 highlights the challenges of qualifying while using the aforementioned resources and argues for a suspension of the item. Commenter 6 also suggests applications for which the majority GP is a nonprofit receive these points automatically given the financial constraints of nonprofit applicants. Commenter 2 suggests alternative language in the case which removal is not an option. This language includes a revision to the closing deadline.

Commenter 7 suggests giving tie-breaker priority to applicants who are able to meet the requirements rather than making the item punitive. Commenter 11 proposes an alternative scoring system which rewards developments when their developments place in service sooner. This is in line with equity providers, who provide upward adjusters when the Developer achieves a benchmark earlier. Commenter 18 suggests that RTP could be changed to reward points to developers depending on how quick the development gets constructed and placed in service.

STAFF RESPONSE: In response to Commenters 2, 6, 9, 10, 18, 20, 21, 24, and 26 regarding the suspension or deletion of Readiness to Proceed, Staff believes that current conditions necessitate the incentivizing of those developments that are able to move as quickly as possible. Staff understands the concerns from Commenters 6, 10, 11, and 18 on this scoring item given current market conditions, and would recommend to continue providing feedback for upcoming QAP roundtables.

In regards to Commenters 6, 7, 11, 14, and 18, Staff believes that the current scoring system will account for any regional differences and complications from different funding mechanisms. Staff recommends that stakeholders bring up this topic for upcoming QAP Roundtables.

In regards to Commenters 2, 7, 11, and 18 for additional tiebreakers and change in scoring procedures, Staff believes making these late additions could impact the upcoming 9% round, in particular, by putting new participants at a disadvantage in future funding rounds. Staff would recommend these Commenters bring up their tie breaker and change in scoring procedures suggestions for upcoming QAP roundtable discussions.

§11.9(f)(2) Construction Costs

COMMENT SUMMARY: Commenter 14 supports the changes to costs based on current economic conditions. They suggest staff continue to review data that supports this action and pledged to continue to provide input to support further increases.

STAFF RESPONSE: Staff appreciates the input and support of Commenter 14, and will continue to review data based on construction costs.

§11.101(a)(3) Neighborhood Risk Factors

COMMENT SUMMARY: Commenters 2 and 11 support the proposed elimination of blight as a Neighborhood Risk Factor. Commenter 2 supports the proposed exemption for rehabilitation developments regarding poverty and crime. Commenters 2 and 14 are opposed to the proposed change removing the schools exemption for developments encumbered by a TDHCA LURA. Commenter 21 recommends the Department limit this exemption to rehabilitations that have existing LURAs, in order to make sure that tax credits are being invested in areas below the crime requirements. Commenter 14 questions why poverty and crime are exempted for rehabilitation, but not schools. They suggest these tenants should have the opportunity to have their units improved despite their surroundings.

Commenter 23 recommends that TDHCA should still require rehabilitation applications to include violent crime and poverty disclosures, and exemptions should be limited to enforcement history, inspection scores, and complaints.

Commenter 16 recommends to revise this rule to allow developers to mitigate census tracts for a development site with a violent crime rate below 18 per 1000 persons, but are contiguous to census tracts which have violent crime rate above 18 per 1000 persons.

Commenters 2, 10, 11, 18, 20, and 24 proposed evaluation of school performance over two rating years as seem in previous QAPs. Proposed language requires mitigation for a school with "Not Rated: Senate Bill 1365" for 2022 and a TEA Accountability Rating of F for the most recent preceding year.

Commenters 2, 10, 11, and 18 propose the removal of language requiring developments that would have been found to be ineligible to provide Pre-K services to mitigate that ineligible status,

arguing that it should not be a mitigation too especially when it is not a solution in all cases. Commenter 2 suggests providing an onsite after school learning center should not be a baseline requirement for mitigation. Commenter 9 suggests the on-site educational service mitigation option should also be provided to elementary students as there is there is usually a higher concentration of elementary aged children living in properties than older children.

Commenters 18, 20 suggest updating the language reflected in 11.8(b) regarding the disclosure of neighborhood risk factors. 11.101(a)(3)(A) still contains language requiring a disclosure for NRFs.

STAFF RESPONSE: Staff appreciates the positive feedback from Commenters 2 and 11 regarding the removal of blight structures for Neighborhood Risk Factors. Staff recommends no changes based on these comments. Commenter 2 also expressed support for exemptions for rehabilitation developments for crime and poverty. Staff recommends no change based on this comment.

In regards to Commenters 2 and 14 on school exemptions for developments encumbered by TDHCA LURAs, Staff believes the newly added language will ensure allocations will be more consistent with agency's goals. Staff acknowledges the concerns regarding this change, and will open to discuss this item during the 2024 QAP Planning Process. In regards to Commenter 14's concerns on exemptions for School Ratings, Staff emphasizes that mitigation options are still available and tenants do have the opportunity to receive renovations, because mitigation options is available.

Staff acknowledges the concern from Commenter 21 regarding violent crime exemptions for rehabilitation developments; however, Staff believes that the proposed exemptions will assist the Department in meeting its goals, including the statutory direction to preserve affordable rental housing.

Staff appreciates the feedback from Commenter 23 regarding additional exemption determinations for rehabilitation applications; however, the current rules do not contemplate gathering and compiling all of the data for neighborhood risk factor determinations.

In regards to Commenter 16 on violent crime rates for contiguous census tracts, the proposed draft states mitigation options are available if a development site is adjacent to any census tract with a violent crime rate more than 18 per 1000. .

Staff acknowledges the return to similar language found in previous QAPs regarding School Ratings from Commenters 2, 10, 11, 18, 20, and 24; however, the proposed suggestions from these Commenters would require the use of outdated and potentially unrepresentative data.

Staff understands the concerns from Commenters 2, 10, 11, and 18 requiring the operation of Pre-K on Development Sites that contain low School Ratings; however, Staff believes the current proposed language will be an effective option for improving the School Ratings and providing additional tenant services. Staff would be open to further discussion on this item during the 2024 QAP Planning Process.

Staff acknowledges the feedback from Commenters 2 and 9 regarding on-site learning centers, and Staff will be open to adding language to include elementary school students for after school on-site learning centers. Staff understands Commenter 2's request to no longer be a baseline item for mitigation; however, Staff requires more information regarding this specific request.

Staff appreciates Commenters 18 and 20 regarding the language inconsistencies, and has addressed this issue for the updated QAP draft.

§11.101(b)(1)(A)(vii) Ineligible Developments, Efficiencies and One-Bedroom Units

COMMENT SUMMARY: Commenters 9, 18, and 24 suggests this item be removed in its entirety, as the percentage of one-bedrooms or efficiencies should be set by the market. Commenter 18 states a 30% limit of efficiency/one bedrooms is restrictive on every application, and the developer should make the decision of unit mix. Commenters 2, 10, and 11 suggest this language be deleted, or the minimum percentage be increased to 60%. Commenter 10 suggests this requirement will negatively impact a development's feasibility and is out of line with what works in the market.

STAFF RESPONSE: In response to Commenters 2, 9, 10, 11 18, and 24 regarding the removal of this threshold item, Staff does not recommend making responsive changes. Staff believes this section, as proposed, aligns with the Department's goals of serving low income families, as well as the federal requirement to serve tenant populations of individuals with children.

§11.101(b)(6)(B)(XI) Site and Development Requirement and Restrictions - Unit, Development, and Energy and Water Efficiency Features

COMMENT SUMMARY: Commenter 18 asks Staff to provide clarification language regarding solar panels.

Commenter 25 supports the addition of solar panels for developers to receive points, specifically the new section 11.101(b)(6)(B).

STAFF RESPONSE: Staff understands the need to provide additional clarification language regarding solar panels, and a responsive revision has been made for this item. Staff appreciates the positive feedback from Commenter 25.

§11.101(b)(5)(C)(v)(I) Common Amenities

COMMENT SUMMARY: Commenters 14 and 24 strongly recommend the return of Gazebos as a scoring item. They suggest this is an important amenity to the rural communities they serve.

Commenter 23 recommends that TDHCA conduct a well-prepared tenant survey to ask tenants about the current on-site amenities.

Commenter 25 recommends adding onsite bike sharing services as a Common Amenity.

STAFF RESPONSE: Regarding gazebos, staff notes that this deletion does not prevent the construction of gazebos, it only removes the point incentive for doing so. Accordingly, staff recommends no change. Staff appreciates the input of Commenter 23 regarding a tenant survey and will consider planning one for use in a future cycle. Regarding Commenter 25's request, currently in the attached QAP draft, onsite bike sharing services are included in the list of Common Amenities.

§11.101(b)(7)(C) Resident Supportive Services - Adult Supportive Services

COMMENT SUMMARY: Commenter 19 recommends to add one-on-one homebuyer counseling as a point option for this scoring item, this would be worth 3.5 points. Commenter 19

recommends that language within this section be amended to allow career training and placement partnerships to be provided by property management companies.

STAFF RESPONSE: Staff appreciates the recommendation from Commenter 19 regarding homebuyer counseling, and staff will be open to discussing this item during the 2024 QAP Planning Process.

§11.204(11)(A) Required Documentation for Application Submission - Zoning

COMMENT SUMMARY: Commenter 18 states the added language within the section does not provide clarity regarding county zoning authority, and provided suggested language revision within their public comment.

STAFF RESPONSE: As some municipalities do have regulatory power over essential services in the ETJ, staff is recommending no change.

§11.204(13) Organizational Charts

COMMENT SUMMARY: Commenters 6 and 9 propose new language requiring Non-Profits to only list board members with Control. Commenter 6 and 9 suggest listing the entire board of a Non-Profit is unnecessary and arduous as they are often extensive and coordination can be difficult. Commenter 9 highlighted problems in securing the subsequent paperwork and signatures.

STAFF RESPONSE: Staff acknowledges the suggested language from Commenters 6 and 9, and understands the workload Non-Profits face in complying with this requirement on Organizational Charts. However, any nonprofit Board member could have control when voting with other Board Members. Furthermore, typically the Board of Directors meets the definition of management entity under the definition of Principal under 2 CFR Part 180; thus, staff suggests no change.

§11.205(2) Market Analysis

COMMENT SUMMARY: Commenter 27 states that the current QAP implementation of market study procedures place greater emphasis on retrospective considerations, rather than forward-looking analyses. Commenter 27 states that the current QAP implemented rules push developments towards major urban areas where land is more expensive. Commenter 27 also requests additional clarification from the Department on the justification of the rural 120-unit threshold.

STAFF RESPONSE: Details surrounding existing renters, existing rental inventory and how they relate to capture rates calculations should be discussed with the market analyst. Staff believes they can explain what existing rental inventory is included in capture rates and what is not. In 2022, §11.302 (i)(1)(c) was changed to allow greater than 120 units in rural markets if you can meet the urban capture rate of 10% instead of the rural capture rate of 30%. This rule change was to address the issues mentioned by the commenter and allow for greater flexibility in rural areas that can support more units. The size limitation for 4% deals in rural areas started at 80 units to mirror the limitation under the 9% program and was increased several years ago to something staff still believed was supportable in rural areas. Staff believes any change to this for 2023 would be too substantive, and is something that could be addressed in a subsequent year after research and discussion with the market analyst community.

§11.302(5)(B) Long Term Pro Forma:

COMMENT SUMMMARY: Commenter 7 suggests allowing developers trend rents at the maximum of either 5 year average of the county income growth or 2%. Commenter 7 suggests this change should be made due to the current state of rising interest rates and construction costs. The change would allow lenders the flexibility to underwrite deals which the current rule

does not allow.

STAFF RESPONSE: While the last few years have experienced fast AMI growth in many counties, it will not necessarily keep trending that way. The long-term pro forma assumptions stress test the long-term financial feasibility of the project. In a time of uncertainty in interest rate, cost, construction timing, and operating expenses, loosening feasibility measures does not further the Department's goal of awarding credits to long-term financially feasible projects. Staff recommends no change.

§11.302(e)(1)(C) Eligible Basis on Acquisition of Build

COMMENT SUMMARY: Commenters 6 and 9 suggest the underwriter use the percentage, not the value, attributed to land in an appraisal. This change would be more in line with equity partners. Commenter 2 suggests revising the eligible basis calculation for buildings where the contract acquisition cost is less than the appraised value and introducing a pro-rating system.

STAFF RESPONSE: The appraisal values the land as if vacant and that is the cost that TDHCA will underwrite for the land, regardless of the value of the buildings on that land. The Department's responsibility is to award no more credits than necessary to any project and by underwriting the full land cost and not applying a percentage of cost paid furthers that goal. While the syndicators may use a percentage allocation, they do not have the responsibility of awarding no more credits than necessary.The Department encourages more rehabilitation work on the properties, rather than getting more basis for purchasing the buildings. Staff recommends no change.

§11.302(e)(7) Developer Fee

COMMENT SUMMARY: Commenter 17 suggests TDHCA allow developers to increase the developer fee by as much as five percent above the current posted amounts for bond financed projects with gaps due to inflation and increased costs. Commenter 17 references state of Arizona Department of Housing used for their 4% LIHTC program.

STAFF RESPONSE: Staff recommends no change. While the percentage of the developer fee is limited, the amount of developer fee for 4% HTC developments (not layerd with Direct Loans) can increase if other eligible costs increase. The 4% tax credits are only limited by actual basis spent at cost certification; this is not the case with 9% tax credits, where the tax credit allocation is limited to the amount awarded at application regardless if increased eligible costs have occurred.

§11.302(e)(12) Special Reserve Accounts

COMMENT SUMMARY: Commenters 11, 18, and 24 recommend returning the deposit amount up to $2,500 per unit for Special Reserve Accounts, to ensure developers are able to provide financial relief to tenants in the situation of another market downturn.

STAFF RESPONSE: Staff recommends no change. The Department's responsibility is to award no more credits than necessary to any project and limiting the amount of these reserves furthers that goal. Furthermore, Staff notes that few properties are cur-

rently using the Special Reserve Accounts to provide financial relief to tenants, and many of these accounts remain unused.

11.302(i)(4)(B) Long Term Feasibility

COMMENT SUMMARY: Commenter 21 requests that the Department allow supportive housing developments to be feasible if they have a positive cash flow during the affordability period, rather than the term of the Direct Loan.

STAFF RESPONSE: Positive cash flow throughout the term of the TDHCA Direct Loan is a Department requirement to show reasonable expectation of re-payment and long-term feasibility of the project. Applying this rule to all TDHCA Direct Loans furthers the Department's goal of streamlining loan documents and increasing the speed at which Direct Loans are awarded, processed and closed. Staff recommends no change based on this comment.

Subchapter F Supplemental Credits

COMMENT SUMMARY: Commenter 2, 5, 11, and 14 stated their support for the inclusion of supplemental credits in the 2023 QAP. Commenter 5 emphasized recent changes in the construction industry and the widespread impact of inflationary pressures. Commenter 2 suggests an expedited timeline culminating in February board approval. Commenters 9, 11, and 18 also highlighted the need for an expedited timeline and suggest adopting the same calendar that was utilized for the Supplemental Credits in the 2022 QAP. Commenter 18 also states developers not knowing until December 1st regarding the supplemental credit limit could be problematic, and recommend using the previous calendar for Supplemental Credits in the 2022 QAP.

Commenters 2, 11, 14, 18, and 24 emphasizes the need for certainty related to the availability of supplemental credits and recommends allocating these as an 'across the board' increase of 15% of the original credit allocation. Commenter 14 also voices their support for the maximum percentage. Commenter 4, 5, 8, 20, and 21 suggest supplemental credits should be available to any application who received force majeure treatment in 2022, regardless of the original year of the application. Commenter 4, 5 and 8 suggest allowing the Board latitude to act in support of 2022 deals should economic conditions render this necessary. Commenters 20, 21 request language to be added that would allow 2021 Applications that were awarded 2022 forward commitments to be eligible to apply for the next round of Supplemental Credits.

STAFF RESPONSE: Staff appreciates Commenters 2, 5, 11, and 14 support for the inclusion of supplemental credits for the 2023 QAP, and acknowledges the challenges that developers are encountering in the current environment.

In regards to Commenters 2, 9, 11, and 18 on the Program Calendar for Supplemental Credits, Staff understands the desire for being thoroughly informed on the next round of Supplemental Credits, but believes the suggested timelines may not be feasible. The Program Calendar cannot be finalized until final approval is received from the Office of the Governor.

Staff acknowledges Commenters 2, 11, 14, 18, and 24's request for certainty for supplemental credit amounts. Staff continues to monitor market conditions and will announce Supplemental Credit amounts in accordance with the QAP.

In regards to Commenters 4, 5, 8, 20, and 21, staff believes that limits need to be in place to ensure enough credits are allocated to new applications in 2023. Staff believes that limiting supplemental credits to 2021 deals is necessary.

SUBCHAPTER A. PRE-APPLICATION, DEFINITIONS, THRESHOLD REQUIREMENTS AND COMPETITIVE SCORING

10 TAC §§11.1 - 11.10

STATUTORY AUTHORITY. The new sections are adopted pursuant to Texas Government Code, §2306.053, which authorizes the Department to adopt rules.

Except as described herein, the adopted new sections affect no other code, article, or statute.

§11.1. General.

(a) Authority. This chapter applies to the awarding and allocation by the Texas Department of Housing and Community Affairs (the Department) of Competitive Housing Tax Credits and the issuance of Determination Notices for non-Competitive Housing Tax Credits. The federal laws providing for the awarding and allocation of Competitive Housing Tax Credits and issuance of Determination Notices for non-Competitive Housing Tax Credits require states to adopt a qualified allocation plan. Pursuant to Tex. Gov't Code, Chapter 2306, Subchapter DD, the Department is assigned responsibility for this activity. As required by Internal Revenue Code (the Code), §42(m)(1), the Department has developed this Qualified Allocation Plan (QAP) and it has been duly approved to establish the procedures and requirements relating to an award and allocation of Competitive Housing Tax Credits and issuance of Determination Notices for non-Competitive Housing Tax Credits. All requirements herein and all those applicable to a Housing Tax Credit Development or an Application under Chapter 10 of this title (relating to Post Award and Asset Management Requirements, Compliance Monitoring, and Incomes and Rents rules) collectively constitute the QAP required by Tex. Gov't Code §2306.67022 and §42(m)(1)(B) of the Code. Unless otherwise specified, certain provisions in this section and §§11.2 - §11.4 of this title also apply to non-Competitive Housing Tax Credits and Multifamily Direct Loans. Subchapters B - E of this chapter also apply to non-Competitive Housing Tax Credits and Multifamily Direct Loans. Applicants are required to certify, among other things, that they have familiarized themselves with the rules that govern that specific program including, but not limited to, Chapter 1 of this title (relating to Administration), Chapter 2 of this title (relating to Enforcement), Chapter 10 of this title (relating to Uniform Multifamily Rules), Chapter 12 of this title (relating to Multifamily Housing Revenue Bond Rules), Chapter 13 of this title (relating to Multifamily Direct Loan Rule), and other Department rules. This subchapter does not apply to operating assistance programs or funds unless incorporated by reference in whole or in part in a Notice of Funding Availability (NOFA) or rules for such a program, except to the extent that Developments receiving such assistance and otherwise subject to this chapter remain subject to this chapter.

(b) Due Diligence and Applicant Responsibility.

(1) Department staff may, from time to time, make available for use by Applicants information and informal guidance in the form of reports and responses to specific questions. The Department encourages communication with staff in order to clarify any issues that may not be fully addressed in the QAP, or may be unclear when applied to specific facts. However, while these resources are offered to help Applicants prepare and submit accurate information, Applicants should also appreciate that this type of guidance is limited by its nature, and that staff will apply the rules of the QAP to each specific situation as it is presented in the submitted Application. The Multifamily Programs Procedures Manual is not a rule and is provided as good faith

guidance and assistance, but in all respects the statutes and rules governing the Low Income Housing Tax Credit program supersede these guidelines and are controlling. Moreover, after the time that an issue is initially presented and guidance is provided, additional information may be identified and the issue itself may continue to develop based upon additional research and guidance. Thus, until confirmed through final action of the Board, staff guidance must be considered merely as an aid and an Applicant continues to assume full responsibility for any actions Applicant takes regarding an Application. In addition, although the Department may compile data from outside sources in order to assist Applicants in the Application process, it remains the sole responsibility of the Applicant to perform independently the necessary due diligence to research, confirm, and verify any data, opinions, interpretations, or other information upon which an Applicant bases an Application or includes in any submittal in connection with an Application.

(2) Developments with Existing LURAs. Applicants proposing to submit an Application requesting an award of Housing Tax Credits or a Direct Loan for a Development that already has a LURA in place should review the existing LURA(s) on the property to ensure there are no conflicts with the proposed Application. Where an Applicant has identified a potential conflict, it is incumbent upon the Applicant to consult with staff regarding the steps that may be necessary to resolve the conflicts. This may include, but is not limited to, an Application amendment or LURA amendment, a waiver, or other action that may necessitate additional staff time for review or a Board determination. Depending on the timing constraints associated with the proposed Application, Applicants should be mindful that resolving issues relating to the existing LURA and for Direct Loans the existing Contract may not coincide with the timing needed for a new award if such requests are not submitted early in the process. A copy of the existing LURA must be included in the Application.

(c) Competitive Nature of Program. Applying for Competitive Housing Tax Credits is a technical process that must be followed completely and correctly. Any person who desires to request any reasonable accommodation for any aspect of this process is directed to §1.1 of this title (relating to Reasonable Accommodation Requests to the Department). As a result of the highly competitive nature of applying for Competitive Housing Tax Credits, an Applicant should proceed on the assumption that deadlines are fixed and firm as further provided for in subsection (f) of this section.

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

(1) Adaptive Reuse--The change-in-use of an existing building not, at the time of Application, being used, in whole or in part, for residential purposes, into a building which will be used, in whole or in part, for residential purposes. Adaptive Reuse requires that at least 75% of the original building remains at completion of the proposed Development. Ancillary non-residential buildings, such as a clubhouse, leasing office, or amenity center may be newly constructed outside the walls of the existing building or as detached buildings on the Development Site. Adaptive Reuse Developments will be considered as New Construction.

(2) Administrative Deficiency--Information requested by Department staff to clarify, explain, confirm, or restrict the Development proposal to a logical and definitive plan or to provide missing information in the original Application or pre-application; or to assist staff in evaluating the Application or pre-application that, in the Department staff's reasonable judgment, may be cured by supplemental information or explanation which will not necessitate a substantial reassessment or re-evaluation of the Application or pre-application. Administrative Deficiencies may be issued at any time while the Application or pre-application is under consideration by the Department, including at any time after award or allocation and throughout the Affordability Period. A matter may begin as an Administrative Deficiency but later be determined to have constituted a Material Deficiency Applicants must intend that the pre-Application or Application is the final version to be reviewed by staff, and should not rely on the Administrative Deficiency process when applying for funding.

(A) The following issues will be treated by Department staff as Administrative Deficiencies that are curable through the Deficiency process only if the issues, when taken as a whole, do not constitute a Material Deficiency as defined in §11.1(d)(79) of this chapter:

(i) For Applications that are substantially complete, a minor quantity of missing signatures, documents, or similar clerical matters, the curing of which will not create change within the Application, unless the missing documentation is required to have existed as of the appropriate deadline and did not, or is otherwise not susceptible to resolution. For Competitive HTC or Direct Loan Applications, this may include documents submitted to substantiate points claimed in the Application only if:

(I) The documents can be readily identified to have existed prior to the Full Application Delivery Date (Competitive HTC) or the Application Acceptance Date (Direct Loan), and the submission of the documents does not necessitate additional changes in the Application to qualify for the points; or

(II) For scoring items that are predicated solely on third-party data, characteristics inherent to the proposed Development Site, or are otherwise not influenced by the actions of the Applicant, the Application's eligibility for these points can be clearly established to have existed prior to the Full Application Delivery Date (Competitive HTC) or the Application Acceptance Date (Direct Loan), and the submission of the documents does not necessitate additional changes in the Application to qualify for the points.

(ii) Inconsistencies that exist between facts presented in the Application and/or its supporting documentation. A discrepancy between the requested points and the points supported by the Application will not be treated as an inconsistency if the facts presented within the Application are otherwise consistent.

(iii) At the Department's sole discretion, additional information that is necessary to assist in the review of the Application.

(B) The following issues will not be treated by Department staff as Administrative Deficiencies that are curable through the Deficiency process:

(i) Any matter that will materially change the Application, except for matters that must be addressed in accordance with 10 TAC §11.1(d)(2), in which case staff will direct the Applicant to resolve the inconsistency in the manner that creates the least change within the Application. Under no circumstance can the resolution of an Administrative Deficiency increase the Application's score from what was initially requested.

(ii) Changes to the Application that are submitted only to qualify for points claimed in the Application.

(C) In all cases, final determinations regarding the sufficiency of documentation submitted to cure a Deficiency as well as the

distinction between material and non-material missing information are reserved for the Department Staff and Board.

(3) Affiliate--An individual, corporation, partnership, joint venture, limited liability company, trust, estate, association, cooperative, or other organization or entity of any nature whatsoever that directly, or indirectly through one or more intermediaries, has Control of, is Controlled by, or is under common Control with any other Person. All entities that share a Principal are Affiliates.

(4) Affordability Period--The Affordability Period commences as specified in the Land Use Restriction Agreement (LURA) or federal regulation, or commences on the first day of the Compliance Period as defined by the Code §42(i)(1), and continues through the appropriate program's affordability requirements or termination of the LURA, whichever is earlier. The term of the Affordability Period shall be imposed by the LURA or other deed restriction, and in some circumstances may be terminated upon foreclosure or deed in lieu of foreclosure. The Department reserves the right to extend the Affordability Period for Developments that fail to meet program requirements. During the Affordability Period, the Department shall monitor to ensure compliance with programmatic rules, as applicable, regulations, and Application representations.

(5) Applicable Percentage--The percentage used to determine the amount of the Housing Tax Credit for any Development, as defined more fully in Code, §42(b).

(A) For purposes of the Application, the Applicable Percentage will be:

(i) nine percent for 70% present value credits; or

(ii) four percent for 30% present value credits.

(B) For purposes of making a credit recommendation at any other time, the Applicable Percentage will be based on:

(i) the percentage indicated in the Agreement and Election Statement, if executed; or

(ii) the percentage as calculated in subparagraph (A) of this paragraph if the Agreement and Election Statement has not been executed and no buildings have been placed in service.

(6) Applicant--Any Person or a group of Persons and any Affiliates of those Persons who file an Application with the Department requesting funding or a tax credit allocation subject to the requirements of this chapter or Chapters 12 or 13 of this title and who have undertaken or may contemplate the later formation of one or more business entities, such as a limited partnership, that is to be engaged in the ownership of a Development.

(7) Application Acceptance Period--That period of time during which Applications may be submitted to the Department. For Tax-Exempt Bond Developments it is the date the Application is submitted to the Department.

(8) Award Letter --A document that may be issued to an awardee of a Direct Loan before the issuance of a Contract which preliminarily sets forth the terms and conditions under which the Direct Loan will be made available. An Award Letter will typically be contingent on the awardee satisfying certain requirements prior to executing a Contract.

(9) Bank Trustee--A federally insured bank with the ability to exercise trust powers in the State of Texas.

(10) Bedroom--A portion of a Unit which is no less than 100 square feet; has no width or length less than eight feet; is self-contained with a door (or the Unit contains a second level sleeping area of 100 square feet or more); has at least one window that provides exterior access; and has at least one closet that is not less than two feet deep and three feet wide and high enough to accommodate five feet of hanging space. A den, study, or other similar space that could reasonably function as a Bedroom and meets this definition is considered a Bedroom. Rehabilitation (excluding Reconstruction) Developments in which Unit configurations are not being altered will be exempt from the bedroom and closet width, length, and square footage requirements. Supportive Housing Developments will be exempt from the bedroom and closet width, length, and square footage requirements.

(11) Breakeven Occupancy--The occupancy level at which rental income plus secondary income is equal to all operating expenses, including replacement reserves and taxes, and mandatory debt service requirements for a Development.

(12) Building Costs--Cost of the materials and labor for the vertical construction or rehabilitation of buildings and amenity structures.

(13) Carryover Allocation--An allocation of current year tax credit authority by the Department pursuant to the provisions of the Code, §42(h)(1)(C) and U.S. Treasury Regulations, §1.42-6.

(14) Carryover Allocation Agreement--A document issued by the Department, and executed by the Development Owner, pursuant to §11.907 of this title (relating to Carryover Agreement General Requirements and Required Documentation).

(15) Cash Flow--The funds available from operations after all expenses and debt service required to be paid have been considered.

(16) Certificate of Reservation or Traditional Carryforward Designation--The notice given by the Texas Bond Review Board (TBRB) to an issuer reserving a specific amount of the private activity bond state ceiling for a specific Development.

(17) Code--The Internal Revenue Code of 1986, as amended from time to time, together with any applicable regulations, rules, rulings, revenue procedures, information statements, or other official pronouncements issued thereunder by the U.S. Department of the Treasury or the Internal Revenue Service (IRS).

(18) Code of Federal Regulations (CFR)--The codification of the general and permanent rules and regulations of the federal government as adopted and published in the *Federal Register.*

(19) Commitment Notice (also referred to as Commitment)--An agreement issued pursuant to §11.905(a) of this title (relating to General Information for Commitments or Determination Notices), setting forth the terms and conditions under which Competitive Housing Tax Credits from the Department will be made available. A Commitment or Commitment Notice does not mean commitment of federal funds under the Direct Loan Program.

(20) Commitment of Funds--Occurs after the Development is approved by the Board and once a Contract is executed between the Department and Development Owner. The Department's Commitment of Funds may not align with commitments made by other financing parties.

(21) Committee--See Executive Award and Review Advisory Committee.

(22) Common Area--Enclosed space outside of Net Rentable Area, whether conditioned or unconditioned, to include such area contained in: property management offices, resident service offices, 24-hour front desk office, clubrooms, lounges, community kitchens, community restrooms, exercise rooms, laundry rooms, mailbox areas, food pantry, meeting rooms, libraries, computer labs,

classrooms, break rooms, flex space programmed for resident use, interior corridors, common porches and patios, and interior courtyards. Common Area does not include individualized garages, maintenance areas, equipment rooms, or storage.

(23) Comparable Unit--A Unit, when compared to the subject Unit, is similar in net rentable square footage, number of Bedrooms, number of bathrooms, overall condition, location (with respect to the subject Property based on proximity to employment centers, amenities, services, and travel patterns), age, Unit amenities, utility structure, and common amenities.

(24) Competitive Housing Tax Credits --Sometimes referred to as Competitive HTC. Tax credits available from the State 9% Housing Credit Ceiling.

(25) Compliance Period--With respect to a building financed, in part with proceeds of Housing Tax Credits, the period of 15 taxable years, beginning with the first taxable year of the credit period, pursuant to Code, §42(i)(1).

(26) Continuously Occupied--The same household has resided in the Unit for at least 12 months.

(27) Contract--A legally binding agreement between the Development Owner and the Department, setting forth the terms and conditions under which Multifamily Direct Loan Program funds will be made available.

(28) Contract Rent--Net rent based upon current and executed rental assistance contract(s), typically with a federal, state, or local governmental agency.

(29) Contractor--See General Contractor.

(30) Control (including the terms "Controlling," "Controlled by," and "under common Control with")--The power, ability, or authority, acting alone or in concert with others, directly or indirectly, to manage, direct, superintend, restrict, regulate, govern, administer, or oversee. As used herein "acting in concert" involves more than merely serving as a single member of a multi-member body. A member of a multi-member body is not acting in concert and therefore does not exercise control in that role, but may have other roles, such as executive officer positions, which involve actual or apparent authority to exercise control. Controlling entities of a partnership include the general partners, may include special limited partners when applicable, but not investor limited partners or special limited partners who do not possess other factors or attributes that give them Control. Persons with Control of a Development must be identified in the Application. Controlling individuals and entities are set forth in subparagraphs (A) - (E) of this paragraph. Multiple Persons may be deemed to have Control simultaneously.

(A) For for-profit corporations, any officer authorized by the board of directors, regardless of title, to act on behalf of the corporation, including, but not limited to, the president, vice president, secretary, treasurer, and all other executive officers, and each stock holder having a 50% or more interest in the corporation, and any individual who has Control with respect to such stockholder.

(B) For nonprofit corporations or governmental instrumentalities (such as housing authorities), any officer authorized by the board, regardless of title, to act on behalf of the corporation, including, but not limited to, the president, vice president, secretary, treasurer, and all other executive officers, the Audit committee chair, the Board chair, and anyone identified as the executive director or equivalent.

(C) For trusts, all beneficiaries that have the legal ability to Control the trust who are not just financial beneficiaries.

(D) For limited liability companies, all managers, managing members, members having a 50% or more interest in the limited liability company, any individual Controlling such members, or any officer authorized to act on behalf of the limited liability company.

(E) For partnerships, Principals include all General Partners, and Principals with ownership interest and special limited partners with ownership interest who also possess factors or attributes that give them Control.

(31) Debt Coverage Ratio (DCR)--Sometimes referred to as the "Debt Coverage" or "Debt Service Coverage." Calculated as Net Operating Income for any period divided by scheduled debt service required to be paid during the same period, and as described in §11.302(d)(4) of this chapter (relating to Operating Feasibility).

(32) Deferred Developer Fee--The portion of the Developer Fee used as a source of funds to finance the development and construction of the Property, and as described in §11.302(i)(2) of this chapter (relating to Feasibility Conclusion).

(33) Deobligated Funds--The funds released by the Development Owner or recovered by the Department canceling a Contract or award involving some or all of a contractual financial obligation between the Department and a Development Owner or Applicant.

(34) Determination Notice--A notice issued by the Department to the Development Owner of a Tax- Exempt Bond Development which specifies the Department's preliminary determination as to the amount of tax credits that the Development may be eligible to claim pursuant to the Code, §42(m)(1)(D).

(35) Developer--Any Person entering into a contractual relationship with the Owner to provide Developer Services with respect to the Development and receiving the right to earn a fee for such services and any other Person receiving any portion of a Developer Fee, whether by subcontract or otherwise, except if the Person is acting as a consultant with no Control. The Developer may or may not be a Related Party or Principal of the Owner.

(36) Developer Fee--Compensation in amounts defined in §11.302(e)(7) of this chapter (relating to Total Housing Development Costs) paid by the Owner to the Developer for Developer Services inclusive of compensation to a Development Consultant(s), Development Team member, or any subcontractor that performs Developer Services or provides guaranties on behalf of the Owner will be characterized as Developer Fee. A person who is entitled to a Developer Fee assumes the risk that it may not be paid if the anticipated sources of repayment prove insufficient.

(37) Developer Services--A scope of work relating to the duties, activities, and responsibilities for pre-development, development, design coordination, and construction oversight of the Property generally including, but not limited to:

(A) Site selection and purchase or lease contract negotiation;

(B) Identifying and negotiating sources of construction and permanent financing, including financing provided by the Department;

(C) Coordination and administration of activities, including the filing of applications to secure such financing;

(D) Coordination and administration of governmental permits, and approvals required for construction and operation;

(E) Selection and coordination of development consultants including architect(s), engineer(s), third- party report providers, attorneys, and other design or feasibility consultants;

(F) Selection and coordination of the General Contractor and construction contract(s);

(G) Construction oversight;

(H) Other consultative services to and for the Owner;

(I) Guaranties, financial, or credit support if a Related Party or Affiliate; and

(J) Any other customary and similar activities determined by the Department to be Developer Services.

(38) Development--A residential rental housing project that consists of one or more buildings under common ownership and financed under a common plan which has applied for Department funds. This includes a proposed qualified low income housing project, as defined by Code, §42(g), that consists of one or more buildings containing multiple Units that is financed under a common plan, and that is owned by the same Person for federal tax purposes, and may consist of multiple buildings that are located on scattered sites and contain only rent restricted Units. (§2306.6702(a)(6)).

(A) Development will be considered to be a scattered site if the property where buildings or amenities are located do not share a common boundary and there is no accessible pedestrian route that the Development Owner controls (transportation in a motor vehicle will not meet the requirement for an accessible route).

(B) A Development for which several parcels comprise the Development Site and are separated only by a private road controlled by the Development Owner, or a public road or similar barrier where the Development Owner has a written agreement with the public entity for at least the term of the LURA stating that the accessible pedestrian route will remain, is considered contiguous. The written agreement with the public entity must be in place by the earlier of the 10% Test for Competitive HTC, the Determination Notice date for a Tax-Exempt Bond Development issued by the Department, Cost Certification for Tax-Exempt Bond Developments where the Determination Notice is issued administratively, or the execution of the Multifamily Direct Loan Contract, as applicable.

(39) Development Consultant or Consultant--Any Person who provides professional or consulting services relating to the filing of an Application, or post award documents, as required by the program.

(40) Development Owner (also referred to as "Owner")--Any Person, General Partner, or Affiliate of a Person who owns or proposes a Development or expects to acquire Control of a Development under a purchase contract or ground lease approved by the Department and is responsible for performing under the allocation or Commitment with the Department. (§2306.6702(a)(7)).

(41) Development Site--The area or, if more than one tract (which may be deemed by the Internal Revenue Service or the Department to be a scattered site), areas on which the Development is proposed and to be encumbered by a LURA, including access to that area or areas through ingress and egress easements.

(42) Development Team--All Persons and Affiliates thereof that play a role in the development, construction, rehabilitation, management, or continuing operation of the Development, including any Development Consultant and Guarantor.

(43) Direct Loan--Funds provided through the HOME Program, Neighborhood Stabilization Program (NSP), National Housing Trust Fund (NHTF), HOME American Rescue Plan (HOME-ARP), Tax Credit Assistance Program Repayment Funds (TCAP RF), Texas Housing Trust Fund (THTF), or other programs available through the Department for multifamily development. The terms and conditions for Direct Loans will be determined by provisions in Chapter 13 of this title (relating to Multifamily Direct Loan Rule), the NOFA under which they are awarded, the Contract, and the loan documents. The tax-exempt bond program is specifically excluded.

(44) Economically Distressed Area--An area that is in a census tract that has a median household income that is 75% or less of the statewide median household income and in a municipality or, if not within a municipality, in a county that has been awarded funds under the Economically Distressed Areas Program administered by the Texas Water Development Board. Notwithstanding all other requirements, for funds awarded to another type of political subdivision (e.g., a water district), the Development Site must be within the jurisdiction of the political subdivision.

(45) Effective Gross Income (EGI)--As provided for in §11.302(d)(1)(D) of this chapter (relating to Operating Feasibility). The sum total of all sources of anticipated or actual income for a rental Development, less vacancy and collection loss, leasing concessions, and rental income from employee-occupied units that is not anticipated to be charged or collected.

(46) Efficiency Unit--A Unit without a separately enclosed Bedroom.

(47) Elderly Development--A Development that either meets the requirements of the Housing for Older Persons Act (HOPA) under the Fair Housing Act, or a Development that receives federal funding that has a requirement for a preference or limitation for elderly persons or households, but must accept qualified households with children.

(48) Eligible Hard Costs--Hard Costs includable in Eligible Basis for the purposes of determining a Housing Credit Allocation.

(49) Environmental Site Assessment (ESA)--An environmental report that conforms to the Standard Practice for Environmental Site Assessments: Phase I Assessment Process (ASTM Standard Designation: E 1527) and conducted in accordance with §11.305 of this chapter (relating to Environmental Site Assessment Rules and Guidelines) as it relates to a specific Development.

(50) Executive Award and Review Advisory Committee (EARAC also referred to as the Committee). The Department committee required by Tex. Gov't Code §2306.1112.

(51) Existing Residential Development--Any Development Site which contains any type of existing residential dwelling at any time as of the beginning of the Application Acceptance Period.

(52) Extended Use Period--With respect to an HTC building, the period beginning on the first day of the Compliance Period and ending the later of:

(A) The date specified in the LURA; or

(B) The date which is 15 years after the close of the Compliance Period.

(53) First Lien Lender--A lender whose lien has first priority as a matter of law or by operation of a subordination agreement or other intercreditor agreement.

(54) Forward Commitment--the issuance of a Commitment of Housing Tax Credits from the State Housing Credit Ceiling for the calendar year following the year of issuance, made subject to the availability of State Housing Credit Ceiling in the calendar year for which the Commitment has been made.

(55) General Contractor (including "Contractor")--One who contracts to perform the construction or rehabilitation of an entire

Development, rather than a portion of the work. The General Contractor hires subcontractors, such as plumbing contractors, electrical contractors, etc., coordinates all work, and is responsible for payment to the subcontractors. A prime subcontractor will also be treated as a General Contractor, and any fees payable to the prime subcontractor will be treated as fees to the General Contractor, in the scenarios described in subparagraphs (A) or (B) of this paragraph:

(A) Any subcontractor, material supplier, or equipment leasor receiving more than 50% of the contract sum in the construction contract will be deemed a prime subcontractor; or

(B) If more than 75% of the contract sum in the construction contract is subcontracted to three or fewer subcontractors, material suppliers, and equipment leasors, such parties will be deemed prime subcontractors.

(56) General Partner--Any person or entity identified as a general partner in a certificate of formation for the partnership or is later admitted to an existing partnership as a general partner that is the Development Owner and that Controls the partnership. Where a limited liability corporation is the legal structure employed rather than a limited partnership, the manager or managing member of that limited liability corporation is deemed, for the purposes of these rules, to be the functional equivalent of a general partner.

(57) Governing Body--The elected or appointed body of public or tribal officials responsible for the enactment, implementation, and enforcement of local rules and the implementation and enforcement of applicable laws for its respective jurisdiction.

(58) Governmental Entity--Includes federal, state or local agencies, departments, boards, bureaus, commissions, authorities, and political subdivisions, special districts, tribal governments, and other similar entities.

(59) Gross Capture Rate--Calculated as the Relevant Supply divided by the Gross Demand, and as described in §11.302(i)(1) of this chapter (relating to Feasibility Conclusion).

(60) Gross Demand--The sum of Potential Demand from the Primary Market Area (PMA) and demand from other sources, as described in §11.303(d)(9)(E)(ii) of this chapter (relating to Market Analysis Rules and Guidelines).

(61) Gross Program Rent--Maximum rent limits based upon the tables promulgated by the Department's division responsible for compliance, which are developed by program and by county or Metropolitan Statistical Area (MSA) or Primary Metropolitan Statistical Area (PMSA) or national non-metro area.

(62) Guarantor--Any Person that provides, or is anticipated to provide, a guaranty for all or a portion of the equity or debt financing for the Development.

(63) Hard Costs--The sum total of Building Costs, Site Work costs, Off-Site Construction costs, and contingency.

(64) Historically Underutilized Businesses (HUB)--An entity that is certified as such under and in accordance with Tex. Gov't Code, Chapter 2161.

(65) Housing Contract System (HCS)--The electronic information system established by the Department for tracking, funding, and reporting Department Contracts and Developments. The HCS is primarily used for Direct Loan Programs administered by the Department.

(66) Housing Credit Allocation--An allocation of Housing Tax Credits by the Department to a Development Owner as provided for in Code.

(67) Housing Credit Allocation Amount--With respect to a Development or a building within a Development, the amount of Housing Tax Credits the Department and the Board, if applicable, determines to be necessary for the financial feasibility of the Development and its viability as a Development throughout the Affordability Period.

(68) HTC Development (also referred to as HTC Property)--A Development subject to an active LURA for Housing Tax Credits allocated by the Department.

(69) HTC Property--See HTC Development.

(70) Initial Affordability Period--The Compliance Period or such longer period as shall have been elected by the Owner as the minimum period for which Units in the Development shall be retained for low-income tenants and rent restricted, as set forth in the LURA.

(71) Integrated Disbursement and Information System (IDIS)--The electronic grants management information system established by HUD to be used for tracking and reporting HOME and NHTF funding and progress, and which may be used for other sources of funds as established by HUD.

(72) Land Use Restriction Agreement (LURA)--An agreement, regardless of its title, between the Department and the Development Owner which is a binding covenant upon the Development Owner and successors in interest, that, when recorded, encumbers the Development with respect to the requirements of the programs for which it receives funds. (§2306.6702)

(73) Low-Income Unit (also referred to as a Rent Restricted Unit)--A Unit that is intended to be restricted for occupancy by an income eligible household, as defined by the Department utilizing its published income limits.

(74) Managing General Partner--A general partner of a partnership (or, as provided for in the definition of General Partner in this subsection, its functional equivalent) that is vested with the authority to take actions that are binding on behalf of the partnership and the other partners. The term Managing General Partner can also refer to a manager or managing member of a limited liability company where so designated to bind the limited liability company and its members under its Agreement or any other person that has such powers in fact, regardless of their organizational title.

(75) Market Analysis--Sometimes referred to as "Market Study." An evaluation of the economic conditions of supply, demand, and rental rates conducted in accordance with §11.303 of this chapter (relating to Market Analysis Rules and Guidelines) as it relates to a specific Development.

(76) Market Analyst--A real estate appraiser or other professional satisfying the qualifications in §11.303(c) of this chapter, and familiar with the subject property's market area who prepares a Market Analysis.

(77) Market Rent--The achievable rent at the subject Property for a Unit without rent and income restrictions determined by the Market Analyst or Underwriter after adjustments are made to actual rents on Comparable Units to account for differences in net rentable square footage, functionality, overall condition, location (with respect to the subject Property based on proximity to primary employment centers, amenities, services, and travel patterns), age, Unit amenities, utility structure, and Common Area amenities. The achievable rent conclusion must also consider the proportion of market Units to total Units proposed in the subject Property.

(78) Market Study--See Market Analysis.

(79) Material Deficiency--Any deficiency in a pre-application or an Application or other documentation that exceeds the scope of an Administrative Deficiency. Inability to provide documentation that existed prior to submission of an Application to substantiate claimed points or meet threshold requirements may be considered material and may result in denial of the requested points or a termination in the case of threshold items. It is possible that multiple deficiencies that could individually be characterized as Administrative Deficiencies, when taken as a whole, would create a need for substantial re-review of the Application and as such would be characterized as constituting a Material Deficiency.

(80) Multifamily Programs Procedures Manual--The manual produced and amended from time to time by the Department which reiterates and implements the rules and provides guidance for the filing of multifamily related documents. The Manual is not a rule and is provided only as good faith guidance and assistance.

(81) Net Operating Income (NOI)--The income remaining after all operating expenses, including replacement reserves and taxes have been paid, as provided for in §11.302(d)(3) of this chapter (relating to Operating Feasibility).

(82) Net Program Rent--Calculated as Gross Program Rent less Utility Allowance.

(83) Net Rentable Area (NRA)--The Unit space that is available exclusively to the tenant and is heated and cooled by a mechanical HVAC system. NRA is measured to the outside of the studs of a Unit or to the middle of walls in common with other Units. If the construction does not use studs, NRA is measured to the outside of the material to which the drywall is affixed. Remote Storage of no more than 25 square feet per Unit may be included in NRA. For Developments using Multifamily Direct Loan funds the Remote Storage may only be included in NRA if the storage area shares a wall with the residential living space. NRA does not include common hallways, stairwells, elevator shafts, janitor closets, electrical closets, balconies, porches, patios, or other areas not actually available to the tenants for their furnishings, nor does NRA include the enclosing walls of such areas.

(84) Non-HTC Development--Sometimes referred to as Non-HTC Property. Any Development not utilizing Housing Tax Credits or Exchange funds.

(85) Notice of Funding Availability (NOFA)--A notice issued by the Department that announces funding availability, usually on a competitive basis, for multifamily rental programs requiring Application submission from potential Applicants.

(86) Office of Rural Affairs--An office established within the Texas Department of Agriculture; formerly the Texas Department of Rural Affairs.

(87) Off-Site Construction--Improvements up to the Development Site such as the cost of roads, water, sewer, and other utilities to provide access to and service the Site.

(88) One Year Period (1YP)--The period commencing on the date on which the Department and the Owner agree to the Qualified Contract price in writing and continuing for 12 calendar months.

(89) Owner--See Development Owner.

(90) Person--Without limitation, any natural person, corporation, partnership, limited partnership, joint venture, limited liability company, trust, estate, association, cooperative, government, political subdivision, agency or instrumentality, or other organization or entity of any nature whatsoever, and shall include any group of Persons acting in concert toward a common goal, including the individual members of the group.

(91) Person or Persons with Disabilities--With respect to an individual, means that such person has:

(A) A physical or mental impairment that substantially limits one or more major life activities of such individual;

(B) A record of such an impairment; or

(C) Is regarded as having such an impairment, to include persons with severe mental illness and persons with substance abuse disorders.

(92) Physical Needs Assessment--See Scope and Cost Review.

(93) Place--An area defined as such by the United States Census Bureau which, in general, includes an incorporated city, town, or village, as well as unincorporated areas known as Census Designated Places. Any part of a Census Designated Place that, at the time of Application, is within the boundaries of an incorporated city, town, or village will be considered as part of the incorporated area. The Department may provide a list of Places for reference.

(94) Post Award Activities Manual--The manual produced and amended from time to time by the Department which explains the post award requirements and provides guidance for the filing of such documentation.

(95) Potential Demand--The number of income-eligible, age-, size-, and tenure-appropriate target households in the designated market area at the proposed placement in service date.

(96) Preservation--Activities that extend the Affordability Period for rent-restricted Developments that are at risk of losing low-income use restrictions or subsidies.

(97) Primary Market--Sometimes referred to as "Primary Market Area." The area defined by the Market Analyst as described in §11.303 of this chapter (relating to Market Analysis Rules and Guidelines) from which a proposed or existing Development is most likely to draw the majority of its prospective tenants or homebuyers.

(98) Primary Market Area (PMA)--See Primary Market.

(99) Principal--Persons that will be capable of exercising Control pursuant to §11.1(d) of this chapter (relating to the definition of Control) over a partnership, corporation, limited liability company, trust, or any other private entity.

(100) Pro Forma Rent--For a restricted Unit, the lesser of the Net Program Rent or the Market Rent. For an unrestricted Unit, the Market Rent. Contract Rents, if applicable, will be used as the Pro Forma Rent.

(101) Property--The real estate and all improvements thereon which are the subject of the Application (including all items of personal property affixed or related thereto), whether currently existing or proposed to be built or rehabilitated thereon in connection with the Application.

(102) Qualified Census Tract (QCT)--those tracts designated as such by the U.S. Department of Housing and Urban Development.

(103) Qualified Contract (QC)--A bona fide contract to acquire the non-low-income portion of the building for fair market value and the low-income portion of the building for an amount not less than the Applicable Fraction (specified in the LURA) of the calculation as defined within §42(h)(6)(F) of the Code.

(104) Qualified Contract Price (QC Price)--Calculated purchase price of the Development as defined within Code, §42(h)(6)(F) and as further delineated in §10.408 of this title (relating to Qualified Contract Requirements).

(105) Qualified Contract Request (Request)--A request containing all information and items required by the Department relating to a Qualified Contract.

(106) Qualified Entity--Any entity permitted under Code, §42(i)(7)(A) and any entity controlled by such a qualified entity.

(107) Qualified Nonprofit Development--A Development which meets the requirements of Code, §42(h)(5), includes the required involvement of a Qualified Nonprofit Organization, and is seeking Competitive Housing Tax Credits.

(108) Qualified Nonprofit Organization--An organization that meets the requirements of Code §42(h)(5)(C) for all purposes, and for an allocation in the nonprofit set-aside or subsequent transfer of the property, when applicable, meets the requirements of Tex. Gov't Code §2306.6706, and §2306.6729, and Code, §42(h)(5), including having a Controlling interest in the Development.

(109) Reconstruction--The demolition of one or more residential buildings in an Existing Residential Development and the construction of Units on the same or another Development Site. At least one Unit must be reconstructed in order to qualify as Reconstruction. The total number of Units to be reconstructed will be determined by program requirements. Developments using Multifamily Direct Loan funds are required to follow the applicable federal requirements.

(110) Rehabilitation--The improvement or modification of an Existing Residential Development through alteration, incidental addition, or enhancement. The term includes the demolition of an Existing Residential Development and the Reconstruction of any Development Units on the Development Site, but does not include Adaptive Reuse. (§2306.004(26-a)) Reconstructed Units will be considered New Construction for purposes of calculating the Replacement Reserves under §11.302(d)(2)(I) (relating to Operating Feasibility). More specifically, Rehabilitation is the repair, refurbishment, or replacement of existing mechanical or structural components, fixtures, and finishes. Rehabilitation will correct deferred maintenance, reduce functional obsolescence to the extent possible, and may include the addition of: energy efficient components and appliances; life and safety systems; site and resident amenities; and other quality of life improvements typical of new residential Developments.

(111) Relevant Supply--The supply of Comparable Units in proposed and Unstabilized Developments targeting the same population including:

(A) The proposed subject Units;and

(B) Comparable Units in previously approved but Unstabilized Developments in the PMA.

(112) Report--See Underwriting Report.

(113) Request--See Qualified Contract Request.

(114) Reserve Account--An individual account:

(A) Created to fund any necessary repairs or other needs for a Development; and

(B) Maintained by a First Lien Lender or Bank Trustee.

(115) Right of First Refusal (ROFR)--An Agreement to provide a series of priority rights to negotiate for the purchase of a Property by a Qualified Entity or a Qualified Nonprofit Organization at a negotiated price at or above the minimum purchase price as defined in Code §42(i)(7) or as established in accordance with an applicable LURA.

(116) Rural Area--

(A) A Place that is located:

(i) outside the boundaries of a primary metropolitan statistical area or a metropolitan statistical area;

(ii) within the boundaries of a primary metropolitan statistical area or a metropolitan statistical area, if the statistical area has a population of 25,000 or less and does not share a boundary with an Urban Area; or

(iii) within the boundaries of a local political subdivision that is outside the boundaries of an Urban Area.

(B) For areas not meeting the definition of a Place, the designation as a Rural Area or Urban Area is assigned in accordance with §11.204(5)(A) of this chapter (relating to Required Documentation for Application Submission) or as requested in accordance with §11.204(5)(B) of this chapter.

(117) Scope and Cost Review (SCR)--Sometimes referred to as "Physical Needs Assessment," "Project Capital Needs Assessment," or "Property Condition Report." The SCR provides an evaluation of the physical condition of an existing Property to evaluate the immediate cost to rehabilitate and to determine costs of future capital improvements to maintain the Property. The SCR must be prepared in accordance with §11.306 of this chapter (relating to Scope and Cost Review Guidelines), as it relates to a specific Development.

(118) Scoring Notice--Notification provided to an Applicant of the score for their Application after staff review. More than one Scoring Notice may be issued for a Competitive HTC or a Direct Loan Application.

(119) Single Room Occupancy (SRO)--An Efficiency Unit that meets all the requirements of a Unit except that it may, but is not required, to be rented on a month to month basis to facilitate Transitional Housing. Buildings with SRO Units have extensive living areas in common and are required to be Supportive Housing and include the provision for substantial supports from the Development Owner or its agent on site.

(120) Site Control--Ownership or a current contract or series of contracts that meets the requirements of §11.204(10) of this chapter, that is legally enforceable giving the Applicant the ability, not subject to any legal defense by the Owner or anyone else, to develop and operate a Property and subject it to a LURA reflecting the requirements of any awards of assistance it may receive from the Department.

(121) Site Work--Materials and labor for the horizontal construction generally including excavation, grading, paving, underground utilities, and site amenities.

(122) State Housing Credit Ceiling--The aggregate amount of Competitive Housing Credit Allocations that may be made by the Department during any calendar year, as determined from time to time by the Department in accordance with applicable federal law, including Code, §42(h)(3)(C), and Treasury Regulation §1.42-14.

(123) Sub-Market--An area defined by the Underwriter based on general overall market segmentation promulgated by market data tracking and reporting services from which a proposed or existing Development is most likely to draw the majority of its prospective tenants or homebuyers.

(124) Supplemental Credits--2023 Housing Tax Credits awarded through Subchapter F of this chapter to assist 2021 Competitive Housing Tax Credit Developments.

(125) Supportive Housing--A residential rental Development and Target Population meeting the requirements of subparagraphs (A) - (E) of this paragraph:

(A) Be intended for and targeting occupancy for households in need of specialized and specific non- medical services in order to maintain housing or transition into independent living;

(B) Be owned and operated by an Applicant or General Partner that must:

(i) have supportive services provided by the Applicant, an Affiliate of the Applicant, or a Third Party provider if the service provider is able to demonstrate a record of providing substantive services similar to those proposed in the Application in residential settings for at least three years prior to the beginning of the Application Acceptance Period, or Application Acceptance Date for Multifamily Direct Loan Applications;

(ii) secure sufficient funds necessary to maintain the Supportive Housing Development's operations throughout the entire Affordability Period;

(iii) provide evidence of a history of fundraising activities reasonably deemed to be sufficient to address any unanticipated operating losses;

(iv) provide a fully executed guaranty agreement whereby the Applicant or its Affiliate assume financial responsibility of any outstanding operating deficits, as they arise, and throughout the entire Affordability Period (in the case of HTC only Applications, the Guaranty Agreement with operating deficit guarantee requirements utilized for the HTC investor, will satisfy this requirement); and

(v) have Tenant Selection Criteria that fully comply with §10.802 of this title (regarding Written Policies and Procedures), which require a process for evaluation of prospective residents against a clear set of credit, criminal conviction, and prior eviction history that may disqualify a potential resident. This process must also follow §1.204 of this title (regarding Reasonable Accommodations), and:

(I) The criminal screening criteria must not allow residents to reside in the Development who are subject to a lifetime sex offender registration requirement; and provide at least, for:

(-a-) Temporary denial for a minimum of seven years from the date of conviction based on criminal history at application or recertification of any felony conviction for murder related offense, sexual assault, kidnapping, arson, or manufacture of a controlled substance as defined in §102 of the Controlled Substances Act (21 U.S.C. 802); and

(-b-) Temporary denial for a minimum of three years from the date of conviction based on criminal history at application or recertification of any felony conviction for aggravated assault, robbery, drug possession, or drug distribution;

(II) The criminal screening criteria must include provisions for approving applications and recertification despite the tenant's criminal history on the basis of mitigation evidence. Applicants/tenants must be provided written notice of their ability to provide materials that support mitigation. Mitigation may be provided during initial tenant application or upon appeal after denial. Mitigation may include personal statements/certifications, documented drug/alcohol treatment, participation in case management, letters of recommendation from mental health professionals, employers, case managers, or others with personal knowledge of the tenant. In addition, the criteria must include provision for individual review of permanent or temporary denials if the conviction is more than 7 years old, or if the applicant/resident is over 50 years of age, and the prospective resident has no additional felony convictions in the last 7 years. The criteria must prohibit consideration of any previously accepted criminal history or mitigation at recertification, unless new information becomes available. Criminal screening criteria and mitigation must conform to federal regulations and official guidance, including HUD's 2016 Guidance on Application of Fair Housing Act Standards to the Use of Criminal Records; and

(III) Disqualifications in a property's Tenant Selection Criteria cannot be a total prohibition, unless such a prohibition is required by federal statute or regulation (i.e. the Development must have an appeal process for other required criteria). As part of the appeal process the prospective resident must be allowed to demonstrate that information in a third party database is incorrect;

(C) Where supportive services are tailored for members of a household with specific needs, such as:

(i) homeless or persons at-risk of homelessness;

(ii) persons with physical, intellectual, or developmental disabilities;

(iii) youth aging out of foster care;

(iv) persons eligible to receive primarily non-medical home or community-based services;

(v) persons transitioning out of institutionalized care;

(vi) persons unable to secure permanent housing elsewhere due to specific, non-medical, or other high barriers to access and maintain housing;

(vii) Persons with Special Housing Needs including households where one or more individuals have alcohol or drug addictions, Violence Against Women Act Protections (domestic violence, dating violence, sexual assault, and stalking), HIV/AIDS, or is a veteran with a disability; or

(viii) other target populations that are served by a federal or state housing program in need of the type and frequency of supportive services characterized herein, as represented in the Application and determined by the Department on a case-by-case basis;

(D) Supportive services must meet the minimum requirements provided in clauses (i) - (iv) of this subparagraph:

(i) regularly and frequently offered to all residents, primarily on-site;

(ii) easily accessible and offered at times that residents are able to use them;

(iii) must include readily available resident services or service coordination that either aid in addressing debilitating conditions, or assist residents in securing the skills, assets, and connections needed for independent living; and

(iv) a resident may not be required to access supportive services in order to qualify for or maintain tenancy in a rent restricted Unit that the household otherwise qualifies for; and

(E) Supportive Housing Developments must meet the criteria of either clause (i) or (ii) of this subparagraph:

(i) not financed, except for construction financing, or a deferred-forgivable or deferred-payable construction-to-permanent Direct Loan from the Department, with any debt containing

foreclosure provisions or debt that contains scheduled or periodic repayment provisions. A loan from a local government or instrumentality of local government is permissible if it is a deferred-forgivable or deferred-payable construction-to-permanent loan, with no foreclosure provisions or scheduled or periodic repayment provisions, and a maturity date after the end of the Affordability Period. For tax credit applications only, permanent foreclosable debt that contains scheduled or periodic repayment provisions (including payments subject to available cash-flow) is permissible if sourced by federal funds and otherwise structured to meet valid debt requirements for tax credit eligible basis considerations. In addition, permanent foreclosable, cash-flow debt provided by an Affiliate is permissible if originally sourced from charitable contributions or pass-through local government funds and the foreclosure provisions are triggered only by default on non-monetary default provisions. Any amendment to an Application or Underwriting Report resulting in the addition of debt prohibited under this definition will result in the revocation of IRS Form(s) 8609, and may not be made for Developments that have Direct Loans after a LURA is executed, except as a part of Work Out Development approved by the Asset Management Division; or

(ii) financed with debt that meets feasibility requirements under Subchapter D of this chapter without exemptions and must also be supported by project-based rental or project-based operating subsidies for 25% of the Units evidenced by an executed agreement with an unaffiliated or governmental third party able to make that commitment, and meet all of the criteria in subclauses (I) - (VI) of this clause:

(I) the Application includes documentation of how resident feedback has been incorporated into design of the proposed Development;

(II) the Development is located less than 1/2 mile from regularly-scheduled public transportation, including evenings and weekends;

(III) at least 10% of the Units in the proposed Development meet the 2010 ADA standards with the exceptions listed in "Nondiscrimination on the Basis of Disability in Federally Assisted Programs and Activities" 79 Federal Register 29671 for persons with mobility impairments;

(IV) multiple systems will be in place for residents to provide feedback to Development staff;

(V) the Development will have a comprehensive written eviction prevention policy that includes an appeal process; and

(VI) the Development will have a comprehensive written services plan that describes the available services, identifying whether they are provided directly or through referral linkages, by whom, and in what location and during what days and hours. A copy of the services plan will be readily accessible to residents.

(F) Supportive housing Units included in an otherwise non-Supportive Housing Development do not meet the requirements of this definition.

(126) Target Population--The designation of types of housing populations shall include Elderly Developments and those that are Supportive Housing. All others will be considered to serve general populations without regard to any subpopulations, although the Application may request that any other populations required for targeting, preference, or limitation by a federal or state fund source are identified.

(127) Tax-Exempt Bond Development--A Development requesting or having been issued a Determination Notice for Housing Tax Credits and which receives a portion of its financing from the proceeds of Tax-Exempt Bonds which are subject to the state volume cap as described in Code, §42(h)(4).

(128) Tax-Exempt Bond Process Manual--The manual produced and amended from time to time by the Department which explains the process and provides guidance for the filing of a Housing Tax Credit Application utilizing Tax-Exempt Bonds.

(129) TDHCA Operating Database--Sometimes referred to as "TDHCA Database." A consolidation of recent actual income and operating expense information collected through the Department's Annual Owner Financial Certification process, as required and described in Chapter 10, Subchapter F of this title (relating to Compliance Monitoring), and published on the Department's website (www.tdhca.state.tx.us).

(130) Third Party--A Person who is not:

(A) An Applicant, General Partner, Developer, or General Contractor;

(B) An Affiliate to the Applicant, General Partner, Developer, or General Contractor;

(C) Anyone receiving any portion of the administration, contractor, or Developer Fee from the Development; or

(D) In Control with respect to the Development Owner.

(131) Total Housing Development Cost--The sum total of the acquisition cost, Hard Costs, soft costs, Developer Fee, and General Contractor fee incurred or to be incurred through lease-up by the Development Owner in the acquisition, construction, rehabilitation, and financing of the Development.

(132) Transitional Housing--A Supportive Housing Development funded with HOME, NSP, or TCAP RF, and not layered with Housing Tax Credits that includes living Units with more limited individual kitchen facilities and is:

(A) Used exclusively to facilitate the transition of homeless individuals and those at-risk of becoming homeless to independent living within 24 months; and

(B) Is owned by a Development Owner that includes a Governmental Entity or a nonprofit which provides temporary housing and supportive services to assist such individuals in, among other things, locating and retaining permanent housing. The limited kitchen facilities in individual Units must be appropriately augmented by suitable, accessible shared or common kitchen facilities.

(133) Underwriter--The author(s) of the Underwriting Report.

(134) Underwriting Report--Sometimes referred to as the Report. A decision making tool prepared by the Department's Real Estate Analysis Division that contains a synopsis of the proposed Development and that reconciles the Application information, including its financials and market analysis, with the underwriter's analysis. The Report allows the Department and Board to determine whether the Development will be financially feasible as required by Code §42(m), or other federal or state regulations.

(135) Uniform Multifamily Application Templates--The collection of sample resolutions and form letters, produced by the Department, as may be required under this chapter or Chapters 12 and 13 of this title (relating to Multifamily Housing Bond Rules and Multifamily Direct Loan Rule, respectively) that may, but are not required to, be used to satisfy the requirements of the applicable rule.

(136) Uniform Physical Condition Standards (UPCS)--As developed by the Real Estate Assessment Center of HUD.

(137) Unit--Any residential rental Unit in a Development consisting of an accommodation, including a single room used as an accommodation on a non-transient basis, that contains complete physical facilities and fixtures for living, sleeping, eating, cooking, and sanitation.

(138) Unit Type--Units will be considered different Unit Types if there is any variation in the number of Bedrooms, bathrooms, features, or a square footage difference equal to or more than 120 square feet.

(139) Unstabilized Development--A Development with Comparable Units that has been approved for funding by the Department's Board of Directors or is currently under construction or has not maintained a 90% occupancy level for at least 90 days following construction completion. A development may be deemed stabilized by the Underwriter based on factors relating to a development's lease-up velocity, Sub-Market rents, Sub-Market occupancy trends, and other information available to the Underwriter. The Market Analyst may not consider such development stabilized in the Market Study.

(140) Urban Area--A Place that is located within the boundaries of a primary metropolitan statistical area or a metropolitan statistical area other than a Place described in paragraph (116)(A) of this subsection, definition of Rural Area. For areas not meeting the definition of a Place, the designation as a Rural Area or Urban Area is assigned in accordance with §11.204(5) of this chapter.

(141) U.S. Department of Agriculture (USDA)--Texas Rural Development Office (TRDO) serving the State of Texas.

(142) U.S. Department of Housing and Urban Development (HUD)-regulated Building--A building for which the rents and utility allowances of the building are reviewed by HUD.

(143) Utility Allowance--The estimate of tenant-paid utilities made in accordance with Treasury Regulation, §1.42-10 and §10.614 of this title (relating to Utility Allowances).

(144) Work Out Development--A financially distressed Development for which the Owner or a primary financing participant is seeking a change in the terms of Department funding or program restrictions.

(e) Data. Where this chapter requires the use of American Community Survey or Housing & Urban Development data, the Department shall use the most current data available as of October 1 of the year prior to Application, unless specifically otherwise provided in federal or state law or in the rules., with the exception of census tract boundaries for which 2020 Census boundaries will be used, unless otherwise noted. All references to census tracts throughout this chapter will mean the 2020 Census tracts, unless otherwise noted. Applicants may need to provide Census tract information based on the 2020 boundaries as well as the ones defined by 2010 boundaries, if data based on 2020 tract boundaries are not available as of October 1, 2022 for the specific item in question. All American Community Survey (ACS) data must be 5-year estimates, unless otherwise specified and it is the ACS data that will be used for population determination. The availability of more current data shall be disregarded. Where other data sources are specifically required, such as NeighborhoodScout, the data available after October 1, but before Pre-Application Final Delivery Date, will be permissible. The NeighborhoodScout report submitted in the Application must include the report date. All references to QCTs throughout this chapter mean the 2023 QCTs designated by HUD to be effective in 2023.

(f) Deadlines. Where a specific date or deadline is identified in this chapter, the information or documentation subject to the deadline must be received by the Department on or before 5:00 p.m. Austin local time on the day of the deadline. If the deadline falls on a weekend or holiday, the deadline is 5:00 p.m. Austin local time on the next day which is not a weekend or holiday and on which the Department is open for general operation. Unless otherwise noted or provided in statute, deadlines are based on calendar days. Deadlines, with respect to both date and time, cannot be waived except where authorized and for truly extraordinary circumstances, such as the occurrence of a significant natural disaster that could not have been anticipated and makes timely adherence impossible. Applicants should further ensure that all required documents are included, legible, properly organized, and tabbed, and that materials in required formats involving digital media are complete and fully readable. Applicants are strongly encouraged to submit the required items well in advance of established deadlines.

(g) Documentation to Substantiate Items and Representations in a Competitive HTC Application. In order to ensure the appropriate level of transparency in this highly competitive program, Applications and all correspondence and other information relating to each Application are posted on the Department's website and updated on a regular basis. Applicants must use the Application form posted online to provide appropriate support for each item substantiating a claim or representation, such as claims for points, qualification for set-asides, meeting of threshold requirements, or timely requesting a waiver or determination. Any Application that staff identifies as having insufficient support information will be directed to cure the matter via the Deficiency process. Applicants are reminded that this process may not be used to increase a scoring item's points or to change any aspect of the proposed Development, financing structure, or other element of the Application. Although a responsive narrative will be created after Application submission, all facts and materials to substantiate any item in response to such an Administrative Deficiency must have been clearly established at the time of submission of the Application.

(h) Board Standards for Review. Some issues may require or benefit from Board review. The Board is not constrained to a particular standard, and while its actions on one matter are not binding as to how it will address another matter, the Board does seek to promote consistency with its policies, including the policies set forth in this chapter.

(i) Scattered Site Applications. As it relates to calculating any distances (tie determinations, proximity to features, etc.) or determining satisfaction of scoring, the site which scores or ranks the lowest will be the site used for that analysis. There is no opportunity for higher scoring or performing sites to elevate the score or performance of other sites in the scattered site Application.

(j) Public Information Requests. Pursuant to Tex. Gov't Code §2306.6717, any pre-application and any full Application, including all supporting documents and exhibits, must be made available to the public, in their entirety, on the Department's website. The filing of a pre-application or Application with the Department shall be deemed as consent to the release of any and all information contained therein, including supporting documents and exhibits. As part of its certifications, the Applicant shall certify that the authors of the reports and other information and documents submitted with the Application have given their consent to the Applicant to submit all reports and other information and documents to the Department, and for the Department to publish anything submitted with the Application on its website and use such information and documents for authorized purposes.

(k) Responsibilities of Municipalities and Counties. In considering resolutions regarding housing de-concentration issues, threshold requirements, or scoring criteria, municipalities and counties should consult their own staff and legal counsel as to whether their handling

of actions regarding such resolution(s) are consistent with Fair Housing laws as they may apply, including, as applicable, consistency with any Fair Housing Activity Statement-Texas (FHAST) form on file, any current Analysis of Impediments to Fair Housing Choice, any current Assessment of Fair Housing, or any current plans such as one year action plans or five year consolidated plans for HUD block grant funds, such as HOME or CDBG funds.

(l) Request for Staff Determinations. Where the requirements of this chapter do not readily align with the activities proposed in an Application, an Applicant may request and Department staff may provide a determination to an Applicant explaining how staff will review an Application in relation to the applicable rules. In no instance will staff provide a determination regarding a scoring item. Any such request must be received by the Department prior to submission of the pre-application (if applicable to the program) or Application (if no pre-application was submitted). Staff may, in its sole discretion, provide the request to the Board for it to make the determination. Staff's determination may take into account the articulated purpose of or policies addressed by a particular rule or requirement, materiality of elements, substantive elements of the development plan that relate to a term or definition, a common usage of the particular term, or other issues relevant to a rule or requirement. All such requests and determinations will be conveyed in writing. If the determination is finalized after submission of the pre-application or Application, the Department may allow corrections to the pre-application or the Application that are directly related to the issues in the determination. It is an Applicant's sole responsibility to request a determination and an Applicant may not rely on any determination for another Application regardless of similarities in a particular fact pattern. For any Application that does not request and subsequently receive a determination, the definitions and applicable rules will be applied as used and defined herein. An Applicant may appeal a determination for their Application, using the Appeal Process provided for in §11.902 of this chapter (relating to Appeals Process), if the determination provides for a treatment that relies on factors other than the explicit definition. A Board determination may not be appealed. A staff or Executive Director determination not timely appealed cannot be further appealed or challenged.

§11.2. Program Calendar for Housing Tax Credits.

(a) Competitive HTC Deadlines. Non-statutory deadlines specifically listed in the Program Calendar may be extended by the Department for a period of not more than 5 business days provided that the Applicant has, in writing, requested an extension prior to the date of the original deadline and has established to the reasonable satisfaction of the Department that there is good cause for the extension. Figure: 10 TAC §11.2(a)

(b) Tax-Exempt Bond and Direct Loan-only Application Dates and Deadlines. Applicants are strongly encouraged to submit the required items well in advance of published deadlines. Other deadlines may be found in Chapters 12 and 13 or a NOFA.

(1) Full Application Delivery Date. The deadline by which the Application must be received by the Department. For Direct Loan Applications, deadlines including the Application Acceptance Date will be defined in the applicable NOFA and for Tax-Exempt Bond Developments, such deadlines are more fully explained in §11.201 of this chapter (relating to Procedural Requirements for Application Submission).

(2) Administrative Deficiency Response Deadline. Such deadline shall be five business days after the date on the deficiency notice, unless extended as provided for in §11.201(6) of this chapter (relating to Deficiency Process).

(3) Third Party Report Delivery Date (Environmental Site Assessment (ESA), Scope and Cost Review (SCR), Appraisal (if applicable), Market Analysis and the Feasibility Report (if applicable)). For Direct Loan Applications, the Third Party reports meeting the requirements described in §11.205 of this title (relating to Required Third Party Reports) must be submitted in order for the Application to be considered complete, unless the Application is made in conjunction with an Application for Housing Tax Credits or Tax-Exempt Bond, in which case the Delivery Date for those programs will apply. For Tax-Exempt Bond Developments, the Third Party Reports must be received by the Department pursuant to §11.201(2) of this chapter.

(4) Resolutions Delivery Date. Resolutions required for Tax-Exempt Bond Developments must be received by the Department no later than 14 calendar days before the Board meeting or prior to the issuance of the Determination Notice, as applicable. If the Direct Loan Application is made in conjunction with an Application for Housing Tax Credits, or Tax-Exempt Bond Developments, the Resolution Delivery Date for those programs will apply to the Direct Loan Application.

(5) Challenges to Neighborhood Organization Opposition Delivery Date. Challenges must be received by the Department no later than 45 calendar days prior to the Board meeting at which consideration of the award will occur.

§11.3. Housing De-Concentration Factors.

(a) Rules reciting statutory limitations are provided as a convenient reference only, and to the extent there is any deviation from the provisions of statute, the statutory language is controlling.

(b) Two Mile Same Year Rule (Competitive HTC Only).

(1) As required by Tex. Gov't Code §2306.6711(f), staff will not recommend for award, and the Board will not make an award to an Application that proposes a Development Site located in a county with a population that exceeds one million, if the proposed Development Site is also located less than two linear miles from the proposed Development Site of another Application, or from the Development Site of a Supplemental Allocation of credits, within said county that is awarded in the same calendar year. If two or more Applications or Supplemental Allocations are submitted that would violate §2306.6711(f), the Supplemental Allocation of 2023 credits will be the one considered eligible, and the other Applications will not be reviewed; if there is no Supplemental Allocation of 2023 credits, the lower scoring of the Applications will not be reviewed unless the higher scoring Application is terminated or withdrawn.

(2) This subsection does not apply if an Application is located in an area that meets the requirements of Tex. Gov't Code §2306.6711(f-1), which excludes any municipality with a population of two million or more where a federal disaster has been declared by the Full Application Delivery Date as identified in §11.2(a) of this chapter (relating to Competitive HTC Deadlines), and the governing body of the municipality containing the Development has by vote specifically authorized the allocation of housing tax credits for the Development in a resolution submitted by the Full Application Delivery Date as identified in §11.2(a) of this chapter, and the municipality is authorized to administer disaster recovery funds as a subgrant recipient.

(c) Twice the State Average Per Capita (Competitive HTC and Tax-Exempt Bond Only). As provided for in Tex. Gov't Code §2306.6703(a)(4), if a proposed Development is located in a municipality, or if located completely outside a municipality, a county, that has more than twice the state average of units per capita supported by Housing Tax Credits or private activity bonds at the time the Application Acceptance Period Begins (or for Tax-Exempt Bond

Developments, Applications submitted after the Application Acceptance Period Begins), then the Applicant must obtain prior approval of the Development from the Governing Body of the appropriate municipality or county containing the Development. Such approval must include a resolution adopted by the Governing Body of the municipality or county, as applicable, setting forth a written statement of support, specifically citing Tex. Gov't Code §2306.6703(a)(4) in the text of the actual adopted resolution, and authorizing an allocation of Housing Tax Credits for the Development. An acceptable, but not required, form of resolution may be obtained in the Uniform Multifamily Application Templates. Required documentation must be submitted by the Full Application Delivery Date as identified in §11.2(a) of this chapter (relating to Competitive HTC Deadlines) or Resolutions Delivery Date in §11.2(b) of this chapter (relating to Tax-Exempt Bond and Direct Loan Application Dates and Deadlines), as applicable.

(d) One Mile Three Year Rule (Competitive HTC and Tax-Exempt Bond Only). (§2306.6703(a)(3)).

(1) An Application that proposes the New Construction or Adaptive Reuse of a Development that is located one linear mile or less (measured between closest boundaries by a straight line on a map) from another development that meets all of the criteria in subparagraphs (A) - (C) of this paragraph shall be considered ineligible.

(A) A Development that serves the same Target Population as the proposed Development, regardless of whether the Development serves general, Elderly, or Supportive Housing; and

(B) A Development that has received an allocation of Housing Tax Credits or private activity bonds, or a Supplemental Allocation of credits, for any New Construction at any time during the three-year period preceding the date the Application Round begins (or for Tax-Exempt Bond Developments the three-year period preceding the date the Certificate of Reservation is issued); and

(C) The Development in subparagraph (B) of this paragraph has not been withdrawn or terminated from the Housing Tax Credit Program.

(2) Paragraph (1) of this subsection does not apply to a proposed Development:

(A) That is using federal HOPE VI (or successor program) funds received through HUD;

(B) That is using locally approved funds received from a public improvement district or a tax increment financing district;

(C) That is using funds provided to the state under the Cranston-Gonzalez National Affordable Housing Act (42 U.S.C. §§12701 et seq.);

(D) That is using funds provided to the state and participating jurisdictions under the Housing and Community Development Act of 1974 (42 U.S.C. §§5301 et seq.);

(E) That is located in a county with a population of less than one million;

(F) That is located outside of a metropolitan statistical area; or

(G) That the Governing Body of the appropriate municipality or county where the Development is to be located has by vote specifically allowed the construction of a new Development located within one linear mile or less from a Development described under paragraph (1)(A) of this subsection. An acceptable, but not required, form of resolution may be obtained in the Uniform Multifamily Application Templates. Required documentation must be submitted by the Full Application Delivery Date as identified in §11.2(a) of this chapter, regarding Competitive HTC Deadlines, or Resolutions Delivery Date in §11.2(b) of this chapter, regarding Tax-Exempt Bond and Direct Loan Development Dates and Deadlines, as applicable.

(3) Where a specific source of funding is referenced in paragraphs (2)(A) - (D) of this subsection, a commitment or resolution documenting a commitment of the funds must be provided in the Application.

(e) Limitations on Developments in Certain Census Tracts. An Application that proposes the New Construction or Adaptive Reuse of a Development proposed to be located in a census tract that has more than 20% Housing Tax Credit Units per total households as reflected in the Department's current Site Demographic Characteristics Report shall be considered ineligible unless the Governing Body of the appropriate municipality or county containing the Development has adopted a resolution that the Governing Body of the appropriate municipality or county containing the Development has no objection to the Application. Rehabilitation Developments are not required to obtain such resolution. The resolution must be submitted by the Full Application Delivery Date as identified in §11.2(a) of this chapter or Resolutions Delivery Date in §11.2(b) of this chapter, as applicable.

(f) Proximity of Development Sites. (Competitive HTC Only) In a county with a population that is less than one million, if two or more HTC Applications, regardless of the Applicant(s), are proposing Developments serving the same Target Population on sites separated by 1,000 feet or less, the lower scoring of the Application(s), including consideration of tie-breakers, will be considered ineligible and will not be reviewed unless the higher scoring Application is terminated or withdrawn.

(g) One Award per Census Tract Limitation (Competitive HTC Only). If two or more Competitive HTC Applications are proposing Developments in the same census tract in an urban subregion, the lower scoring of the Application(s), including consideration of tie breakers, will be considered ineligible and will not be reviewed unless the higher scoring Application is terminated or withdrawn. This subsection does not apply to Applications submitted under §11.5(2) of this chapter (relating to USDA Set-Aside) or §11.5(3) (relating to At-Risk Set-Aside).

§11.4. Tax Credit Request, Award Limits and Increase in Eligible Basis.

(a) Credit Amount (Competitive HTC Only). (§2306.6711(b)) The Board may not award or allocate to an Applicant, Developer, Affiliate, or Guarantor (unless the Guarantor is also the General Contractor or provides the guaranty only during the construction period, and is not a Principal of the Applicant, Developer or Affiliate of the Development Owner) Housing Tax Credits in an aggregate amount greater than $3 million in a single Application Round. Any Supplemental Allocation of credits awarded to such parties will carry a designated, elevated value not to exceed $2.00 for every $1.00 Supplemental Allocation awarded when calculating the $3 million maximum for all 2023 Applications, with this elevated value to be determined by the Department no later than December 1, 2022. Prior to posting the agenda for the last Board meeting in June, an Applicant that has Applications pending for more than $3 million in credit may notify staff in writing or by email of the Application(s) they will not pursue in order to bring their request within the $3 million cap. Any other Applications they do not wish to pursue will remain on the waiting list if not otherwise terminated. If the Applicant has not made this self-selection by this date, staff will first select the Application(s) that will enable the Department to comply with the state and federal non-profit set-asides, and will then select the highest scoring Application, including consideration of tie-breakers if there are tied scores. The Application(s) that does not meet Depart-

ment criteria will not be reviewed unless the Applicant withdraws an Application that is eligible for an award and has been reviewed. All entities that are under common Control are Affiliates. For purposes of determining the $3 million limitation, a Person is not deemed to be an Applicant, Developer, Affiliate, or Guarantor solely because it:

(1) Raises or provides equity;

(2) Provides "qualified commercial financing";

(3) Is a Qualified Nonprofit Organization or other not-for-profit entity that is providing solely loan funds, grant funds or social services; or

(4) Receives fees as a consultant or advisor that do not exceed $200,000.

(b) Maximum Request Limit (Competitive HTC Only). For any given Development, an Applicant may not request more than 150% of the credit amount available in the subregion based on estimates released by the Department on December 1, or $2,000,000 whichever is less. In addition, for Elderly Developments in a Uniform State Service Region containing a county with a population that exceeds one million, the request may not exceed the final amount published on the Department's website after the annual release of the Internal Revenue Service notice regarding the credit ceiling (2306.6711(h)); Supplemental Allocations made from the 2023 ceiling to Elderly Developments in such tracts will be included in calculating the allocated Elderly credits in that region, thereby reducing the available credits for Elderly Developments in that region for 2023 Competitive HTC Applications. For all Applications, the Department will consider the amount in the funding request of the pre-application and Application to be the amount of Housing Tax Credits requested and will reduce the Applicant's request to the maximum allowable under this subsection through the underwriting process. Regardless of the credit amount requested or any subsequent changes to the request made by staff, the Board may not award to any individual Development more than $2 million in a single Application Round. (§2306.6711(b)).

(c) Increase in Eligible Basis (30% Boost). Applications will be evaluated for an increase of up to 30% in Eligible Basis provided they meet any one of the criteria identified in paragraphs (1) - (4) of this subsection. Staff will recommend no increase or a partial increase in Eligible Basis if it is determined it would cause the Development to be over sourced, as determined by the Department, in which case a credit amount necessary to fill the gap in financing will be recommended. In no instance will the boost exceed more than the amount of credits required to create the HTC rent-restricted Units. The criteria in paragraph (3) of this subsection are not applicable to Tax-Exempt Bond Developments.

(1) The Development is located in a Qualified Census Tract (QCT) (as determined by the Secretary of HUD) that has less than 20% Housing Tax Credit Units per total households in the tract as reflected in the Department's current Site Demographic Characteristics Report. New Construction or Adaptive Reuse Developments located in a QCT that has in excess of 20% Housing Tax Credit Units per total households are not eligible for a 30% increase in Eligible Basis, which would otherwise be available for the Development Site pursuant to §42(d)(5) of the Code, unless the Application includes a resolution acknowledging the Development is located in a census tract that has more than 20% Housing Tax Credits Units per total households and stating that the Governing Body of the appropriate municipality or county containing the Development has no objection to the Application. Rehabilitation Developments where this rule is triggered are eligible for the boost and are not required to obtain such a resolution from the Governing Body. An acceptable, but not required, form of resolution may be obtained in the Multifamily Uniform Application Templates. Required documentation must be submitted by the Full Application Delivery Date as identified in §11.2(a) of this chapter (relating to Competitive HTC Deadlines), or Resolutions Delivery Date in §11.2(b) of this chapter (relating to Tax-Exempt Bond and Direct Loan Application Dates and Deadlines), as applicable. The Application must include a census map that includes the 11-digit census tract number and clearly shows that the proposed Development is located within a QCT.

(2) The Development is located in a Small Area Difficult Development Area (SADDA)) (based on Small Area Fair Market Rents as determined by the Secretary of HUD) or for Rural areas located in a Difficult Development Area (DDA) that has high construction, land and utility costs relative to the AMGI. The Application must include the SADDA or DDA map that clearly shows the proposed Development is located within the boundaries of a SADDA or DDA as applicable.

(3) For Competitive HTC only, Development meets one of the criteria described in subparagraphs (A) - (F) of this paragraph pursuant to Code, §42(d)(5)(B)(v):

(A) The Development is located in a Rural Area;

(B) The Development is entirely Supportive Housing and is in accordance with §11.1(d)(126)(E) related to the definition of Supportive Housing;

(C) The Development meets the criteria for the Opportunity Index as defined in §11.9(c)(5) of this chapter (relating to Competitive HTC Selection Criteria);

(D) The Applicant elects to restrict 10% of the proposed low income Units for households at or below 30% of AMGI. These Units may not be used to meet any scoring criteria, or used to meet any Multifamily Direct Loan program requirement;

(E) The Development is in an area covered by a concerted revitalization plan, is not an Elderly Development, and is not located in a QCT. A Development will be considered to be in an area covered by a concerted revitalization plan if it is eligible for and elects points under §11.9(d)(7) of this chapter; or

(F) The Development is located in a Qualified Opportunity Zone designated under the Bipartisan Budget Act of 2018 (H.R. 1892). Pursuant to Internal Revenue Service Announcement 2021-10, the boundaries of the Opportunity Zone are unaffected by 2020 Decennial Census changes.

(4) For Tax-Exempt Bond Developments, as a general rule, a QCT, non-metro DDA or SADDA designation would have to coincide with the program year the Certificate of Reservation is issued in order for the Department to apply the 30% boost in its underwriting evaluation. The Department acknowledges guidance contained in the Federal Register regarding effective dates of QCT, non-metro DDA and SADDA designations. Pursuant to the Federal Register Notice, unless federal guidance states otherwise, complete Applications (including all Third Party Reports) with a corresponding Certificate of Reservation that are submitted to the Department in the year the QCT, non-metro DDA or SADDA designation is not effective may be underwritten to include the 30% boost, provided a complete application was submitted to the bond issuer in the year the QCT, non-metro DDA or SADDA designation was effective. Where this is the case, the Application must contain a certification from the issuer that speaks to the date on which such complete application (as defined in the Notice) was submitted. If the issuer is a member of the organizational structure then such certification must come from the bond counsel to the issuer.

§11.5. Competitive HTC Set-Asides. (§2306.111(d)).

This section identifies the statutorily-mandated Set-asides which the Department is required to administer. An Applicant may elect to compete in each of the Set-asides for which the proposed Development qualifies. In order to be eligible to compete in the Set-aside, the Application must meet the requirements of the Set-aside as of the Full Application Delivery Date. Election to compete in a Set-aside does not constitute eligibility to compete in the Set-aside, and Applicants who are ultimately deemed not to qualify to compete in the Set-aside will be considered not to be participating in the Set- aside for purposes of qualifying for points under §11.9(e)(3) of this chapter (related to Criteria promoting the efficient use of limited resources and applicant accountability). Commitments of Competitive HTCs issued by the Board in the current program year will be applied to each Set-aside, Rural regional allocation, Urban regional allocation, and USDA Set-aside for the current Application round as appropriate.

(1) Nonprofit Set-Aside. (§2306.6729 and §2306.6706(b)). At least 10% of the State Housing Credit Ceiling for each calendar year shall be allocated to Qualified Nonprofit Developments which meet the requirements of Code, §42(h)(5) and Tex. Gov't Code §2306.6729 and §2306.6706(b). The Supplemental Allocation amount for any Qualified Nonprofit Developments receiving a Supplemental Allocation from the 2023 ceiling will be attributed to the 2023 Nonprofit Set-Aside. Qualified Nonprofit Organizations must have the controlling interest in the Development Owner applying for this Set-aside (i.e., greater than 50% ownership in the General Partner). If the Application is filed on behalf of a limited partnership, the Qualified Nonprofit Organization must be the manager of the Managing General Partner. If the Application is filed on behalf of a limited liability company, the Qualified Nonprofit Organization must be the Manager of the controlling Managing Member. Additionally, for Qualified Nonprofit Development in the Nonprofit Set-aside the nonprofit entity or its nonprofit Affiliate or subsidiary must be the Developer or a co-Developer as evidenced in the development agreement. An Applicant that meets the requirements to be in the Qualified Nonprofit Set-aside is deemed to be applying under that Set-aside unless their Application specifically includes an affirmative election to not be treated under that Set-aside and a certification that they do not expect to receive a benefit in the allocation of tax credits as a result of being affiliated with a nonprofit. The Department reserves the right to request a change in this election or to not recommend credits for those unwilling to change elections if insufficient Applications in the Nonprofit Set-Aside are received. Applicants may not use different organizations to satisfy the state and federal requirements of the Set-aside.

(2) USDA Set-Aside. (§2306.111(d-2)). 5% of the State Housing Credit Ceiling for each calendar year shall be allocated to Rural Developments which are financed through USDA. The Supplemental Allocation amount for any USDA Developments receiving a Supplemental Allocation from the 2023 ceiling will be attributed to the 2023 USDA Set-Aside. If an Application in this Set-aside involves Rehabilitation it will be attributed to and come from the At- Risk Development Set-aside; if an Application in this set-aside involves New Construction it will be attributed to and come from the applicable Uniform State Service Region and will compete within the applicable subregion unless the Application is receiving USDA Section 514 funding. Applications must also meet all requirements of Tex. Gov't Code §2306.111(d-2).

(A) Eligibility of Certain Developments to Participate in the USDA or Rural Set-asides. (§2306.111 (d-4)). A proposed or Existing Residential Development that, before September 1, 2013, has been awarded or has received federal financial assistance provided under §§514, 515, or 516 of the Housing Act of 1949 (42 U.S.C. §§1484, 1485, or 1486) may be attributed to and come from the At-Risk Development Set-aside or the Uniform State Service Region in which the Development is located, regardless of whether the Development is located in a Rural Area.

(B) All Applications that are eligible to participate under the USDA Set-aside will be considered Rural for all scoring items under this chapter. If a Property receiving USDA financing is unable to participate under the USDA Set-aside and it is located in an Urban subregion, it will be scored as Urban.

(3) At-Risk Set-Aside. (§2306.6714; §2306.6702).

(A) At least 15% of the State Housing Credit Ceiling for each calendar year will be allocated under the At-Risk Development Set-aside and will be deducted from the State Housing Credit Ceiling prior to the application of the regional allocation formula required under §11.6 of this chapter (relating to Competitive HTC Allocation Process). The Supplemental Allocation amount for any At-Risk Developments receiving a Supplemental Allocation from the 2023 ceiling will be attributed to the 2023 At-Risk Set-Aside. Through this Set-aside, the Department, to the extent possible, shall allocate credits to Applications involving the preservation of Developments identified as At-Risk Developments. (§2306.6714) 5% of the State Housing Credit Ceiling associated with this Set- aside will be given as priority to Rehabilitation Developments under the USDA Set-aside; any Applications submitted under the USDA Set-Aside in excess of this 5% priority may compete within the At-Risk Set-Aside only if they meet the definition for an At-Risk Development and have made the selection of the At-Risk Set-Aside in their Application.

(B) An At-Risk Development qualifying under Tex. Gov't Code §2306.6702(a)(5)(A) must meet the following requirements:

(i) Pursuant to Tex. Gov't Code §2306.6702(a)(5)(A)(i), a Development must have received the benefit of a subsidy in the form of a qualified below-market interest rate loan, interest rate reduction, rental subsidy, Section 8 housing assistance payment, rental supplement payment, rental assistance payment, or equity incentive from any of the programs provided in subclauses (I) to (VIII) of this clause. Applications participating in the At-Risk Set-Aside must include evidence of the qualifying subsidy.

(I) Sections 221(d)(3) and (5), National Housing Act (12 U.S.C. §1715l);

(II) Section 236, National Housing Act (12 U.S.C. §1715z-1);

(III) Section 202, Housing Act of 1959 (1 2 U.S.C. §1701q);

(IV) Section 101, Housing and Urban Development Act of 1965 (12 U.S.C. §1701s);

(V) the Section 8 Additional Assistance Program for housing developments with HUD-Insured and HUD-Held Mortgages administered by the United States Department of Housing and Urban Development as specified by 24 CFR Part 886, Subpart A;

(VI) the Section 8 Housing Assistance Program for the Disposition of HUD-Owned Projects administered by the United States Department of Housing and Urban Development as specified by 24 CFR Part 886, Subpart C; (VII) §§514, 515, and 516, Housing Act of 1949 (42 U.S.C. §§1484, 1485, and 1486);

(VII) §§514, 515, and 516, Housing Act of 1949 (42 U.S.C. §§1484, 1485, and 1486); or

(VIII) §42, Internal Revenue Code of 1986.

(ii) Any stipulation to maintain affordability in the contract granting the subsidy or any HUD-insured or HUD-held mortgage as described in §2306.6702(a)(5)(A)(ii)(a) will be considered to be nearing expiration or nearing the end of its term if the contract expiration will occur or the term will end within two years of July 31 of the year the Application is submitted. Developments with HUD-insured or HUD-held mortgages qualifying as At-Risk under §2306.6702(a)(5)(A)(ii)(b) will be considered eligible if the HUD-insured or HUD-held mortgage is eligible for prepayment.

(iii) Developments with existing Department LI-HTC LURAs must have completed all applicable Right of First Refusal procedures prior to the pre-application Final Delivery Date.

(C) An At-Risk Development qualifying under Tex. Gov't Code §2306.6702(a)(5)(B) must meet one of the requirements under clause (i), (ii) or (iii) of this subparagraph and also meet the stipulations noted in clause (iv) of this subparagraph:

(i) Units to be Rehabilitated or Reconstructed must be owned by a public housing authority or a public facility corporation created by a public housing authority under Chapter 303, Local Government Code and received assistance under §9, United States Housing Act of 1937 (42 U.S.C. §1437g); or

(ii) Units to be Rehabilitated or Reconstructed must have been proposed to be disposed of or demolished, or already disposed or demolished within the two-year period preceding the date the Application is submitted, by a public housing authority or public facility corporation created by a public housing authority under Chapter 303, Local Government Code and received assistance under §9, United States Housing Act of 1937 (42 U.S.C. §1437g); or

(iii) To the extent that an Application is eligible under Tex. Gov't Code §2306.6702(a)(5)(B)(iii), the Development must receive assistance through the Rental Assistance Demonstration (RAD) program administered by the United States Department of Housing and Urban Development (HUD). Applications must include evidence that RAD participation is included in the applicable public housing plan that was most recently approved by HUD, and evidence that HUD has approved the Units proposed for Rehabilitation or Reconstruction for participation in the RAD program; and

(iv) Notwithstanding any other provision of law, an At-Risk Development described by Tex. Gov't Code §2306.6702(a)(5)(B) that was previously allocated housing tax credits set aside under subsection (a) of this section does not lose eligibility for those credits if the portion of Units reserved for public housing as a condition of eligibility for the credits under Tex. Gov't Code §2306.6714 (a-1)(2) are later converted under RAD.

(D) An Application for a Development that includes the demolition of the existing Units which have received the financial benefit described in Tex. Gov't Code §2306.6702(a)(5)(i) will not qualify as an At-Risk Development unless the redevelopment will include at least a portion of the same site. Alternatively, pursuant to Tex. Gov't Code §2306.6702(a)(5)(B), an Applicant may propose relocation of the existing Units in an otherwise qualifying At-Risk Development if:

(i) the affordability restrictions and any At-Risk eligible subsidies are approved to be transferred with the units proposed for Rehabilitation or Reconstruction prior to the tax credit Carryover deadline;

(ii) the Applicant seeking tax credits must propose at least the same number of restricted Units (the Applicant may, however, add market rate Units, and other rules, limitations, approvals, and potential conflicting requirements based on fund source, number and unit type may be implicated by creating more units than the original number); and

(iii) the new Development Site must either:

(I) qualify for points on the Opportunity Index under §11.9(c)(5) of this chapter (relating to Competitive HTC Selection Criteria); OR

(II) the local Governing Body of the applicable municipality or county (if completely outside of a municipality) in which that Development is located must submit a resolution confirming that the proposed Development is supported by the municipality or county in order to carry out a previously adopted plan that meets the requirements of §11.9(d)(7) of this chapter. Development Sites that cross jurisdictional boundaries must provide such resolutions from both local governing bodies.

(E) If Developments at risk of losing affordability from the financial benefits available to the Development are able to retain, renew, or replace the existing financial benefits and affordability they must do so unless regulatory barriers necessitate elimination of all or a portion of that benefit for the Development.

(i) Evidence of the legal requirements that will unambiguously cause the loss of affordability and that this will occur within the two calendar years of July 31 of the year the Application is submitted, and must be included with the application.

(ii) For Developments qualifying under Tex. Gov't Code §2306.6702(a)(5)(B), only a portion of the subsidy must be retained for the proposed Development, but no less than 25% of the proposed Units must be public housing units supported by public housing operating subsidy. (§2306.6714(a-1). If less than 100% of the public housing benefits are transferred to the proposed Development, an explanation of the disposition of the remaining public housing benefits must be included in the Application, as well as a copy of the HUD-approved plan for demolition and disposition.

(F) Nearing expiration on a requirement to maintain affordability includes Developments eligible to request a Qualified Contract under Code, §42. Evidence must be provided in the form of a copy of the recorded LURA, the first year's IRS Forms 8609 for all buildings showing Part II of the form completed and, if applicable, documentation from the original application regarding the Right of First Refusal. The Application must also include evidence that any applicable Right of First Refusal procedures have been completed prior to the pre-application Final Delivery Date.

(G) An amendment to any aspect of the existing tax credit property sought to enable the Development to qualify as an At-Risk Development, that is submitted to the Department after the Application has been filed and is under review will not be accepted.

§11.6. Competitive HTC Allocation Process.

This section identifies the general allocation process and the methodology by which awards during the Application Round are made.

(1) Regional Allocation Formula. The Department shall initially make available in each Rural Area and Urban Area of each Uniform State Service Region (subregion) Housing Tax Credits in an amount not less than $600,000 in each Rural and Urban subregion, consistent with the Regional Allocation Formula developed in compliance with Tex. Gov't Code §2306.1115. As authorized by Tex. Gov't Code §2306.111(d-3), the Department will reserve $600,000 in housing tax credits for Applications in rural areas in each uniform state service region. The process of awarding the funds made available within each subregion shall follow the process described in this section. Where a particular situation that is not contemplated and addressed explicitly by

the process described herein, Department staff shall formulate a recommendation for the Board's consideration based on the objectives of the regional allocation formula together with other policies and purposes set out in Tex. Gov't Code, Chapter 2306 and the Department shall provide the public the opportunity to comment on and propose alternatives to such a recommendation. In general, such a recommendation shall not involve broad reductions in the funding request amounts solely to accommodate regional allocation and shall not involve rearranging the competitive ranking of Applications within a particular subregion or set-aside except as described herein. If the Department determines that an allocation recommendation would cause a violation of the $3 million credit limit per Applicant, the Department will make its recommendation based on the criteria described in §11.4(a) of this chapter (relating to Tax Credit Request, Award Limits and Increase in Eligible Basis). The Department will publish on its website on or before December 1 of each year, initial estimates of Regional Allocation Formula percentages and limits of credits available, and the calculations periodically, if those calculations change, until the credits are fully allocated.

(2) Credits Returned and National Pool Allocated After January 1. For any credits returned after January 1 and eligible for reallocation (not including credit returned and reallocated under force majeure provisions), the Department shall first return the credits to the subregion or set-aside from which the original allocation was made. The credits will be treated in a manner consistent with the allocation process described in this section and may ultimately flow from the subregion and be awarded in the collapse process to an Application in another region, subregion or set-aside. For any credit received from the "national pool" after the initial approval of awards in late July, the credits will be added to any remaining credits and awarded to the next Application on the waiting list for the state collapse, if sufficient credits are available to meet the requirements of the Application as may be amended after underwriting review.

(3) Award Recommendation Methodology. (§2306.6710(a) - (f); §2306.111) The Department will assign, as described herein, Developments for review by the program and underwriting divisions. In general, Applications reviews will be conducted in the order described in subparagraphs (A) - (F) of this paragraph based upon the Applicant self-score and an initial program review. The procedure identified in subparagraphs (A) - (F) of this paragraph will also be used in making recommendations to the Board.

(A) USDA Set-Aside Application Selection (Step 1). The first set of reviews will be those Applications with the highest scores in the USDA Set-Aside until the minimum requirements stated in §11.5(2) of this chapter (relating to Competitive HTC Set-Asides. (§2306.111(d)) are attained. The minimum requirement may be exceeded in order to award the full credit request or underwritten amount of the last Application selected to meet the USDA Set-Aside requirement.

(B) At-Risk Set-Aside Application Selection (Step 2). The second set of reviews will be those Applications with the highest scores in the At-Risk Set-Aside statewide until the minimum requirements stated in §11.5(3) of this chapter (relating to At-Risk Set-Aside) are attained. This may require the minimum requirement to be exceeded to award the full credit request or underwritten amount of the last Application selected to meet the At-Risk Set-Aside requirement. This step may leave less than originally anticipated in the 26 subregions to award under the remaining steps.

(C) Initial Application Selection in Each Subregion (Step 3). The highest scoring Applications within each of the 26 subregions will then be selected provided there are sufficient funds within the subregion to fully award the Application with the priorities in this subparagraph first prioritized. Applications electing the At-Risk or USDA Set-Asides will not be eligible to receive an award from funds made generally available within each of the subregions. In Urban subregions in which credits available do not allow for all of the priorities in clauses (iii) to (v) of this subparagraph to be achieved, the priorities will be followed in the order reflected in this subparagraph.

(i) In Uniform State Service Regions containing a county with a population that exceeds one million, the Board may not allocate more than the maximum percentage of credits available for Elderly Developments, unless there are no other qualified Applications in the subregion. The Department will, for each such Urban subregion, calculate the maximum percentage in accordance with Tex. Gov't Code §2306.6711(h), and will publish such percentages on its website. The Supplemental Allocation amount for any Supplemental Allocations made in such a county to an Elderly Development will be attributed to the total of 2023 credits made to Elderly Developments for that Uniform State Service Region.

(ii) In accordance with Tex. Gov't Code, §2306.6711(g), in Uniform State Service Regions containing a county with a population that exceeds 1.7 million, the Board shall allocate competitive tax credits to the highest scoring Development, if any, that is part of a concerted revitalization plan that meets the requirements of §11.9(d)(7) (except for §11.9(d)(7)(A)(ii)(III) and §11.9(d)(7)(B)(iii)), is located in an Urban subregion, and is within the boundaries of a municipality with a population that exceeds 500,000.

(iii) In Urban subregions, not including the calculation of At-Risk Applications awarded, no more than 50% of all credits in a subregion will be awarded to Applications proposing Rehabilitation or Reconstruction, unless only Rehabilitation or Reconstruction Applicants are eligible in the subregion.

(iv) In Urban subregions containing a county with a population that exceeds 950,000, the Board shall allocate competitive tax credits to the highest scoring Development, if any, that is located in a neighborhood which is a recipient of a HUD Choice Neighborhood Planning or Implementation grant in the preceding five years from the date of Application submission and funds from the HUD Choice Neighborhood awardee are reflected in the Application's Sources and Uses.

(D) Rural Collapse (Step 4). If there are any tax credits set-aside for Developments in a Rural Area in a specific Uniform State Service Region (Rural subregion) that remain after award under subparagraph (C) of this paragraph, those tax credits shall be combined into one "pool" and then be made available in any other Rural Area in the state to the Application in the most underserved Rural subregion as compared to the subregion's allocation. This rural redistribution will continue until all of the tax credits in the "pool" are allocated to Rural Applications and at least 20% of the funds available to the State are allocated to Applications in Rural Areas. (§2306.111(d)(3)) In the event that more than one subregion is underserved by the same percentage, the priorities described in clauses (i) - (ii) of this subparagraph will be used to select the next most underserved subregion:

(i) the subregion with no recommended At-Risk Applications from the same Application Round; and

(ii) the subregion that was the most underserved during the Application Round during the year immediately preceding the current Application Round.

(E) Statewide Collapse (Step 5). Any credits remaining after the Rural Collapse, including those in any subregion in the State, will be combined into one "pool." The funds will be used to award the highest scoring Application (not selected or eliminated in a prior step) in the most underserved subregion in the State compared to the amount originally made available in each subregion. In Uniform State Service

Regions containing a county with a population that exceeds one million, the Board may not allocate more than the maximum percentage of credits available as calculated through the Regional Allocation Formula (RAF) for Elderly Developments, and as reduced by any 2023 Supplemental Allocations made meeting these criteria as provided in §11.4(b) of this subchapter (relating to Maximum Request Limit (Competitive HTC Only)), within an Urban subregion of that service region. Therefore, certain Applications for Elderly Developments may be excluded from receiving an award from the collapse. The Department will, for each such Urban subregion, calculate the maximum percentage in accordance with Tex. Gov't Code §2306.6711(h) and will publish such percentages on its website. This process will continue until the funds remaining are insufficient to award the next highest scoring Application that is not rendered ineligible through application of the elderly cap in the next most underserved subregion. At least seven calendar days prior to the July Board meeting of the Department at which final awards of credits are authorized, the Department will post on its website the most current 2023 State of Texas Competitive Housing Tax Credit Ceiling Accounting Summary which includes the Regional Allocation Formula percentages including the maximum funding request/award limits, the Elderly Development maximum percentages and limits of credits available, and the methodology used for the determination of the award determinations within the State Collapse. In the event that more than one subregion is underserved by the same degree, the priorities described in clauses (i) and (ii) of this subparagraph will be used to select the next most underserved subregion:

(i) the subregion with no recommended At-Risk Applications from the same Application Round; and

(ii) the subregion that was the most underserved during the Application Round during the year immediately preceding the current Application Round.

(F) Contingent Qualified Nonprofit Set-aside Step (Step 6). If an insufficient number of Applications participating in the Nonprofit Set-Aside are selected after implementing the criteria described in subparagraphs (A) - (E) of this paragraph to meet the requirements of the 10% Nonprofit Set-Aside, action must be taken to modify the criteria described in subparagraphs (A) - (E) of this paragraph to ensure the Set-aside requirements are met. Therefore, the criteria described in subparagraphs (C) - (E) of this paragraph will be repeated after selection of the highest scoring Application(s) under the Nonprofit Set-aside statewide are selected to meet the minimum requirements of the Nonprofit Set- Aside. This step may cause some lower scoring Applications in a subregion to be selected instead of a higher scoring Application not participating in the Nonprofit Set-aside.

(4) Waiting List. The Applications that do not receive an award by July 31 and remain active and eligible will be recommended for placement on the waiting list. The waiting list is not static. The allocation process will be used in determining the next Application to award. If credits are returned through any process, those credits will first be made available in the set-aside or subregion from which they were originally awarded. The first Application on the waiting list is in part contingent on the nature of the credits that became available for award. The Department shall hold all credit available after the late-July awards until September 30 in order to collect credit that may become available when tax credit Commitments are submitted. Credit confirmed to be available, as of September 30, may be awarded to Applications on the waiting list unless insufficient credits are available to fund the next Application on the waiting list. For credit returned after September 30, awards from the waiting list will be made when the remaining balance is sufficient to award the next Application as may be amended on the waiting list based on the date(s) of returned credit. Notwithstanding the foregoing, if decisions related to any returns or rescissions of tax credits are under appeal or are otherwise contested, the Department may delay awards until resolution of such issues. The Department will evaluate all waiting list awards for compliance with requested Set-asides. This may cause some lower scoring Applications to be selected instead of a higher scoring Application. Where sufficient credit becomes available to award an Application on the waiting list later in the calendar year, staff may allow flexibility in meeting the Carryover Allocation submission deadline and changes to the Application as necessary to ensure to the extent possible that available resources are allocated by December 31. (§2306.6710(a) - (f); §2306.111).

(5) Credit Returns Resulting from Force Majeure Events. In the event that the Department receives a return of Competitive HTCs during the current program year from an Application that received a Competitive Housing Tax Credit award during any of the preceding three years, such returned credit will, if the Board determines that all of the requirements of this paragraph are met to its satisfaction, be allocated separately from the current year's tax credit allocation, and not be subject to the requirements of paragraph (2) of this section. The Board determination must indicate the year of the Multifamily Rules to be applied to the Development. The Department's Governing Board may impose a deadline that is earlier than the Placed in Service Deadline and may impose conditions that were not placed on the original allocation. Requests to allocate returned credit separately where all of the requirements of this paragraph have not been met or requests for waivers of any part of this paragraph will not be considered. For purposes of this paragraph, credits returned after September 30 of the preceding program year may be considered to have been returned on January 1 of the current year in accordance with the treatment described in §(b)(2)(C)(iii) of Treasury Regulation 1.42-14. The Board may approve the execution of a current program year Carryover Agreement regarding the returned credits with the Development Owner that returned such credits only if:

(A) The credits were returned as a result of "Force Majeure" events that occurred before issuance of Forms 8609. Force Majeure events are the following sudden and unforeseen circumstances outside the control of the Development Owner: acts of God such as fire, tornado, flooding, significant and unusual rainfall or subfreezing temperatures, or loss of access to necessary water or utilities as a direct result of significant weather events; explosion; vandalism; orders or acts of military authority; unrelated party litigation; changes in law, rules, or regulations; national emergency or insurrection; riot; acts of terrorism; supplier failures; or materials or labor shortages. If a Force Majeure event is also a presidentially declared disaster, the Department may treat the matter under the applicable federal provisions. Force Majeure events must make construction activity impossible or materially impede its progress;

(B) Acts or events caused by the negligent or willful act or omission of the Development Owner, Affiliate or a Related Party shall under no circumstance be considered to be caused by Force Majeure. In order for rainfall, material shortages, or labor shortages to constitute Force Majeure, the Development Owner must clearly explain and document how such events could not have been reasonably foreseen and mitigated through appropriate planning and risk management. Staff may use Construction Status reports for the subject or other Developments in conducting their review and forming a recommendation to the Board;

(C) A Development Owner claiming Force Majeure must provide evidence of the type of event, as described in subparagraph (A) of this paragraph, when the event occurred, and that the loss was a direct result of the event;

(D) The Development Owner must prove that reasonable steps were taken to minimize or mitigate any delay or damages,

that the Development Owner substantially fulfilled all obligations not impeded by the event, including timely closing of all financing and start of construction, that the Development and Development Owner was properly insured and that the Department was timely notified of the likelihood or actual occurrence of an event described in subparagraph (A) of this paragraph;

(E) The event prevents the Development Owner from meeting the placement in service requirements of the original allocation;

(F) The requested current year Carryover Agreement allocates the same amount of credit as that which was returned; and

(G) The Department's Real Estate Analysis Division determines that the Development continues to be financially feasible in accordance with the Department's underwriting rules after taking into account any insurance proceeds related to the event.

§11.7. Tie Breaker Factors.

In the event there are Competitive HTC Applications that receive the same number of points in any given set-aside category, rural regional allocation or urban regional allocation, or rural or statewide collapse, the Department will utilize the factors in this section, in the order they are presented, to determine which Development will receive preference in consideration for an award. For the purposes of this section, all measurements will include ingress/egress requirements and any easements regardless of how they will be held. The tie breaker factors are not intended to specifically address a tie between equally underserved subregions in the rural or statewide collapse.

(1) Applications proposed to be located in a census tract with a poverty rate below a 20% poverty rate threshold in all regions except for Regions 11 and 13(with Region 11 adding an additional 15% to that value and Region 13 adding an additional 5% to that value). The poverty rate for each census tract will come from the most recent American Community Survey data. If a tie still persists, then the Development in the census tract with the highest percentage of statewide rent burden for renter households at or below 80% Area Median Family Income (AMFI), as determined by the U.S. Department of Housing and Urban Development's Comprehensive Housing Affordability Strategy (CHAS) dataset as of October 1, 2022 and as reflected in the Department's current Site Demographic Characteristics Report. As a consequence of disparities that exist between the two datasets, for the purposes of this subparagraph, the poverty rate for each census tract will be determined based on 2020 census tract boundaries, and the rent burden will be determined based on 2010 census tract boundaries. Each Application will need to specify both the current census tract, as well as the Development Site's pre-2020 census tract in order to qualify for this tiebreaker.

(2) Applications proposed to be located the greatest linear distance from the nearest Housing Tax Credit assisted Development that serves the same Target Population and that was awarded 15 or fewer years ago. Years are measured in whole years, and are calculated by deducting the year of the award from the "Board Approval" column of the property inventory from the Site Demographics Characteristics report from the current year. The specific month and date of the award are disregarded for this analysis. Developments awarded Housing Tax Credits but do not yet have a Land Use Restriction Agreement in place will be considered Housing Tax Credit assisted Developments for purposes of this paragraph according to the property inventory included in the HTC Site Demographic Characteristics Report. The linear measurement will be performed from closest boundary to closest boundary of the Site presented at Pre-Application, if a pre-application is submitted, or the Site presented at full Application, whichever is closest.

§11.8. Pre-Application Requirements (Competitive HTC Only).

(a) General Submission Requirements. The pre-application process allows Applicants interested in pursuing an Application to assess potential competition across the 13 state service regions, subregions and set-asides. Based on an understanding of the potential competition they can make a more informed decision about whether they wish to proceed to prepare and submit an Application. A complete pre-application is a pre-application that meets all of the Department's criteria, as outlined in subsections (a) and (b) of this section.

(1) The pre-application must be submitted using the URL provided by the Department, as outlined in the Multifamily Programs Procedures Manual, along with the required pre-application fee as described in §11.901 of this chapter (relating to Fee Schedule), not later than the pre-application Final Delivery Date as identified in §11.2(a) of this chapter (relating to Competitive HTC Deadlines). If the pre-application and corresponding fee is not submitted on or before this deadline the Applicant will be deemed to have not made a pre-application.

(2) Only one pre-application may be submitted by an Applicant for each Development Site and for each Site Control document.

(3) Department review at this stage is limited, and not all issues of eligibility and threshold are reviewed or addressed at pre-application. Acceptance by staff of a pre-application does not ensure that an Applicant satisfies all Application eligibility, threshold or documentation requirements. While the pre-application is more limited in scope than the Application, pre-applications are subject to the same limitations, restrictions, or causes for disqualification or termination as Applications, and pre-applications will thus be subject to the same consequences for violation, including but not limited to loss of points and termination of the pre-application.

(4) The pre-application becomes part of the full Application if the full Application claims pre-application points.

(5) Regardless of whether a Full Application is submitted, a pre-application may not be withdrawn after the Full Application Delivery Date described in §11.2(a) of this chapter.

(b) Pre-Application Threshold Criteria. Pursuant to Tex. Gov't Code §2306.6704(c) pre-applications will be terminated unless they meet the threshold criteria described in subsection (a) of this section and paragraphs (1) and (2) of this subsection:

(1) Submission of the Competitive HTC pre-application in the form prescribed by the Department which identifies or contains at a minimum:

(A) Site Control meeting the requirements of §11.204(10) of this title (relating to Required Documentation for Application Submission). For purposes of meeting this specific requirement related to pre-application threshold criteria, proof of consideration and any documentation required for identity of interest transactions is not required at the time of pre-application submission but will be required at the time of full application submission;

(B) Funding request;

(C) Target Population;

(D) Requested set-asides (At-Risk, USDA, Nonprofit, or Rural);

(E) Total Number of Units proposed;

(F) Census tract number in which the Development Site is located, and a map of that census tract with an outline of the proposed Development Site;

(G) Expected score for each of the scoring items identified in the pre-application materials;

(H) Proposed name of ownership entity;

(I) The name and address of the nearest Housing Tax Credit assisted Development that serves the same Target Population and was awarded 15 or fewer years ago following the calculation established in 10 TAC §11.7(2) according to the Department's property inventory tab of the Site Demographic Characteristics Report; and

(J) If points are to be claimed related to Underserved Area and/or Proximity to Jobs, documentation supporting those point elections.

(2) Evidence in the form of a certification provided in the pre-application, that all of the notifications required under this paragraph have been made. (§2306.6704).

(A) The Applicant must list in the pre-application all Neighborhood Organizations on record with the county or state 30 days prior to the beginning of the Application Acceptance Period whose boundaries include the entire proposed Development, where a reasonable search for applicable entities has been conducted.

(B) Notification Recipients. Developments located in an ETJ of a municipality are required to notify both municipal and county officials. The notifications may be sent by e-mail, fax or mail with registered return receipt or similar tracking mechanism in the format included in the Public Notification Template provided in the Uniform Multifamily Application Template or in an alternative format that meets the applicable requirements and achieves the intended purpose. The Applicant is required to retain proof of delivery in the event the Department requests proof of notification. Acceptable evidence of such delivery is demonstrated by signed receipt for mail or courier delivery and confirmation of delivery for fax and e-mail. Officials to be notified are those officials in office at the time the pre-application is submitted. Between the time of pre-application (if made) and full Application, the boundaries of an official's jurisdictions may change. If there is a change in jurisdiction between pre-application and the Full Application Delivery Date, additional notifications must be made at full Application to any entity that has not been previously notified by the Applicant. Meetings and discussions do not constitute notification. Only a timely and compliant written notification to the correct entity constitutes notification. No later than the date the pre-application is submitted, notification must be sent to all of the entities prescribed in clauses (i) - (viii) of this subparagraph:

(i) Neighborhood Organizations on record with the state or county 30 days prior to the beginning of the Application Acceptance Period whose boundaries include the entire proposed Development Site;

(ii) Superintendent of the school district in which the Development Site is located;

(iii) Presiding officer of the board of trustees of the school district in which the Development Site is located;

(iv) Mayor of the municipality (if the Development Site is within a municipality or its extraterritorial jurisdiction);

(v) All elected members of the Governing Body of the municipality (if the Development Site is within a municipality or its extraterritorial jurisdiction);

(vi) Presiding officer of the Governing Body of the county in which the Development Site is located;

(vii) All elected members of the Governing Body of the county in which the Development Site is located; and

(viii) State Senator and State Representative of the districts whose boundaries include the proposed Development Site.

(C) Contents of Notification.

(i) The notification must include, at a minimum, all of the information described in subclauses (I) - (VIII) of this clause:

(I) The Applicant's name, address, an individual contact name and phone number;

(II) The Development name, address, city, and county;

(III) A statement informing the entity or individual being notified that the Applicant is submitting a request for Housing Tax Credits with the Texas Department of Housing and Community Affairs;

(IV) Whether the Development proposes New Construction, Reconstruction, Adaptive Reuse, or Rehabilitation;

(V) The physical type of Development being proposed (e.g. single family homes, duplex, apartments, high-rise, etc.);

(VI) The approximate total number of Units and approximate total number of Low-Income Units;

(VII) The residential density of the Development, i.e., the number of Units per acre; and

(VIII) Information on how and when an interested party or Neighborhood Organization can provide input to the Department.

(ii) The notification may not contain any false or misleading statements. Without limiting the generality of the foregoing, the notification may not create the impression that the proposed Development will serve a population exclusively or as a preference unless such targeting or preference is documented in the Application and is in full compliance with all applicable state and federal laws, including state and federal fair housing laws.

(iii) Notifications or any other communications may not contain any statement that violates Department rules, statute, code, or federal requirements.

(c) Pre-Application Results. Only pre-applications which have satisfied all of the pre-application requirements, including those in §11.9(e)(3) of this chapter (relating to Criteria promoting the efficient use of limited resources and applicant accountability), will be eligible for pre-application points. The order and scores of those Developments released on the pre-application Submission Log do not represent a Commitment on the part of the Department or the Board to allocate tax credits to any Development and the Department bears no liability for decisions made by Applicants based on the results of the pre-application Submission Log. Inclusion of a pre-application on the pre-application Submission Log does not ensure that an Applicant will receive points for a pre-application.

(d) Applicants that may be requesting a Multifamily Direct Loan from the Department may submit a Request for Preliminary Determination on or before February 13, 2023. The results of evaluation of the Request may be used as evidence of review of the Development and the Principals for purposes of scoring under §11.9(e)(1)(E) of this chapter. Submission of a Request for Preliminary Determination does not obligate the Applicant to request Multifamily Direct Loan funds with their full Application.

§11.9. Competitive HTC Selection Criteria.

(a) General Information. This section identifies the scoring criteria used in evaluating and ranking Applications. The criteria identified in subsections (b) - (e) of this section include those items required under Tex. Gov't Code, Chapter 2306, Code §42, and other criteria

established in a manner consistent with Chapter 2306 and Code §42. There is no rounding of numbers in this section for any of the calculations in order to achieve the desired requirement or limitation, unless rounding is explicitly stated as allowed for that particular calculation or criteria. The Application must include one or more maps indicating the location of the Development Site and the related distance to the applicable facility. Distances are to be measured from the nearest boundary of the Development Site to the nearest boundary of the property or easement containing the facility, unless otherwise noted. For the purposes of this section, all measurements will include ingress/egress requirements and any easements regardless of how they will be held. Applications will only be reviewed for point items specifically elected in the Application. Except for scoring items that are awarded based on tiered categories, if an Application is determined to not qualify for the points elected, Department staff will not evaluate the Application to determine whether it might qualify for alternative points.

(b) Criteria promoting development of high quality housing.

(1) Size and Quality of the Units. (§2306.6710(b)(1)(D); 2306.6725(b)(1); §42(m)(1)(C)(iii) and (ix)) An Application may qualify for up to fifteen (15) points under subparagraphs (A) and (B) of this paragraph.

(A) Unit Sizes (6 points). The Development must meet the minimum requirements identified in this subparagraph to qualify for points. Points for this item will be automatically granted for Applications involving Rehabilitation (excluding Reconstruction), for Developments receiving funding from USDA, or for Supportive Housing Developments without meeting these square footage minimums only if requested in the Self Scoring Form. If the Development involves both Rehabilitation and Reconstruction or New Construction, the Reconstruction or New Construction Units must meet these requirements:

(i) five-hundred (500) square feet for an Efficiency Unit;

(ii) six-hundred (600) square feet for a one Bedroom Unit;

(iii) eight-hundred fifty (850) square feet for a two Bedroom Unit;

(iv) one-thousand fifty (1,050) square feet for a three Bedroom Unit; and

(v) one-thousand two-hundred fifty (1,250) square feet for a four Bedroom Unit.

(B) Unit, Development Construction, and Energy and Water Efficiency Features (9 points). Applicants that elect in an Application to provide specific amenity and quality features in every Unit at no extra charge to the tenant will be awarded points based on the point structure provided in §11.101(b)(6)(B) of this title (relating to Unit, Development Construction, and Energy and Water Efficiency Features) and as certified to in the Application. The amenities will be required to be identified in the LURA. Rehabilitation Developments and Supportive Housing Developments will start with a base score of five (5) points.

(2) Sponsor Characteristics. (§42(m)(1)(C)(iv)) An Application may qualify to receive either one (1) or two (2) points if it meets the requirements of either subparagraphs (A), (B), or (C) of this paragraph.

(A) HUB. The ownership structure contains a HUB or HUBs certified by the Texas Comptroller of Public Accounts by the Full Application Delivery Date. The HUB or HUBs must have some combination of ownership interest in each of the General Partner of the Applicant, Cash Flow from operations, and Developer Fee which taken together equal at least 50% and no less than 5% for any category. For HUD 202 Rehabilitation projects which prohibit for-profit ownership, ownership will not be required for a HUB or nonprofit, only for Cash Flow or Developer Fee; the total ownership percentage must still equal 50%, even if it is only attributable to one of the two categories. Any Application that includes one or more HUBs must include a narrative description of each of the HUB's experience directly related to the housing industry.

(i) The HUB must materially participate in the Development and operation of the Development throughout the Compliance Period and must have experience directly related to the housing industry, which may include experience with property management, construction, development, financing, or compliance. Material participation means that the HUB is regularly, continuously, and substantially involved in providing services integral to the Development Team; providing services as an independent contractor is not sufficient.

(ii) A Principal or officer of the HUB cannot be a Related Party to or Affiliate, including the spouse, of any other Principal or officer of the Applicant, Developer or Guarantor (excluding another Principal of said HUB), regardless of Control. (2 points).

(iii) The HUB must be involved with the Development Services or in the provision of on-site tenant services during the Development's Affordability Period. A Principal of the HUB or nonprofit Organization cannot be a Related Party to or Affiliate, including the spouse of, any other Principal of the Applicant, Developer or Guarantor (excluding another Principal of said HUB or Nonprofit Organization). (1 point).

(B) Qualified Nonprofit Organization. The ownership structure contains a Qualified Nonprofit Organization provided the Application is submitted in the Nonprofit Set-Aside. The Qualified Nonprofit Organization must have some combination of ownership interest in the General Partner of the Applicant, Cash Flow from operations, and Developer Fee which taken together equal at least 50%, and no less than 5% for any category. For HUD 202 Rehabilitation projects which prohibit for-profit ownership, ownership will not be required for a nonprofit, only for Cash Flow or Developer Fee; the total ownership percentage must still equal 50%, even if it is only attributable to one of the two categories.

(i) The Qualified Nonprofit Organization must materially participate in the Development and operation of the Development throughout the Compliance Period and must have experience directly related to the housing industry, which may include experience with property management, construction, development, financing, or compliance. Material participation means that the Qualified Nonprofit Organization is regularly, continuously, and substantially involved in providing services integral to the Development Team; providing services as an independent contractor is not sufficient.

(ii) A Principal of the Qualified Nonprofit Organization cannot be a Related Party to or Affiliate, including the spouse, of any other Principal of the Applicant, Developer, or Guarantor (excluding another Principal of said Qualified Nonprofit Organization). (2 points).

(iii) The Qualified Nonprofit Organization must be involved with the Development Services or in the provision of on-site tenant services during the Development's Affordability Period. A Principal of the Qualified Nonprofit Organization cannot be a Related Party to or Affiliate, including the spouse of, any other Principal of the Applicant, Developer, or Guarantor (excluding another Principal of said Qualified Nonprofit Organization). (1 point).

(C) Nonprofit Organization. The ownership structure contains a nonprofit organization that meets the requirements of IRC §42(h)(5)(C) on the Application Delivery Date, with at least 51% ownership in the General Partner of the Applicant. (2 points)

(i) The nonprofit organization must maintain Control of the Development and materially participate in the operation of the Development throughout the Compliance Period. Nonprofit organizations that formally operate under a parent organization may assign Control of the Development to that parent organization, so long as it meets the requirements of IRC §42(h)(5)(C).

(ii) The nonprofit organization, or individuals with Control of the nonprofit organization, must provide verifiable documentation of at least 10 years' experience in the continuous operation of a Development that provides services similar to those in the proposed Development.

(iii) The Applicant will provide a minimum of 3 additional points under §11.101(7) of this chapter (related to Resident Supportive Services), in addition to points selected under subsection (c)(3) of this section.

(c) Criteria to serve and support Texans most in need.

(1) Income Levels of Residents. (§§2306.111(g)(3)(B) and (E); 2306.6710(b)(1)(C) and (e); and §42 (m)(1)(B)(ii)(I)) An Application may qualify for up to sixteen (16) points for rent and income restricting a Development for the entire Affordability Period at the levels identified in subparagraph (A), (B), (C), or (D) of this paragraph.

(A) For any Development located within a non-Rural Area of the Dallas, Fort Worth, Houston, San Antonio, or Austin MSAs that propose to use either the 20-50 or 40-60 election under §42(g)(1)(A) or §42(g)(1)(B) of the Code, respectively:

(i) At least 60% of all Low-Income Units at 50% or less of AMGI in a Supportive Housing Development proposed by a Qualified Nonprofit (16 points);

(ii) At least 40 % of all Low-Income Units at 50% or less of AMGI (15 points);

(iii) At least 30% of all Low-Income Units at 50% or less of AMGI (13 points); or

(iv) At least 20% of all Low-Income Units at 50 %or less of AMGI (11 points).

(B) For Developments proposed to be located in areas other than those listed in subparagraph (A) of this paragraph and that propose to use either the 20-50 or 40-60 election under §42(g)(1)(A) or §42(g)(1)(B) of the Code, respectively:

(i) At least 60% of all Low-Income Units at 50% or less of AMGI in a Supportive Housing Development proposed by a Qualified Nonprofit (16 points);

(ii) At least 20% of all Low-Income Units at 50% or less of AMGI (15 points);

(iii) At least 15% of all Low-Income Units at 50% or less of AMGI (13 points); or

(iv) At least 10% of all Low-Income Units at 50% or less of AMGI (11 points).

(C) For any Development located within a non-Rural Area of the Dallas, Fort Worth, Houston, San Antonio, or Austin MSAs that propose to use the Average Income election under §42(g)(1)(C) of the Code:

(i) The Average Income and Rent restriction for all Low-Income Units for the proposed Development will be 54% or lower (15 points);

(ii) The Average Income and Rent restriction for all Low-Income Units for the proposed Development will be 55% or lower (13 points); or

(iii) The average income and Rent restriction for all Low-Income Units for the proposed Development will be 56% or lower (11 points).

(D) For Developments proposed to be located in the areas other than those listed in subparagraph (C) of this paragraph and that propose to use the Average Income election under §42(g)(1)(C) of the Code:

(i) The Average Income and Rent restriction for all Low-Income Units for the proposed Development will be 55% or lower (15 points);

(ii) The Average Income and Rent restriction for all Low-Income Units for the proposed Development will be 56% or lower (13 points); or

(iii) The Average Income and Rent restriction for all Low-Income Units for the proposed Development will be 57% or lower (11 points).

(2) Rent Levels of Tenants. (§2306.6710(b)(1)(E)) An Application may qualify to receive up to thirteen (13) points for rent and income restricting a Development for the entire Affordability Period. If selecting points from paragraph (1)(A) or paragraph (1)(B) of this subsection, these levels are in addition to those committed under paragraph (1) of this subsection. If selecting points from paragraph (1)(C) or paragraph (1)(D) of this subsection, these levels are included in the income average calculation under paragraph (1) of this subsection. These units must be maintained at this rent level throughout the Affordability Period regardless of the Average Income calculation. Scoring options include:

(A) At least 20% of all Low-Income Units at 30% or less of AMGI for Supportive Housing Developments proposed by a Qualified Nonprofit (13 points);

(B) At least 10% of all Low-Income Units at 30% or less of AMGI or, for a Development located in a Rural Area, 7.5% of all Low-Income Units at 30% or less of AMGI (11 points); or

(C) At least 5% of all Low-Income Units at 30% or less of AMGI (7 points).

(3) Resident Supportive Services. (§2306.6710(b)(3) and (1)(G), and §2306.6725(a)(1)) A Development may qualify to receive up to eleven (11) points.

(A) The Applicant certifies that the Development will provide a combination of resident supportive services, which are listed in §11.101(b)(7) of this chapter (relating to Development Requirements and Restrictions) and meet the requirements of that section. (10 points).

(B) The Applicant certifies that the Development will contact local nonprofit and governmental providers of services that would support the health and well-being of the Department's residents, and will make Development community space available to them on a regularly-scheduled basis to provide outreach services and education to the tenants. Applicants may contact service providers on the Department list, or contact other providers that serve the general area in which the Development is located. (1 point).

(4) Residents with Special Housing Needs. (§2306.6710(b)(4); §42(m)(1)(C)(v)) An Application may qualify to receive up to three (3) points by serving Residents with Special Housing Needs by selecting points under any combination of subparagraphs (A), (B), and (C) of this paragraph. The Units identified for this scoring item may not be the same Units identified previously for the Section 811 PRA Program.

(A) The Development must commit at least 5% of the total Units to Persons with Special Housing Needs. For purposes of this subparagraph, Persons with Special Housing Needs is defined as a household where one or more individuals have alcohol or drug addictions, is a Colonia resident, a Person with a Disability, has Violence Against Women Act Protections (domestic violence, dating violence, sexual assault, and stalking), HIV/AIDS, homeless, veterans, and farmworkers. Throughout the Compliance Period, unless otherwise permitted by the Department, the Development Owner agrees to specifically market Units to Persons with Special Housing Needs. In addition, the Department will require an initial minimum twelve-month period during which Units must either be occupied by Persons with Special Housing Needs or held vacant, unless the Units receive HOME funds from any source. After the initial twelve-month period, the Development Owner will no longer be required to hold Units vacant for Persons with Special Housing Needs, but will be required to continue to specifically market Units to Persons with Special Housing Needs. (2 points)

(B) If the Development has committed units under subparagraph (A) of this paragraph, the Development must commit at least an additional 2% of the total Units to Persons referred from the Continuum of Care or local homeless service providers to be made available for those experiencing homelessness. Rejection of an applicant's tenancy for those referred may not be for reasons of credit history or prior rental payment history. Throughout the Compliance Period, unless otherwise permitted by the Department, the Development Owner agrees to specifically market the 2% of Units through the Continuum of Care and other homelessness providers local to the Development Site. In addition, the Department will require an initial minimum twelve-month period in Urban subregions, and an initial six-month period in Rural subregions, during which Units must either be occupied by Persons referred from the Continuum of Care or local homeless service providers, or held vacant, unless the Units receive HOME funds from any source. After the initial twelve-month or six-month period, the Development Owner will no longer be required to hold Units vacant but will be required to continue to provide quarterly notifications to the Continuum of Care and other homeless service providers local to the Development Site on the availability of Units at the Development Site. A Development is not eligible under this paragraph unless points have also been selected under subparagraph (A) of this paragraph. (1 point)

(C) If at Application, the Development is located in a county with a population of 1 million or more, but less than 4 million, and is located not more than two miles from a veteran's hospital, veteran's affairs medical center, or veteran's affairs health care center, (which include all providers listed under the Veteran's Health Administration categories, excluding Benefits Administration offices, listed at this link https://www.va.gov/directory/guide/fac_list_by_state.cfm?State=TX&dnum=ALL) and agrees to provide a preference for leasing units in the Development to low income veterans. (1 point)

(5) Opportunity Index. (42(m)(1)(C)(i)) The Department may refer to locations qualifying for points under this scoring item as high opportunity areas in some materials. Based on the American Community Survey (ACS) data, a Development is eligible for a maximum of seven (7) opportunity index points from subparagraphs (A) and (B) of this paragraph.

(A) A proposed Development is eligible for up to two (2) opportunity index points if it is located entirely within a census tract with a poverty rate less than 20% or the median poverty rate among tracts for the region, whichever is greater, and meets the requirements in clause (i) or (ii) of this subparagraph:

(i) The Development Site is located entirely within a census tract that has:

(I) a poverty rate less than 20% or the median poverty rate among Census tracts for the region whichever is greater; and

(II) a median household income in the two highest quartiles among Census tracts within the uniform service region (2 points); or

(ii) The Development Site is located entirely within a census tract that has:

(I) a poverty rate less than 20% or the median poverty rate among Census tracts for the region, whichever is greater,

(II) a median household income in the third quartile among Census tracts within the region, and

(III) is contiguous to a census tract that is in the first or second quartile among tracts for median household income in the region, and has a poverty rate less than 20% or the median poverty rate among tracts for the region, whichever is greater, and the Development Site is no more than 2 miles from the boundary between the census tracts (1 point); and

(B) An Application that meets one of the foregoing criteria in subparagraph (A) of this paragraph may qualify for additional points for any one or more of the factors in clause (i) or (ii) of this subparagraph. Each amenity may be used only once for scoring purposes, unless allowed within the scoring item, regardless of the number of categories it fits. All members of the Applicant or Affiliates cannot have had an ownership position in the amenity or served on the board or staff of a nonprofit that owned or managed that amenity within the year preceding the Pre-Application Final Delivery Date. All amenities must be operational or have started Site Work at the Pre-Application Final Delivery Date. Any age restrictions associated with an amenity must positively correspond to the Target Population of the proposed Development.

(i) For Developments located in an Urban Area (other than Applicants competing in the USDA Set- Aside), an Application may qualify to receive points through a combination of requirements in subclauses (I) - (XV) of this clause.

(I) The Development Site is located on a route, with sidewalks for pedestrians, that is 1/2 mile or less from the entrance to a public park with a playground or from a multiuse hike-bike trail. The entirety of the sidewalk route must consist of smooth hard surfaces, curb ramps, and marked pedestrian crossings when traversing a street. (1 point).

(II) The Development Site is located on a route, with sidewalks for pedestrians, that is within a specified distance from the entrance of a public transportation stop or station with a route schedule that provides regular service to employment and basic services. The entirety of the sidewalk route must consist of smooth hard surfaces, curb ramps, and marked pedestrian crossings when traversing a street. Only one of the following may be selected:

(-a-) The Development Site is 1/2 mile or less from the stop or station and the scheduled service is beyond 8 a.m. to 5 p.m., plus weekend service (both Saturday and Sunday) (1 point); or

(-b-) The Development Site is 1/2 mile or less from the stop or station and the scheduled service arrives every 15 minutes, on average, between 6 a.m. and 8 p.m., every day of the week (2 points).

(III) The Development Site is located within 2 miles of a full-service grocery store. A full service grocery store is a store of sufficient size and volume to provide for the needs of the surrounding neighborhood including the proposed Development; and the space of the store is dedicated primarily to offering a wide variety of fresh, frozen, canned and prepared foods, including but not limited to a variety of fresh meats, poultry, and seafood; a wide selection of fresh produce including a selection of different fruits and vegetables; a selection of baked goods and a wide array of dairy products including cheeses, and a wide variety of household goods, paper goods and toiletry items. (2 point).

(IV) The Development Site is located within 2 miles of a pharmacy. For the purposes of this menu item only, the pharmacy may be claimed if it is within the same building as a grocery store. (2 point).

(V) The Development Site is located within 4 miles of a health-related facility, such as a full service hospital, community health center, minor emergency center, emergency room or urgent care facility. Physician offices and physician specialty offices are not considered in this category. (1 point).

(VI) The Development Site is within 3 miles of a center that is licensed by the Department of Family and Protective Services (DFPS) specifically to provide a school-age program or to provide a child care program for infants, toddlers, or pre-kindergarten. The Application must include evidence from DFPS that the center meets the above requirements. (1 point)

(VII) The Development Site is located in a census tract with a property crime rate of 26 per 1,000 persons or less as defined by neighborhoodscout.com, or local law enforcement data sources. If employing the latter source, the formula for determining the crime rate will include only data relevant to the census tract in which the Development Site is located. (1 point)

(VIII) The Development Site is located within 2 miles of a public library that has indoor meeting space, physical books that can be checked out and that are of a general and wide-ranging subject matter, computers and internet access, and that is open 50 hours or more per week. The library must not be age or subject-restricted and must be at least partially funded with government funding. (1 point)

(IX) The Development Site is located within 6 miles of an accredited university or community college, as confirmed by the Texas Higher Education Coordination Board (THECB). To be considered a university for these purposes, the provider of higher education must have the authority to confer bachelor's degrees. Two-year colleges are considered community colleges, and to be considered for these purposes must confer at least associate's degrees. The university or community college must have a physical campus, where classes are regularly held for students pursuing their degrees, within the required distance; online-only institutions do not qualify under this item. (1 point)

(X) Development Site is located in a census tract where 27% or more of adults age 25 and older has an Associate's Degree or higher as tabulated by the American Community Survey 5-year Estimate. (1 point)

(XI) Development Site is within 2 miles of an indoor recreation facility available to the public. Examples include, but are not limited to, a gym, health club, a bowling alley, a theater, or a municipal or county community center. A facility that is primarily a restaurant or bar with recreational facilities is not eligible. (1 point)

(XII) Development Site is within 2 miles of an outdoor, dedicated, and permanent recreation facility available to the public. Examples include, but are not limited to, swimming pools or splash pads, tennis courts, golf courses, softball fields, or basketball courts. (1 point).

(XIII) Development Site is within 2 miles of community, civic or service organizations that provide regular and recurring substantive services, beyond exclusively congregational or member-affiliated activities, available to the entire community (this could include religious organizations or organizations like the Kiwanis or Rotary Club as long as they make services available without regard to affiliation or membership). (1 point).

(XIV) Development Site is in the current service area of Meals on Wheels or similar nonprofit service that provides regular visits and meals to individuals in their homes. (1 point).

(XV) Development Site is located in the attendance zone of a general enrollment public school rated A or B by TEA for the most recently available rating. (1 point).

(ii) For Developments located in a Rural Area and any Application qualifying under the USDA set- aside, an Application may qualify to receive points through a combination of requirements in subclauses (I) - (XIV) of this clause.

(I) The Development Site is located within 5 miles of a full-service grocery store. A full service grocery store is a store of sufficient size and volume to provide for the needs of the surrounding neighborhood including the proposed Development; and the space of the store is dedicated primarily to offering a wide variety of fresh, frozen, canned and prepared foods, including but not limited to a variety of fresh meats, poultry, and seafood; a wide selection of fresh produce including a selection of different fruits and vegetables; a selection of baked goods and a wide array of dairy products including cheeses, and a wide variety of household goods, paper goods and toiletry items. (2 point).

(II) The Development Site is located within 5 miles of a pharmacy. For the purposes of this menu item only, the pharmacy may be claimed if it is within the same building as a grocery store. (2 point).

(III) The Development Site is located within 5 miles of health-related facility, such as a full service hospital, community health center, minor emergency center, or a doctor with a general practice that takes walk-in patients. Physician specialty offices are not considered in this category. (1 point).

(IV) The Development Site is located within 5 miles of a center that is licensed by the Department of Family and Protective Services (DFPS) specifically to provide a school-age program or to provide a child care program for infants, toddlers, or pre-kindergarten. The Application must include evidence from DFPS that the center meets the above requirements. (1 point).

(V) The Development Site is located in a census tract with a property crime rate 26 per 1,000 or less, as defined by neighborhoodscout.com, or local law enforcement data sources. If employing the latter source, the formula for determining the crime rate will include only data relevant to the census tract in which the Development Site is located. (1 point).

(VI) The Development Site is located within 5 miles of a public library that has indoor meeting space, physical books that can be checked out and that are of a general and wide-ranging sub-

ject matter, computers and internet access, and that is open 40 hours or more per week. The library must not be age or subject-restricted and must be at least partially funded with government funding. (1 point).

(VII) The Development Site is located within 5 miles of a public park with a playground. (1 point).

(VIII) The Development Site is located within 15 miles of an accredited university or community college, as confirmed by the Texas Higher Education Coordination Board (THECB). To be considered a university for these purposes, the provider of higher education must have the authority to confer bachelor's degrees. Two-year colleges are considered community colleges, and to be considered for these purposes must confer at least associate's degrees. The university or community college must have a physical campus, where classes are regularly held for students pursuing their degrees, within the required distance; online-only institutions do not qualify under this item. (1 point).

(IX) Development Site is located in a census tract where 27% or more of adults age 25 and older has an Associate's Degree or higher as tabulated by the American Community Survey 5-year Estimate. (1 point).

(X) Development Site is within 4 miles of an indoor recreation facility available to the public. Examples include, but are not limited to, a gym, health club, a bowling alley, a theater, or a municipal or county community center. A facility that is primarily a restaurant or bar with recreational facilities is not eligible. (1 point).

(XI) Development Site is within 4 miles of an outdoor, dedicated, and permanent recreation facility available to the public. Examples include, but are not limited to, swimming pools or splash pads, tennis courts, golf courses, softball fields, or basketball courts. (1 point).

(XII) Development Site is within 4 miles of community, civic or service organizations that provide regular and recurring substantive services, beyond exclusively congregational or member-affiliated activities, available to the entire community (this could include religious organizations or organizations like the Kiwanis or Rotary Club as long as they make services available without regard to affiliation or membership). (1 point).

(XIII) Development Site is in the current service area of Meals on Wheels or similar nonprofit service that provides regular visits and meals to individuals in their homes. (1 point).

(XIV) Development Site is located in the attendance zone of a general enrollment public school rated A or B by TEA for the most recently available rating. (1 point).

(6) Underserved Area. (§§2306.6725(a)(4) and (b)(2); 2306.127(3), 42(m)(1)(C)(i) and (ii)). Points are not cumulative and an Applicant is therefore limited to selecting one subparagraph. If an Application qualifies for points under paragraph (5) of this subsection, then the Application is not eligible for points under subparagraphs (A) and (B) of this paragraph. Years are measured in whole years, and are calculated by deducting the year of the award from the "Board Approval" column of the property inventory of the Site Demographic Characteristics Report from the current year. The specific month and date of the award are disregarded for this analysis. The Application must include evidence that the Development Site meets the requirements. An Application may qualify to receive up to five (5) points if the Development Site meets any one of the criteria described in subparagraphs (A) - (H) of this paragraph:

(A) (§2306.127(3)). The Development Site is located wholly or partially within the boundaries of a colonia as such boundaries are determined by the Office of the Attorney General and within 150 miles of the Rio Grande River border. For purposes of this scoring item, the colonia must lack water, wastewater, or electricity provided to all residents of the colonia at a level commensurate with the quality and quantity expected of a municipality and the proposed Development must make available any such missing water, wastewater, and electricity supply infrastructure physically within the borders of the colonia in a manner that would enable the current dwellings within the colonia to connect to such infrastructure (5 points);

(B) (§2306.127(3)). The Development Site is located entirely within the boundaries of an Economically Distressed Area that has been awarded funds by the Texas Water Development Board in the previous five years ending at the beginning of the Application Acceptance Period (1 point);

(C) (§2306.6725(b)(2)). The Development Site is located entirely within a census tract that does not have another Development that was awarded 30 or fewer years ago according to the Department's property inventory in the Site Demographic Characteristics Report (4 points);

(D) For areas not scoring points for subparagraph (C), the Development Site is located entirely within a census tract that does not have another Development that was awarded 15 or fewer years ago according to the Department's property inventory tab of the Site Demographic Characteristics Report (3 points);

(E) For areas not scoring points for subparagraphs (C) or (D) of this paragraph, the Development Site is located entirely within a census tract that does not have another Development that was awarded 10 or fewer years ago according to the Department's property inventory in the Site Demographic Characteristics Report (2 points);

(F) The Development Site is located entirely within a census tract that is located wholly within the perimeter formed by the outermost boundaries of an incorporated area and the census tract itself and all of its contiguous census tracts do not have another Development that was awarded 10 or fewer years ago according to the Department's property inventory tab of the Site Demographic Characteristics Report. This item will apply to Development Sites located entirely in in Places with a population of 100,000 or more, and will not apply in the At-Risk Set-Aside; (5 points)

(i) The presence of unincorporated enclaves within the census tract will not make an Application ineligible for these points so long as the tract is wholly within the outer boundaries of an incorporated area.

(ii) The perimeter of incorporated area may be composed of boundaries from multiple municipalities so long as the boundaries, when taken as a whole, form a complete perimeter.

(iii) The Development Site may intersect the boundaries of multiple Places so long as each has a population of 100,000 or more.

(iii) To accommodate for mapping inaccuracies, for purposes of this scoring item only, any overlap of boundaries that is 300 or fewer feet, measured outward from the incorporated area boundary, will be disregarded when determining that a census tract is located within an incorporated area so long as the determination is in the Application's favor.

(iv) Contiguous census tracts include those that touch at a point.

(G) The Development Site is located entirely within a census tract where, according to American Community Survey 5-year Estimates, the population share of persons below 200% federal poverty

level decreased by 10% or more and where the total number of persons at or above 200% federal poverty level had increased by 15% or more between the years 2012 and 2019. This measure is referred to as the Affordable Housing Needs Indicator in the Site Demographic Characteristics Report. The Census Tracts for this scoring item will be those defined by the ACS 2012 and 2019 5-year data sets. Due to changing census tracts resulting from the 2020 decennial census, Development sites which would have qualified for this point item under the 2022 QAP using the 2022 Site Demographics Report will continue to be eligible. The Department will not publish an updated Affordable Housing Needs Indicator analysis until sufficient data is available to do so. It is incumbent upon the Applicant to demonstrate within the Application that the Development Site would have qualified for these points. (4 points); or

(H) An At-risk or USDA Development placed in service 25 or more years ago, that is still occupied, and that has not yet received federal funding, or LIHTC equity, for the purposes of Rehabilitation for the Development. If the Application involves multiple sites, the age of all sites will be averaged for the purposes of this scoring item. (3 points).

(7) Proximity to Job Areas. (§42(m)(1)(C)(i)) An Application may qualify to receive up to four (4) points if the Development Site is located in one of the areas described in subparagraphs (A), (B), or (C) of this paragraph, and the Application contains evidence substantiating qualification for the points. The data used will be based solely on that available through US Census' OnTheMap tool. Jobs counted are limited to those based on the work area, all workers, and all primary jobs. This determination will be based on the latest data set posted to the US Census website on or before October 1, 2022. The Development will use OnTheMap's function to import GPS coordinates that clearly fall within the Development Site, and the OnTheMap chart/map report submitted in the Application must include the report date. This scoring item will not apply to Applications under the At-Risk or USDA Set-Aside.

(A) Proximity to Jobs. For Development Sites in Urban subregions a Development may qualify for points under this subparagraph if it meets one of the criteria in clauses (i) - (vi) of this subparagraph.

(i) The Development is located within 2 miles of 10,000 jobs. (4 points)

(ii) The Development is located within 2 miles of 8,000 jobs. (3 points)

(iii) The Development is located within 2 miles of 6,500 jobs. (2 points)

(iv) The Development is located within 2 miles of 4,500 jobs. (1 points)

(B) Proximity to Jobs. For Development Sites in Rural subregions a Development may qualify for points under this subparagraph if it meets one of the criteria in clauses (i) - (vi) of this subparagraph.

(i) The Development is located within 4 miles of 8,000 jobs. (4 points)

(ii) The Development is located within 4 miles of 6,000 jobs. (3 points)

(iii) The Development is located within 4 miles of 4,000 jobs. (2 points)

(iv) The Development is located within 4 miles of 2,000 jobs. (1 points)

(C) Access to Jobs. A Development site which qualifies for at least 2 points under subparagraph (A) or (B) may qualify for up to 2 additional points under this subparagraph if the Development Site is within one half-mile from the entrance of a public transportation stop or station with a route schedule that provides regularly scheduled service to employment and basic services. (2 points)

(d) Criteria promoting community support and engagement.

(1) Local Government Support. (§2306.6710(b)(1)(B)) An Application may qualify for up to seventeen (17) points for a resolution or resolutions voted on and adopted by the bodies reflected in subparagraphs (A) - (C) of this paragraph, as applicable. The resolution(s) must be dated prior to Final Input from Elected Officials Delivery Date and must be submitted to the Department no later than the Final Input from Elected Officials Delivery Date as identified in §11.2(a) of this chapter, relating to Competitive HTC Deadlines. Such resolution(s) must specifically identify the Development whether by legal description, address, Development name, Application number or other verifiable method. Resolutions received by the Department setting forth that the municipality and/or county objects to or opposes the Application or Development will result in zero points awarded to the Application for that Governing Body. If a Development site is located partially within a municipality and partially within a county or extraterritorial jurisdiction, positive points will only be awarded if a resolution is obtained from both entities. Such resolutions will be added to the Application posted on the Department's website. Once a resolution is submitted to the Department it may not be changed or withdrawn. For an Application with a proposed Development Site that, at the time of the initial filing of the Application, is:

(A) Within a municipality, the Application will receive points from either:

(i) Seventeen (17) points for a resolution from the Governing Body of that municipality expressly setting forth that the municipality supports the Application or Development; or

(ii) Fourteen (14) points for a resolution from the Governing Body of that municipality expressly setting forth that the municipality has no objection to the Application or Development.

(B) Within the extraterritorial jurisdiction of a municipality, the Application may receive points under clause (i) or (ii) of this subparagraph and under clause (iii) or (iv) of this subparagraph.

(i) Eight and one-half (8.5) points for a resolution from the Governing Body of that municipality expressly setting forth that the municipality supports the Application or Development.

(ii) Seven (7) points for a resolution from the Governing Body of that municipality expressly setting forth that the municipality has no objection to the Application or Development.

(iii) Eight and one-half (8.5) points for a resolution from the Governing Body of that county expressly setting forth that the county supports the Application or Development.

(iv) Seven (7) points for a resolution from the Governing Body of that county expressly setting forth that the county has no objection to the Application or Development.

(C) Within a county and not within a municipality or the extraterritorial jurisdiction of a municipality, the Application will receive points from either:

(i) Seventeen (17) points for a resolution from the Governing Body of that county expressly setting forth that the county supports the Application or Development; or

(ii) Fourteen (14) points for a resolution from the Governing Body of that county expressly setting forth that the county has no objection to the Application or Development.

(2) Commitment of Development Funding by Local Political Subdivision. (§2306.6725(a)(5)) The source of the funding cannot be the Applicant, Developer, or an Affiliate of the Applicant. The commitment of Development funding must be reflected in the Application as a financial benefit to the Development, i.e. reported as a source of funds on the Sources and Uses Form or reflected in a lower cost in the Development Cost Schedule, such as notation of a reduction in building permits and related costs. Documentation must include a letter from an official of the municipality, county, or other instrumentality with jurisdiction over the proposed Development stating they will provide a loan, grant, reduced fees or contribution of other value that equals $500 or more for Applications located in Urban subregions or $250 or more for Applications located in Rural subregions for the benefit of the Development. The letter must describe the value of the contribution, the form of the contribution, e.g. reduced fees or gap funding, and any caveats to delivering the contribution. Once a letter is submitted to the Department it may not be changed or withdrawn. (1 point)

(3) Declared Disaster Area. (§2306.6710(b)(1)(H); §42(m)(1)(C)(i)) An Application may receive ten (10) points if at the time of Application submission or at any time within the two-year period preceding the date of submission, the Development Site is located in an area declared to be a disaster area under the Tex. Gov't Code §418.014.

(4) Quantifiable Community Participation. (§2306.6710(b)(1)(I); §2306.6725(a)(2)) An Application may qualify for up to nine (9) points for written statements from a Neighborhood Organization. In order for the statement to qualify for review, the Neighborhood Organization must have been in current, valid existence with boundaries that contain the entire Development Site. In addition, the Neighborhood Organization must be on record 30 days prior to the beginning of the Application Acceptance period with the Secretary of State or county in which the Development Site is located as of the beginning of the Application Acceptance Period. Once a letter is submitted to the Department it may not be changed or withdrawn. The written statement must meet all of the requirements in subparagraph (A) of this paragraph. Letters received by the Department setting forth that the eligible Neighborhood Organization objects to or opposes the Application or Development will be added to the Application posted on the Department's website. Written statements from the Neighborhood Organizations included in an Application and not received by the Department from the Neighborhood Organization will not be scored but will be counted as public comment.

(A) Statement Requirements. If an organization cannot make the following affirmative certifications or statements then the organization will not be considered a Neighborhood Organization for purposes of this paragraph:

(i) the Neighborhood Organization's name, a written description and map of the organization's boundaries, signatures and contact information (phone, email and mailing address) of at least two individual members with authority to sign on behalf of the organization;

(ii) certification that the boundaries of the Neighborhood Organization contain the entire Development Site and that the Neighborhood Organization meets the definition pursuant to Tex. Gov't Code §2306.004(23-a) and includes at least two separate residential households;

(iii) certification that no person required to be listed in accordance with Tex. Gov't Code §2306.6707 with respect to the Development to which the Application requiring their listing relates participated in any way in the deliberations of the Neighborhood Organization, including any votes taken;

(iv) certification that at least 80% of the current membership of the Neighborhood Organization consists of homeowners and/or tenants living within the boundaries of the Neighborhood Organization; and

(v) an explicit expression of support, opposition, or neutrality. Any expression of opposition must be accompanied with at least one reason forming the basis of that opposition. A Neighborhood Organization should be prepared to provide additional information with regard to opposition.

(B) Technical Assistance. For purposes of this paragraph, if and only if there is no Neighborhood Organization already in existence or on record, the Applicant, Development Owner, or Developer is allowed to provide technical assistance in the creation of or placing on record of a Neighborhood Organization. Technical assistance is limited to:

(i) the use of a facsimile, copy machine/copying, email and accommodations at public meetings;

(ii) assistance in completing the QCP Neighborhood Information Packet, providing boundary maps and assisting in the Administrative Deficiency process;

(iii) presentation of information and response to questions at duly held meetings where such matter is considered; and

(iv) notification regarding deadlines for submission of responses to Administrative Deficiencies.

(C) Point Values for Quantifiable Community Participation. An Application may receive points based on the values in only one of the clauses (i) - (vi) of this subparagraph. Points will not be cumulative. Where more than one written statement is received for an Application, the average of all statements received in accordance with this subparagraph will be assessed and awarded.

(i) Nine (9) points for explicit support from a Neighborhood Organization that, during at least one of the three prior Application Rounds, provided a written statement that qualified as Quantifiable Community Participation opposing any Competitive Housing Tax Credit Application and whose boundaries remain unchanged.

(ii) Eight (8) points for explicitly stated support from a Neighborhood Organization.

(iii) Six (6) points for explicit neutrality from a Neighborhood Organization that, during at least one of the three prior Application Rounds provided a written statement, that qualified as Quantifiable Community Participation opposing any Competitive Housing Tax Credit Application and whose boundaries remain unchanged.

(iv) Four (4) points for statements of neutrality from a Neighborhood Organization or statements not explicitly stating support or opposition, or an existing Neighborhood Organization provides no statement of either support, opposition or neutrality, which will be viewed as the equivalent of neutrality or lack of objection.

(v) Four (4) points for areas where no Neighborhood Organization is in existence, equating to neutrality or lack of objection, or where the Neighborhood Organization did not meet the explicit requirements of this section.

(vi) Zero (0) points for statements of opposition meeting the requirements of this subsection.

(D) Challenges to opposition. Any written statement from a Neighborhood Organization expressing opposition to an Application may be challenged if it is contrary to findings or determinations, including zoning determinations, of a municipality, county, school district, or other local Governmental Entity having jurisdiction or oversight over the finding or determination. If any such statement is challenged, the challenger must declare the basis for the challenge and submit such challenge by the Challenges to Neighborhood Organization Opposition Delivery Date May 1, 2023. The Neighborhood Organization expressing opposition will be given seven calendar days to provide any information related to the issue of whether their assertions are contrary to the findings or determinations of a local Governmental Entity. All such materials and the analysis of the Department's staff will be provided to a fact finder, chosen by the Department, for review and a determination of the issue presented by this subsection. The fact finder will not make determinations as to the accuracy of the statements presented, but only with regard to whether the statements are contrary to findings or determinations of a local Governmental Entity. The fact finder's determination will be final and may not be waived or appealed. Should the Neighborhood Organization's statements be found to be contrary to findings or determinations of a local Government Entity, or should the Neighborhood Organization not respond in seven calendar days, then the Application shall be eligible for four (4) points under subparagraph (C)(v) of this subsection.

(5) Community Support from State Representative. (§2306.6710(b)(1)(J); §2306.6725(a)(2); §2306.6710(f) and (g)) Applications may receive up to eight (8) points for express support, zero points for neutral statements, or have deducted up to eight (8) points for express opposition.

(A) Letter from a State Representative. To qualify under this subparagraph, letters must be on the State Representative's letterhead or submitted in such a manner as to verify the sender, be signed by the State Representative, identify the specific Development and express whether the letter conveys support, neutrality, or opposition. This documentation will be accepted with the Application or through delivery to the Department from the Applicant or the State Representative and must be submitted no later than the Final Input from Elected Officials Delivery Date as identified in §11.2(a) of this chapter (relating to Competitive HTC Deadlines). Letters received by the Department from State Representatives will be added to the Application posted on the Department's website. Once a letter is submitted to the Department it may not be changed or withdrawn. Therefore, it is encouraged that letters not be submitted well in advance of the specified deadline in order to facilitate consideration of all constituent comment and other relevant input on the proposed Development. State Representatives to be considered are those in office at the time the letter is submitted and whose district boundaries include the Development Site. If the office is vacant, the Application will be considered to have received a neutral letter. Neutral letters or letters that do not specifically refer to the Development will receive zero (0) points. A letter from a state representative expressing the level of community support may be expressly based on the representative's understanding or assessments of indications of support by others, such as local government officials, constituents, or other applicable representatives of the community. In providing this letter, pursuant to Tex. Gov't Code §2306.6710(b)(1)(J), a representative may either express their position of support, opposition, or neutrality regarding the Application, which shall be presumed to reflect their assessment of the views of their constituents, or they may provide a statement of the support, opposition, or neutrality of their constituents regarding the Application without expressing their personal views on the matter.

(B) No Letter from a State Representative. To qualify under this subparagraph, no written statement can be received for an Application from the State Representative who represents the geographic area in which the proposed Development is located, unless the sole content of the written statement is to convey to the Department that no written statement will be provided by the State Representative for a particular Development. Points available under this subparagraph will be based on how an Application scores under paragraph (1) of this subsection (relating to Local Government Support). If a Development site is located partially within a municipality and partially within a county or extraterritorial jurisdiction, positive points will only be awarded if a resolution is obtained from both entities. For an Application with a proposed Development Site that, at the time of the initial filing of the Application, is:

(i) Within a municipality, the Application will receive:

(I) Eight (8) points for a resolution from the Governing Body of that municipality expressly setting forth that the municipality supports the Application or Development; or

(II) Zero (0) points for no resolution or a resolution from the Governing Body of that municipality expressly setting forth that the municipality has no objection to the Application or Development; or

(III) Negative eight (-8) points for a resolution from the Governing Body of that municipality expressly setting forth that the municipality opposes the Application or Development.

(ii) Within the extraterritorial jurisdiction of a municipality, the Application will receive points under subclause (I) or (II) or (III) of this subparagraph, and under subclause (IV) or (V) or (VI) of this subparagraph.

(I) Four (4) points for a resolution from the Governing Body of that municipality expressly setting forth that the municipality supports the Application or Development.

(II) Zero (0) points for no resolution or a resolution from the Governing Body of that municipality expressly setting forth that the municipality has no objection to the Application or Development.

(III) Negative four (-4) points for a resolution from the Governing Body of that municipality expressly setting forth that the municipality opposes the Application or Development.

(IV) Four (4) points for a resolution from the Governing Body of that county expressly setting forth that the county supports the Application or Development.

(V) Zero (0) points for no resolution or a resolution from the Governing Body of that county expressly setting forth that the county has no objection to the Application or Development.

(VI) Negative four (-4) points for a resolution from the Governing Body of that county expressly setting forth that the county opposes the Application or Development.

(iii) Within a county and not within a municipality or the extraterritorial jurisdiction of a municipality:

(I) Eight (8) points for a resolution from the Governing Body of that county expressly setting forth that the county supports the Application or Development; or

(II) Zero (0) points for no resolution or a resolution from the Governing Body of that county expressly setting forth that the county has no objection to the Application or Development; or

(III) Negative eight (-8) points for a resolution from the Governing Body of that county expressly setting forth that the county opposes the Application or Development.

(6) Input from Community Organizations. (§2306.6725(a)(2)) Where, at the time of Application, the Development Site does not fall within the boundaries of any qualifying Neighborhood Organization or there is a qualifying Neighborhood Organization that has given no statement or a statement of neutrality (as described in subparagraph B(4)(C)(iv) or (v) of this subsection), then, in order to ascertain if there is community support, an Application may receive up to four (4) points for letters that qualify for points under subparagraphs (A), (B), or (C) of this paragraph. No more than four (4) points will be awarded under this point item under any circumstances. All letters of support must be submitted within the Application. Once a letter is submitted to the Department it may not be changed or withdrawn. Should an Applicant elect this option and the Application receives letters in opposition, then one (1) point will be subtracted from the score under this paragraph for each letter in opposition, provided that the letter is from an organization that would otherwise qualify under this paragraph. However, at no time will the Application receive a score lower than zero (0) for this item. Letters received by the Department setting forth that the community organization objects to or opposes the Application or Development will be added to the Application posted on the Department's website.

(A) An Application may receive two (2) points for each letter of support submitted from a community or civic organization that serves the community in which the Development Site is located. Letters of support must identify the specific Development and must state support of the specific Development at the proposed location. To qualify, the organization must be qualified as tax exempt and have as a primary (not ancillary or secondary) purpose the overall betterment, development, or improvement of the community as a whole or of a major aspect of the community such as improvement of schools, fire protection, law enforcement, city-wide transit, flood mitigation, or the like. The Applicant must provide evidence that the community or civic organization remains in good standing by providing evidence from a federal or state government database confirming that the exempt status continues. An Organization must also provide evidence of its participation in the community in which the Development Site is located including, but not limited to, a listing of services or members, brochures, annual reports, etc. Letters of support from organizations that cannot provide reasonable evidence that they are active in the area that includes the location of the Development Site will not be awarded points. For purposes of this subparagraph, community and civic organizations do not include neighborhood organizations, governmental entities (excluding Special Management Districts as described in subparagraph C), or taxing entities.

(B) An Application may receive two (2) points for a letter of support from a property owners association created for a master planned community whose boundaries include the Development Site and that does not meet the requirements of a Neighborhood Organization for the purpose of awarding points under paragraph (4) of this subsection.

(C) An Application may receive two (2) points for a letter of support from a Special Management District formed under Tex. Local Gov't Code chapter 375 whose boundaries, as of the Full Application Delivery Date as identified in §11.2(a) of this chapter, (relating to Competitive HTC Deadlines, Program Calendar for Competitive Housing Tax Credits), include the Development Site.

(D) Input that evidences unlawful discrimination against classes of persons protected by Fair Housing law or the scoring of which the Department determines to be contrary to the Department's efforts to affirmatively further fair housing will not be considered. If the Department receives input that could reasonably be suspected to implicate issues of non-compliance under the Fair Housing Act, staff will refer the matter to the Texas Workforce Commission for investigation, but such referral will not, standing alone, cause staff or the Department to terminate the Application. Staff will report all such referrals to the Board and summarize the status of any such referrals in any recommendations.

(7) Concerted Revitalization Plan. (§42(m)(1)(B)(ii)(III) and (C)(iii)). An Application may qualify for up to seven (7) points under this paragraph only if no points are elected under subsection (c)(5) of this section, related to Opportunity Index.

(A) For Developments located in an Urban Area:

(i) An Application may qualify to receive points if the Development Site is geographically located within an area for which a concerted revitalization plan (plan or CRP) has been developed and published by the municipality.

(ii) A plan may consist of one or two complementary local planning documents that together have been approved by the municipality as a plan to revitalize the specific area. The plan and supporting documentation must be submitted using the CRP Application Packet. No more than two local plans may be submitted for each proposed Development. The concerted revitalization plan may be a Tax Increment Reinvestment Zone (TIRZ) or Tax Increment Finance (TIF) or similar plan. A city- or county-wide comprehensive plan, including a consolidated plan or one-year action plan required to receive HUD funds does not equate to a concerted revitalization plan unless evidence is presented that additional efforts have been undertaken to meet the requirements in clause (iii) of this subparagraph.

(iii) The area targeted for revitalization must be larger than the assisted housing footprint.

(iv) The Application must include a copy of the plan or a link to the online plan and a description of where specific information required below can be found in the plan. The plan must meet the criteria described in subclauses (I) and (II) of this clause:

(I) The concerted revitalization plan, or each of the local planning documents that compose the plan, must have been published by the municipality or county in which the Development Site is located.

(II) The plan must be current at the time of Application.

(v) If the Application includes an acceptable Concerted Revitalization Plan, up to seven (7) points will be awarded as follows:

(I) the proposed Development Site is located within a Qualified Census Tract (7 points); or

(II) the proposed Development Site is not located within a Qualified Census Tract and in addition to all requirements for this paragraph has also submitted a letter from the appropriate local official for the municipality (or county if the Development Site is completely outside of a municipality) that explicitly identifies the proposed Development as contributing to the concerted revitalization efforts of the municipality or county (as applicable) (7 points); or

(III) the proposed Development Site is not located within a Qualified Census Tract and does not have a letter described in subclause (II) of this clause (5 points).

(B) For Developments located in a Rural Area the Rehabilitation, or demolition and Reconstruction, of a Development in

a rural area that has been leased and occupied at 85% or greater for the six months preceding Application by low income households and which was initially constructed 25 or more years prior to Application submission as either public housing or as affordable housing with support from USDA, HUD, the HOME program, or the CDBG program. The occupancy percentage will not include Units that cannot be occupied due to needed repairs, as confirmed by the SCR or CNA. Demolition and relocation of units must be determined locally to be necessary to comply with the Affirmatively Furthering Fair Housing Rule, or if necessary to create an acceptable distance form Undesirable Site Features or Neighborhood Risk Factors. (7 points)

(e) Criteria promoting the efficient use of limited resources and Applicant accountability.

(1) Financial Feasibility. (§2306.6710(b)(1)(A)) To qualify for points, a 15-year pro forma itemizing all projected income including Unit rental rate assumptions, operating expenses and debt service, and specifying the underlying growth assumptions and reflecting a minimum must-pay debt coverage ratio of 1.15 for each year must be submitted, unless allowable exceptions provided for in §11.302(i)(5) are applicable. The pro forma must include the signature and contact information evidencing that it has been reviewed and found to be acceptable by an authorized representative of a proposed Third Party permanent lender. In addition to the signed pro forma, a lender approval letter must be submitted. An acceptable form of lender approval letter may be obtained in the Uniform Multifamily Application Templates. Scoring will be awarded as follows:

(A) If the letter evidences review of the Development alone it will receive twenty-four (24) points; or

(B) If the letter is from the Third Party permanent lender and evidences review of the Development and the Principals, it will receive twenty-six (26) points; or

(C) If the Development is Supportive Housing and meets the requirements of §11.1(d)(126)(E)(i) of this chapter, it will receive twenty-six (26) points; or

(D) If the Development is part of the USDA set-aside and meets the requirements of §11.5(2) of this chapter and the letter is from the Third Party construction lender, and evidences review of the Development and the Principals, it will receive twenty-six (26) points; or

(E) If the Department is the only permanent lender, and the Application includes the evaluation of the Request for Preliminary Determination submitted under §11.8(d) of this chapter, it will receive twenty-six (26) points.

(2) Cost of Development per Square Foot. (§2306.6710(b)(1)(F); §42(m)(1)(C)(iii)) For the purposes of this scoring item, Eligible Building Costs will be defined as Building Costs voluntarily included in Eligible Basis for the purposes of determining a Housing Credit Allocation. Eligible Building Costs will exclude structured parking or commercial space that is not included in Eligible Basis, and voluntary Eligible Hard Costs will include general contractor overhead, profit, and general requirements. The square footage used will be the Net Rentable Area (NRA). The calculations will be based on the cost listed in the Development Cost Schedule and NRA shown in the Rent Schedule. If the proposed Development is a Supportive Housing Development, the NRA will include Common Area up to 75 square feet per Unit, of which at least 50 square feet will be conditioned. The Department will annually compare the proportional cost increases from October of the prior year to October of the year being calculated based on the Construction Price Index for Multifamily Housing Units Under Construction (US Census Bureau) and increase the square foot cost targets in this item by that annual proportional amount of increase.

(A) Applications proposing New Construction or Reconstruction or Adaptive Reuse will be eligible for twelve (12) points if one of the following conditions is met:

(i) the voluntary Eligible Building Cost per square foot is less than or equal to $134 per square foot; or

(ii) the voluntary Eligible Hard Cost per square foot is less than or equal to $179 per square foot.

(B) Applications proposing New Construction or Reconstruction will be eligible for eleven (11) points if one of the following conditions is met:

(i) the voluntary Eligible Building Cost per square foot is less than or equal to $143 per square foot; or

(ii) the voluntary Eligible Hard Cost per square foot is less than or equal to $188 per square foot.

(C) Applications proposing Rehabilitation (excluding Reconstruction) will be eligible for points if one of the following conditions is met:

(i) Twelve (12) points for Applications which include voluntary Eligible Hard Costs plus acquisition costs included in Eligible Basis that are less than or equal to $179 per square foot; or

(ii) Twelve (12) points for Applications which include voluntary Eligible Hard Costs plus acquisition costs included in Eligible Basis that are less than or equal to $232 per square foot, located in an Urban Area, and that qualify for 5 or more points under subsection (c)(5)(A) and (B) of this section, related to Opportunity Index; or

(iii) Eleven (11) points for Applications which include voluntary Eligible Hard Costs plus acquisition costs included in Eligible Basis that are less than or equal to $232 per square foot.

(3) Pre-application Participation. (§2306.6704) An Application may qualify to receive up to six (6) points provided a pre-application was submitted by the Pre-Application Final Delivery Date. Applications that meet all of the requirements described in subparagraphs (A) - (H) of this paragraph will qualify for six (6) points:

(A) The total number of Units does not increase by more than 10% from pre-application to Application;

(B) The designation of the proposed Development as Rural or Urban remains the same;

(C) The proposed Development serves the same Target Population;

(D) The pre-application and Application are participating in the same set-asides (At-Risk, USDA, Non-Profit, or Rural);

(E) The Application final score (inclusive of only scoring items reflected on the self-score form) does not vary by more than four (4) points from what was reflected in the pre-application self-score;

(F) The Development Site at Application is at least in part the Development Site at pre-application, and the census tract number listed at pre-application is the same at Application. The site at full Application may not require notification to any person or entity not required to have been notified at pre-application; and

(G) The pre-application met all applicable requirements.

(4) Leveraging of Private, State, and Federal Resources. (§2306.6725(a)(3))

(A) An Application may qualify to receive up to three (3) points if at least 5% of the total Units are restricted to serve households at or below 30% of AMGI (restrictions elected under other point items may count) and the Housing Tax Credit funding request for the proposed Development meet one of the levels described in clauses (i) - (iv) of this subparagraph:

(i) the Development leverages CDBG Disaster Recovery, HOPE VI, RAD, or Choice Neighborhoods funding and the Housing Tax Credit Funding Request is less than 9% of the Total Housing Development Cost (3 points). The Application must include a commitment of such funding; or

(ii) if the Housing Tax Credit funding request is less than 9% of the Total Housing Development Cost (3 points); or

(iii) if the Housing Tax Credit funding request is less than 10% of the Total Housing Development Cost (2 points); or

(iv) if the Housing Tax Credit funding request is less than 11% of the Total Housing Development Cost (1 point).

(B) The calculation of the percentages stated in subparagraph (A) of this paragraph will be based strictly on the figures listed in the Funding Request and Development Cost Schedule. Should staff issue an Administrative Deficiency that requires a change in either form, then the calculation will be performed again and the score adjusted, as necessary. However, points may not increase based on changes to the Application. In order to be eligible for points, no more than 50% of the Developer Fee can be deferred. Where costs or financing change after completion of underwriting or award (whichever occurs later), the points attributed to an Application under this scoring item will not be reassessed unless there is clear evidence that the information in the Application was intentionally misleading or incorrect.

(5) Extended Affordability. (§§2306.6725(a)(5) and (7); 2306.111(g)(3)(C); 2306.185(a)(1) and (c); 2306.6710(e)(2); and 42(m)(1)(B)(ii)(II)) An Application may qualify to receive up to four (4) points for this item.

(A) Development Owners that agree to extend the Affordability Period for a Development to 45 years total. (4 points)

(B) Development Owners that agree to extend the Affordability Period for a Development to 40 years total. (3 points)

(C) Development Owners that agree to extend the Affordability Period for a Development to 35 years total. (2 points)

(6) Historic Preservation. (§2306.6725(a)(6); §42(m)(1)(C)(x)) An Application may qualify to receive five (5) points if at least 75% of the residential Units shall reside within the Certified Historic Structure. The Development must receive historic tax credits before or by the issuance of Forms 8609. The Application must include either documentation from the Texas Historical Commission that the Property is currently a Certified Historic Structure, or documentation determining preliminary eligibility for Certified Historic Structure status and evidence that the Texas Historic Commission received the request for determination of preliminary eligibility and supporting information on or before February 1 of the current year (5 points).

(7) Right of First Refusal. (§2306.6725(b)(1); §42(m)(1)(C)(viii)). An Application may receive points under subparagraphs (A) or (B) of this paragraph.

(A) An Application may qualify to receive (1 point) for Development Owners that will agree to provide a right of first refusal to purchase the Development upon or following the end of the Compliance Period in accordance with Tex. Gov't Code, §2306.6726 and the Department's rules including §10.407 of this title (relating to Right of First Refusal) and §10.408 of this title (relating to Qualified Contract Requirements).

(B) The Development at the time of LURA execution is single family detached homes on separate lots or is organized as condominiums under Chapter 81 or 82 of the Texas Property Code and commits to offer a right of first refusal to tenants of the property to purchase the dwelling at a selected term but no earlier than the end of the Compliance Period and no later than the Extended Use Period. A de minimis amount of a participating tenant's rent may be attributed to the purchase of a Unit. Such commitment will be reflected in the LURA for the Development. The Applicant must provide a description of how they will implement the 'rent-to-own' activity, how they will make tenants aware of the opportunity, and how they will implement the right at the end of the selected term. If a Development is layered with National Housing Trust Funds, HOME-ARP, or another MFDL source where homeownership is not an eligible activity, the right of first refusal may not be earlier than the end of the Federal Affordability Period. §42(m)(1)(C)(viii). (1 point)

(8) Funding Request Amount. The Application requests no more than 100% of the amount of LIHTC available within the subregion or set-aside as determined by the regional allocation formula on or before December 1, 2022. (1 point)

(9) Readiness to Proceed. Due to continued economic uncertainty, scoring for all Applicants under this item is suspended (no points may be requested, nor will they be awarded) for 2023 HTC Applications. Applications that include a certification that all financing will be closed and the construction contract will be fully executed on or before the last business day of November or as otherwise permitted under subparagraph (C) of this paragraph. These points are not available in the At-Risk or USDA Set-Asides. (1 point)

(A) Applications must include evidence that appropriate zoning will be in place at award and acknowledgement from all lenders and the syndicator of the required closing date.

(B) The Board cannot and will not waive the deadline and will not consider waiver under its general rule regarding waivers. Failure to close all financing and provide evidence of an executed construction contract by the November deadline will result in penalty under 10 TAC §11.9(g), as determined solely by the Board.

(C) Applications that remain on the waiting list after awards are made in late July that ultimately receive an award will receive an extension of the November deadline equivalent to the period of time between the late July meeting and the date that the Commitment Notice for the Application is issued.

(f) Factors Affecting Scoring and Eligibility in current and future Application Rounds. Staff may recommend to the Board and the Board may find that an Applicant or Affiliate should be ineligible to compete in the following year's competitive Application Round or that it should be assigned a penalty deduction in the following year's competitive Application Round of no more than two points for each submitted Application (Tex. Gov't Code §2306.6710(b)(2)) because it meets the conditions for any of the items listed in paragraphs (1) - (4) of this subsection. For those items pertaining to non-statutory deadlines, an exception to the penalty may be made if the Board or Executive Director, as applicable, makes an affirmative finding setting forth that the need for an extension of the deadline was beyond the reasonable control of the Applicant and could not have been reasonably anticipated. Any such matter to be presented for final determination of deduction by the Board must include notice from the Department to the affected

party not less than 14 days prior to the scheduled Board meeting. The Executive Director may, but is not required, to issue a formal notice after disclosure if it is determined that the matter does not warrant point deductions. The Executive Director may make a determination that the matter does not warrant point deduction only for paragraph (1) of this subsection. (§2306.6710(b)(2)) Any deductions assessed by the Board for paragraph (1), (2), (3), or (4) of this subsection based on a Housing Tax Credit Commitment from a preceding Application round will be attributable to the Applicant or Affiliate of an Application submitted in the Application round referenced above.

(1) If the Applicant or Affiliate failed to meet the original Carryover submission or 10% Test deadline(s) or has requested an extension of the Carryover submission deadline or the 10% Test deadline (relating to either submission or expenditure).

(2) If the Applicant or Affiliate failed to meet the federal commitment or expenditure requirements, deadlines to enter into a Contract or close a Direct Loan, or did not meet benchmarks of their Contract with the Department.

(3) If the Applicant or Affiliate, in the Competitive HTC round immediately preceding the current round, failed to meet the deadline to both close financing and provide evidence of an executed construction contract under subsection (c)(9) of this section (related to Readiness to Proceed).

(4) If the Developer or Principal of the Applicant has violated or violates the Adherence to Obligations.

§11.10. Third Party Request for Administrative Deficiency for Competitive HTC Applications.

(a) The purpose of the Third Party Request for Administrative Deficiency (RFAD) process is to allow an unrelated person or entity to bring new, material information about an Application to staff's attention. Such Person may request staff to consider whether a matter in an Application in which the Person has no involvement should be the subject of an Administrative Deficiency. While an Administrative Deficiency may be issued as the result of an RFAD, not all RFADs will result in an Administrative Deficiency being issued.

(b) Staff will consider each RFAD received and proceed as it deems appropriate under the applicable rules including, if the Application in question has a noncompetitive score relative to other Applications in the same Set-Aside or subregion or will not be eligible for an award through the collapse as outlined in §11.6(3) of this chapter (related to Competitive HTC Allocation Process), not reviewing the matter further.

(c) If the assertion(s) in the RFAD describe matters that are part of the Application review process, and the RFAD does not contain information not present in the Application, staff will not review or act on it.

(d) The RFAD and any testimony presented to the Board regarding the result of an RFAD may not be used to appeal staff decisions regarding competing Applications (§2306.6715(b)). Any RFAD that questions a staff decision regarding staff's scoring of an Application filed by another Applicant will be disregarded.

(e) Requestors must provide, at the time of filing the request all information that the requestor offers in support of the deficiency. A copy of the request and supporting information must be provided by the requestor directly to the Applicant at the same time it is provided to the Department. Requestors must provide sufficient credible evidence that, if confirmed, would substantiate the deficiency request. Assertions not accompanied by supporting documentation susceptible to confirmation will not be considered. An RFAD that expresses the requestor's opinion will not be considered.

(f) Staff shall provide to the Board a written report summarizing each third party request for administrative deficiency and the manner in which it was addressed. Interested persons may provide testimony on this report before the Board takes any formal action to accept the report. When the Board receives a report on the disposition of RFADs it may, for any staff disposition contained in the report, change the conclusion if it believes the change is necessary to bring the result into compliance with applicable laws and rules as construed by the Board; or if based on public testimony, it believes staff's conclusion should be revisited, it may remand the RFAD to staff for further consideration, which may result in a reaffirmation, reversal, or modification.

(g) The results of a RFAD may not be appealed by the requestor, and testimony to the Board arguing staff's determination will not be considered unless the requestor can show that staff failed to follow the applicable rule.

(h) A scoring notice or termination notice that results from a RFAD may be appealed by the Applicant as further described in §11.902 of this chapter, relating to Appeals Process.

(i) Information received after the RFAD deadline will not be considered by staff or presented to the Board unless the information is of such a matter as to warrant a termination notice.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on December 6, 2022.

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Bobby Wilkinson
Executive Director
Texas Department of Housing and Community Affairs
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Proposal publication date: September 23, 2022
For further information, please call: (512) 475-3959

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SUBCHAPTER B. SITE AND DEVELOPMENT REQUIREMENTS AND RESTRICTIONS

10 TAC §11.101

STATUTORY AUTHORITY. The new section is adopted pursuant to Texas Government Code, §2306.053, which authorizes the Department to adopt rules.

Except as described herein the adopted new section affects no other code, article, or statute.

§11.101. Site and Development Requirements and Restrictions.

(a) Site Requirements and Restrictions. The purpose of this section is to identify specific requirements and restrictions related to a Development Site seeking multifamily funding or assistance from the Department.

(1) Floodplain. New Construction or Reconstruction Developments located within a 100 year floodplain as identified by the Federal Emergency Management Agency (FEMA) Flood Insurance Rate Maps must develop the site in full compliance with the National Flood Protection Act and all applicable federal and state statutory and regulatory requirements. The Applicant will have to use floodplain maps and comply with regulation as they exist at the time of com-

mencement of construction. Even if not required by such provisions, the Site must be developed so that all finished ground floor elevations are at least one foot above the floodplain and parking and drive areas are no lower than six inches below the floodplain. If there are more stringent federal or local requirements they must also be met. Applicants requesting NHTF funds from the Department must also meet the federal environmental provisions under 24 CFR §93.301(f)(1)(vi). Applicants requesting HOME, HOME-ARP, or NSP PI funds from the Department must meet the federal environmental provisions under 24 CFR Part 58, as in effect at the time of execution of the Contract between the Department and the Owner. If no FEMA Flood Insurance Rate Maps are available for the proposed Development Site, flood zone documentation must be provided from the local government with jurisdiction identifying the 100 year floodplain. Rehabilitation (excluding Reconstruction) Developments with existing and ongoing federal funding assistance from HUD or USDA are exempt from this requirement, to the extent NHTF is not being requested from the Department. All Developments located within a 100 year floodplain must state in the Tenant Rights and Resource Guide that part or all of the Development Site is located in a floodplain, and that it is encouraged that they consider getting appropriate insurance or take necessary precautions. However, where existing and ongoing federal assistance is not applicable such Rehabilitation (excluding Reconstruction) Developments will be allowed in the 100 year floodplain provided the local government has undertaken and can substantiate sufficient mitigation efforts and such documentation is submitted in the Application or the existing structures meet the requirements that are applicable for New Construction or Reconstruction Developments, as certified to by a Third Party engineer.

(2) Undesirable Site Features. Rehabilitation (excluding Reconstruction) Developments with ongoing and existing federal assistance from HUD, USDA, or Veterans Affairs (VA) and Developments encumbered by a TDHCA LURA the earlier of the first day of the Application Acceptance Period for HTC, Application Acceptance Date for Direct Loan, or date the pre-application is submitted (if applicable) may be granted an exemption; however, depending on the undesirable site feature(s) staff may recommend mitigation still be provided as appropriate. Such an exemption must be requested at the time of or prior to the filing of an Application. Historic Developments that would otherwise qualify under §11.9(e)(6) of this chapter (related to Criteria promoting the efficient use of limited resources and applicant accountability) may be granted an exemption, and such exemption must be requested at the time of or prior to the filing of an Application. The distances are to be measured from the nearest boundary of the Development Site to the nearest boundary of the property or easement containing the undesirable feature, unless otherwise noted below. Where there is a local ordinance that specifies the proximity of such undesirable feature to a multifamily development that has smaller distances than the minimum distances noted below, then such smaller distances may be used and documentation such as a copy of the local ordinance identifying such distances relative to the Development Site must be included in the Application. Pre-existing zoning does not meet the requirement for a local ordinance. If a state or federal cognizant agency would require a new facility under its jurisdiction to have a minimum separation from housing, the Department will defer to that agency and require the same separation for a new housing facility near an existing regulated or registered facility. In addition to these limitations, a Development Owner must ensure that the proposed Development Site and all construction thereon comply with all applicable state and federal requirements regarding separation for safety purposes. If Department staff identifies what it believes would constitute an undesirable site feature not listed in this paragraph or covered under subparagraph (K) of this paragraph, staff may issue a Deficiency. If staff identifies an undesirable site feature reflected in subparagraphs (A) - (J) of this paragraph and it was not disclosed the Application will be terminated. An Applicant's failure to disclose an Undesirable Site Feature is not curable by Administrative Deficiency. Requests for pre-determinations of Site eligibility prior to pre-application or Application submission will not be binding on full Applications submitted at a later date. For Tax-Exempt Bond Developments where the Department is the Issuer, the Applicant may submit a request for pre-determination at pre-application or for Tax-Exempt Bond Developments utilizing a local issuer a request for a pre-determination may be submitted prior to Application submission. An Applicant should understand that any determination made by staff or the Board at that point in time regarding Site eligibility based on the documentation presented, is preliminary in nature. Should additional information related to any of the Undesirable Site Features become available while the Application is under review, or the information by which the original determination was made changes in a way that could affect eligibility, then such information will be re-evaluated by staff and may result in an Administrative Deficiency or re-evaluation. The following are Undesirable Site Features:

(A) Development Sites located within 300 feet of junkyards. For purposes of this paragraph, a junkyard shall be defined as stated in Texas Transportation Code §396.001;

(B) Development Sites located within 300 feet of a solid waste facility or sanitary landfill facility or illegal dumping sites (as such dumping sites are identified by the local municipality);

(C) Development Sites located within 300 feet of a sexually-oriented business. For purposes of this paragraph, a sexually-oriented business shall be defined in Local Government Code §243.002, or as zoned, licensed and regulated as such by the local municipality;

(D) Development Sites located within 500 feet of active railroad tracks, measured from the closest rail to the boundary of the Development Site, unless:

(i) the Applicant provides evidence that the city/community has adopted a Railroad Quiet Zone covering the area within 500 feet of the Development Site;

(ii) the Applicant has engaged a qualified Third Party to perform a noise assessment and the Applicant commits to perform sound mitigation in accordance with HUD standards as if they were directly applicable to the Development; or

(iii) the railroad in question is commuter or light rail;

(E) Development Sites located within 500 feet of heavy industry (i.e. facilities that require extensive use of land and machinery, produce high levels of external noise such as manufacturing plants, or maintains fuel storage facilities (excluding gas stations);

(F) Development Sites located within 10 miles of a nuclear plant;

(G) Development Sites in which the buildings are located within the accident potential zones or the runway clear zones of any airport;

(H) Development Sites that contain one or more pipelines, situated underground or aboveground, which carry highly volatile liquids or Development Sites located adjacent to a pipeline easement (for a pipeline carrying highly volatile liquids), the Application must include a plan for developing near the pipeline(s) and mitigation, if any, in accordance with a report conforming to the Pipelines and Informed Planning Alliance (PIPA);

(I) Development Sites located within 2 miles of refineries capable of refining more than 100,000 barrels of oil daily;

(J) Development Sites that are located in a Clear Zone, any Accident Potential Zone, or within any Noise Contour of 65 deci-

bels or greater, as reflected in a Joint Land Use Study for any military Installation, except that if the Development Site is located in a Noise Contour between 65 and 70 decibels, the Development Site will not be considered to have an Undesirable Site Feature if the Applicant has engaged a qualified Third Party to perform a noise assessment and the Applicant commits to perform sound mitigation in accordance with HUD standards as if they were directly applicable to the Development; or

(K) Any other Site deemed unacceptable, which would include, without limitation, those with exposure to an environmental factor that may adversely affect the health and safety of the residents or render the Site inappropriate for housing use and which cannot be adequately mitigated. If staff believe that a Site should be deemed unacceptable under this provision due to information that was not included in the Application, it will provide the Applicant with written notice and an opportunity to respond.

(3) Neighborhood Risk Factors.

(A) If the Development Site has any of the characteristics described in subparagraph (B) of this paragraph, the Applicant must disclose the presence of such characteristics in the Application submitted to the Department. Requests for pre-determinations of Site eligibility prior to pre-application or Application submission will not be binding on full Applications submitted at a later date. For Tax-Exempt Bond Developments where the Department is the Issuer, the Applicant may submit the documentation described under subparagraphs (C) and (D) of this paragraph at pre-application or for Tax-Exempt Bond Developments utilizing a local issuer a request for a pre-determination may be submitted prior to Application submission. An Applicant should understand that any determination made by staff or the Board at that point in time regarding Site eligibility based on the documentation presented, is preliminary in nature. Should additional information related to any of the Neighborhood Risk Factors become available while the Tax-Exempt Bond Development or Direct Loan only Application is under review, or the information by which the original determination was made changes in a way that could affect eligibility, then such information will be re-evaluated by staff and staff may issue an Administrative Deficiency. Should staff determine that the Development Site has any of the characteristics described in subparagraph (B) of this paragraph and such characteristics were not disclosed, the Application will be terminated. Applicant's failure to disclose a Neighborhood Risk Factor is not curable by Administrative Deficiency. The presence of any characteristics listed in subparagraph (B) of this paragraph will prompt staff to perform an assessment of the Development Site and neighborhood, which may include a site visit, and include, where applicable, a review as described in subparagraph (C) of this paragraph. Mitigation to be considered by staff, including those allowed in subparagraph (C) of this paragraph, are identified in subparagraph (D) of this paragraph. Preservation of affordable units alone does not present a compelling reason to support a conclusion of eligibility.

(B) The Neighborhood Risk Factors include those noted in clauses (i) - (iii) of this subparagraph and additional information as applicable to the neighborhood risk factor(s) disclosed as provided in subparagraphs (C) and (D) of this paragraph must be submitted in the Application. In order to be considered an eligible Site despite the presence of Neighborhood Risk Factors, an Applicant must demonstrate actions being taken that would lead staff to conclude that there is a high probability and reasonable expectation the risk factor will be sufficiently mitigated or significantly improved prior to placement in service and that the risk factor demonstrates a positive trend and continued improvement. Conclusions for such reasonable expectation may need to be affirmed by an industry professional, as appropriate, and may be dependent upon the severity of the Neighborhood Risk Factor disclosed.

(i) The Development Site is located within a census tract that has a poverty rate above 40% for individuals (or 55% for Developments in regions 11 and 13). Rehabilitation Developments are exempt from this Neighborhood Risk Factor.

(ii) The Development Site is New Construction or Reconstruction and is located in a census tract (or for any adjacent census tract with a boundary less than 500 feet from the proposed Development Site that is not separated from the Development Site by a natural barrier such as a river or lake, or an intervening restricted area, such as a military installation) in an Urban Area and the rate of Part I violent crime is greater than 18 per 1,000 persons (annually) as reported on neighborhoodscout.com. Rehabilitation developments are exempt from this Neighborhood Risk Factor.

(iii) The Development Site is located within the attendance zone of an elementary school, a middle school or a high school that has a TEA Accountability Rating of "Not Rated: Senate Bill 1365" for 2022. In districts with district-wide enrollment or choice districts an Applicant shall use the rating of the closest elementary, middle and high school, respectively, which may possibly be attended by the tenants in determining whether or not disclosure is required. Schools with an application process for admittance, limited enrollment or other requirements that may prevent a child from attending will not be considered as the closest school or the school which attendance zone contains the site. School ratings will be determined by the school number, so that in the case where a new school is formed or named or consolidated with another school but is considered to have the same number that rating will be used. A school that has never been rated by the Texas Education Agency will use the district rating. If a school is configured to serve grades that do not align with the Texas Education Agency's conventions for defining elementary schools (typically grades K-5 or K-6), middle schools (typically grades 6-8 or 7-8) and high schools (typically grades 9-12), the school will be considered to have the lower of the ratings of the schools that would be combined to meet those conventions. In determining the ratings for all three levels of schools, ratings for all grades K-12 must be included, meaning that two or more schools' ratings may be combined. Sixth grade centers will be considered as part of the middle school rating. Elderly Developments,Supportive Housing SRO Developments or Supportive Housing Developments where all Units are Efficiency Units, and Applications in the USDA Set-Aside for Rehabilitation of existing properties are exempt and are not required to provide mitigation for this subparagraph, but are still required to provide rating information in the Application and disclose the presence of the Neighborhood Risk Factor.

(C) Should any of the neighborhood risk factors described in clauses (ii) and (iii) of subparagraph (B) of this paragraph exist, the Applicant may submit the Neighborhood Risk Factors Report that contains the information described in clauses (i) - (viii) of this subparagraph, if such information pertains to the Neighborhood Risk Factor(s) disclosed, and mitigation pursuant to subparagraph (D) of this paragraph so staff may conduct a further Development Site and neighborhood review. The Neighborhood Risk Factors Report cannot be supplemented or modified unless requested by staff through the deficiency process. The information required includes:

(i) a determination regarding neighborhood boundaries, which will be based on the review of a combination of natural and manmade physical features (rivers, highways, etc.), apparent changes in land use, the Primary Market Area as defined in the Market Analysis, census tract or municipal boundaries, and information obtained from any Site visits;

(ii) an assessment of general land use in the neighborhood, including comment on the prevalence of residential uses;

(iii) an assessment concerning any of the features reflected in paragraph (2) of this subsection if they are present in the neighborhood, regardless of whether they are within the specified distances referenced in paragraph (2) of this subsection;

(iv) an assessment of the number of existing affordable rental units (generally includes rental properties subject to TDHCA, HUD, or USDA restrictions) in the Primary Market Area, including comment on concentration based on the size of the Primary Market Area;

(v) an assessment of the percentage of households residing in the census tract that have household incomes equal to or greater than the median household income for the MSA or county where the Development Site is located;

(vi) an assessment of the number of market rate multifamily units in the neighborhood and their current rents and levels of occupancy;

(vii) A copy of the TEA Accountability Rating Report for each of the schools in the attendance zone containing the Development that received a TEA Accountability Rating of "Not Rated: Senate Bill 1365" for 2022, along with a discussion of performance indicators and what progress has been made over the prior year, and progress relating to the goals and objectives identified in the campus improvement plan or turnaround plan pursuant to §39.107 of the Texas Education Code in effect. The actual campus improvement plan does not need to be submitted unless there is an update to the plan or if such update is not available, information from a school official that speaks to progress made under the plan as further indicated under subparagraph (D)(iii) of this paragraph; and

(viii) Any additional information necessary to complete an assessment of the Development Site, as requested by staff.

(D) Information regarding mitigation of neighborhood risk factors should be relevant to the risk factors that are present in the neighborhood. Mitigation must include documentation of efforts underway at the time of Application, and should include the measures described in clauses (i) - (iv) of this subparagraph or such other mitigation as the Applicant determines appropriate to support a finding of eligibility. If staff determines that the Development Site cannot be found eligible and the Applicant appeals that decision to the Board, the Applicant may not present new information at the Board meeting.

(i) Mitigation for Developments in a census tract that has a poverty rate that exceeds 40% may include a resolution from the Governing Body of the appropriate municipality or county containing the Development, acknowledging the high poverty rate and authorizing the Development to move forward. A Neighborhood Risk Factors Report is not required to be submitted, the resolution alone will suffice. If the Development is located in the ETJ, the resolution would need to come from the county.

(ii) Evidence by the most qualified person that the data and evidence establish that there is a reasonable basis to proceed on the belief that the crime data shows, or will show, a favorable trend such that within the next two years Part I violent crime for that location is expected to be less than 18 per 1,000 persons or the data and evidence reveal that the data reported on neighborhoodscout.com does not accurately reflect the true nature of what is occurring and what is actually occurring does not rise to the level to cause a concern to the Board over the level of Part I violent crime for the location. The data and evidence may be based on violent crime data from the city's police department or county sheriff's department, as applicable based on the location of the Development, for the police beat or patrol area within which the Development Site is located, based on the population of the police beat or patrol area that yields a crime rate below the threshold indicated in this section or that would yield a crime rate below the threshold indicated in this section by the time the Development is placed into service. The instances of violent crimes within the police beat or patrol area that encompass the census tract, calculated based on the population of the census tract, may also be used. The data must include incidents reported during the entire calendar year previous to the year of Application. Violent crimes reported through the date of Application submission may be requested by staff as part of the assessment performed under subparagraph (C) of this paragraph. A written statement from the most qualified person (i.e. Chief of Police or Sheriff (as applicable) or the police officer/detective for the police beat or patrol area containing the proposed Development Site), including a description of efforts by such enforcement agency addressing issues of crime and the results of their efforts may be provided, and depending on the data provided by the Applicant, such written statement may be required, as determined by staff. It is expected that such written statement would also speak to whether there is a reasonable expectation that based on the efforts underway there is crime data that reflects a favorable downward trend in crime rates.

(iii) Evidence of mitigation for each of the schools in the attendance zone that has a TEA Accountability Rating of "Not Rated: Senate Bill 1365" for 2022 must meet the requirements of subclauses (I) and (II) of this clause which will be a requirement of the LURA for the duration of the Affordability Period and cannot be used to count for purposes of meeting the threshold requirements under subparagraph (7)(B)(ii) of this paragraph.

(I) Documentation from a person authorized to speak on behalf of the school district with oversight of the school in question that indicates the specific plans in place and current progress towards meeting the goals and performance objectives identified in the Campus Improvement Plan and in restoring the school(s) to an acceptable rating status. The documentation should include actual data from progress already made under such plan(s) to date demonstrating favorable trends and should speak to the authorized persons assessment that the plan(s) and the data supports a reasonable conclusion that the school(s) will have an acceptable rating by the time the proposed Development places into service. The letter may, to the extent applicable, identify the efforts that have been undertaken to increase student performance, decrease mobility rate, benchmarks for re-evaluation, increased parental involvement, plans for school expansion, plans to implement early childhood education, and long- term trends that would point toward their achieving an A, B, or C Rating by the time the Development is placed in service. The letter from such education professional should also speak to why they believe the staff tasked with carrying out the plan will be successful at making progress towards acceptable student performance considering that prior Campus Improvement Plans were unable to do so. Such assessment could include whether the team involved has employed similar strategies at prior schools and were successful.

(II) The Applicant has committed that it will operate an after school learning center that offers at a minimum 15 hours of weekly, organized, on-site educational services provided to elementary, middle and high school children by a dedicated service coordinator or Third-Party entity which includes at a minimum: homework assistance, tutoring, test preparation, assessment of skill deficiencies and provision of assistance in remediation of those deficiencies (e.g., if reading below grade level is identified for a student, tutoring in reading skills is provided), research and writing skills, providing a consistent weekly schedule, provides for the ability to tailor assistance to the age and education levels of those in attendance, and other evidence-based approaches and activities that are designed to augment classroom per-

formance. Up to 20% of the activities offered may also include other enrichment activities such as music, art, or technology.

(E) In order for the Development Site to be found eligible, including when mitigation described in subparagraph (D) of this paragraph is not provided in the Application, despite the existence of one or more Neighborhood Risk Factors, the Applicant must explain how the use of Department funds at the Development Site is consistent with the goals in clauses (i) - (iii) of this subparagraph. If the Board grants an Appeal of staff's determination of Site eligibility, the Board shall document the reasons for a determination of eligibility.

(i) Preservation of existing occupied affordable housing units to ensure they are safe and suitable or the new construction of high quality affordable housing units that are subject to federal rent or income restrictions.

(ii) Determination that the risk factor(s) that has been disclosed are not of such a nature or severity that should render the Development Site ineligible based on the assessment and mitigation provided under subparagraphs (C) and (D) of this paragraph.

(iii) No mitigation was provided, or in staff's determination the mitigation was considered unsatisfactory and the Applicant has requested a waiver of the presence of Neighborhood Risk Factors on the basis that the Development is necessary to enable the state, a participating jurisdiction, or an entitlement community to comply with its obligation to affirmatively further fair housing, a HUD approved Conciliation Agreement, or a final and non-appealable court order and such documentation is submitted with the disclosure.

(4) Site and Neighborhood Standards (Direct Loan only). A New Construction Development requesting federal funds must meet the Site and Neighborhood Standards in 24 CFR §983.57(e)(2) or (3). A Development requesting NHTF funds that meets the federal definition of reconstruction in 24 CFR §93.2 must also meet these standards.

(b) Development Requirements and Restrictions. The purpose of this subsection is to identify specific restrictions on a proposed Development requesting multifamily funding by the Department.

(1) Ineligible Developments. A Development shall be ineligible if any of the criteria in subparagraphs (A) - (C) of this paragraph apply.

(A) General Ineligibility Criteria include:

(i) Developments such as hospitals, nursing homes, trailer parks, dormitories (or other buildings that will be predominantly occupied by students) or other facilities that are usually classified as transient housing (as provided in Code §42(i)(3)(B)(iii) and (iv));

(ii) any Development with any building(s) with four or more stories that does not include an elevator. Developments where topography or other characteristics of the Site require basement splits such that a tenant will not have to walk more than two stories to fully utilize their Unit and all Development amenities, will not require an elevator;

(iii) a Housing Tax Credit Development that provides on-site continual or frequent nursing, medical, or psychiatric services. Refer to IRS Revenue Ruling 98-47 for clarification of assisted living;

(iv) a Development that proposes population limitations that violate §1.15 of this title (relating to Integrated Housing Rule);

(v) a Development seeking Housing Tax Credits that will not meet the general public use requirement under Treasury Regulation, §1.42-9 or a documented exception thereto;

(vi) a Development utilizing a Direct Loan that is subject to the Housing and Community Development Act, 104(d) requirements and proposing Rehabilitation or Reconstruction, if the Applicant is not proposing at least the one-for-one replacement of the existing Unit mix. Adding additional units would not violate this provision; or

(vii) any New Construction, Reconstruction, or Adaptive Reuse Development proposing more than 30% efficiency and/or one-Bedroom Units. This requirement will not apply to Elderly or Supportive Housing Developments.

(B) Ineligibility of Elderly Developments include:

(i) any Elderly Development of two stories or more that does not include elevator service for any Units or Common Areas above the ground floor;

(ii) any Elderly Development with any Units having more than two Bedrooms with the exception of up to three employee Units reserved for the use of the manager, maintenance, or security officer. These employee Units must be specifically designated as such; or

(iii) any New Construction, Reconstruction, or Adaptive Reuse Elderly Development (including Elderly in a Rural Area) proposing more than 70% two-Bedroom Units.

(C) Ineligibility of Developments within Certain School Attendance Zones. Due to uncertainty linked to the COVID-19 pandemic, this item is suspended. Any Development that falls within the attendance zone of a school that has a TEA Accountability Rating of F for the most recent year available prior to Application and an Improvement Required Rating for the most recent available year preceding is ineligible with no opportunity for mitigation Developments that are encumbered by a TDHCA LURA on the first day of the Application Acceptance Period or at the time of Pre-application (if applicable), an Elderly Development, or a Supportive Housing SRO Development or Supportive Housing Development where all Units are Efficiency Units are exempt. If the Board grants an Appeal of staff's determination of Site eligibility, the Board shall document the reasons for a determination of eligibility.

(D) Ineligibility of Developments within Areas of High Crime. Any Development involving New Construction or Adaptive Reuse located in an area described in (a)(3)(B)(ii) of this subsection and for which mitigation submitted under subparagraph (D)(ii) of this paragraph still yields a Part I violent crime rate greater than 18 per 1,000 persons (annually) is ineligible with no opportunity for mitigation. If the Board grants an Appeal of staff's determination of Site eligibility, the Board shall document the reasons for a determination of eligibility.

(2) Development Size Limitations. The minimum Development size is 16 Units. Competitive Housing Tax Credit or Multifamily Direct Loan-only Developments involving New Construction or Adaptive Reuse in Rural Areas are limited to a maximum of 80 total Units. Tax-Exempt Bond Developments involving New Construction or Adaptive Reuse in a Rural Area must meet the Development size limitation and corresponding capture rate requirements in §11.302(i)(1)(C) of this chapter (related to Feasibility Conclusion). Rehabilitation Developments do not have a limitation as to the maximum number of Units.

(3) Rehabilitation Costs. Developments involving Rehabilitation must establish a scope of work that will substantially improve the interiors of all units and exterior deferred maintenance, and meet the minimum Rehabilitation amounts identified in subparagraphs (A) - (C) of this paragraph. Such amounts must be maintained through the issuance of IRS Forms 8609. For Developments with multiple build-

ings that have varying placed in service dates, the earliest date will be used for purposes of establishing the minimum Rehabilitation amounts. Applications must meet the Rehabilitation amounts identified in subparagraphs (A), (B) or (C) of this paragraph. For Tax-Exempt Bond Developments that include existing USDA funding that is continuing or new USDA funding, staff may consider the cost standard under subparagraph (A) of this paragraph on a case-by-case basis.

(A) For Housing Tax Credit Developments under the USDA Set-Aside the Rehabilitation will involve at least $25,000 per Unit in Building Costs and Site Work.

(B) For Tax-Exempt Bond Developments, less than 20 years old, based on the placed in service date, the Rehabilitation will involve at least $20,000 per Unit in Building Costs and Site Work. If such Developments are greater than or equal to 20 years old, based on the placed in service date, the Rehabilitation will involve at least $30,000 per Unit in Building Costs and Site Work.

(C) For all other Developments, the Rehabilitation will involve at least $30,000 per Unit in Building Costs and Site Work.

(4) Mandatory Development Amenities. (§2306.187) New Construction, Reconstruction or Adaptive Reuse Units must include all of the amenities in subparagraphs (A) - (O) of this paragraph. Rehabilitation (excluding Reconstruction) Developments must provide the amenities in subparagraphs (D) - (O) of this paragraph unless stated otherwise. Supportive Housing Developments are not required to provide the amenities in subparagraph (B), (E), (F), (G), (H) or (N) of this paragraph; however, access must be provided to a comparable amenity in a Common Area. All amenities listed below must be at no charge to the residents. Residents must be provided written notice of the applicable required amenities for the Development. The Board may waive one or more of the requirements of this paragraph for Developments that will include Historic Tax Credits, with evidence submitted with the request for amendment that the amenity has not been approved by the Texas Historical Commission or National Park Service, as applicable. Applicants for Multifamily Direct Loans should be aware that certain amenities are not eligible for Direct Loan funding, including without limitation, detached community spaces, furnishings, swimming pools, athletic courts, and playgrounds, as more fully described at §13.3 of this title (relating to General Loan Requirements). Amenities include:

(A) All Bedrooms, the dining room and living room in Units must be wired with current cabling technology for data and phone;

(B) Laundry connections;

(C) Exhaust/vent fans (vented to the outside) in the bathrooms;

(D) Screens on all operable windows;

(E) Disposal (not required for USDA);

(F) Energy-Star or equivalently rated dishwasher; Rehabilitation Developments exempt from dishwasher if one was not originally in the Unit;

(G) Energy-Star or equivalently rated refrigerator;

(H) Oven/Range;

(I) Blinds or window coverings for all windows;

(J) At least one Energy-Star or equivalently rated ceiling fan per Unit;

(K) Energy-Star or equivalently rated lighting in all Units;

(L) All areas of the Unit (excluding exterior storage space on an outdoor patio/balcony) must have heating and air-conditioning;

(M) Adequate parking spaces consistent with local code including a waiver or variance thereof, unless there is no local code, in which case the requirement would be one and a half spaces per Unit for non-Elderly Developments and one space per Unit for Elderly Developments. The minimum number of required spaces must be available to the tenants at no cost. If parking requirements under local code rely on car sharing or similar arrangements, the LURA will require the Owner to provide the service at no cost to the tenants throughout its term;

(N) Energy-Star or equivalently rated windows (for Rehabilitation Developments, only if windows are planned to be replaced as part of the scope of work); and

(O) Adequate accessible parking spaces consistent with the requirements of the 2010 ADA Standards with the exceptions listed in "Nondiscrimination on the Basis of Disability in Federally Assisted Programs and Activities" 79 FR 29671, the Texas Accessibility Standards, and if covered by the Fair Housing Act, HUD's Fair Housing Act Design Manual.

(5) Common Amenities.

(A) All Developments must include sufficient common amenities as described in subparagraph (C) of this paragraph to qualify for at least the minimum number of points required in accordance with clauses (i) - (vi) of this subparagraph:

(i) Developments with 16 to 40 Units must qualify for two (2) points;

(ii) Developments with 41 to 76 Units must qualify for four (4) points;

(iii) Developments with 77 to 99 Units must qualify for seven (7) points;

(iv) Developments with 100 to 149 Units must qualify for ten (10) points;

(v) Developments with 150 to 199 Units must qualify for fourteen (14) points; or

(vi) Developments with 200 or more Units must qualify for eighteen (18) points.

(B) These points are not associated with any selection criteria points. The amenities must be for the benefit of all residents and made available throughout normal business hours and maintained throughout the Affordability Period. Residents must be provided written notice of the elections made by the Development Owner. If fees or deposits in addition to rent are charged for amenities, then the amenity may not be included among those provided to satisfy the requirement. All amenities must meet all applicable accessibility standards, including those adopted by the Department, and where a specific space or size requirement for a listed amenity is not specified then the amenity must be reasonably adequate based on the Development size. Applications for non-contiguous scattered site housing, excluding non-contiguous single family sites, will have the test applied based on the number of Units per individual site and the amenities selected must be distributed proportionately across all sites. A Development composed of non-contiguous single family sites must provide a combination of unit and common amenities to equal the appropriate points under subparagraph (A) of this paragraph for the Development size. In the case of additional phases of a Development any amenities that are anticipated to be shared with the first phase development cannot be claimed for purposes of meeting this requirement for the second phase. The sec-

ond phase must include enough points to meet this requirement that are provided on the Development Site, regardless of resident access to the amenity in another phase. All amenities must be available to all Units via an accessible route.

(C) The common amenities and respective point values are set out in clauses (i) - (v) of this subparagraph, which are grouped primarily for organizational purposes. Applicants are not required to select a specific number of amenities from each section. An Applicant can only count an amenity once; therefore combined functions (a library which is part of a community room) will only qualify for points under one category:

(i) Community Space for Resident Supportive Services includes:

(I) Except in Applications where more than 10% of the Units in the proposed Development are Supportive Housing SRO Units, an Application may qualify to receive half of the points required under §11.101(b)(5)(A)(i) - (vi) by electing to provide a High Quality Pre-Kindergarten (HQ Pre-K) program and associated educational space at the Development Site. To receive the points the Applicant must commit to all of items (-a-) - (-c-) of this subclause.

(-a-) Space and Design. The educational space for the HQ Pre-K program must be provided on the Development Site and must be a suitable and appropriately designed space for educating children that an independent school district or open-enrollment charter school can utilize to establish and operate a HQ Pre-K program. This space includes at a minimum a bathroom and large closet in the classroom space; appropriate design considerations made for the safety and security of the students; including limited and secure ingress and egress to the classroom space; and satisfaction of the requirements of all applicable building codes for school facilities. The Applicant must provide in the Application a copy of the current school facility code requirements applicable to the Development Site and Owner and Architect certifications that they understand the associated space and design requirements reflected in those code requirements. The Application must also include acknowledgement by all lenders, equity providers and partners that the Application includes election of these points.

(-b-) Educational Provider. The Applicant must enter into an agreement, addressing all items as described in subitems (-1-) - (-5-) of this item, and provide evidence of such agreement to the Department on or before submission of the Cost Certification. Lack of evidence of such agreement by the deadline will be cause for rescission of the Carryover Agreement for Competitive HTC Applications.

(-1-) The agreement must be between the Owner and any one of the following: a school district; open-enrollment charter school; or Education Service Center. Private schools and private childcare providers, whether nonprofit or for profit, are not eligible parties, unless the private school or private childcare provider has entered into a partnership with a school district or open-enrollment charter school to provide a HQ Pre-K program in accordance with Texas Education Code Chapter 29, Subchapter E-1.

(-2-) The agreement must reflect that at the Development Site the educational provider will provide a HQ Pre-K program, in accordance with Texas Education Code Chapter 29, Subchapter E-1, at no cost to residents of the proposed Development and that is available for general public use, meaning students other than those residing at the Development may attend.

(-3-) Such agreement must reflect a provision that the option to operate the HQ Pre-K program in the space at the Development Site will continue to be made available to the school or provider until such time as the school or provider wishes to withdraw from the location. This provision will not limit the Owner's right to terminate the agreement for good cause.

(-4-) Such agreement must set forth the responsibility of each party regarding payment of costs to use the space, utility charges, insurance costs, damage to the space or any other part of the Development, and any other costs that may arise as the result of the operation of the HQ Pre-K program.

(-5-) The agreement must include provision for annual renewal, unless terminated under the provisions of item (-c-) of this subclause.

(-c-) If an education provider who has entered into an agreement becomes defunct or elects to withdraw from the agreement and provision of services at the location, as provided for in subitem (-b-)(-3-) of this subclause, the Owner must notify the Texas Commissioner of Education at least 30 days prior to ending the agreement to seek out any other eligible parties listed in subitem (-b-)(-1-) of this subclause above. If another interested open-enrollment charter school or school district is identified by the Texas Commissioner of Education or the Owner, the Owner must enter into a subsequent agreement with the interested open-enrollment charter school or school district and continue to offer HQ Pre-K services. If another interested provider cannot be identified, and the withdrawing provider certifies to the Department that their reason for ending the agreement is not due to actions of the Owner, the Owner will not be considered to be in violation of its commitment to the Department. If the Owner is not able to find a provider, they must notify the Commissioner annually of the availability of the space.

(II) Multifunctional learning and care center(s) or conference room(s) with the appropriate furnishings to deliver the Resident Supportive Services pertaining to classes or care for children and selected by the Development Owner. The room(s) devoted to meeting this requirement must equal 15 square feet times the total number of Units, but need not exceed 2,000 square feet in total. This space must be separate from any other community space but may include a full kitchen. The room(s) must include storage space, such as closets or cabinetry (4 points).

(III) Multifunctional learning and care center(s) or conference room(s) with the appropriate furnishings to deliver the Resident Supportive Services pertaining to classes or care for adults and selected by the Development Owner. The room(s) devoted to meeting this requirement must equal 10 square feet times the total number of Units, but need not exceed 1,000 square feet in total. This space must be separate from any other community space but may include a full kitchen. The room(s) must include storage space, such as closets or cabinetry (2 points).

(IV) Service provider office in addition to leasing offices (1 point).

(ii) Safety amenities include:

(I) Controlled gate access for entrance and exit areas, intended to provide access that is limited to the Development's tenancy (1 point).

(II) Secured Entry (applicable only if all Unit entries are within the building's interior) (1 point).

(III) Twenty-four hour, seven days a week monitored camera/security system in each building. Monitoring may be on-site or off-site (2 points).

(IV) Twenty-four hour, seven days a week recorded camera / security system in each building (1 point).

(V) The provision of a courtesy patrol service that, at a minimum, answers after-hour resident phone calls regarding noise and crime concerns or apartment rules violations and that can dispatch to the apartment community a courtesy patrol officer in a timely manner (3 points).

(iii) Health/Fitness/Play amenities include:

(I) Accessible walking/jogging path, equivalent to the perimeter of the Development or a length that reasonably achieves the same result, separate from a sidewalk and in addition to required accessible routes to Units or other amenities (1 point).

(II) Furnished fitness center. Equipped with a variety of fitness equipment (at least one item for every 40 Units). Choose from the following: stationary bicycle, elliptical trainer, treadmill, rowing machine, universal gym, multi-functional weight bench, stair-climber, dumbbell set, or other similar equipment. Equipment shall be commercial use grade or quality. Fitness center must be located indoors or be a designated room with climate control and allow for after-hours access. (1 point).

(III) Furnished fitness center. Equipped with a variety of fitness equipment (at least one item for every 20 Units). Choose from the following: stationary bicycle, elliptical trainer, treadmill, rowing machine, universal gym, multi-functional weight bench, stair-climber, dumbbell set, or other similar equipment. Equipment shall be commercial use grade or quality. Fitness center must be located indoors or be a designated room with climate control and allow for after-hours access. (2 points).

(IV) One Children's Playscape Equipped for five to 12 year olds, or one Tot Lot (2 points). Must be covered with a shade canopy or awning, intended to keep equipment cool, and provide shade and ultraviolet protection. This item can only be selected if subclause (V) of this clause is not selected.

(V) Two Children's Playscapes Equipped for five to 12 year olds, two Tot Lots, or one of each (4 points). Must be covered with a shade canopy or awning, intended to keep equipment cool, and provide shade and ultraviolet protection. This item can only be selected if subclause (IV) of this clause is not selected.

(VI) Horseshoe pit; putting green; shuffleboard court; pool table; ping pong table; or similar equipment in a dedicated location accessible to all residents to play such games (1 point).

(VII) Swimming pool (5 points).

(VIII) Splash pad/water feature play area (3 point).

(IX) Sport Court or field (including, but not limited to, Tennis, Basketball, Volleyball, Pickleball, Soccer or Baseball Field) (2 points).

(iv) Design / Landscaping amenities include:

(I) Full perimeter fencing that contains the parking areas and all amenities (excludes guest or general public parking areas) (2 points).

(II) Enclosed community sun porch or covered community porch/patio (1 point).

(III) Dog Park area that is fully enclosed (the perimeter fencing may be used for part of the enclosure) and intended for tenant owned dogs to run off leash (requires that the Development allow dogs) (2 point).

(IV) Shaded rooftop or structural viewing deck of at least 500 square feet (2 points).

(V) Porte-cochere (1 point).

(VI) Lighted pathways along all accessible routes (1 point).

(VII) a resident-run community garden with annual soil preparation and mulch provided by the Owner and access to water (which may be subject to local water usage restrictions) (1 point).

(v) Community Resources amenities include:

(I) Community laundry room with at least one washer and dryer for every 40 Units (2 points).

(II) Barbecue grill and picnic table with at least one of each for every 50 Units (1 point). Grill must be permanently installed (no portable grills).

(III) Business center with workstations and seating internet access, 1 printer and at least one scanner which may be integrated with the printer, and either 2 desktop computers or laptops available to check-out upon request (2 points).

(IV) Furnished Community room (2 points).

(V) Library with an accessible sitting area (separate from the community room) (1 point).

(VI) Activity Room stocked with supplies (Arts and Crafts, board games, etc.) (2 points).

(VII) Community Dining Room with full or warming kitchen furnished with adequate tables and seating (3 points).

(VIII) Community Theater Room equipped with a 52 inch or larger screen or projection with surround sound equipment; DVD player or a streaming service at no cost to residents; and seating (3 points).

(IX) High-speed Wi-Fi with advanced telecommunications capacity as determined under 47 U.S.C. 1302 or more with coverage throughout the clubhouse or community building (1 point).

(X) High-speed Wi-Fi with advanced telecommunications capacity as determined under 47 U.S.C. 1302 with coverage throughout the Development (2 points).

(XI) Bicycle parking that allows for, at a minimum, one bicycle for every five Units, within reasonable proximity to each residential building that allows for bicycles to be secured with lock (lock not required to be provided to tenant) (1 point).

(XII) Package Lockers or secure package room. Automated Package Lockers or secure package room provided at a location within the complex that can be accessed by residents 24/7 and at no charge to the resident. To qualify, there would need to be at least one locker for every eight residential units (2 points).

(XIII) Recycling Service (includes providing a storage location and service for pick-up) (1 point).

(XIV) Community car vacuum station (1 point).

(XV) Access to onsite bike sharing services, provided tenants have short-term, autonomous access to community-owned bicycles, with at least one bicycle per 25 Units (1 point).

(6) Unit Requirements.

(A) Unit Sizes. Developments proposing New Construction or Reconstruction will be required to meet the minimum sizes of Units as provided in clauses (i) - (v) of this subparagraph. These minimum requirements are not associated with any selection criteria. Developments proposing Rehabilitation (excluding Reconstruction) or

Supportive Housing Developments will not be subject to the requirements of this subparagraph. If the Development involves both Rehabilitation and Reconstruction or New Construction, the Reconstruction or New Construction Units must meet these requirements. The requirements are:

(i) four hundred fifty (450) square feet for an Efficiency Unit;

(ii) five hundred fifty (550) square feet for a one Bedroom Unit;

(iii) eight hundred (800) square feet for a two Bedroom Unit;

(iv) one thousand (1,000) square feet for a three Bedroom Unit; and

(v) one thousand, two-hundred (1,200) square feet for a four Bedroom Unit.

(B) Unit, Development Construction, and Energy and Water Efficiency Features. Housing Tax Credit Applicants may select amenities for the score of an Application under this section, but must maintain the points associated with those amenities by maintaining the amenity selected or providing substitute amenities with equal or higher point values. Tax-Exempt Bond Developments must include enough amenities to meet a minimum of nine (9) points. Direct Loan Applications not layered with Housing Tax Credits must include enough amenities to meet a minimum of five (5) points. The amenity shall be for every Unit at no extra charge to the tenant. The points selected at Application and corresponding list of amenities will be required to be identified in the LURA, and the points selected at Application must be maintained throughout the Affordability Period. Applications involving scattered site Developments must have a specific amenity located within each Unit to count for points. Rehabilitation Developments and Supportive Housing Developments will start with a base score of five (5) points. At least two (2) points must be selected from clause (iii), Energy and Water Efficiency Features, of this subparagraph.

(i) Unit Features include:

(I) Covered entries (0.5 point);

(II) Nine foot ceilings in living room and all Bedrooms (at minimum) (1 point);

(III) Microwave ovens (0.5 point);

(IV) Self-cleaning or continuous cleaning ovens (0.5 point);

(V) Storage room or closet, of approximately 9 square feet or greater, separate from and in addition to Bedroom, entryway or linen closets and which does not need to be in the Unit but must be on the Property site (0.5 point);

(VI) Covered patios or covered balconies (0.5 point);

(VII) High Speed Internet service to all Units (can be wired or wireless; required equipment for either must be provided) (1 point);

(VIII) Built-in (recessed into the wall) shelving unit (0.5 point);

(IX) Breakfast Bar (a space, generally between the kitchen and dining area, that includes an area for seating although actual seating such as bar stools does not have to be provided) (0.5 point);

(X) Walk-in closet in at least one Bedroom (0.5 point);

(XI) 48-inch upper kitchen cabinets (1 point);

(XII) Kitchen island (0.5 points);

(XIII) Kitchen pantry with shelving (may include the washer/dryer unit for Rehabilitation Developments only) (0.5 point);

(XIV) Natural stone or quartz countertops in kitchen and bath (1 point);

(XV) Double vanity in at least one bathroom (0.5 point); and

(XVI) Hard floor surfaces in over 50% of unit NRA (0.5 point).

(ii) Development Construction Features include:

(I) Covered parking (may be garages or carports, attached or freestanding) and include at least one covered space per Unit (1.5 points);

(II) Thirty year roof (0.5 point);

(III) Greater than 30% stucco or masonry (includes stone, cultured stone, and brick but excludes cementitious and metal siding) on all building exteriors; the percentage calculation may exclude exterior glass entirely (2 points);

(IV) Electric Vehicle Charging Station (0.5 points);

(V) An Impact Isolation Class (IIC) rating of at least 55 and a Sound Transmission Class (STC) rating of 60 or higher in all Units, as certified by the architect or engineer of record (3 points); and

(VI) Green Building Features. Points under this item are intended to promote energy and water conservation, operational savings and sustainable building practices. Four (4) points may be selected from only one of the categories described in items (-a-) - (-d-) of this subclause. If the Development involves scattered sites, there must be green building features incorporated into each site in order to qualify for these points.

(-a-) Enterprise Green Communities. The Development must incorporate all mandatory and optional items applicable to the construction type (i.e. New Construction, Rehabilitation, etc.) as provided in the most recent version of the Enterprise Green Communities Criteria found at http://www.greencommunitiesonline.org.

(-b-) Leadership in Energy and Environmental Design (LEED). The Development must incorporate, at a minimum, all of the applicable criteria necessary to obtain a LEED Certification, regardless of the rating level achieved (i.e., Certified, Silver, Gold or Platinum).

(-c-) ICC/ASHRAE - 700 National Green Building Standard (NGBS). The Development must incorporate, at a minimum, all of the applicable criteria necessary to obtain a NGBS Green Certification, regardless of the rating level achieved (i.e. Bronze, Silver, Gold, or Emerald).

(-d-) 2018 International Green Construction Code.

(iii) Energy and Water Efficiency Features include:

(I) Energy-Star or equivalently rated refrigerator with icemaker (0.5 point);

(II) Energy-Star or equivalently rated laundry equipment (washers and dryers) for each individual Unit; must be front loading washer and dryer in required accessible Units (2 points);

(III) Recessed LED lighting or LED lighting fixtures in kitchen and living areas (1 point);

(IV) Energy-Star or equivalently rated ceiling fans in all Bedrooms (0.5 point);

(V) EPA WaterSense or equivalent qualified toilets in all bathrooms (0.5 point);

(VI) EPA WaterSense or equivalent qualified showerheads and faucets in all bathrooms (0.5 point);

(VII) 15 SEER HVAC, or in Region 13, an efficient evaporative cooling system. For Rehabilitation (excluding Reconstruction) where such systems are not being replaced as part of the scope of work, a radiant barrier in the attic is provided, (1 point);

(VIII) 16 SEER HVAC, for New Construction or Rehabilitation (1.5 points);

(IX) A rainwater harvesting/collection system or locally approved greywater collection system (0.5 points);

(X) Wi-Fi enabled, Energy-Star or equivalently rated "smart" thermostats installed in all units (1 point); and

(XI) Solar panels installed, with a sufficient number of panels to reach a rated power output of at least 300 watts for each Low-Income Unit. (2 points).

(7) Resident Supportive Services. The resident supportive services include those listed in subparagraphs (A) - (E) of this paragraph, which are grouped primarily for organizational purposes. Applicants are not required to select a specific number of services from each section. Tax Exempt Bond Developments must select a minimum of eight points; Direct Loan Applications not layered with Housing Tax Credits must include enough services to meet a minimum of four points. The points selected and complete list of supportive services will be included in the LURA and the timeframe by which services are offered must be in accordance with §10.619 of this title (relating to Monitoring for Social Services) and maintained throughout the Affordability Period. The Owner may change, from time to time, the services offered; however, the overall points as selected at Application must remain the same. A Development Owner may be required to substantiate such service(s) if requested by staff. Should the QAP in subsequent years provide different services than those listed in subparagraphs (A) - (E) of this paragraph, the Development Owner may request an Amendment as provided in §10.405(a)(2) of this chapter (relating to Amendments and Extensions). The services provided should be those that will directly benefit the Target Population of the Development. Residents must be provided written notice of the elections made by the Development Owner. No fees may be charged to the residents for any of the services, there must be adequate space for the intended services and services offered should be accessible to all (e.g. exercises classes must be offered in a manner that would enable a person with a disability to participate). Services must be provided on-site or transportation to those off-site services identified on the list must be provided. The same service may not be used for more than one scoring item. These services are intended to be provided by a qualified and reputable provider in the specified industry such that the experience and background of the provider demonstrates sufficient knowledge to be providing the service. In general, on-site leasing staff or property maintenance staff would not be considered a qualified provider. Where applicable, the services must be documented by a written agreement with the provider. Unless otherwise noted in a particular clause, courses and services must be offered by an onsite instructor(s).

(A) Transportation Supportive Services include:

(i) shuttle, at least three days a week, to a grocery store and pharmacy or a major, big-box retailer that includes a grocery store and pharmacy, OR a daily shuttle, during the school year, to and from nearby schools not served by a school bus system for children who live at the Development (3.5 points); and

(ii) monthly transportation to community/social events such as mall trips, community theatre, bowling, organized tours, etc. (1 point).

(B) Children Supportive Services include:

(i) provide a High Quality Pre-Kindergarten (HQ Pre-K) program and associated educational space at the Development Site meeting the requirements of paragraph (5)(C)(i)(I) of this subsection. (Half of the points required under this paragraph); and

(ii) Twelve hours of weekly, organized, on-site services provided to K-12 children by a dedicated service coordinator or third-party entity. Services include after-school and summer care and tutoring, recreational activities, character building programs, mentee opportunities, test preparation, and similar activities that promote the betterment and growth of children and young adults (3.5 points).

(C) Adult Supportive Services include:

(i) Four hours of weekly, organized, in-person, hybrid, or live virtual classes accessible to participants from a common area on site to an adult audience by persons skilled or trained in the subject matter being presented, such as English as a second language classes, computer training, financial literacy courses, homebuyer counseling, health education courses, certification courses, GED preparation classes, resume and interview preparatory classes, general presentations about community services and resources, and any other course, class, or presentation that may equip residents with new skills that they may wish to develop (3.5 points);

(ii) annual income tax preparation (offered by an income tax prep service) or IRS-certified VITA (Volunteer Income Tax Assistance) program (offered by a qualified individual) that also emphasizes how to claim the Earned Income Tax Credit (1 point);

(iii) contracted career training and placement partnerships with local worksource offices, culinary programs, or vocational counseling services; may include resident training programs that train and hire residents for job opportunities inside the development in areas like leasing, tenant services, maintenance, landscaping, or food and beverage operation (2 points);

(iv) external partnerships for provision of weekly substance abuse meetings at the Development Site (1 point); and

(v) reporting rent payments to credit bureaus for any resident who affirmatively elects to participate, which will be a requirement of the LURA for the duration of the Affordability Period (2 points).

(D) Health Supportive Services include:

(i) food pantry consisting of an assortment of non-perishable food items and common household items (i.e. laundry detergent, toiletries, etc.) accessible to residents at least on a monthly basis or upon request by a resident. While it is possible that transportation may be provided to a local food bank to meet the requirement of this resident service, the resident must not be required to pay for the items they receive at the food bank (2 points);

(ii) annual health fair provided by a health care professional (1 point);

(iii) weekly exercise classes (offered at times when most residents would be likely to attend) (2 points); and

(iv) contracted onsite occupational or physical therapy services for Elderly Developments or Developments where the service is provided for Persons with Disabilities and documentation to that effect can be provided for monitoring purposes (2 points).

(E) Community Supportive Services include:

(i) partnership with local law enforcement or local first responders to provide quarterly on-site social and interactive activities intended to foster relationships with residents (such activities could include playing sports, having a cook-out, swimming, card games, etc.) (2 points);

(ii) Notary Services during regular business hours (§2306.6710(b)(3)) (1 point);

(iii) twice monthly arts, crafts, and other recreational activities (e.g. Book Clubs and creative writing classes) (1 point);

(iv) twice monthly on-site social events (i.e. potluck dinners, game night, sing-a-longs, movie nights, birthday parties, holiday celebrations, etc.) (1 point);

(v) specific service coordination services offered by a qualified Owner or Developer, qualified provider or through external, contracted parties for seniors, Persons with Disabilities or Supportive Housing (3 points);

(vi) weekly home chore services (such as valet trash removal, assistance with recycling, furniture movement, etc., and quarterly preventative maintenance including light bulb replacement) for Elderly Developments or Developments where the service is provided for Persons with Disabilities and documentation to that effect can be provided for monitoring purposes (2 points);

(vii) any of the programs described under Title IV-A of the Social Security Act (42 U.S.C. §§601, et seq.) which enables children to be cared for in their homes or the homes of relatives; ends the dependence of needy families on government benefits by promoting job preparation, work and marriage; prevents and reduces the incidence of unplanned pregnancies; and encourages the formation and maintenance of two-parent families (1 point);

(viii) a part-time resident services coordinator with a dedicated office space at the Development or a contract with a third-party to provide the equivalent of 15 hours or more of weekly resident supportive services at the Development (2 points); and

(ix) provision, by either the Development Owner or a community partner, of an education tuition- or savings-match program or scholarships to residents who may attend college (2 points).

(8) Development Accessibility Requirements. All Developments must meet all specifications and accessibility requirements as identified in subparagraphs (A) - (F) of this paragraph and any other applicable state or federal rules and requirements. The accessibility requirements are further identified in the Certification of Development Owner as provided in the Application.

(A) The Development shall comply with the accessibility requirements under Federal law and as further defined in Chapter 1, Subchapter B of this title (relating to Accessibility Requirements). (§§2306.6722; 2306.6730).

(B) Regardless of building type, all Units accessed by the ground floor or by elevator (affected units) must comply with the visitability requirements in clauses (i) - (iii) of this subparagraph. Design specifications for each item must comply with the standards of the Fair Housing Act Design Manual. Buildings occupied for residential use on or before March 13, 1991 are exempt from this requirement. If the townhome Units of a Rehabilitation Development do not have a bathroom on the ground floor, the Applicant will not be required to add a bathroom to meet the requirements of clause (iii) of this subparagraph. Visitability requirements include:

(i) All common use facilities must be in compliance with the Fair Housing Design Act Manual;

(ii) To the extent required by the Fair Housing Design Act Manual, there must be an accessible or exempt route from common use facilities to the affected units; and

(iii) Each affected unit must include the features in subclauses (I) - (V) of this clause:

(I) At least one zero-step, accessible entrance;

(II) At least one bathroom or half-bath with toilet and sink on the entry level. The layout of this bathroom or half-bath must comply with one of the specifications set forth in the Fair Housing Act Design Manual;

(III) The bathroom or half-bath must have the appropriate blocking relative to the toilet for the later installation of a grab bar, if ever requested by the tenant of that Unit;

(IV) There must be an accessible route from the entrance to the bathroom or half-bath, and the entrance and bathroom must provide usable width; and

(V) Light switches, electrical outlets, and thermostats on the entry level must be at accessible heights.

(C) The Development Owner is and will remain in compliance with state and federal laws, including but not limited to, fair housing laws, including Chapter 301, Property Code, Title VIII of the Civil Rights Act of 1968 (42 U.S.C. §§3601 et seq.), the Fair Housing Amendments Act of 1988 (42 U.S.C. §§3601 et seq.); the Civil Rights Act of 1964 (42 U.S.C. §§2000a et seq.); the Americans with Disabilities Act of 1990 (42 U.S.C. §§12101 et seq.); the Rehabilitation Act of 1973 (29 U.S.C. §§701 et seq.); Fair Housing Accessibility; the Texas Fair Housing Act; and that the Development is designed consistent with the Fair Housing Act Design Manual produced by HUD, and the Texas Accessibility Standards. (§2306.257; §2306.6705(7))

(D) All Applications proposing Rehabilitation (including Reconstruction) will be treated as substantial alteration, in accordance with Chapter 1, Subchapter B of this title (relating to Section 504 of the Rehabilitation Act of 1973 and the Fair Housing Act).

(E) For all Developments other than Direct Loan Developments, for the purposes of determining the appropriate distribution of accessible Units across Unit Types, assuming all the Units have similar features only the number of Bedrooms and full bathrooms will be used to define the Unit Type, but accessible Units must have an equal or greater square footage than the square footage offered in the smallest non-accessible Unit with the same number of Bedrooms and full bathrooms. For Direct Loan Developments, for purposes of determining the appropriate distribution of accessible Units across Unit Types, the definition of Unit Type will be used. However, a single story Unit may be substituted for a townhome Unit, if the single story Unit contains the same number of Bedrooms and bathrooms and has an equal or greater square footage.

(F) Alternative methods of calculating the number of accessible Units required in a Development must be approved by the Department prior to award or allocation.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

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Bobby Wilkinson
Executive Director
Texas Department of Housing and Community Affairs
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For further information, please call: (512) 475-3959

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SUBCHAPTER C. APPLICATION SUBMISSION REQUIREMENTS, INELIGIBILITY CRITERIA, BOARD DECISIONS AND WAIVER OF RULES

10 TAC §§11.201 - 11.207

STATUTORY AUTHORITY. The new sections are adopted pursuant to Texas Government Code, §2306.053, which authorizes the Department to adopt rules.

Except as described herein the adopted new sections affect no other code, article, or statute.

§11.201. Procedural Requirements for Application Submission.

This subchapter establishes the procedural requirements for Application submission. Only one Application may be submitted for a Development Site in an Application Round. While the Application Acceptance Period is open or prior to the Application deadline, an Applicant may withdraw an Application and subsequently file a new Application utilizing the original pre-application fee (as applicable) that was paid as long as no substantive evaluation was performed by the Department and the re-submitted Application relates to the same Development Site, consistent with §11.9(e)(3) of this chapter (relating to Criteria promoting the efficient use of limited resources and applicant accountability). Applicants are subject to the schedule of fees as set forth in §11.901 of this chapter (relating to Fee Schedule).

(1) General Requirements.

(A) An Applicant requesting funding from the Department must submit an Application in order to be considered for an award. An Application must be complete (including all required exhibits and supporting materials) and submitted by the required program deadline. If an Application, including the corresponding Application fee as described in §11.901 of this chapter, is not submitted to the Department on or before the applicable deadline, the Applicant will be deemed not to have made an Application; provided, however, that errors in the calculation of applicable fees may be cured via an Administrative Deficiency. The deficiency period for curing fee errors will be 5:00 p.m. on the third business day following the date of the deficiency notice and may not be extended. Failure to cure such an error timely will be grounds for termination.

(B) Applying for multifamily funds from the Department is a technical process that must be followed completely. As a result of the competitive nature of some funding sources, an Applicant should proceed on the assumption that deadlines are fixed and firm with respect to both date and time and cannot be waived except where authorized and for truly extraordinary circumstances, such as the occurrence of a significant natural disaster that makes timely adherence impossible. If checks or original Carryover Allocation Agreements are physically delivered to the Department, it is the Applicant's responsibility to be within the Department's doors by the appointed deadline. All Applications and all related materials are to be delivered electronically pursuant to the Multifamily Programs Procedures Manual. Applicants are strongly encouraged to submit the required items well in advance of established deadlines. Applicants must ensure that all documents are legible, properly organized and tabbed, and that materials are fully readable by the Department.

(C) The Applicant must timely upload a PDF copy and Excel copy of the complete Application to the Department's secure web transfer server. The PDF copy and Excel copy of the Application must match, if variations exist between the two copies, an Administrative Deficiency will be issued for the Applicant to identify which document to rely on. Each copy must be in a single file and individually bookmarked as further described in the Multifamily Programs Procedures Manual. Additional files required for Application submission outside the Uniform Application must also be uploaded to the secure web transfer server. It is the responsibility of the Applicant to confirm the upload to the Department's secure web transfer server was successful and to do so in advance of the deadline. If an Applicant can view the files that were uploaded, then that shall serve as an indication that the Application was uploaded and received by the Department. Staff, may, as a courtesy, confirm that the Application files were uploaded, but shall not be obligated or required to confirm such submission. Where there are instances of computer problems, mystery glitches, etc. that prevent the Application from being received by the Department prior to the deadline the Application may be terminated.

(D) Applications must include materials addressing all of the items enumerated in this chapter and other chapters as applicable. If an Applicant does not believe that a specific item should be applied, the Applicant must include, in its place, a statement identifying the required item, stating that it is not being supplied, and a statement as to why the Applicant does not believe it should be required.

(2) Filing of Application for Tax-Exempt Bond Developments. Applications must be submitted to the Department as described in either subparagraph (A) or (B) of this paragraph. Applications will be required to satisfy the requirements of this chapter and applicable Department rules that coincide with the year the Certificate of Reservation is issued. Those Applications that receive a Traditional Carryforward Designation will be subject to the QAP and applicable Department rules in place at the time the Application is received by the Department, unless determined otherwise by staff. Regardless of the timing associated with notification by the TBRB that an application is next in line to receive a Certificate of Reservation and the corresponding deadline to submit the Application pursuant to 10 TAC §190.3(b)(13), it is the Department's expectation that the requirements in this chapter are adhered to, and that care and attention are given to the compilation of the Application, or the Application may be terminated.

(A) Lottery Applications. At the option of the bond issuer, an Applicant may participate in the TBRB lottery for private activity bond volume cap. Applicants should refer to the TBRB website or discuss with their issuer or TBRB staff, the deadlines regarding lottery participation and the timing for the issuance of the Certificate of Reservation based on lottery results. Depending on the Priority designation of the application filed with TBRB, the Application submission requirements to the Department under clause (i) or (ii) of this subpara-

graph must be met. For those that participate in the Lottery but are not successful (i.e. a Certificate of Reservation will not be issued in January, but at some other time), the Application may not be submitted until a Certificate of Reservation has been issued (i.e. Priority 3 applications) or TBRB has sent an email stating the application is next in line (i.e. Priority 1 or 2), but the Certificate of Reservation cannot be issued until the Application is submitted.

(i) Priority 1 or 2 applications: If the Certificate of Reservation will be issued in January, the Applicant may submit the complete Application, including all required Third Party Reports, accompanied by the Application Fee described in §11.901 of this chapter as early as the beginning of December, to be tentatively scheduled for the March Board meeting or March target date for the issuance of the Determination Notice, as applicable. The Application must be submitted using the Draft Uniform Application released by the Department for the upcoming program year. Upon notification from TBRB that an potential Applicant is next in line to receive a Reservation the Applicant may choose to only submit the complete Application (excluding all required Third Party Reports), for purposes of meeting TBRB requirements to have the Certificate of Reservation issued. In this case, the Application will not be scheduled for a Board meeting or target date for the issuance of the Determination Notice, as applicable, until such time the Third Party Reports have been submitted, which should be on the fifth of the month. The Application may be scheduled for a Board meeting at which the decision to have the Determination Notice issued would be made, or the target date for the issuance of the Determination Notice, as applicable, approximately 90 days following the submission of such Third Party Reports. If the fifth day falls on a weekend or holiday, the submission deadline shall be on the next business day. For Third Party Reports that are submitted after the fifth of the month, it will be staff's discretion as to which Board meeting the Application will be presented, or target date for the issuance of the Determination Notice, as applicable.

(ii) Priority 3 applications: Once the Certificate of Reservation has been issued, the same Application submission requirements as indicated in clause (i) of this subparagraph apply. Specifically, an Applicant may submit the Application including or excluding the Third Party Reports, however, only after the Application is considered complete (i.e. Application Fee and all Third Party Reports) will staff schedule the Application for a Board meeting or target date for the issuance of the Determination Notice. The timing of when a Priority 3 Application is submitted to the Department is up to the Applicant and if not submitted on the fifth of the month, it will be staff's discretion as to which Board meeting the Application will be presented, or target date for the administrative issuance of the Determination Notice, as applicable.

(B) Non-Lottery Applications or Applications Not Successful in Lottery.

(i) Applications designated as Priority 1 or 2 by the TBRB must submit the Application Fee described in §11.901 of this chapter and the complete Application, with the exception of the Third Party Reports, before the Certificate of Reservation can be issued by the TBRB. The Third Party Reports, if not submitted with the Application to meet the TBRB submission requirement, must then be submitted on the fifth day of the month and the Application may be scheduled for a Board meeting at which the decision to have the Determination Notice issued would be made, or the target date for the administrative issuance of the Determination Notice, as applicable, approximately 90 days following such submission deadline. If the fifth day falls on a weekend or holiday, the submission deadline shall be on the next business day. If the Third Party Reports are submitted on a date other than the fifth of the month, it will be at staff's discretion as to which Board meeting the Application will be presented, or what will be the target date for the administrative issuance of the Determination Notice, as applicable. Applicants may not submit the Application until staff receives notice from TBRB that the application is next in line to receive a Certificate of Reservation; or

(ii) An Application designated as Priority 3 will not be accepted until after the TBRB has issued a Certificate of Reservation and may be submitted on the fifth day of the month. Priority 3 Application submissions must be complete, including all Third Party Reports and the required Application Fee described in §11.901 of this chapter, before they will be considered accepted by the Department and meeting the submission deadline for the applicable Board meeting date or administrative issuance of the Determination Notice, as applicable.

(C) Generally, the Department will require at least 90 days to review an Application unless staff can complete its evaluation in sufficient time for earlier consideration. An Applicant should expect this timeline to apply regardless of whether the Board will need to approve the issuance of the Determination Notice or it is determined that staff can issue the Determination Notice administratively for a particular Application. Applicants should be aware that unusual financing structures, portfolio transactions, the need to resolve Administrative Deficiencies and changes made by an Applicant after the Application has been reviewed by staff may require additional time to review. In instances where an Application necessitates more staff time to review than normal, where an Application is suspended due to the inability to resolve Administrative Deficiencies by the original deadline, or an extension to respond to an Administrative Deficiency is requested, staff is not obligated to ensure the Application meets the original target date for a Board Meeting or administrative issuance of a Determination Notice, as applicable. Moreover, such review period may be longer depending on the volume of Applications under review and statutory program timing constraints associated with such Applications. The prioritization of Applications will be subject to the review priority established in paragraph (5) of this section.

(D) Withdrawal of Certificate of Reservation. Applicants are required to notify the Department before 5:00 p.m. on the business day after the Certificate of Reservation is withdrawn if the Application is still under review by the Department. If, by the fifth business day following the withdrawal, a new Certificate of Reservation is not issued, the Application will be suspended. If a new Certificate of Reservation is not issued by 5:00 p.m. on the fifth business day following the date of the suspension, the Application will be terminated. Applicants must ensure once a Certificate of Reservation is issued, the Application as submitted is complete and all respective parts of the Development are in process such that closing under the Certificate of Reservation is achievable. Once a new Certificate of Reservation is issued, it will be at the Department's discretion to determine whether the existing Application can still be utilized for purposes of review or if a new Application, including payment of another Application Fee, must be submitted due to material changes. The Department will not prioritize the processing of the new Application over other Applications under review once a new Certificate of Reservation is issued, regardless of the stage of review the Application was in prior to termination, or that it maintain the originally selected Board meeting or targeted administrative issuance date for the Determination Notice, as applicable.

(E) Direct Loan Applications must be submitted in accordance with the requirements in this chapter, §13.5 (relating to the Application and Award Process), and the applicable Notice of Funding Availability (NOFA).

(3) Withdrawal of Application. An Applicant may withdraw an Application prior to or after receiving an award of funding by submitting to the Department written notice of the withdrawal. To the

extent a Direct Loan award is returned after Board approval, penalties may be imposed on the Applicant and Affiliates in accordance with §13.11(a) of this title (relating to Post Award Requirements).

(4) Competitive Evaluation Process. Applications believed likely to be competitive will undergo a program review for compliance with submission requirements and selection criteria, as applicable. In general, Application reviews by the Department shall be conducted based upon the likelihood that an Application will be competitive for an award based upon the region, set-aside, self score, received date, or other ranking factors. Thus, non-competitive or lower scoring Applications may never be reviewed. The Director of Multifamily Finance will identify those Applications that will receive a full program review based upon a reasonable assessment of each Application and its relative position to other Applications, but no Application with a competitive ranking shall be skipped or otherwise overlooked. This initial assessment may be a high level assessment, not a full assessment. The Real Estate Analysis division shall underwrite Applications that received a full program review and remain competitive to determine financial feasibility and an appropriate funding amount. In making this determination, the Department will use §11.302 of this chapter (relating to Underwriting Rules and Guidelines) and §13.6 of this title (relating to Multifamily Direct Loan Rule) as applicable. The Department may have an external party perform all or part of the underwriting evaluation and components thereof to the extent it determines appropriate. The expense of any external underwriting shall be paid by the Applicant prior to the commencement of the aforementioned evaluation pursuant to §11.901(5) of this chapter (relating to Fee Schedule, Appeals and other Provisions). The reviews by the Multifamily Finance Division and the Real Estate Analysis Division will be conducted to meet the requirements of the Program or NOFA under which the Application was submitted. Applications will undergo a previous participation review in accordance with Chapter 1, Subchapter C of this title (relating to Previous Participation) and a Development Site may be evaluated by the Department or its agents through a physical site inspection or site visit, (which may include neighboring areas), independent of or concurrent with a site visit that may be performed in conjunction with §11.101(a)(3) (relating to Neighborhood Risk Factors). The Department may provide a scoring notice reflecting such score to the Applicant which will trigger appeal rights and corresponding deadlines pursuant to Tex. Gov't Code §2306.6715 and §11.902 of this chapter (relating to Appeals Process). For an Application for which the selection criteria are reviewed, the scoring notice for the Application will be sent to the Applicant no later than 21 days prior to the final Board approval of awards.

(5) Order of review of Applications under various Programs. This paragraph identifies how ties or other matters will be handled when dealing with de-concentration requirements, capture rate calculations, and general order of review of Applications submitted under different programs.

(A) De-concentration. Priority will be established based on the earlier date associated with an Application. The dates that will be used to establish priority are as follows:

(i) for Tax-Exempt Bond Developments, the issuance date of the Certificate of Reservation issued by the TBRB; or in instances where there is a Traditional Carryforward Designation associated with an Application the Department will utilize the date the complete HTC Application associated with the Traditional Carryforward Designation is submitted to the Department;

(ii) for all other Developments, the date the Application is considered received by the Department; and

(iii) notwithstanding the foregoing, after July 31 of the current program year, a Tax-Exempt Bond Development with a Certificate of Reservation from the TBRB will take precedence over any Housing Tax Credit Application from the current Application Round on the waiting list.

(B) General Review Priority. Order of reviews of Applications under various multifamily programs will be established based on Department staff's consideration of any statutory timeframes associated with a program or Application in relation to the volume of Applications being processed.

(6) Deficiency Process. The purpose of the deficiency process is to allow an Applicant to provide clarification, explanation, or non-material missing information to resolve inconsistencies in the original Application or to assist staff in an efficient and effective review of the Application. The deficiency process does not require staff to request information from the Applicant in order to complete the Application. Applicants are encouraged to utilize manuals or other materials produced by staff, as additional guidance in conjunction with the rules to provide appropriate support for each item substantiating a claim or representation, such as claims for points, qualification for set-asides, or meeting of threshold and eligibility requirements. Because the review of an Application occurs in several phases, deficiency notices may be issued during any of these phases. Staff will send the deficiency notice via an e-mail to the Applicant and one other contact party if identified in the Application. It is the Applicant's responsibility to ensure that e-mails sent from TDHCA staff to the Applicant or contact are not electronically blocked or redirected by a security feature as they will be considered to be received once they are sent. The time period for responding to a deficiency notice commences on the first business day following the deficiency notice date. Deficiency notices may be sent to an Applicant prior to or after the end of the Application Acceptance Period and may also be sent in response to reviews on post-award submissions. Responses are required to be submitted electronically as a PDF or multiple PDF files and must be uploaded to the Application's ServU http file. Emailed responses will not be accepted. A review of the response provided by the Applicant may reveal that issues initially identified as an Administrative Deficiency are actually determined to be beyond the scope of an Administrative Deficiency process, meaning they are Material Deficiencies not susceptible to being resolved. Department staff may in good faith provide an Applicant confirmation that an Administrative Deficiency response has been received or that such response is satisfactory. Communications from staff that the response was satisfactory do not establish any entitlement to points, eligibility status, or to any presumption of having fulfilled any requirements. Final determinations regarding the sufficiency of documentation submitted to cure a Deficiency as well as the distinction between material and non-material missing information are reserved for the Department staff and Board.

(A) It is critical that the use of the deficiency process not unduly slow the review process, and since the process is intended to clarify or explain matters or obtain at the Department's request missing information, there is an expectation that a party responding to an Administrative Deficiency will be able to respond immediately. It is the responsibility of a person who receives a deficiency to address the matter in a timely manner so that staff has the ability to review the response by the close of business on the date by which resolution must be complete and the deficiency fully resolved. Merely submitting materials prior to that time places the responsibility on the responding party that if the materials do not fully resolve the matter there may be adverse consequences such as point deductions, suspension, or termination. Extensions relating to Administrative Deficiency deadlines may only be extended up to five days if documentation needed to re-

solve the item is needed from a Third Party, the documentation involves Third Party signatures needed on certifications in the Application, or an extension is requested as a reasonable accommodation. A Deficiency response may not contain documentation that did not exist prior to submission of the pre-application or Full Application, as applicable.

(B) Deficiencies for Competitive HTC Applications. Unless an extension has been timely requested and granted prior to the deadline, if a deficiency is not fully resolved to the satisfaction of the Department by 5:00 p.m. on the fifth business day following the date of the deficiency notice, then five (5) points shall be deducted from the selection criteria score for each additional day the deficiency remains unresolved. Points deducted for failure to timely respond to a deficiency will not impact the Pre-Application score. If deficiencies are not resolved by 5:00 p.m. on the seventh business day following the date of the deficiency notice, then the Application shall be terminated, subject to the Applicant's right to appeal. An Applicant may not change or supplement any part of an Application in any manner after the filing deadline or while the Application is under consideration for an award, and may not add any set-asides, increase the requested credit amount, revise the Unit mix (both income levels and Bedroom mixes), or adjust their self-score except in response to a direct request from the Department to do so as a result of an Administrative Deficiency. (§2306.6708(b); §2306.6708) Applicants may not use the Deficiency Process to increase a scoring item's points or to change any aspect of the proposed Development, financing structure, or other element of the Application. To the extent that the review of deficiency documentation or the imposing of point reductions for late responses alters the score assigned to the Application, such score will be reflected in the updated application log published on the Department's website or a Scoring Notice may be issued.

(C) Deficiencies for Tax-Exempt Bond Developments. Unless an extension has been requested prior to the deadline, deficiencies must be resolved to the satisfaction of the Department by 5:00 p.m. on the fifth business day following the date of the deficiency notice. Applications with unresolved deficiencies after 5:00 p.m. on the fifth business day following the date of the deficiency notice will be suspended from further processing and the Applicant will be provided with notice to that effect. If, on the fifth business day following the date of the suspension notice, there are deficiencies that remain unresolved, the Application will be terminated and the Applicant will be provided notice to that effect.

(D) Deficiencies for Direct Loan-only Applications. Deficiencies must be resolved to the satisfaction of the Department by 5:00 p.m. on the fifth business day following the date of the deficiency notice. Applications with unresolved deficiencies after 5:00 p.m. on the fifth business day following the date of the deficiency notice will be suspended from further processing and the Applicant will be provided with notice to that effect. If, on the fifth business day following the date of the suspension notice, there are deficiencies that remain unresolved, the Application may be terminated and the Applicant will be provided notice to that effect. For purposes of priority under the Direct Loan set-asides, if the outstanding item(s) are resolved during the suspension period, the date by which the final deficient item is submitted shall be the new received date pursuant to §13.5(c) of this title (relating to Multifamily Direct Loan Rule). Applicants should be prepared for additional time needed for completion of staff reviews as described in paragraph (2)(B) of this section. Should an Applicant still desire to move forward with the Development after Termination, a completely new Application must be submitted, along with a new Application Fee, as applicable, pursuant to rule. All of the deficiencies noted in the original deficiency notice must be incorporated into the re-submitted Application, which will have a new Application Acceptance Date.

(7) Limited Reviews. If, after the submission of the Application, an Applicant identifies an error in the Application that could likely be the subject of a Deficiency, the Applicant may request a limited review of the specific and limited issues in need of clarification or correction. The issue may not relate to the score of an Application. This limited review may only cover the specific issue and not the entire Application. If the limited review results in the identification of an issue that requires correction or clarification, staff will request such through the Deficiency process as stated in paragraph (6) of this section, if deemed appropriate. A limited review is intended to address:

(A) Clarification of issues that Department staff would have difficulty identifying due to the omission of information that the Department may have access to only through Applicant disclosure, such as a prior removal from a tax credit transaction or participation in a Development that is not identified in the previous participation portion of the Application; or

(B) Technical correction of non-material information that would cause an Application deemed non- competitive to be deemed competitive and, therefore, subject to a staff review. For example, failure to mark the Nonprofit Set-Aside in an Application that otherwise included complete submission of documentation for participation in the Nonprofit Set-Aside.

(8) Challenges to Opposition. Any written statement from a Neighborhood Organization expressing opposition to an Application may be challenged if it is contrary to findings or determinations, including zoning determinations, of a municipality, county, school district, or other local Governmental Entity having jurisdiction or oversight over the finding or determination. If any such comment is challenged, the challenger must declare the basis for the challenge and submit such challenge by the Challenges to Neighborhood Organization Opposition Delivery Date as identified in §11.2 of this chapter and no later than May 1 of the current year for Competitive HTC Applications. The Neighborhood Organization expressing opposition will be given seven calendar days to provide any information related to the issue of whether their assertions are contrary to the findings or determinations of a local Governmental Entity. All such materials and the analysis by staff will be provided to a fact finder, chosen by the Department, for review and a determination. The fact finder will not make determinations as to the accuracy of the statements presented, but only regarding whether the statements are contrary to findings or determinations of a local Governmental Entity. The fact finder's determination will be final and may not be waived or appealed.

§11.202. Ineligible Applicants and Applications.

The purpose of this section is to identify those situations in which an Application or Applicant may be considered ineligible for Department funding and subsequently terminated. Such matters may be brought to the attention of staff by anyone, including members of the general public. The items listed in this section include those requirements in Code, §42, Tex. Gov't Code, Chapter 2306, and other criteria considered important by the Department, and does not represent an exhaustive list of ineligibility criteria that may otherwise be identified in applicable rules, federal statutes or regulations, or a specific program NOFA. The Application may include, or Department staff may request, documentation or verification of compliance with any requirements related to the eligibility of an Applicant, Application, Development Site, or Development. One or more of the matters enumerated in paragraph (1) of this section may also serve as a basis for debarment, or the assessment of administrative penalties, and nothing herein shall limit the Department's ability to pursue any such matter. Failure to provide disclosure may be cause for termination.

(1) Applicants. An Applicant may be considered ineligible if any of the criteria in subparagraphs (A) - (N) of this paragraph

apply to those identified on the organizational chart for the Applicant, Developer and Guarantor. An Applicant is ineligible if the Applicant, Developer, or Guarantor:

(A) Has been or is barred, suspended, or terminated from participation in a state or Federal program, including those listed in the U.S. government's System for Award Management (SAM); (§2306.0504)

(B) Has been convicted of a state or federal felony crime involving fraud, bribery, theft, misrepresentation of material fact, misappropriation of funds, or other similar criminal offenses within 15 years preceding the received date of Application or Pre-Application submission (if applicable);

(C) Is, at the time of Application, subject to an order in connection with an enforcement or disciplinary action under state or federal securities law or by the NASD; subject to a federal tax lien (other than a contested lien for which provision has been made); or the subject of a proceeding in which a Governmental Entity has issued an order to impose penalties, suspend funding, or take adverse action based on an allegation of financial misconduct or uncured violation of material laws, rules, or other legal requirements governing activities considered relevant by the Governmental Entity;

(D) Has materially breached a contract with a public agency, and, if such breach is permitted to be cured under the contract, has been given notice of the breach and a reasonable opportunity to cure, and failed to cure that breach within the time specified in the notice of breach;

(E) Has misrepresented to a subcontractor the extent to which the Developer has benefited from contracts or financial assistance that has been awarded by a public agency, including the scope of the Developer's participation in contracts with the agency, and the amount of financial assistance awarded to the Developer by the agency;

(F) Has been found by the Board to be ineligible based on a previous participation review performed in accordance with Chapter 1 Subchapter C of this title (relating to Previous Participation and Executive Award Review and Advisory Committee);

(G) Is delinquent in any loan, fee, or escrow payments to the Department in accordance with the terms of the loan, as amended, or is otherwise in default with any provisions of such loans, and for which no repayment plan has been approved by the Department;

(H) Has failed to cure any past due fees owed to the Department within the time frame provided by notice from the Department and at least 10 days prior to the Board meeting at which the decision for an award is to be made;

(I) Would be prohibited by a state or federal revolving door or other standard of conduct or conflict of interest statute, including Tex. Gov't Code §2306.6733, or a provision of Tex. Gov't Code, Chapter 572, from participating in the Application in the manner and capacity they are participating;

(J) Has, without prior approval from the Department, had previous Contracts or Commitments that have been partially or fully Deobligated during the 12 months prior to the submission of the Application, and through the date of final allocation due to a failure to meet contractual obligations, and the Person is on notice that such Deobligation results in ineligibility under this chapter;

(K) Has provided false or misleading documentation or made other intentional or negligent material misrepresentations or omissions in or in connection with an Application (and certifications contained therein), Commitment, or Determination Notice for a Development;

(L) Was the Owner or Affiliate of the Owner of a Department assisted rental Development for which the federal affordability requirements were prematurely terminated and the affordability requirements have not been re-affirmed or Department funds repaid;

(M) Fails to disclose, in the Application, any Principal or any entity or Person in the Development ownership structure who was or is involved as a Principal in any other affordable housing transaction, that has terminated voluntarily or involuntarily within the past 10 years, or plans to or is negotiating to terminate, their relationship with any other affordable housing development. The disclosure must identify the person or persons and development involved, the identity of each other development, and contact information for the other Principals of each such development, a narrative description of the facts and circumstances of the termination or proposed termination, and any appropriate supporting documents. An Application may be referred to the Board for a determination of a person's fitness to be involved as a Principal with respect to an Application, which may include a staff recommendation, using the factors described in clauses (i) - (v) of this subparagraph as considerations:

(i) the amount of resources in a Development and the amount of the benefit received from the Development;

(ii) the legal and practical ability to address issues that may have precipitated the termination or proposed termination of the relationship;

(iii) the role of the person in causing or materially contributing to any problems with the success of the development;

(iv) the person's compliance history, including compliance history on other developments; and

(v) any other facts or circumstances that have a material bearing on the question of the person's ability to be a compliant and effective participant in their proposed role as described in the Application; or

(N) Fails to disclose in the Application any voluntary compliance agreement or similar agreement with any governmental agency that is the result of negotiation regarding noncompliance of any affordable housing Development with any requirements. Any such agreement impacting the proposed Development or any other affordable housing Development controlled by the Applicant must be disclosed.

(2) Applications. An Application shall be ineligible if any of the criteria in subparagraphs (A) - (C) of this paragraph apply to the Application:

(A) A violation of Tex. Gov't Code §2306.1113, exists relating to Ex Parte Communication. An ex parte communication occurs when an Applicant or Person representing an Applicant initiates substantive contact (other than permitted social contact) with a board member, or vice versa, in a setting other than a duly posted and convened public meeting, in any manner not specifically permitted by Tex. Gov't Code §2306.1113(b). Such action is prohibited. For Applicants seeking funding after initial awards have been made, such as waiting list Applicants, the ex parte communication prohibition remains in effect so long as the Application remains eligible for funding. The ex parte provision does not prohibit the Board from participating in social events at which a Person with whom communications are prohibited may, or will be present; provided that no matters related to any Application being considered by the Board may be discussed;

(B) The Application is submitted after the Application submission deadline (time or date); is missing multiple parts of the Application; or has a Material Deficiency; or

(C) For any Development utilizing Housing Tax Credits or Tax-Exempt Bonds:

(i) at the time of Application or at any time during the two-year period preceding the date the Application Round begins (or for Tax-Exempt Bond Developments any time during the two-year period preceding the date the Application is submitted to the Department), the Applicant or a Related Party is or has been a person covered by Tex. Gov't Code §2306.6703(a)(1);

(ii) if the Application is represented or communicated about by a Person that would prompt the violations covered by Tex. Gov't Code §2306.6733; or

(iii) the Applicant proposes to replace in less than 15 years any private activity bond financing of the Development described by the Application, unless the exceptions in Tex. Gov't Code §2306.6703(a)(2) are met.

§11.203. Public Notifications. (§2306.6705(9)).

A certification, as provided in the Application, that the Applicant met the requirements and deadlines identified in paragraphs (1) - (3) of this section must be submitted with the Application. For Applications utilizing Competitive Housing Tax Credits, notifications generally must not be older than three months from the first day of the Application Acceptance Period. For Tax-Exempt Bond Developments and Direct Loan Applications, notifications must not be older than three months prior to the date the complete Application is submitted. If notifications were made in order to satisfy requirements of pre-application submission (if applicable to the program) for the same Application, then no additional notification is required at Application. Should the jurisdiction of the official holding any position or role described in paragraph (2) of this section change between the submission of a pre-application and the submission of an Application, Applicants are required to notify the new entity no later than the Full Application Delivery Date.

(1) Neighborhood Organization Notifications.

(A) The Applicant must identify and notify all Neighborhood Organizations on record with the county or the state as of 30 days prior to the beginning of the Application Acceptance Period and whose boundaries include the entire proposed Development Site. As used in this section, "on record with the state" means on record with the Secretary of State.

(B) The Applicant must list, in the certification form provided in the pre-application and Application, all Neighborhood Organizations on record with the county or state as of 30 days prior to the beginning of the Application Acceptance Period and whose boundaries include the proposed Development Site.

(2) Notification Recipients. No later than the date the Application is submitted, notification must be sent to all of the entities identified in subparagraphs (A) - (H) of this paragraph. Developments located in an Extra Territorial Jurisdiction (ETJ) of a city are required to notify both city and county officials. The notifications may be sent by e-mail, fax or mail with return receipt requested or similar tracking mechanism. A template for the notification is included in the Application Notification Template provided in the Application. Evidence of notification is required in the form of a certification provided in the Application. The Applicant is required to retain proof of delivery in the event it is requested by the Department. Evidence of proof of delivery is demonstrated by a signed receipt for mail or courier delivery and confirmation of receipt by recipient for fax and e-mail. Officials to be notified are those in office at the time the Application is submitted. Note that between the time of pre-application (if made) and full Application, the boundaries of their jurisdictions may change. Meetings and discussions do not constitute notification. Recipients include:

(A) Neighborhood Organizations on record with the state or county as of 30 days prior to the beginning of the Application Acceptance Period whose boundaries include the entire Development Site;

(B) Superintendent of the school district in which the Development Site is located;

(C) Presiding officer of the board of trustees of the school district in which the Development Site is located;

(D) Mayor of the municipality (if the Development Site is within a municipality or its extraterritorial jurisdiction);

(E) All elected members of the Governing Body of the municipality (if the Development Site is within a municipality or its extraterritorial jurisdiction);

(F) Presiding officer of the Governing Body of the county in which the Development Site is located;

(G) All elected members of the Governing Body of the county in which the Development Site is located; and

(H) State Senator and State Representative of the districts whose boundaries include the Development Site.

(3) Contents of Notification.

(A) The notification must include, at a minimum, all information described in clauses (i) - (viii) of this subparagraph:

(i) the Applicant's name, address, individual contact name, and phone number;

(ii) the Development name, address, city and county;

(iii) a statement indicating the program(s) to which the Applicant is applying with the Texas Department of Housing and Community Affairs;

(iv) whether the Development proposes New Construction, Reconstruction, Adaptive Reuse or Rehabilitation;

(v) the physical type of Development being proposed (e.g. single family homes, duplex, apartments, high-rise etc.);

(vi) the total number of Units proposed and total number of Low-Income Units proposed;

(vii) the residential density of the Development, i.e., the number of Units per acre; and

(viii) information on how and when an interested party or Neighborhood Organization can provide input to the Department.

(B) The notification may not contain any false or misleading statements. Without limiting the generality of the foregoing, the notification may not create the impression that the proposed Development will target, provide a preference, or serve a Target Population exclusively, unless such population limitation, targeting, or preference is documented in the Application, and is or will be in full compliance with all applicable state and federal laws, including state and federal fair housing laws; and

(C) Notifications or any other communications may not contain any statement that violates Department rules, statute, code, or federal requirements.

§11.204. Required Documentation for Application Submission.

The purpose of this section is to identify the threshold documentation that is required at the time of Application submission, unless specifi-

cally indicated or otherwise required by Department rule. Unless stated otherwise, all documentation identified in this section must not be dated more than six (6) months prior to the close of the Application Acceptance Period or the date of Application submission as applicable to the program.

(1) Certification, Acknowledgement and Consent of Development Owner. A certification of the information in this subchapter as well as Subchapter B of this chapter must be executed by the Development Owner and addresses the specific requirements associated with the Development. The Person executing the certification is responsible for ensuring all individuals referenced therein are in compliance with the certification and that they have given it with all required authority and with actual knowledge of the matters certified.

(A) The Development will adhere to the Texas Property Code relating to security devices and other applicable requirements for residential tenancies, and will adhere to local building codes or, if no local building codes are in place, then to the most recent version of the International Building Code.

(B) This Application and all materials submitted to the Department constitute records of the Department subject to Tex. Gov't Code, Chapter 552. Any person signing the Certification acknowledges that they have the authority to release all materials for publication on the Department's website, that the Department may publish them on the Department's website and release them in response to a request for public information, and make other use of the information as authorized by law.

(C) All representations, undertakings and commitments made by Applicant in the Application process expressly constitute conditions to any Commitment, Determination Notice, Carryover Allocation, or Direct Loan Commitment for such Development which the Department may issue or award, and the violation of any such condition shall be sufficient cause for the cancellation and rescission of such Commitment, Determination Notice, Carryover Allocation, or Direct Loan Commitment by the Department. If any such representations, undertakings and commitments concern or relate to the ongoing features or operation of the Development, they shall be enforceable even if not reflected in the Land Use Restriction Agreement. All such representations, undertakings and commitments are also enforceable by the Department and the residents of the Development, including enforcement by administrative penalties for failure to perform (consistent with Chapter 2, Subchapter C of this title, relating to Administrative Penalties), in accordance with the Land Use Restriction Agreement.

(D) The Development Owner has read and understands the Department's fair housing educational materials posted on the Department's website as of the beginning of the Application Acceptance Period.

(E) The Development Owner agrees to implement a plan to use Historically Underutilized Businesses (HUB) in the development process consistent with the Historically Underutilized Business Guidelines for contracting with the State of Texas. The Development Owner will be required to submit a report of the success of the plan as part of the cost certification documentation, in order to receive IRS Forms 8609 or, if the Development does not have Housing Tax Credits, release of retainage.

(F) The Applicant will attempt to ensure that at least 30% of the construction and management businesses with which the Applicant contracts in connection with the Development are Minority Owned Businesses as further described in Tex. Gov't Code §2306.6734.

(G) The Development Owner will specifically market to veterans through direct marketing or contracts with veteran's organizations and will specifically market to the public housing authority (PHA) waitlists for any PHA in the city and/or county the Development is located within and the PHA of any City within 5 miles of the Development. The Development Owner will be required to identify how they will specifically market to veterans and the PHA waiting lists and report to the Department in the annual housing report on the results of the marketing efforts to veterans and PHA waiting lists. Exceptions to this requirement must be approved by the Department.

(H) The Development Owner will comply with any and all notices required by the Department.

(I) If the Development has an existing LURA with the Department, the Development Owner will comply with the existing restrictions.

(2) Applicant Eligibility Certification. A certification of the information in this subchapter as well as Subchapter B of this chapter must be executed by any individuals required to be listed on the organizational chart and also meeting the definition of Control. The certification must identify the various criteria relating to eligibility requirements associated with multifamily funding from the Department, including but not limited to the criteria identified under §11.202 of this chapter (relating to Ineligible Applicants and Applications).

(3) Engineer/Architect Certification Form. The certification, addressing all of the accessibility requirements applicable to the Development Site, must be executed by the Development engineer or accredited architect after careful review of the Department's accessibility requirements, and including Tex. Gov't Code §2306.6722 and §2306.6730.

(4) Notice, Hearing, and Resolution for Tax-Exempt Bond Developments. In accordance with Tex. Gov't Code, §2306.67071, the following actions must take place with respect to the filing of an Application and any Department consideration for a Tax-Exempt Bond Development.

(A) Prior to submission of an Application to the Department, an Applicant must provide notice of the intent to file the Application in accordance with §11.203 of this chapter (relating to Public Notifications (§2306.6705(9)).

(B) The Governing Body of a municipality must hold a hearing if the Development Site is located within a municipality or the extra territorial jurisdiction (ETJ) of a municipality. The Governing Body of a county must hold a hearing unless the Development Site is located within a municipality. For Development Sites located in an ETJ the county and municipality must hold hearings; however, the county and municipality may arrange for a joint hearing. The purpose of the hearing(s) must be to solicit public input concerning the Application or Development and the hearing(s) must provide the public with such an opportunity. The Applicant may be asked to substantively address the concerns of the public or local government officials.

(C) An Applicant must submit to the Department a resolution of no objection from the applicable Governing Body. Such resolution(s) must specifically identify the Development whether by legal description, address, Development name, Application number or other verifiable method. For an Application with a Development Site that is:

(i) within a municipality, the Applicant must submit a resolution from the Governing Body of that municipality;

(ii) within the ETJ of a municipality, the Applicant must submit both:

(I) A resolution from the Governing Body of that municipality; and

(II) A resolution from the Governing Body of the county; or

(iii) within a county and not within a municipality or the ETJ of a municipality, a resolution from the Governing Body of the county.

(D) For purposes of meeting the requirements of subparagraph (C) of this paragraph, the resolution(s) must be submitted no later than the Resolutions Delivery Date described in §11.2(b) of this chapter (relating to Tax-Exempt Bond Dates and Deadlines). An acceptable, but not required, form of resolution may be obtained in the Multifamily Programs Procedures Manual. Applicants should ensure that the resolutions all have the appropriate references and certifications or the resolution may be determined by staff to be invalid. The resolution(s) must certify that:

(i) notice has been provided to the Governing Body in accordance with Tex. Gov't Code §2306.67071(a);

(ii) the Governing Body has had sufficient opportunity to obtain a response from the Applicant regarding any questions or concerns about the proposed Development;

(iii) the Governing Body has held a hearing at which public comment may be made on the proposed Development in accordance with Tex. Gov't Code §2306.67071(b); and

(iv) after due consideration of the information provided by the Applicant and public comment, the Governing Body does not object to the proposed Application.

(5) Designation as Rural or Urban.

(A) Each Application must identify whether the Development Site is located in an Urban Area or Rural Area of a Uniform State Service Region. The Department shall make available a list of Places meeting the requirements of Tex. Gov't Code §2306.004(28-a)(A) and (B), for designation as a Rural Area and those that are an Urban Area in the Site Demographics Characteristics Report. Some Places are municipalities. For any Development Site located in the ETJ of a municipality and not in a Place, the Application shall have the Rural Area or Urban Area designation of the municipality whose ETJ within which the Development Site is located. For any Development Site not located within the boundaries of a Place or the ETJ of a municipality, the applicable designation is that of the closest Place.

(B) Certain areas located within the boundaries of a primary metropolitan statistical area or a metropolitan statistical area can request a Rural designation from the Department for purposes of receiving an allocation Housing Tax Credits (§2306.6740). In order to apply for such a designation, a letter must be submitted from a duly authorized official of the political subdivision or census designated place addressing the factors outlined in clauses (i) - (vi) of this subparagraph. Photographs and other supporting documentation are strongly encouraged. In order for the area to be designated Rural by the Department for the current Application Round, such requests must be made no later than December 15 of the previous year. If staff is able to confirm the findings outlined in the request, the Rural designation will be granted without further action and will remain in effect until such time that the population as described in clause (i) of this subparagraph exceeds 25,000. In the event that staff is unable to confirm the information contained in the request, the Applicant will be given an opportunity to supplement their case. If, after receiving any supplemental information, staff still cannot confirm the rural nature of the Application, a recommendation for denial will be presented to the Board. The factors include:

(i) the population of the political subdivision or census designated place does not exceed 25,000;

(ii) the characteristics of the political subdivision or census designated place and how those differ from the characteristics of the area(s) with which it shares a contiguous boundary;

(iii) the percentage of the total border of the political subdivision or census designated place that is contiguous with other political subdivisions or census designated places designated as urban. For purposes of this assessment, less than 50% contiguity with urban designated places is presumptively rural in nature;

(iv) the political subdivision or census designated place contains a significant number of unimproved roads or relies on unimproved roads to connect it to other places;

(v) the political subdivision or census designated place lacks major amenities commonly associated with urban or suburban areas; and

(vi) the boundaries of the political subdivision or census designated place contain, or are surrounded by, significant areas of undeveloped or agricultural land. For purposes of this assessment, significant being more than one-third of the total surface area of political subdivision/census designated place, or a minimum of 1,000 acres immediately contiguous to the border.

(6) Experience Requirement. Evidence that meets the criteria as stated in subparagraph (A) of this paragraph must be provided in the Application, unless an experience certificate was issued by the Department in the years 2014-2022, which may be submitted as acceptable evidence of this requirement. Experience of multiple parties may not be aggregated to meet this requirement.

(A) A natural Person, with control of the Development who intends and has the ability to remain in control through placement in service, who is also a Principal of the Developer, Development Owner, or General Partner must establish that they have experience that has included the development and placement in service of a minimum of 150 units or, or a Person, who was included on the original Owner or Developer organization chart for at least 10 awarded Competitive HTC Applications and/or Tax-Exempt Bond Developments in Texas, which all placed in service timely Applicants requesting Multifamily Direct Loan funds only may meet the alternative requirement at §13.5(h)(1) of this title (relating to Experience). Acceptable documentation to meet this requirement shall include any of the items in clauses (i) - (ix) of this subparagraph:

(i) American Institute of Architects (AIA) Document (A102) or (A103) 2007 - Standard Form of Agreement between Owner and Contractor;

(ii) AIA Document G704--Certificate of Substantial Completion;

(iii) AIA Document G702--Application and Certificate for Payment;

(iv) Certificate of Occupancy;

(v) IRS Form 8609 (only one per development is required);

(vi) HUD Form 9822;

(vii) Development agreements;

(viii) partnership agreements; or

(ix) other documentation satisfactory to the Department verifying that a Principal of the Development Owner, General Partner, or Developer has the required experience.

(B) The names on the forms and agreements in subparagraph (A)(i) - (ix) of this paragraph must reflect that the individual seeking to provide experience is a Principal of the Development Owner, General Partner, or Developer as listed in the Application. For purposes of this requirement any individual attempting to use the experience of another individual or entity must demonstrate they had the authority to act on their behalf that substantiates the minimum 150 unit requirement.

(C) For competitive HTC Applications, if a Principal is determined by the Department to not have the required experience, a replacement Principal will not be allowed.

(D) Notwithstanding the foregoing, no person may be used to establish such required experience if that Person or an Affiliate of that Person would not be eligible to be an Applicant themselves.

(7) Financing Requirements.

(A) Non-Department Debt Financing. Interim and permanent financing sufficient to fund the proposed Total Housing Development Cost less any other funds requested from the Department must be included in the Application. For any Development that is a part of a larger development plan on the same site, the Department may request and evaluate information related to the other components of the development plan in instances in which the financial viability of the Development is in whole or in part dependent upon the other portions of the development plan. Any local, state or federal financing identified in this section which restricts household incomes at any level that is lower than restrictions required or elected in accordance with this Chapter or Chapter 13 of this title (relating to Multifamily Direct Loan) must be identified in the rent schedule and the local, state or federal income restrictions must include corresponding rent levels in accordance with Code §42(g) if the Development will receive housing tax credits. The income and corresponding rent restrictions that impact the Units also restricted by the Department will be reflected in the LURA. Financing amounts must be consistent throughout the Application and acceptable documentation shall include those described in clauses (i) - (iv) of this subparagraph.

(i) Financing is in place as evidenced by:

(I) a valid and binding loan agreement; and

(II) a valid recorded deed(s) of trust lien on the Development in the name of the Development Owner as grantor in favor of the party providing such financing.

(ii) Term sheets for interim and permanent loans issued by a lending institution or mortgage company must:

(I) be current, non-expired, and have been signed or otherwise acknowledged by the lender;

(II) be addressed to the Development Owner or Affiliate;

(III) for a permanent loan, include a minimum loan term of 15 years with at least a 30 year amortization or for non-amortizing loan structures a term of not less than 30 years;

(IV) include either a committed and locked interest rate, or the estimated interest rate;

(V) include all required Guarantors, if known;

(VI) include the principal amount of the loan;

(VII) include an acknowledgement of the amounts and terms of all other anticipated sources of funds and if the Application reflects an intent to elect income averaging there must be an acknowledgement to that effect in the term sheet; and

(VIII) include and address any other material terms and conditions applicable to the financing. The term sheet may be conditional upon the completion of specified due diligence by the lender and upon the award of tax credits, if applicable;

(iii) For Developments proposing to refinance an existing USDA Section 514, 515, or 516 loan, a letter from the USDA confirming the outstanding loan balance on a specified date and confirming that the Preliminary Assessment Tool has been submitted by the Applicant to USDA. The loan amount that is reported on the Schedule of Sources (tab 31 in the MF Uniform Application) and that is used to determine the acquisition cost must be the Applicant's estimate of the projected outstanding loan balance at the time of closing as calculated on the USDA Principal Balance Amortization exhibit.

(iv) For Direct Loan Applications or Tax-Exempt Bond Developments with TDHCA as the issuer that utilize FHA financing, the Application shall include the applicable pages from the HUD Application for Multifamily Housing Project. If the HUD Application has not been submitted at the time the Application is submitted then a statement to that effect should be included in the Application along with an estimated date for submission. Applicants should be aware that staff's underwriting of an Application will not be finalized and presented to the Board until staff has evaluated the HUD Application relative to the Application.

(B) Gap Financing. Any anticipated federal, state, local or private gap financing, whether soft or hard debt, must be identified and described in the Application. Applicants must provide evidence that an application for such gap financing has been made to an available fund source. Acceptable documentation may include a letter from the funding entity confirming receipt of an application or a term sheet from the lending agency which clearly describes the amount and terms of the financing. Other Department funding requested with Housing Tax Credit Applications must be on a concurrent funding period with the Housing Tax Credit Application, and no term sheet is required for such a request. A term loan request must comply with the applicable terms of the NOFA under which an Applicant is applying.

(C) Owner Contributions. If the Development will be financed in part with a capital contribution or debt by the General Partner, Managing General Partner, any other partner or investor that is not a partner providing the syndication equity, a Guarantor or a Principal in an amount that exceeds 5% of the Total Housing Development Cost, a letter from a Third Party CPA must be submitted that verifies the capacity of the contributor to provide the capital from funds that are not otherwise committed or pledged. Additionally, a letter from the contributor's bank(s) or depository(ies) must be submitted confirming sufficient funds are readily available to the contributor. The contributor must certify that the funds are and will remain readily available at Commitment and until the required investment is completed. Regardless of the amount, all capital contributions other than syndication equity will be deemed to be a part of, and therefore added to, the Deferred Developer Fee for feasibility purposes under §11.302(i)(2) of this chapter (relating to Underwriting Rules and Guidelines) or where scoring is concerned, unless the contribution is a seller note equal to or less than the acquisition price of the subject Development, the Development is a Supportive Housing Development, the Development is not supported with Housing Tax Credits, or the ownership structure includes a nonprofit organization with a documented history of fundraising sufficient to support the development of affordable housing.

(D) Equity Financing. (§2306.6705(2) and (3)) If applicable to the program, the Application must include a term sheet from a syndicator that, at a minimum, includes:

(i) an estimate of the amount of equity dollars expected to be raised for the Development;

(ii) the amount of Housing Tax Credits requested for allocation to the Development Owner;

(iii) pay-in schedules;

(iv) syndicator consulting fees and other syndication costs. No syndication costs should be included in the Eligible Basis; and

(v) include an acknowledgement of the amounts and terms of all other anticipated sources of funds and if the Application reflects an intent to elect income averaging there must be an acknowledgement to that effect in the term sheet.

(E) Financing Narrative. (§2306.6705(1)) A narrative must be submitted that describes all aspects of the financing plan for the Development, including as applicable the sources and uses of funds; construction, permanent and bridge loans, rents, operating subsidies, project-based assistance, and replacement reserves; and the status (dates and deadlines) for applications, approvals and closings, etc. associated with the term sheets for all funding sources. For Applicants requesting Direct Loan funds, Match, as applicable, must be documented with a letter from the anticipated provider of Match indicating the provider's willingness and ability to make a financial commitment should the Development receive an award of Direct Loan funds. The information provided must be consistent with all other documentation in the Application.

(8) Operating and Development Cost Documentation.

(A) Fifteen-year Pro forma. All Applications must include a 15-year pro forma estimate of operating expenses (or longer, if required by the NOFA), in the form provided by the Department. Any "other" debt service included in the pro forma must include a description. For Tax-Exempt Bond Developments, the pro forma must be signed by the lender and syndicator.

(B) Utility Allowances. This exhibit, as provided in the Application, must be submitted along with documentation from the source of the utility allowance estimate used in completing the Rent Schedule provided in the Application. This exhibit must clearly indicate which utility costs are included in the estimate and must comply with the requirements of §10.614 of this title (relating to Utility Allowances), including deadlines for submission. Where the Applicant uses any method that requires Department review, documentation indicating that the requested method has been granted by the Department must be included in the Application.

(C) Operating Expenses. This exhibit, as provided in the Application, must be submitted indicating the anticipated operating expenses associated with the Development. Any expenses noted as "other" in any of the categories must include a description. "Miscellaneous" or other nondescript designations are not acceptable.

(D) Rent Schedule. This exhibit, as provided in the Application, must meet the requirements of clauses (i) - (vi) of this subparagraph. The income and corresponding rent restrictions will be reflected in the LURA for the duration of the Affordability Period and for Tax-Exempt Bond Developments, in accordance with the Applicant's election under Tex. Gov't Code §1372.0321. The requirements are:

(i) indicate the type of Unit restriction based on the Unit's rent and income restrictions;

(ii) reflect the rent and utility limits available at the time the Application is submitted;

(iii) reflect gross rents that cannot exceed the maximum rent limits unless documentation of project-based rental assistance is provided and rents are consistent with such assistance and applicable legal requirements;

(iv) have a Unit mix and net rentable square footages that are consistent with the site plan and architectural drawings;

(v) if applying for Direct Loan funds:

(I) Direct Loan-restricted Units will generally be designated "floating" unless specifically disallowed under the program specific rules or as specifically allowed in a NOFA;

(II) if HOME, TCAP RF, and/or NSP PI are the anticipated fund source, the Application must have at least 90% of the Direct Loan-restricted Units be available to households or families whose incomes do not exceed 60% of the Area Median Income;

(III) in which HOME or TCAP RF are the anticipated fund source have at least 20% of the Direct Loan-restricted Units available to households or families whose incomes do not exceed 50% of the Area Median Income;

(IV) in which NHTF is the anticipated fund source, have 100% of the Direct Loan-restricted Units available to households or families whose incomes do not exceed the greater of 30% of the Area Median Income or whose income is at or below the poverty line;

(V) in which NSP PI is the anticipated fund source, have at least 25% of the Direct Loan-restricted Units available to households or families whose incomes do not exceed 50% of the Area Median Income;

(VI) in which HOME-ARP is the anticipated fund source, during the State Affordability Period have at least 20% of the Direct Loan-restricted Units for households and families whose incomes do not exceed 60% of the Area Median Income and 100% of the Direct Loan-restricted Units for households and families whose incomes do not exceed 80% of the Area Median Income; and

(vi) if proposing to elect income averaging, Units restricted by any fund source other than housing tax credits must be specifically identified, and all restricted Units, regardless of fund source, must be included in the average calculation.

(E) Development Costs. This exhibit, as provided in the Application, must include the contact information for the person providing the cost estimate and must meet the requirements of clauses (i) and (ii) of this subparagraph. For Applications that include a scope of work that contains a combination of new construction and rehabilitation activities, the Application must include a separate development cost schedule exhibit for only the costs attributed to the portion of rehabilitation activities.

(i) Applicants must provide a detailed cost breakdown of projected Site Work costs (excluding site amenities), if any, prepared by a Third Party engineer. If Site Work costs (excluding site amenities) exceed $20,000 per Unit and are included in Eligible Basis, a letter must be provided from a certified public accountant allocating which portions of those site costs should be included in Eligible Basis.

(ii) If costs for Off-Site Construction are included in the budget as a line item, or embedded in the site acquisition contract, or referenced in the utility provider letters, then an Off-Site Cost Breakdown prepared by a Third Party engineer must be provided. The certification from a Third Party engineer must describe the necessity

of the off-site improvements, including the relevant requirements of the local jurisdiction with authority over building codes and the source of their cost estimate. If any Off-Site Construction costs are included in Eligible Basis, a letter must be provided from a certified public accountant allocating which portions of those costs should be included in Eligible Basis. If off-site costs are included in Eligible Basis based on PLR 200916007, a statement of findings from a CPA must be provided which describes the facts relevant to the Development and affirmatively certifies that the fact pattern of the Development matches the fact pattern in PLR 200916007.

(F) Rental Assistance/Subsidy. (§2306.6705(4)) If rental assistance, an operating subsidy, an annuity, or an interest rate reduction payment is proposed to exist or continue for the Development, any related contract or other agreement securing those funds. Such documentation shall, at a minimum, identify the source and annual amount of the funds, the number of units receiving the funds, and the term and expiration date of the contract or other agreement.

(G) Occupied Developments. The items identified in clauses (i) - (vi) of this subparagraph must be submitted with any Application where any structure on the Development Site is occupied at any time after the Application Acceptance Period begins or if the Application proposes the demolition of any housing occupied at any time after the Application Acceptance Period begins. If the Application includes a request for Direct Loan funds, Applicants must follow the requirements of the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 (URA) and other HUD requirements including Section 104(d) of the Housing and Community Development Act. HUD Handbook 1378 provides guidance and template documents. Failure to follow URA or 104(d) requirements will make the proposed Development ineligible for Direct Loan funds and may lead to penalty under §13.11(b) of this title (relating to Multifamily Direct Loan Rule). If one or more of the items described in clauses (i) - (vi) of this subparagraph is not applicable based upon the type of occupied structures on the Development Site, the Applicant must provide an explanation of such non- applicability. Applicant must submit:

(i) at least one of the items identified in subclauses (I) - (IV) of this clause:

(I) Historical monthly operating statements of the Existing Residential Development for 12 consecutive months ending not more than three months from the first day of the Application Acceptance Period; or

(II) The two most recent consecutive annual operating statement summaries; or

(III) The most recent consecutive six months of operating statements and the most recent available annual operating summary; or

(IV) All monthly or annual operating summaries available; and

(ii) a rent roll not more than six months old as of the first day the Application Acceptance Period that discloses the terms and rate of the lease, rental rates offered at the date of the rent roll, Unit mix, and any vacant units;

(iii) a written explanation of the process used to notify and consult with the tenants in preparing the Application; (§2306.6705(6))

(iv) a relocation plan outlining relocation requirements and a budget with an identified funding source; (§2306.6705(6))

(v) any documentation necessary for the Department to facilitate, or advise an Applicant with respect to or to ensure compliance with the URA and any other relocation laws or regulations as may be applicable; and

(vi) if applicable, evidence that the relocation plan has been submitted to all appropriate legal or governmental agencies or bodies. (§2306.6705(6))

(9) Architectural Drawings. All Applications must include the items identified in subparagraphs (A) - (D) of this paragraph, unless specifically stated otherwise, and must be consistent with all applicable exhibits throughout the Application. The drawings must have a legible scale and show the dimensions of each perimeter wall and floor heights.

(A) For all Developments a site plan must be submitted that includes the items identified in clauses (i) - (xii) of this subparagraph:

(i) states the size of the site on its face;

(ii) includes a Unit and building type table matrix that is consistent with the Rent Schedule and Building/Unit Configuration forms provided in the Application;

(iii) includes a table matrix specifying the square footage of Common Area space on a building by building basis;

(iv) identifies all residential and common buildings in place on the Development Site and labels them consistently with the Rent Schedule and Building/Unit Type Configuration forms provided in the Application;

(v) shows the locations (by Unit and floor) of mobility and hearing/visual accessible Units (unless included in residential building floor plans);

(vi) clearly delineates the flood plain boundary lines or states there is no floodplain;

(vii) indicates placement of detention/retention pond(s) or states there are no detention ponds;

(viii) describes, if applicable, how flood mitigation or other required mitigation will be accomplished;

(ix) indicates the location and number of parking spaces, garages, and carports;

(x) indicates the location and number of accessible parking spaces, garages, and carports, including van accessible spaces;

(xi) includes information regarding local parking requirements; and

(xii) indicates compliant accessible routes or if a route is not accessible a cite to the provision in the Fair Housing Design Manual providing for its exemption.

(B) Building floor plans must be submitted for each building type. Building floor plans must include the locations of the accessible Units and must also include square footage calculations for balconies, breezeways, corridors and any other areas not included in net rentable area.

(C) Unit floor plans for each Unit Type must be included in the Application and must include the square footage. Unit floor plans must be submitted for the accessible Units. Applications for Adaptive Reuse are only required to include Unit floor plans for each distinct floor plan such as one-Bedroom, or two-Bedroom, and for all floor plans that vary in Net Rentable Area by 10% from the typical floor plan.

(D) Elevations must be submitted for each side of each building type (or include a statement that all other sides are of simi-

lar composition as the front) and include a percentage estimate of the exterior composition and proposed roof pitch. Applications for Rehabilitation and Adaptive Reuse may submit photographs if the Unit configurations are not being altered and post-renovation drawings must be submitted if Unit configurations are proposed to be altered.

(10) Site Control.

(A) Evidence that the Development Owner has Site Control must be submitted. If the evidence is not in the name of the Development Owner, then an Affiliate of the Development Owner must have Site Control that allows for an ability to assign the Site Control to the Development Owner. All of the sellers of the proposed Property for the 36 month period prior to the first day of the Application Acceptance Period and their relationship, if any, to members of the Development Team must be identified at the time of Application. The Department may request documentation at any time after submission of an Application of the Development Owner's ability to compel title of any Affiliated property acquisition(s) and the Development Owner must be able to promptly provide such documentation or the Application, award, or Commitment may be terminated. The Department acknowledges and understands that the Property may have one or more encumbrances at the time of Application submission and the Department will take into account whether any such encumbrance is reasonable within the legal and financial ability of the Development Owner to address without delaying development on the timeline contemplated in the Application. To meet the requirements of subparagraph (B) of this paragraph, Tax-Exempt Bond Developments that do not include a request for Direct Loan or include the Department as the bond issuer, must certify in the Application that the Site Control submitted with the TBRB application for the Certificate of Reservation to be issued is still valid.

(B) In order to establish Site Control, one of the items described in clauses (i) - (iii) of this subparagraph must be provided. In the case of land donations, Applicants must demonstrate that the entity donating the land has Site Control as evidenced through one of the items described in clauses (i) - (iii) of this subparagraph or other documentation acceptable to the Department. Site Control items include:

(i) a recorded warranty deed vesting indefeasible title in the Development Owner or, if transferrable to the Development Owner, an Affiliate of the Owner, with corresponding executed settlement statement (or functional equivalent for an existing lease with at least 45 years remaining); or

(ii) a contract or option for lease with a minimum term of 45 years that includes a price; address or legal description; proof of consideration in the form specified in the contract; and expiration date; or

(iii) a contract for sale or an option to purchase that includes a price; address or legal description; proof of consideration in the form specified in the contract; and expiration date.

(C) If the acquisition can be characterized as an identity of interest transaction, as described in §11.302 of this chapter (relating to Underwriting Rules and Guidelines), then the documentation required as further described therein must be submitted in addition to that of subparagraph (B) of this paragraph.

(D) If ingress and egress to a public right of way are not part of the Property described in the site control documentation, the Applicant must provide evidence of an easement, leasehold, or similar documented access, along with evidence that the fee title owner of the property agrees that the LURA may extend to the access easement by the time of Commitment, Determination Notice or Contract (as applicable).

(E) If control of the entire proposed Development Site requires that a plat or right of way be vacated to remove a right of way or similar dedication, evidence that the vacation/re-platting process has started must be included in the Application, and evidence of control of the entire Development Site must be provided by the time of Commitment or Contract (as applicable).

(11) Zoning. (§2306.6705(5)) Acceptable evidence of zoning for all Developments must include one of subparagraphs (A) - (D) of this paragraph. In instances where annexation of a Development Site occurs while the Application is under review, the Applicant must submit evidence of appropriate zoning with the Commitment or Determination Notice. Letters evidencing zoning status must be no more than 6 months old at Application submission, except where such evidence is for an area where there is no zoning and such letters must be updated annually by the political subdivision.

(A) No Zoning Ordinance in Effect. The Application must include a letter from a local government official with appropriate jurisdiction stating that the Development is located within the boundaries of a political subdivision that has no zoning. This requirement does not apply to a Development Site located entirely in the unincorporated area of a county, and not within the ETJ of a municipality.

(B) Zoning Ordinance in Effect. The Application must include a letter from a local government official with appropriate jurisdiction stating the Development is permitted under the provisions of the zoning ordinance that applies to the location of the Development.

(C) Requesting a Zoning Change. The Application must include evidence in the form of a letter from a local government official with jurisdiction over zoning matters that the Applicant or Affiliate has made formal application for a required zoning change and that the jurisdiction has received a release whereby the Applicant has agreed to hold the political subdivision and all other parties harmless in the event the appropriate zoning is not granted. Documentation of final approval of appropriate zoning must be submitted to the Department with the Commitment or Determination Notice.

(D) Zoning for Rehabilitation Developments. In an area with zoning, the Application must include documentation of current zoning. If the Property is currently conforming but with an overlay that would make it a non-conforming use as presently zoned, the Application must include a letter from a local government official with appropriate jurisdiction which addresses the items in clauses (i) - (v) of this subparagraph:

(i) a detailed narrative of the nature of non-conformance;

(ii) the applicable destruction threshold;

(iii) that it will allow the non-conformance;

(iv) Owner's rights to reconstruct in the event of damage; and

(v) penalties for noncompliance.

(12) Title Commitment/Policy. A title commitment or title policy must be submitted that includes a legal description that is consistent with the Site Control. If the title commitment or policy is dated more than six months prior to the date of Application submission or the first day of the Application Acceptance Period for Competitive HTC Applications, then a letter from the title company indicating that nothing further has transpired during the six-month period on the commitment or policy must be submitted. Tax-Exempt Bond Developments that do not include a request for Direct Loan or include the Department as the bond issuer are exempt from this requirement.

(A) The title commitment must list the name of the Development Owner as the proposed insured and list the seller or lessor as the current owner of the Development Site.

(B) The title policy must show that the ownership (or leasehold) of the Development Site is vested in the name of the Development Owner.

(13) Ownership Structure and Previous Participation.

(A) The Department assumes that the Applicant will be able to form any one or more business entities, such as a limited partnership, that are to be engaged in the ownership of a Development as represented in the Application, and that all necessary rights, powers, and privileges including, but not limited to, Site Control will be transferable to that entity. The formation of the ownership entity, qualification to do business (if needed), and transfer of any such rights, powers, and privileges must be accomplished as required in this chapter and Chapters 12 and 13, as applicable.

(B) Organizational Charts. A chart must be submitted that clearly illustrates the organizational structure of the proposed Development Owner and of any Developer and Guarantor, identifying all Principals thereof and providing the names and ownership percentages of all Persons having an ownership interest in the Development Owner, Developer and Guarantor, as applicable, whether directly or through one or more subsidiaries, whether or not they have Control. Persons having Control should be specifically identified on the chart. Individual board members and executive directors of nonprofit entities, governmental bodies, and corporations, as applicable, must be included in this exhibit and trusts must list all beneficiaries that have the legal ability to control or direct activities of the trust and are not just financial beneficiaries. In the case of Housing Tax Credit Applications only in which private equity fund investors are passive investors in the sponsorship entity, the fund manager, managing member or authorized representative of the fund who has the ability to Control, should be identified on the organizational chart, and a full list of investors is not required. The List of Organizations form, as provided in the Application, must include all Persons identified on the organizational charts, and further identify which of those Persons listed exercise Control of the Development.

(C) Previous Participation. Evidence must be submitted that each individual and entity shown on the organizational charts described in subparagraph (B) of this paragraph has provided a copy of the completed previous participation information to the Department. Individual Principals of such entities identified on the organizational chart and on the List of Organizations form, must provide the previous participation information, unless excluded from such requirement pursuant to Chapter 1 Subchapter C of this title (relating to Previous Participation and Executive Award Review and Advisory Committee). The information must include a list of all Developments that are, or were, previously under ownership or Control of the Applicant or each Principal, including any Person providing the required experience. All participation in any Department funded or monitored activity, including non-housing activities, as well as Housing Tax Credit developments or other programs administered by other states using state or federal programs must be disclosed. The individuals providing previous participation information must authorize the parties overseeing such assistance to release compliance histories to the Department.

(D) Direct Loan. In addition to the information required in (B) and (C) of this subparagraph, if the Applicant is applying for Direct Loan funds then the Applicant must also include the definitions of Person, Affiliate, Principal, and Control found in 2 CFR Part 180 and 2424, when completing the organizational chart and the Previous Participation information.

(14) Nonprofit Ownership. Applications that involve a §501(c)(3) or (4) nonprofit, housing finance corporation or public facility corporation as the General Partner or Owner shall submit the documentation identified in subparagraph (A) or (B) of this paragraph, as applicable. Additionally, a resolution approved at a regular meeting of the majority of the board of directors of the nonprofit, indicating their awareness of the organization's participation in each specific Application, and naming all members of the board and employees who may act on its behalf, must be provided. For Tax-Exempt Bond Developments, a copy of the executed inducement resolution will meet the resolution requirement in this paragraph.

(A) Competitive HTC Applications for the Nonprofit Set-Aside. Applications for Competitive Housing Tax Credits involving a §501(c)(3) or (4) nonprofit General Partner and which meet the Nonprofit Set-Aside requirements, must submit all of the documents described in clauses (i) to (v) of this subparagraph and indicate the nonprofit status on the carryover documentation and IRS Forms 8609. (§2306.6706) Applications that include an affirmative election to not be treated under the Nonprofit Set-Aside and a certification that they do not expect to receive a benefit in the allocation of tax credits as a result of being Affiliated with a nonprofit, only need to submit the documentation in subparagraph (B) of this paragraph. Required documents include:

(i) An IRS determination letter which states that the nonprofit organization has been determined by the Internal Revenue Service to be tax-exempt under §501(c)(3) or (4) of the Code;

(ii) The Nonprofit Participation exhibit as provided in the Application, including a list of the names and contact information for all board members, directors, and officers;

(iii) A Third Party legal opinion stating:

(I) That the nonprofit organization is not Affiliated with or Controlled by a for-profit organization and the basis for that opinion;

(II) That the nonprofit organization is eligible, as further described, for a Housing Credit Allocation from the Nonprofit Set-Aside pursuant to Code, §42(h)(5) and the basis for that opinion;

(III) That one of the exempt purposes of the nonprofit organization is to provide low-income housing;

(IV) That the nonprofit organization prohibits a member of its board of directors, other than a chief staff member serving concurrently as a member of the board, from receiving material compensation for service on the board. If the Application includes a request for Community Housing Development Corporation (CHDO) funds, no member of the board may receive compensation, including the chief staff member;

(V) That the Qualified Nonprofit Development will have the nonprofit entity or its nonprofit Affiliate or subsidiary be the Developer or co-Developer as evidenced in the development agreement; and

(VI) That the nonprofit organization has the ability to do business as a nonprofit in Texas;

(iv) a copy of the nonprofit organization's most recent financial statement as prepared by a Certified Public Accountant; and

(v) evidence in the form of a certification that a majority of the members of the nonprofit organization's board of directors principally reside:

(I) in this state, if the Development is located in a Rural Area; or

(II) not more than ninety (90) miles from the Development, if the Development is not located in a Rural Area.

(B) All Other Applications. Applications that involve a §501(c)(3) or (4) nonprofit, housing finance corporation or public facility corporation as the General Partner or Owner must submit an IRS determination letter which states that the nonprofit organization has been determined by the Internal Revenue Service to be tax-exempt under §501(c)(3) or (4) of the Code; and the Nonprofit Participation exhibit as provided in the Application. If the Application involves a nonprofit that is not exempt from taxation under §501(c)(3) or (4) of the Code, then they must disclose in the Application the basis of their nonprofit status. Housing finance corporations or public facility corporations that do not have such IRS determination letter shall submit documentation evidencing creation under their respective chapters of the Texas Local Government Code and corresponding citation for an exemption from taxation.

(15) Feasibility Report. This report, compiled by the Applicant or Third Party Consultant, and prepared in accordance with this paragraph, which reviews site conditions and development requirements of the Development and Development Site, is required and must meet all of the criteria provided in subparagraphs (A) to (F) of this paragraph. Acquisition and Rehabilitation Applications are exempt from this requirement. If an Application involves Acquisition and Rehabilitation along with other activities, the Feasibility Report is required for the entire Development. Tax-Exempt Bond Developments that do not include a request for Direct Loan or where the Department is not the bond issuer, only subparagraph (D) of this paragraph is required to be submitted.

(A) For all Applications, careful focus and attention should be made regarding any atypical items materially impacting costs or the successful and timely execution of the Development plan. The report must also include the following statement, "any person signing this Report acknowledges that the Department may publish the full report on the Department's website, release the report in response to a request for public information and make other use of the report as authorized by law."

(B) An Executive Summary must provide a narrative overview of the Development in sufficient detail that would help a reviewer of the Application better understand the site, the site plan, off site requirements (including discussion of any seller contributions or reimbursements), any other unique development requirements, and their impact on Site Work and Off- Site Construction costs. It should specifically describe any atypical or unusual factors that will impact site design or costs, including but not limited to: Critical Water Quality Zones, habitat protection requirements, construction for environmental conditions (wind, hurricane, flood), and local design restrictions.

(C) The Report should contain a general statement regarding the level of due diligence that has been done relating to site development (including discussions with local government development offices). Where ordinances or similar information is required, provide website links rather than copies of the ordinance. Additionally, it should contain:

(i) a summary of zoning requirements;

(ii) subdivision requirements;

(iii) property identification number(s) and millage rates for all taxing jurisdictions;

(iv) development ordinances;

(v) fire department requirements;

(vi) site ingress and egress requirements; and

(vii) building codes, and local design requirements impacting the Development.

(D) Survey as defined by the Texas Society of Professional Surveyors in their Manual of Practice for Land Surveying in Texas (Category 1A - Land Title Survey or Category 1B - Standard Land Boundary Survey). Surveys (excluding those for Rehabilitation Developments) may not be older than 24 months from the beginning of the Application Acceptance Period.

(E) Preliminary site plan for New Construction or Adaptive Reuse Developments prepared by the civil engineer with a statement that the plan materially adheres to all applicable zoning, site development, and building code ordinances. The site plan must identify all structures, site amenities, parking spaces and driveways, topography (using either existing seller topographic survey or U.S. Geological Survey (USGS)/other database topography), site drainage and detention, water and waste water utility tie-ins, general placement of retaining walls, set- back requirements, and any other typical or locally required items. Off-site improvements required for utilities, detention, access or other requirement must be shown on the site plan or ancillary drawings.

(F) Architect or civil engineer prepared statement describing the entitlement, site development permitting process and timing, building permitting process and timing, and an itemization specific to the Development of total anticipated impact, site development permit, building permit, and other required fees.

§11.205. Required Third Party Reports.

The Environmental Site Assessment, Scope and Cost Review, Appraisal (if applicable), and the Market Analysis must be submitted no later than the Third Party Report Delivery Date as identified in §11.2(b) of this chapter (relating to Tax-Exempt Bond and Direct Loan Development Dates and Deadlines). For Competitive HTC Applications, the Environmental Site Assessment, Scope and Cost Review, Appraisal (if applicable), and the Primary Market Area map (with definition based on census tracts, and site coordinates in decimal degrees, area of PMA in square miles, and list of census tracts included) must be submitted no later than the Full Application Delivery Date as identified in §11.2(a) of this title (relating to Competitive HTC Deadlines Program Calendar) and the Market Analysis must be submitted no later than the Market Analysis Delivery Date as identified in §11.2(a) of this chapter. For Competitive HTC Applications, if the reports, in their entirety, are not received by the deadline, the Application may be terminated. An electronic copy of the report in the format of a single file containing all information and exhibits clearly labeled with the report type, Development name and Development location are required. All Third Party reports must be prepared in accordance with Subchapter D of this chapter (relating to Underwriting and Loan Policy). The Department may request additional information from the report provider or revisions to the report as needed. In instances of non-response by the report provider, the Department may substitute in-house analysis. The Department is not bound by any opinions expressed in the report.

(1) Environmental Site Assessment. This report, required for all Developments and prepared in accordance with the requirements of §11.305 of this chapter (relating to Environmental Site Assessment Rules and Guidelines), must not be dated more than 12 months prior to the date of Application submission for non-Competitive Applications, or the first day of the Application Acceptance Period for Competitive HTC Applications. If this timeframe is exceeded, then a letter or updated report must be submitted, dated not more than six months prior

to the date of Application submission or the first day of the Application Acceptance Period for Competitive HTC Applications from the Person or organization which prepared the initial assessment confirming that the site has been re-inspected and reaffirming the conclusions of the initial report or identifying the changes since the initial report.

(A) Existing Developments funded by USDA will not be required to supply this information; however, it is the Applicant's responsibility to ensure that the Development is maintained in compliance with all state and federal environmental hazard requirements.

(B) If the report includes a recommendation that an additional assessment be performed, then a statement from the Applicant must be submitted with the Application indicating that those additional assessments and recommendations will be performed prior to closing. If the assessments require further mitigating recommendations, then evidence indicating that the mitigating recommendations have been carried out must be submitted at cost certification.

(2) Market Analysis. The Market Analysis, required for all Developments and prepared in accordance with the requirements of §11.303 of this chapter (relating to Market Analysis Rules and Guidelines), must not be dated more than six months prior to the date of Application submission or the first day of the Application Acceptance Period for Competitive HTC Applications. If the report is older than six months, but not more than 12 months prior to the date of Application submission or the first day of the Application Acceptance Period for Competitive HTC Applications, the Qualified Market Analyst that prepared the report may provide a statement that reaffirms the findings of the original Market Analysis. The statement may not be dated more than six months prior to the date of Application submission, or Application Acceptance Date for Direct Loan Applications, or the first day of the Application Acceptance Period for Competitive HTC Applications and must be accompanied by the original Market Analysis.

(A) For Acquisition/Rehabilitation or Reconstruction projects that meet the following criteria, a comprehensive market study as outlined in IRS Section 42(m)(1)(A)(iii) shall mean a location map and a written statement by a disinterested Qualified Market Analyst certifying that the project meets these criteria:

(i) All of the Units in the project contain existing project based rental assistance that will continue for at least the Compliance Period, an existing Department LURA, or the subject rents are at or below 50% AMGI rents;

(ii) The Units are at least 80% occupied at time of Application; and

(iii) Existing tenants have a leasing preference or right to return to the Development as stated in a relocation plan.

(B) The report must be prepared by a disinterested Qualified Market Analyst approved by the Department in accordance with the approval process outlined in §11.303 of this chapter.

(C) Applications in the USDA Set-Aside proposing Rehabilitation with residential structures at or above 80% occupancy at the time of Application submission, the appraisal, required for Rehabilitation Developments and Identity of Interest transactions prepared in accordance with §11.304 of this chapter (relating to Appraisal Rules and Guidelines), will satisfy the requirement for a Market Analysis; however, the Department may request additional information as needed. (§2306.67055; §42(m)(1)(A)(iii))(D). It is the responsibility of the Applicant to ensure that this analysis forms a sufficient basis for the Applicant to be able to use the information obtained to ensure that the Development will comply with fair housing laws.

(3) Scope and Cost Review (SCR). This report, required for Rehabilitation (excluding Reconstruction) and Adaptive Reuse Developments and prepared in accordance with the requirements of §11.306 of this chapter (relating to Scope and Cost Review Guidelines), must not be dated more than six months prior to the date of Application submission or the first day of the Application Acceptance Period for Competitive HTC Applications. If the report is older than six months, but not more than 12 months prior to the date of Application submission or the first day of the Application Acceptance Period for Competitive HTC Applications, the report provider may provide a statement that reaffirms the findings of the original SCR. The statement may not be dated more than six months prior to the date of Application submission or the first day of the Application Acceptance Period for Competitive HTC Applications and must be accompanied by the original SCR. For Developments which require a capital needs assessment from USDA the capital needs assessment may be substituted for the SCR and may be more than six months old, as long as USDA has confirmed in writing that the existing capital needs assessment is still acceptable and it meets the requirements of §11.306 of this chapter. All Rehabilitation Developments financed with Direct Loans must also submit a capital needs assessment estimating the useful life of each major system. This assessment must include a comparison between the local building code and the International Existing Building Code of the International Code Council. The report must be accompanied by the Department's SCR Supplement in the form of an excel workbook as published on the Department's website. For Rehabilitation (excluding Reconstruction) and Adaptive Reuse Tax-Exempt Bond Developments that do not include a request for Direct Loan or where the Department is not the bond issuer, a Scope and Cost Review prepared by a Third Party is not required. The application must include a Scope of Work Narrative as described in §11.306(k) of this chapter (relating to Scope and Cost Review Guidelines).

(4) Appraisal. This report prepared in accordance with the requirements of §11.304 of this chapter (relating to Appraisal Rules and Guidelines), is required for any Application claiming any portion of the building acquisition in Eligible Basis, and Identity of Interest transactions pursuant to Subchapter D of this chapter. The Appraisal must not be dated more than six months prior to the date of Application submission, the Application Acceptance Date for Direct Loan Applications, or the first day of the Application Acceptance Period for Competitive HTC Applications. For Developments that require an appraisal from USDA, the appraisal may be more than six months old, as long as USDA has confirmed in writing that the existing appraisal is still acceptable. Notwithstanding the foregoing, if the Application contains a Market Analysis and the appraisal is not required to fulfill purposes other than establishing the value of land or buildings, an appraisal is not required if no acquisition costs are entered in the development cost schedule.

§11.206. Board Decisions (§§2306.6725(c);2306.6731; and 42(m)(1)(A)(iv)).

The Board's decisions regarding awards or the issuance of Determination Notices, if applicable, shall be based upon the Department's staff and the Board's evaluation of the proposed Developments' consistency with, and fulfillment of, the criteria and requirements set forth in this chapter, Chapter 13 of this title (relating to the Multifamily Direct Loan Rule) and other applicable Department rules and other applicable state, federal and local legal requirements, whether established in statute, rule, ordinance, NOFA, official finding, or court order. The Board shall document the reasons for each Application's selection, including any discretionary factors used in making its determination, including good cause, and the reasons for any decision that conflicts with the recommendations made by Department staff. Good cause includes the Board's decision to apply discretionary factors where authorized.

The Department reserves the right to reduce the amount of funds requested in an Application, condition the Housing Tax Credit or Direct Loan recommendation or terminate the Application based on the Applicant's inability to demonstrate compliance with program requirements.

§11.207. Waiver of Rules.

An Applicant may request a waiver from the Board in writing at or prior to the submission of the pre-application (if applicable) or the Application or subsequent to an award. Waiver requests on Competitive HTC Applications will not be accepted between submission of the Application and any award for the Application. Staff may identify and initiate a waiver request to remedy an error in the QAP or other Multifamily rules, provide necessary relief in response to a natural disaster, or address facets of an Application or Development that have not been contemplated. The Applicant must submit plans for mitigation or alternative solutions with the waiver request. Any such request for waiver submitted by an Applicant must be specific to an actual proposed Development and must be submitted to the Department in the format required in the Multifamily Programs Procedures Manual. Any waiver, if granted, shall apply solely to the Application and shall not constitute a general modification or waiver of the rule involved. All waiver requests must meet the requirements of paragraphs (1) and (2) of this subsection.

(1) A waiver request made at or prior to pre-application or Application must establish that the need for the waiver is not within the control of the Applicant or is due to an overwhelming need. A recommendation for a waiver may be subject to the Applicant's provision of alternative design elements or amenities of a similar nature or that serve a similar purpose. Waiver requests for items that were elected to meet scoring criteria or where the Applicant was provided a menu of options to meet the requirement will not be considered to satisfy this paragraph, unless the Applicant demonstrates that all potential options have been exhausted.

(2) The waiver request must establish how, by granting the waiver, it better serves the policies and purposes articulated in Tex. Gov't Code §§2306.001, 2306.002, 2306.359, and 2306.6701, (which are general in nature and apply to the role of the Department and its programs, including the Housing Tax Credit program) than not granting the waiver.

(3) The Board may not grant a waiver to provide directly or implicitly any Forward Commitments, unless due to extenuating and unforeseen circumstances as determined by the Board. The Board may not waive any requirement contained in statute. The Board may grant a waiver that is in response to a natural, federally declared disaster that occurs after the adoption of the Qualified Allocation Plan to the extent authorized by a governor declared disaster proclamation suspending statutory or regulatory requirements.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on December 6, 2022.

TRD-202204840
Bobby Wilkinson
Executive Director
Texas Department of Housing and Community Affairs
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Proposal publication date: September 23, 2022
For further information, please call: (512) 475-3959

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SUBCHAPTER D. UNDERWRITING AND LOAN POLICY

10 TAC §§11.301 - 11.306

STATUTORY AUTHORITY. The new sections are adopted pursuant to Texas Government Code, §2306.053, which authorizes the Department to adopt rules.

Except as described herein the adopted new sections affect no other code, article, or statute.

§11.301. General Provisions.

This subchapter applies to the underwriting, Market Analysis, appraisal, Environmental Site Assessment, Direct Loan, and Scope and Cost Review standards employed by the Department. This subchapter provides rules for the underwriting review of an affordable housing Development's financial feasibility and economic viability that ensures the most efficient allocation of resources while promoting and preserving the public interest in ensuring the long-term health of an awarded Application and the Department's portfolio. In addition, this subchapter guides staff in making recommendations to the Executive Award and Review Advisory Committee (EARAC or the Committee), Executive Director, and the Board to help ensure procedural consistency in the determination of Development feasibility (Texas Government Code §§2306.081(c), 2306.185, and 2306.6710(d)). Due to the unique characteristics of each Development, the interpretation of the rules and guidelines described in this subchapter is subject to the discretion of the Department and final determination by the Board.

§11.302. Underwriting Rules and Guidelines.

(a) General Provisions.

(1) Pursuant to Tex. Gov't Code §2306.148 and §2306.185(b), the Board is authorized to adopt underwriting standards as set forth in this section. Furthermore, for Housing Credit Allocation, Code §42(m)(2), requires the tax credits allocated to a Development not to exceed the amount necessary to assure feasibility. Additionally, 24 CFR Parts 92 and 93, as further described in CPD Notices 15-11 and 21-10 require the Department to adopt rules and standards to determine the appropriate Multifamily Direct Loan feasibility. The rules adopted pursuant to the Tex. Gov't Code and the Code are developed to result in an Underwriting Report (Report) used by the Board in decision making with the goal of assisting as many Texans as possible by providing no more financing than necessary based on an independent analysis of Development feasibility. The Report generated in no way guarantees or purports to warrant the actual performance, feasibility, or viability of the Development.

(2) Oversourcing of Funds. The total amount of Department-allocated funds combined with any additional soft funds provided by other units of government may not exceed the total cost of all non-market Units at the development, calculated on a per-unit basis. For purposes of this subsection, soft funds include any grants, below-market interest rate loans, or similar funds with a total cost to the Applicant that is below commercial-rate financing, but does not include payable loans provided at commercial rates with deferred payments. If the Department determines that a Development is oversourced in accordance with this subsection, the Applicant will be required to reduce the soft funds provided by other units of government so as to no longer be oversourced.

(b) Report Contents. The Report provides a synopsis and reconciliation of the Application information submitted by the Applicant. For the purpose of this subchapter the term Application includes additional documentation submitted after the initial award of funds that is relevant to any subsequent reevaluation. The Report contents will be

based upon information that is provided in accordance with and within the timeframes set forth in this chapter, Chapters 11, 12, or 13, or in a Notice of Funds Availability (NOFA), as applicable.

(c) Recommendations in the Report. The conclusion of the Report, if being recommended, includes a recommended award of funds or Housing Credit Allocation Amount and states any feasibility or other conditions to be placed on the award. The award amount is based on the lesser of the amounts determined using the methods in paragraphs (1) - (3) of this subsection:

(1) Program Limit Method. For Housing Credit Allocations, this method is based upon calculation of Eligible Basis after applying all cost verification measures and program limits as described in this section. The Applicable Percentage used is defined in §11.1(d) of this chapter (relating to Definitions). For Department programs other than Housing Tax Credits, this method is based upon calculation of the funding limit in current program rules or NOFA at the time of underwriting.

(2) Gap Method. This method evaluates the amount of funds needed to fill the gap created by Total Housing Development Cost less total non-Department-sourced funds or Housing Tax Credits. In making this determination, the Underwriter resizes any anticipated Deferred Developer Fee downward (but not less than zero) before reducing the amount of Department funds or Housing Tax Credits. In the case of Housing Tax Credits, the syndication proceeds needed to fill the gap in permanent funds are divided by the syndication rate to determine the amount of Housing Tax Credits. In making this determination and based upon specific conditions set forth in the Report, the Underwriter may assume adjustments to the financing structure (including treatment of a Cash Flow loan as if fully amortizing over its term) or make adjustments to any Department financing, such that the cumulative Debt Coverage Ratio (DCR) conforms to the standards described in this section. For Housing Tax Credit Developments at cost certification, timing adjusters may be considered as a reduction to equity proceeds for this purpose. Timing adjusters must be consistent with and documented in the original partnership agreement (at admission of the equity partner) but relating to causes outside of the Developer's or Owner's control. The equity partner must provide a calculation of the amount of the adjuster to be used by the Underwriter.

(3) The Amount Requested. The amount of funds that is requested by the Applicant. For Housing Tax Credit Developments (exclusive of Tax-Exempt Bond Developments) this amount is limited to the amount requested in the original Application documentation.

(d) Operating Feasibility. The operating feasibility of a Development funded by the Department is tested by analyzing its Net Operating Income (NOI) to determine the Development's ability to pay debt service and meet other financial obligations throughout the Affordability Period. NOI is determined by subtracting operating expenses, including replacement reserves and taxes, from rental and other income sources.

(1) Income. In determining the first year stabilized pro forma, the Underwriter evaluates the reasonableness of the Applicant's income pro forma by determining the appropriate rental rate per unit based on subsidy contracts, program limitations including but not limited to Utility Allowances, actual rents supported by rent rolls and Market Rents and other market conditions. Miscellaneous income, vacancy and collection loss limits as set forth in subparagraphs (B) and (C) of this paragraph, respectively, are used unless well-documented support is provided and independently verified by the Underwriter.

(A) Rental Income. The Underwriter will review the Applicant's proposed rent schedule and determine if it is consistent with the representations made throughout the Application. The Underwriter will independently calculate a Pro Forma Rent for comparison to the Applicant's estimate in the Application.

(i) Market Rents. The Underwriter will use the Market Analyst's conclusion of Market Rent if reasonably justified and supported by the attribute adjustment matrix of Comparable Units as described in §11.303 of this chapter (relating to Market Analysis Rules and Guidelines). Independently determined Market Rents by the Underwriter may be used based on rent information gained from direct contact with comparable properties, whether or not used by the Market Analyst and other market data sources. For a Development that contains less than 15% unrestricted units, the Underwriter will limit the Pro Forma Rents to the lesser of Market Rent or the Gross Program Rent at 80% AMI.

(ii) Gross Program Rent. The Underwriter will use the Gross Program Rents for the year that is most current at the time the underwriting begins. When underwriting for a simultaneously funded competitive round, all Applications are underwritten with the Gross Program Rents for the same year. If Gross Program Rents are adjusted by the Department after the close of the Application Acceptance Period, but prior to publication of the Report, the Underwriter may adjust the Effective Gross Income (EGI) to account for any increase or decrease in Gross Program Rents for the purposes of determining the reasonableness of the Applicant's EGI.

(iii) Contract Rents. The Underwriter will review rental assistance contracts to determine the Contract Rents currently applicable to the Development. Documentation supporting the likelihood of continued rental assistance is also reviewed. The Underwriter will take into consideration the Applicant's intent to request a Contract Rent increase. At the discretion of the Underwriter, the Applicant's proposed rents may be used as the Pro Forma Rent, with the recommendations of the Report conditioned upon receipt of final approval of such an increase. Tenant-based vouchers or tenant-based rental assistance are not included as Income.

(iv) Utility Allowances. The Utility Allowances used in underwriting must be in compliance with all applicable federal guidance, and §10.614 of this title (relating to Utility Allowances). Utility Allowances must be calculated for individually metered tenant paid utilities.

(v) Net Program Rents. Gross Program Rent less Utility Allowance.

(vi) Actual Rents for existing Developments will be reviewed as supported by a current rent roll. For Unstabilized Developments, actual rents will be based on the most recent units leased with occupancy and leasing velocity considered. Actual rents may be adjusted by the Underwriter to reflect lease-up concessions and other market considerations.

(vii) Collected Rent. Represents the monthly rent amount collected for each Unit Type. For rent- assisted units, the Contract Rent is used. In absence of a Contract Rent, the lesser of the Net Program Rent, Market Rent or actual rent is used.

(B) Miscellaneous Income. All ancillary fees and miscellaneous secondary income, including but not limited to, late fees, storage fees, laundry income, interest on deposits, carport and garage rent, washer and dryer rent, telecommunications fees, and other miscellaneous income, are anticipated to be included in a $5 to $30 per Unit per month range. Projected income from tenant-based rental assistance will not be considered. Exceptions may be made at the discretion of the Underwriter and must be supported by either the normalized operating history of the Development or other existing comparable properties within the same market area.

(i) The Applicant must show that a tenant will not be required to pay the additional fee or charge as a condition of renting a Unit and must show that the tenant has a reasonable alternative.

(ii) The Applicant's operating expense schedule should reflect an itemized offsetting line-item associated with miscellaneous income derived from pass-through utility payments, pass-through water, sewer and trash payments, and cable fees.

(iii) Collection rates of exceptional fee items will generally be heavily discounted.

(iv) If an additional fee is charged for the optional use of an amenity, any cost associated with the construction, acquisition, or development of the hard assets needed to produce the amenity must be excluded from Eligible Basis.

(C) Vacancy and Collection Loss. The Underwriter uses a normalized vacancy rate of 7.5% (5% vacancy plus 2.5% for collection loss). 100% project-based rental subsidy developments (not including employee-occupied units) may be underwritten at a combined 5% vacancy rate.

(D) Effective Gross Income (EGI). EGI is the total of Collected Rent for all Units plus Miscellaneous Income less Vacancy and Collection Loss. If the Applicant's pro forma EGI is within 5% of the EGI independently calculated by the Underwriter, the Applicant's EGI is characterized as reasonable in the Report; however, for purposes of calculating the underwritten DCR the Underwriter's pro forma will be used unless the Applicant's pro forma meets the requirements of paragraph (3) of this subsection.

(2) Expenses. In determining the first year stabilized operating expense pro forma, the Underwriter evaluates the reasonableness of the Applicant's expense estimate based upon the characteristics of each Development, including the location, utility structure, type, the size and number of Units, and the Applicant's management plan. Historical, stabilized and certified financial statements of an existing Development or Third Party quotes specific to a Development will reflect the strongest data points to predict future performance. The Underwriter may review actual operations on the Applicant's other properties monitored by the Department, if any, or review the proposed management company's comparable properties. The Department's database of properties located in the same market area or region as the proposed Development also provides data points; expense data from the Department's database is available on the Department's website. Data from the Institute of Real Estate Management's (IREM) most recent Conventional Apartments-Income/Expense Analysis book for the proposed Development's property type and specific location or region may be referenced. In some cases local or project-specific data such as PHA Utility Allowances and property tax rates are also given significant weight in determining the appropriate line item expense estimate. Estimates of utility savings from green building components, including on-site renewable energy, must be documented by an unrelated contractor or component vendor.

(A) General and Administrative Expense. (G&A)--Accounting fees, legal fees, advertising and marketing expenses, office operation, supplies, and equipment expenses. G&A does not include partnership related expenses such as asset management, accounting or audit fees. Costs of tenant services are not included in G&A.

(B) Management Fee. Fee paid to the property management company to oversee the operation of the Property and is most often based upon a percentage of EGI as documented in an existing property management agreement or proposal. The Underwriter will use the Applicant's proposed Management Fee if it is within the range of 4% to 6% of EGI. A proposed fee outside of this range must be documented.

(C) Payroll Expense. Compensation, insurance benefits, and payroll taxes for on-site office, leasing and maintenance staff. Payroll does not include Third-Party security or tenant services contracts. Staffing specific to tenant services, security or other staffing not related to customary property operations should be itemized and included in other expenses or tenant services expense.

(D) Repairs and Maintenance Expense. Materials and supplies for the repairs and maintenance of the Development including Third-Party maintenance contracts. This line-item does not include costs that are customarily capitalized that would result from major replacements or renovations.

(E) Utilities Expense. Gas and electric energy expenses paid by the Development. Estimates of utility savings from green building components, including on-site renewable energy, must be documented by an unrelated contractor or component vendor.

(F) Water, Sewer, and Trash Expense (WST). Includes all water, sewer and trash expenses paid by the Development.

(G) Insurance Expense. Cost of Insurance coverage for the buildings, contents, and general liability, but not health or workman's compensation insurance.

(H) Property Tax. Includes real property and personal property taxes but not payroll taxes.

(i) An assessed value will be calculated based on the capitalization rate published by the county taxing authority. If the county taxing authority does not publish a capitalization rate, a capitalization rate of 10% or a comparable assessed value may be used.

(ii) Other assessed values or property tax estimates may be used based on development specific factors as determined by the Underwriter.

(iii) If the Applicant proposes a property tax exemption or Payment in Lieu of Taxes (PILOT) agreement the Applicant must provide documentation in accordance with §10.402(d) of this title (relating to Documentation Submission Requirements at Commitment of Funds). At the underwriter's discretion, such documentation may be required prior to Commitment or Determination Notice if deemed necessary.

(I) Replacement Reserves. Periodic deposits to a reserve account to pay for the future replacement or major repair of building systems and components (generally items considered capitalized costs). The Underwriter will use a minimum reserve of $250 per Unit for New Construction and Reconstruction Developments and $300 per Unit for all other Developments. The Underwriter may require an amount above $300 for the Development based on information provided in the Scope and Cost Review (SCR) or, for existing USDA developments, an amount approved by USDA. The Applicant's assumption for reserves may be adjusted by the Underwriter if the amount provided by the Applicant is insufficient to fund capital needs as documented by the SCR during the first fifteen (15) years of the long term pro forma. Higher reserves may be used if documented by a primary lender or syndicator.

(J) Other Operating Expenses. The Underwriter will include other reasonable, customary and documented property-level operating expenses such as audit fees, security expense, telecommunication expenses (tenant reimbursements must be reflected in EGI) and TDHCA's compliance fees. For Developments financed by USDA, a Return to Owner (RTO) may be included as an operating expense in an amount consistent with the maximum approved by USDA or an amount

determined by the Underwriter. This category does not include depreciation, interest expense, lender or syndicator's asset management fees, or other ongoing partnership fees.

(K) Resident Services. Resident services are not included as an operating expense or included in the DCR calculation unless:

(i) There is a documented financial obligation on behalf of the Owner with a unit of state or local government to provide resident supportive services at a specified dollar amount. The financial obligation must be identified by the permanent lender in their term sheet and the dollar amount of the financial obligation must be included in the DCR calculation on the permanent lender's 15-year pro forma at Application. If the term sheet has an expiration date, the term sheet must have been signed by the Applicant prior to the expiration date; or

(ii) The Applicant demonstrates a history of providing comparable supportive services and expenses at existing affiliated properties within the local area. Except for Supportive Housing Developments, the estimated expense of supportive services must be identified by the permanent lender in their term sheet and included in the DCR calculation on the 15-year pro forma; and

(iii) On-site staffing or pro ration of staffing for coordination of services only, and not the provision of services, can be included as a supportive services expense without permanent lender documentation.

(L) Total Operating Expenses. The total of expense items described in subparagraphs (A) - (K) of this paragraph (relating to Operating Feasibility). If the Applicant's total expense estimate is within 5% of the final total expense figure calculated by the Underwriter, the Applicant's figure is characterized as reasonable in the Report; however, for purposes of calculating DCR, the Underwriter's independent calculation will be used unless the Applicant's first year stabilized pro forma meets the requirements of paragraph (3) of this subsection.

(3) Net Operating Income (NOI). The difference between the EGI and total operating expenses. If the Applicant's first year stabilized NOI figure is within 5% of the NOI calculated by the Underwriter, the Applicant's NOI is characterized as reasonable in the Report; however, for purposes of calculating the first year stabilized pro forma DCR, the Underwriter's calculation of NOI will be used unless the Applicant's first year stabilized EGI, total operating expenses, and NOI are each within 5% of the Underwriter's estimates. For Housing Tax Credit Developments at cost certification, actual NOI will be used as adjusted for stabilization of rents and extraordinary lease-up expenses. Permanent lender and equity partner stabilization requirements documented in the loan and partnership agreements will be considered in determining the appropriate adjustments and the NOI used by the Underwriter. For Tax-Exempt Bond Developments that do not include a request for Direct Loan or where the Department is not the bond issuer, the Underwriter will not develop independent estimates of EGI, Total Operating Expenses, or NOI. The Applicant's NOI will generally be characterized as reasonable, subject to review for compliance with Underwriting Rules and Guidelines.

(4) Debt Coverage Ratio. DCR is calculated by dividing NOI by the sum of the debt service payments on all permanent or foreclosable lien(s) with scheduled and periodic payment requirements, including any required debt service on a Direct Loan subject to the applicable Notice of Funding Availability (NOFA) or other program requirements, and any on-going loan related fees such as credit enhancement fees or loan servicing fees. If executed loan documents do not exist, loan terms including principal and interest payments are calculated based on the terms indicated in the most current term sheet(s). Otherwise, actual terms indicated in the executed loan documents will be used. Term sheet(s) must indicate the minimum DCR required by the lender for initial underwriting as well as for stabilization purposes. Unusual or non-traditional financing structures may also be considered.

(A) Interest Rate. The rate documented in the term sheet(s) or loan document(s) will be used for debt service calculations. Term sheets indicating a variable interest rate must provide the base rate index or methodology for determining the variable rate index and any component rates comprising an all-in interest rate. The term sheet(s) must state the lender's underwriting interest rate assumption, or the Applicant must submit a separate statement from the lender with an estimate of the interest rate as of the date of such statement. At initial underwriting, the Underwriter may adjust the underwritten interest rate assumption based on market data collected on similarly structured transactions or rate index history. Private Mortgage Insurance premiums and similar fees are not included in the interest rate but calculated on outstanding principal balance and added to the total debt service payment.

(B) Amortization Period. For purposes of calculating DCR, the permanent lender's amortization period will be used if not less than 30 years and not more than 40 years. Up to 50 years may be used for federally sourced or insured loans. For permanent lender debt with amortization periods less than 30 years, 30 years will be used. For permanent lender debt with amortization periods greater than 40 years, 40 years will be used. For non-Housing Tax Credit transactions a lesser amortization period may be used if the Direct Loans will be fully amortized over the same period as the permanent lender debt.

(C) Repayment Period. For purposes of projecting the DCR over a 30 year period for Developments with permanent financing structures with balloon payments in less than 30 years, the Underwriter will carry forward debt service based on a full amortization at the interest rate stated in the term sheet(s).

(D) Acceptable Debt Coverage Ratio Range. Except as set forth in clauses (i) or (ii) of this subparagraph, the acceptable first year stabilized pro forma DCR must be between a minimum of 1.15 and a maximum of 1.35 (maximum of 1.50 for Housing Tax Credit Developments at cost certification).

(i) If the DCR is less than the minimum, the recommendations of the Report may be based on a reduction to debt service and the Underwriter will make adjustments to the financing structure in the priority order presented in subclauses (I) - (IV) of this clause subject to Direct Loan NOFA requirements and program rules:

(I) A reduction to the interest rate of a Direct Loan;

(II) An increase in the amortization period of a Direct Loan;

(III) A reduction in the principal amount of a Direct Loan; and

(IV) An assumed reduction in the permanent loan amount for non-Department funded loans based upon the rates and terms in the permanent loan term sheet(s) as long as they are within the ranges in subparagraphs (A) and (B) of this paragraph.

(ii) Except for Developments financed with a Direct Loan as the senior debt and the DCR is greater than the maximum, the recommendations of the Report may be based on an increase to debt service and the Underwriter will make adjustments to the assumed financing structure in the priority order presented in subclauses (I) - (III) of this clause subject to Direct Loan NOFA requirements and program rules:

(I) an increase to the interest rate of a Direct Loan up to the lesser of the maximum interest rate pursuant to a Direct Loan NOFA or the interest rate on any senior permanent debt or if no senior permanent debt a market rate determined by the Underwriter based on current market interest rates;

(II) or a decrease in the amortization period on a Direct Loan but not less than 30 years; and

(III) an assumed increase in the permanent loan amount for non-Department proposed financing based upon the rates and terms in the permanent loan term sheet as long as they are within the ranges in subparagraphs (A) and (B) of this paragraph.

(iii) For Housing Tax Credit Developments, a reduction in the recommended Housing Credit Allocation Amount may be made based on the Gap Method described in subsection (c)(2) of this section as a result of an increased debt assumption, if any.

(iv) For Developments financed with a Direct Loan subordinate to FHA financing, DCR on the Direct Loan will be calculated using 75% of the Surplus Cash (or other amount if identified in a Direct Loan NOFA).

(v) The Underwriter may limit total debt service that is senior to a Direct Loan to produce an acceptable DCR on the Direct Loan and may limit total debt service if the Direct Loan is the senior primary debt.

(5) Long Term Pro forma. The Underwriter will create a 30-year operating pro forma using the criteria provided in subparagraphs (A) to (C) of this paragraph:

(A) The Underwriter's or Applicant's first year stabilized pro forma as determined by paragraph (3) of this subsection.

(B) A 2% annual growth factor is utilized for income and a 3% annual growth factor is utilized for operating expenses except for management fees that are calculated based on a percentage of each year's EGI.

(C) Adjustments may be made to the long term pro forma if satisfactory support documentation is provided by the Applicant or as independently determined by the Underwriter.

(e) Total Housing Development Costs. The Department's estimate of the Total Housing Development Cost will be based on the Applicant's Development cost schedule to the extent that costs can be verified to a reasonable degree of certainty with documentation from the Applicant and tools available to the Underwriter. For New Construction Developments, the Underwriter's total cost estimate will be used unless the Applicant's Total Housing Development Cost is within 5% of the Underwriter's estimate. The Department's estimate of the Total Housing Development Cost for Rehabilitation Developments or Adaptive Reuse Developments will be based on the estimated cost provided in the SCR for the scope of work as defined by the Applicant and §11.306(a)(5) of this chapter (relating to SCR Guidelines); the Underwriter may make adjustments to the SCR estimated costs. If the Applicant's cost estimate is utilized and the Applicant's line item costs are inconsistent with documentation provided in the Application or program rules, the Underwriter may make adjustments to the Applicant's Total Housing Development Cost. For Competitive Housing Tax Credit Applications, the Underwriter will adjust an Applicant's cost schedule line item to meet program rules. Underwriter will not make subsequent adjustments to the application to meet feasibility requirements as a result of the initial adjustment required to meet program rules.

(1) Acquisition Costs.

(A) Land, Acquisition and Rehabilitation, Reconstruction, and Adaptive Reuse Acquisition.

(i) For a non-identity of interest acquisition with no building acquisition cost in basis or when the acquisition is not part of the Direct Loan eligible cost and not subject to the appraisal requirements in the Uniform Relocation Assistance and Act of 1970, the underwritten acquisition cost will be the amount(s) reflected in the Site Control document(s) for the Property. At Cost Certification, the acquisition cost used will be the actual amount paid as verified by the settlement statement.

(ii) For an identity of interest acquisition or when required by the Uniform Relocation Assistance and Acquisition Act of 1970 the underwritten acquisition cost will be the lesser of the amount reflected in the Site Control documents for the property or the appraised value as determined by an appraisal that meets the requirements of §11.304 of this chapter (relating to Appraisal Rules and Guidelines). An appraisal is not required if the land or building are donated to the proposed Development, and no costs of acquisition appear on the Development Cost Schedule. An acquisition will be considered an identity of interest transaction when an Affiliate of the seller is an Affiliate of, or a Related Party to, any Owner at any level of the Development Team or a Related Party lender; and

(I) is the current owner in whole or in part of the Property as of the first date of the Application Acceptance Period or the Application Acceptance Date for Direct Loans; or

(II) has or had within the prior 36 months the legal or beneficial ownership of the property or any portion thereof or interest therein regardless of ownership percentage, control or profit participation prior to the first day of the Application Acceptance Period or in the case of a tax-exempt bond or 4% tax credit application the Application Date.

(iii) For all identity of interest acquisitions, the cost used at cost certification will be limited to the acquisition cost underwritten in the initial Underwriting of the Application.

(iv) In cases where more land will be acquired (by the Applicant or a Related Party) than will be utilized as the Development Site and the remainder acreage is not accessible for use by tenants or dedicated as permanent and maintained green space, the value ascribed to the proposed Development Site will be prorated based on acreage from the total cost reflected in the Site Control document(s) or the appraisal, if an appraisal is required. An appraisal containing segregated values for the total acreage to be acquired, the acreage for the Development Site and the remainder acreage may be used by the Underwriter in making a proration determination based on relative value. The Underwriter will not utilize a prorated value greater than the total amount in the Site Control document(s).

(B) USDA Rehabilitation Developments. The underwritten acquisition cost for developments financed by USDA will be the transfer value approved by USDA.

(C) Eligible Basis on Acquisition of Buildings. Building acquisition cost included in Eligible Basis is limited to the appraised value of the buildings, exclusive of land value, as determined by an appraisal that meets the requirements of §11.304 of this chapter (relating to Appraisal Rules and Guidelines). If the acquisition cost in the Site Control documents is less than the appraised value, Underwriter will utilize the land value from the appraisal and adjust the building acquisition cost accordingly.

(2) Off-Site Costs. The Underwriter will only consider costs of Off-Site Construction that are well documented and certified

to by a Third Party engineer on the required Application forms with supporting documentation.

(3) Site Work Costs. The Underwriter will only consider costs of Site Work, including site amenities, that are well documented and certified to by a Third Party engineer on the required Application forms with supporting documentation.

(4) Building Costs.

(A) New Construction and Reconstruction. The Underwriter will use the Marshall and Swift Residential Cost Handbook, other comparable published Third-Party cost estimating data sources, historical final cost certifications of previous Housing Tax Credit developments and other acceptable cost data available to the Underwriter to estimate Building Cost. Generally, the "Average Quality" multiple, townhouse, or single family costs, as appropriate, from the Marshall and Swift Residential Cost Handbook or other comparable published Third-Party data source, will be used based upon details provided in the Application and particularly building plans and elevations. Costs for multi- level parking structures must be supported by a cost estimate from a Third Party contractor with demonstrated experience in structured parking construction. The Underwriter will consider amenities, specifications and development types not included in the Average Quality standard. The Underwriter may consider a sales tax exemption for nonprofit General Contractors.

(B) Rehabilitation and Adaptive Reuse.

(i) The Applicant must provide a scope of work and narrative description of the work to be completed. The narrative should speak to all Off-Site Construction, Site Work, and building components including finishes and equipment, and development amenities. The narrative should be in sufficient detail so that the reader can understand the work and it must generally be arranged consistent with the line-items on the SCR Supplement and must also be consistent with the Development Cost Schedule of the Application.

(ii) The Underwriter will use cost data provided on the SCR Supplement if adequately described and substantiated in the SCR report as the basis for estimating Total Housing Development Costs.

(5) Contingency. Total contingency, including any soft cost contingency, will be limited to a maximum of 7% of Building Cost plus Site Work and Off-Site Construction for New Construction and Reconstruction Developments, and 10% of Building Cost plus Site Work and Off-Site Construction for Rehabilitation and Adaptive Reuse Developments. For Housing Tax Credit Developments, the percentage is applied to the sum of the eligible Building Cost, eligible Site Work costs and eligible Off-Site Construction costs in calculating the eligible contingency cost.

(6) General Contractor Fee. General Contractor fees include general requirements, contractor overhead, and contractor profit. General requirements include, but are not limited to, on-site supervision or construction management, off-site supervision and overhead, jobsite security, equipment rental, storage, temporary utilities, and other indirect costs. General Contractor fees are limited to a total of 14% on Developments with Hard Costs of $3 million or greater, the lesser of $420,000 or 16% on Developments with Hard Costs less than $3 million and greater than $2 million, and the lesser of $320,000 or 18% on Developments with Hard Costs at $2 million or less. Any contractor fees to Affiliates or Related Party subcontractors regardless of the percentage of the contract sum in the construction contract (s) will be treated collectively with the General Contractor Fee limitations. Any General Contractor fees above this limit will be excluded from Total Housing Development Costs. For Housing Tax Credit Developments, the percentages are applied to the sum of the Eligible Hard Costs in calculating the eligible contractor fees. For Developments also receiving financing from USDA, the combination of builder's general requirements, builder's overhead, and builder's profit should not exceed the lower of TDHCA or USDA requirements. Additional fees for ineligible costs will be limited to the same percentage of ineligible Hard Costs but will not be included in Eligible Basis.

(7) Developer Fee.

(A) For Housing Tax Credit Developments, the Developer Fee included in Eligible Basis cannot exceed 15% of the project's eligible costs, less Developer Fee, for Developments proposing 50 Units or more and 20% of the project's eligible costs, less Developer Fee, for Developments proposing 49 Units or less. If the Development is an additional phase, proposed by any Principal of the existing tax credit Development, the Developer Fee may not exceed 15%, regardless of the number of Units.

(B) For Housing Tax Credit Developments, any additional Developer Fee claimed for ineligible costs will be limited to the same percentage but applied only to ineligible Hard Costs. Any Developer Fee above this limit will be excluded from Total Housing Development Costs. All fees to Affiliates or Related Parties for work or guarantees determined by the Underwriter to be typically completed or provided by the Developer or Principal(s) of the Developer will be considered part of Developer Fee.

(C) For Housing Tax Credit Developments, Eligible Developer Fee is multiplied by the appropriate Applicable Percentage depending on whether it is attributable to acquisition or rehabilitation basis.

(D) For non-Housing Tax Credit Developments, the percentage can be up to 7.5%, but is based upon Total Housing Development Cost less the sum of the fee itself, land costs, the costs of permanent financing, excessive construction period financing described in paragraph (8) of this subsection, reserves, and any identity of interest acquisition cost.

(8) Financing Costs. All fees required by the construction lender, permanent lender and equity partner must be indicated in the term sheets. Eligible construction period interest is limited to the lesser of actual eligible construction period interest, or the interest on one year's fully drawn construction period loan funds at the construction period interest rate indicated in the term sheet(s). For tax-exempt bond transactions up to 24 months of interest may be included. Any excess over this amount will not be included in Eligible Basis. Construction period interest on Related Party or Affiliate construction loans is only included in Eligible Basis with documentation satisfactory to the Underwriter that the loan will be at a market interest rate, fees and loan terms and the Related Party lender can demonstrate that it is routinely engaged in construction financing to unrelated parties.

(9) Reserves. Except for the underwriting of a Housing Tax Credit Development at cost certification, the Underwriter will utilize the amount presented in the Applicant's Development Cost Schedule up to twelve months of stabilized operating expenses plus debt service (up to twenty-four months for USDA or HUD-financed rehabilitation transactions). Reserve amounts exceeding these limits will be excluded from Total Housing Development Costs. Pursuant to §10.404(c) of this title (relating to Operative Reserve Accounts), and for the underwriting of a Housing Tax Credit Development at cost certification, operating reserves that will be maintained for a minimum period of five years and documented in the Owner's partnership agreement or the permanent lender's loan documents will be included as a development cost.

(10) Soft Costs. Eligible soft costs are generally costs that can be capitalized in the basis of the Development for tax purposes. The Underwriter will evaluate and apply the allocation of these soft costs in accordance with the Department's prevailing interpretation of the Code. Generally the Applicant's costs are used however the Underwriter will use comparative data and Third Party CPA certification as to the capitalization of the costs to determine the reasonableness of all soft costs. For Tax-Exempt Bond Developments that do not include a request for Direct Loan or where the Department is not the bond issuer, the Underwriter will not develop independent estimates for Building Cost or Soft Costs. The Applicant's Total Housing Development Cost and Total Eligible Cost will generally be characterized as reasonable, subject to review for compliance with Underwriting Rules and Guidelines.

(11) Additional Tenant Amenities. For Housing Tax Credit Developments and after submission of the cost certification package, the Underwriter may consider costs of additional building and site amenities (suitable for the Target Population being served) proposed by the Owner in an amount not to exceed 1.5% of the originally underwritten Hard Costs. The additional amenities must be included in the LURA.

(12) Special Reserve Account. For Housing Tax Credit Developments at cost certification, the Underwriter may include a deposit of up to $1,000 per Unit into a Special Reserve Account as a Development Cost.

(f) Development Team Capacity and Development Plan.

(1) The Underwriter will evaluate and report on the overall capacity of the Development Team by reviewing aspects, including but not limited to those identified in subparagraphs (A) - (D) of this paragraph:

(A) Personal credit reports for development sponsors, Developer Fee recipients and those individuals anticipated to provide guarantee(s) in cases when warranted. The Underwriter may evaluate the credit report and identify any bankruptcy, state or federal tax liens or other relevant credit risks for compliance with eligibility and debarment requirements as found in Chapter 2 of this title (relating to Enforcement);

(B) Quality of construction, Rehabilitation, and ongoing maintenance of previously awarded housing developments by review of construction inspection reports, compliance on-site visits, findings of UPCS violations and other information available to the Underwriter;

(C) For Housing Tax Credit Developments, repeated or ongoing failure to timely submit cost certifications, requests for and clearance of final inspections, and timely response to deficiencies in the cost certification process; and

(D) Adherence to obligations on existing or prior Department funded developments with respect to program rules and documentation.

(2) While all components of the Development plan may technically meet the other individual requirements of this section, a confluence of serious concerns and unmitigated risks identified during the underwriting process may result in an Application being determined to be infeasible by the Underwriter. Any recommendation made under this subsection to deny an Application for a Grant, Direct Loan or Housing Credit Allocation is subject to Appeal as further provided for in §11.902 of this chapter (relating to Appeals).

(g) Other Underwriting Considerations. The Underwriter will evaluate additional feasibility elements as described in paragraphs (1) - (4) of this subsection.

(1) Interim Operating Income. Interim operating income listed as a source of funds must be supported by a detailed lease-up schedule and analysis.

(2) Floodplains. The Underwriter evaluates the site plan, floodplain map, survey and other information provided to determine if any of the buildings, drives, or parking areas reside within the 100-year floodplain. If such a determination is made by the Underwriter, the Report will include a condition that:

(A) The Applicant must pursue and receive a Letter of Map Amendment (LOMA) or Letter of Map Revision (LOMR-F); or

(B) The Applicant must identify the cost of flood insurance for the buildings within the 100-year floodplain and certify that the flood insurance will be obtained; and

(C) The Development must be proposed to be designed to comply with the QAP, Program Rules and NOFA, and applicable Federal or state requirements.

(3) Proximity to Other Developments. The Underwriter will identify in the Report any Developments funded or known and anticipated to be eligible for funding within one linear mile of the subject. Distance is measured in a straight line from nearest boundary point to nearest boundary point.

(4) Direct Loans. In accordance with the requirements of 24 CFR §§92.250 and 93.300(b), a request for a Direct Loan will not be recommended for approval if the first year stabilized pro forma Cash Flow, after deducting any payment due to the Developer on a deferred developer fee loan and scheduled payments on cash flow loans, divided by the Development Owner's equity exceeds 10%, or a higher amount not to exceed 12% may be approved by the underwriter for unique ownership capital structures or as allowed by a federally insured loan program. For this purpose, Cash Flow may be adjusted downward by the Applicant electing to commit any Cash Flow in excess of the limitation to a special reserve account, in accordance with §10.404(d) of this title. For capital structures without Development Owner equity, a maximum of 75% of on-going Cash Flow, after deducting any payment due to the Developer on a deferred developer fee loan and scheduled payments on cash flow loans, may be distributed to the Development Owner and the remaining 25% must be deposited to a special reserve account, in accordance with §10.404(d) of this title. If the Direct Loan is not recommended for approval, the remaining feasibility considerations under this section will be based on a revised sources schedule that does not contain the Direct Loan. This standard will also be used when the Development Owner is seeking approval for a request for a subordination agreement or a refinance.

(h) Work Out Development. Developments that are underwritten subsequent to Board approval in order to refinance or gain relief from restrictions may be considered infeasible based on the guidelines in this section, but may be characterized as "the best available option" or "acceptable available option" depending on the circumstances and subject to the discretion of the Underwriter as long as the option analyzed and recommended is more likely to achieve a better financial outcome for the property and the Department than the status quo.

(i) Feasibility Conclusion. A Development will be characterized as infeasible if paragraph (1) or (2) of this subsection applies. The Development will be characterized as infeasible if one or more of paragraphs (3) or (4) of this subsection, applies unless paragraph (5)(B) of this subsection also applies.

(1) Gross Capture Rate, AMGI Band Capture Rates, and Individual Unit Capture Rate. The method for determining capture rates for a Development is defined in §11.303 of this chapter (relating to Market Analysis Rules and Guidelines). The Underwriter will verify the conclusions of the capture rates and may, at their discretion, use independently acquired demographic data to calculate demand and may make a determination of the capture rates based upon an analysis of the Sub-market. The Development:

(A) Is characterized as an Elderly Development and the Gross Capture Rate or any AMGI bad capture rate exceeds 10%; or

(B) Is outside a Rural Area and targets the general population, and the Gross Capture Rate or any AMGI band capture rate exceeds 10% (or 15% for Tax-Exempt Bond Developments located in an MSA (as defined in the HTC Site Demographics Characteristics Report) with a population greater than one million if the average physical occupancy is 92.5% or greater for all stabilized affordable housing developments located within a 20 minute drive time, as supported by the Market Analyst, from the subject Development); or

(C) Is in a Rural Area and targets the general population, and:

(i) contains total Units of 120 or less, and the Gross Capture Rate or any AMGI band capture rate exceeds 30%; or

(ii) contains more than 120 total Units, and the Gross Capture Rate or any AMGI band capture rate exceeds 10%; or

(D) Is Supportive Housing and the Gross Capture Rate or any AMGI band capture rate exceeds 30%; or

(E) Has an Individual Unit Capture Rate for any Unit Type greater than 65%; and

(F) Developments meeting the requirements of subparagraph (A), (B), (C), (D) or (E) of this paragraph may avoid being characterized as infeasible if clause (i) or (ii) of this subparagraph apply:

(i) Replacement Housing. The proposed Development is comprised of affordable housing which replaces previously existing affordable housing within the Primary Market Area as defined in §11.303 of this chapter (relating to Market Analysis Rules and Guidelines) on a Unit for Unit basis, and gives the displaced tenants of the previously existing affordable housing a leasing preference; or

(ii) Existing Housing. The proposed Development is comprised of existing affordable housing, whether defined by an existing land use and rent restriction agreement or if the subject rents are at or below 50% AMGI rents, which is at least 50% occupied and gives displaced existing tenants a leasing preference as stated in a relocation plan.

(2) Deferred Developer Fee. Applicants requesting an allocation of tax credits where the estimated Deferred Developer Fee, based on the underwritten capitalization structure, is not repayable from Cash Flow within the first 15 years of the long term pro forma as described in subsection (d)(5) of this section.

(3) Initial Feasibility.

(A) Except when underwritten at cost certification, the first year stabilized pro forma operating expense divided by the first year stabilized pro forma Effective Gross Income is greater than 68% for Rural Developments 36 Units or less, and 65% for all other Developments.

(B) The first year DCR is below 1.15 (1.00 for USDA Developments).

(4) Long Term Feasibility. The Long Term Pro forma reflects:

(A) A Debt Coverage Ratio below 1.15 at any time during years two through fifteen; or

(B) Negative Cash Flow at any time throughout the term of a Direct Loan, or at any time during years two through fifteen for applications that do not include a request for a Direct Loan.

(5) Exceptions. The infeasibility conclusions will not apply if:

(A) The Executive Director of the Department finds that documentation submitted by the Applicant at the request of the Underwriter will support unique circumstances that will provide mitigation.

(B) Developments not meeting the requirements of one or more of paragraphs (3)(A) or (4) of this subsection will be re-characterized as feasible if one or more of clauses (i) - (v) of this subparagraph apply. A Development financed with a Direct Loan, including a Supportive Housing Development, will not be re-characterized as feasible with respect to paragraph (4)(B) of this subsection. The Development:

(i) will receive Project-based Section 8 Rental Assistance or the HUD Rental Assistance Demonstration Program for at least 50% of the Units and a firm commitment, with terms including Contract Rent and number of Units, is submitted at Application;

(ii) will receive rental assistance for at least 50% of the Units in association with USDA financing;

(iii) will be characterized as public housing as defined by HUD for at least 50% of the Units;

(iv) meets the requirements under §11.1(d)(125)(E)(i) of this chapter (relating to the Definition of Supportive Housing) and there is an executed guaranty agreement, to fund operating deficits over the entire Affordability Period; or

(v) has other long term project based restrictions on rents for at least 50% of the Units that allow rents to increase based upon expenses and the Applicant's proposed rents are at least 10% lower than both the Net Program Rent and Market Rent.

§11.303. Market Analysis Rules and Guidelines.

(a) General Provision. A Market Analysis prepared for the Department must evaluate the need for decent, safe, and sanitary housing at rental rates or sales prices that eligible tenants can afford. The analysis must determine the feasibility of the subject Development rental rates or sales price, and state conclusions as to the impact of the Development with respect to the determined housing needs. The Market Analysis must include a statement that the report preparer has read and understood the requirements of this section. The Market Analysis must also include a statement that the person or company preparing the Market Analysis is a disinterested party and will not materially benefit from the Development in any other way than receiving a fee for performing the Market Analysis, and that the fee is in no way contingent upon the outcome of the Market Analysis. The report must also include the following statement, "any person signing this Report acknowledges that the Department may publish the full report on the Department's website, release the report in response to a request for public information and make other use of the report as authorized by law."

(b) Self-Contained. A Market Analysis prepared for the Department must allow the reader to understand the market data presented, the analysis of the data, and the conclusions derived from such data. All data presented should reflect the most current information available and the report must provide a parenthetical (in-text) citation or footnote describing the data source. The analysis must clearly lead the reader to

the same or similar conclusions reached by the Market Analyst. All steps leading to a calculated figure must be presented in the body of the report.

(c) Market Analyst Qualifications. A Market Analysis submitted to the Department must be prepared and certified by an approved Qualified Market Analyst. (§2306.67055) The Department will maintain an approved Market Analyst list based on the guidelines set forth in paragraphs (1) - (2) of this subsection.

(1) The approved Qualified Market Analyst list will be updated and published annually on or about November 1st. If not listed as an approved Qualified Market Analyst by the Department, a Market Analyst may request approval by submitting items in subparagraphs (A) - (F) of this paragraph at least 30 calendar days prior to the first day of the competitive tax credit Application Acceptance Period or 30 calendar days prior to submission of any other application for funding for which the Market Analyst must be approved. An already approved Qualified Market Analyst will remain on the list so long as at least one (1) Market Analysis has been submitted to the Department in the previous 12 months or items (A), (B), (C) and (E) are submitted prior to October 1st. Otherwise, the Market Analyst will automatically be removed from the list. Submission items include:

(A) Franchise Tax Account Status from the Texas Comptroller of Public Accounts (not applicable for sole proprietorships);

(B) A current organization chart or list reflecting all members of the firm who may author or sign the Market Analysis. A firm with multiple offices or locations must indicate all members expected to be providing Market Analysis;

(C) Resumes for all members of the firm or subcontractors who may author or sign the Market Analysis;

(D) General information regarding the firm's experience including references, the number of previous similar assignments and timeframes in which previous assignments were completed;

(E) Certification from an authorized representative of the firm that the services to be provided will conform to the Department's Market Analysis Rules and Guidelines, as described in this section, in effect for the Application Round in which each Market Analysis is submitted; and

(F) A sample Market Analysis that conforms to the Department's Market Analysis Rules and Guidelines, as described in this section, in effect for the year in which the sample Market Analysis is submitted.

(2) During the underwriting process each Market Analysis will be reviewed and any discrepancies with the rules and guidelines set forth in this section may be identified and require timely correction. Subsequent to the completion of the Application Round and as time permits, staff or a review appraiser will re-review a sample set of submitted market analyses to ensure that the Department's Market Analysis Rules and Guidelines are met. If it is found that a Market Analyst has not conformed to the Department's Market Analysis Rules and Guidelines, as certified to, the Market Analyst will be notified of the discrepancies in the Market Analysis and will be removed from the approved Qualified Market Analyst list.

(A) In and of itself, removal from the list of approved Market Analysts will not invalidate a Market Analysis commissioned prior to the removal date and at least 90 days prior to the first day of the applicable Application Acceptance Period.

(B) To be reinstated as an approved Qualified Market Analyst, the Market Analyst must amend the previous report to remove all discrepancies or submit a new sample Market Analysis that conforms to the Department's Market Analysis Rules and Guidelines, as described in this section, in effect for the year in which the updated or new sample Market Analysis is submitted.

(d) Market Analysis Contents. A Market Analysis for a rental Development prepared for the Department must be organized in a format that follows a logical progression and must include, at minimum, items addressed in paragraphs (1) - (13) of this subsection.

(1) Title Page. Include Development address or location, effective date of analysis, date report completed, name and address of person authorizing report, and name and address of Market Analyst.

(2) Letter of Transmittal. The date of the letter must be the date the report was completed. Include Development's address or location, description of Development, statement as to purpose and scope of analysis, reference to accompanying Market Analysis report with effective date of analysis and summary of conclusions, date of Property inspection, name of persons inspecting subject Property, and signatures of all Market Analysts authorized to work on the assignment. Include a statement that the report preparer has read and understood the requirements of this section.

(3) Table of Contents. Number the exhibits included with the report for easy reference.

(4) Market Analysis Summary. Include the Department's Market Analysis Summary exhibit.

(5) Assumptions and Limiting Conditions. Include a description of all assumptions, both general and specific, made by the Market Analyst concerning the Property.

(6) Identification of the Real Estate. Provide a statement to acquaint the reader with the Development. Such information includes street address, tax assessor's parcel number(s), and Development characteristics.

(7) Statement of Ownership. Disclose the current owners of record and provide a three year history of ownership for the subject Development.

(8) Primary Market Area. A limited geographic area from which the Development is expected to draw most of its demand. The size and shape of the PMA should be reflective of proximity to employment centers, services and amenities and contain the most significant areas from which to draw demand. All of the Market Analyst's conclusions specific to the subject Development must be based on only one PMA definition. The Market Analyst must adhere to the methodology described in this paragraph when determining the market area. (§2306.67055)

(A) The PMA will be defined by the Market Analyst as:

(i) geographic size based on a base year population no larger than necessary to provide sufficient demand but no more than 100,000 people;

(ii) boundaries based on U.S. census tracts; and

(iii) the population of the PMA may exceed 100,000 if the amount over the limit is contained within a single census tract.

(B) The Market Analyst's definition of the PMA must include:

(i) a detailed narrative specific to the PMA explaining:

(I) How the boundaries of the PMA were determined with respect to census tracts chosen and factors for including or excluding certain census tracts in proximity to the Development;

(II) Whether a more logical market area within the PMA exists but is not definable by census tracts and how this subsection of the PMA supports the rationale for the defined PMA;

(III) What are the specific attributes of the Development's location within the PMA that would draw prospective tenants from other areas of the PMA to relocate to the Development;

(IV) What are the specific attributes, if known, of the Development itself that would draw prospective tenants currently residing in other areas of the PMA to relocate to the Development;

(V) If the PMA crosses county lines, discuss the different income and rent limits in each county and how these differing amounts would affect the demand for the Development;

(VI) For rural Developments, discuss the relative draw (services, jobs, medical facilities, recreation, schools, etc.) of the Development's immediate local area (city or populous area if no city) in comparison to its neighboring local areas (cities, or populous areas if no cities), in and around the PMA. A rural PMA should not include significantly larger more populous areas unless the analyst can provide substantiation and rationale that the tenants would migrate to the Development's location from the larger cities;

(VII) Discuss and quantify current and planned single-family and non-residential construction (include permit data if available); and

(VIII) Other housing issues in general, if pertinent;

(ii) a complete demographic report for the defined PMA;

(iii) a scaled distance map indicating the PMA boundaries showing relevant U.S. census tracts with complete 11-digit identification numbers in numerical order with labels as well as the location of the subject Development and all comparable Developments. The map must indicate the total square miles of PMA; and

(iv) a proximity table indicating distance from the Development to employment centers, medical facilities, schools, entertainment and any other amenities relevant to the potential residents and include drive time estimates.

(C) Comparable Units. Identify developments in the PMA with Comparable Units. In PMAs lacking sufficient rent comparables, it may be necessary for the Market Analyst to collect data from markets with similar characteristics and make quantifiable and qualitative location adjustments. Provide a data sheet for each comparable development consisting of:

(i) development name;

(ii) address;

(iii) year of construction and year of Rehabilitation, if applicable;

(iv) property condition;

(v) Target Population;

(vi) unit mix specifying number of Bedrooms, number of baths, Net Rentable Area including:

(I) monthly rent and Utility Allowance; or

(II) sales price with terms, marketing period and date of sale;

(vii) description of concessions;

(viii) list of unit amenities;

(ix) utility structure;

(x) list of common amenities;

(xi) narrative comparison of its proximity to employment centers and services relative to targeted tenant population of the subject property; and

(xii) for rental developments only, the occupancy and turnover.

(9) Market Information.

(A) Identify the number of units for each of the categories in clauses (i) - (vi) of this subparagraph, if applicable:

(i) total housing;

(ii) all multi-family rental developments, including unrestricted and market-rate developments, whether existing, under construction or proposed;

(iii) Affordable housing;

(iv) Comparable Units;

(v) Unstabilized Comparable Units; and

(vi) proposed Comparable Units.

(B) Occupancy. The occupancy rate indicated in the Market Analysis may be used to support the overall demand conclusion for the proposed Development. State the overall physical occupancy rate for the proposed housing tenure (renter or owner) within the defined market areas by:

(i) number of Bedrooms;

(ii) quality of construction (class);

(iii) Target Population; and

(iv) Comparable Units.

(C) Absorption. State the absorption trends by quality of construction (class) and absorption rates for Comparable Units.

(D) Demographic Reports must include:

(i) All demographic reports must include population and household data for a five year period with the year of Application submission as the base year;

(ii) All demographic reports must provide sufficient data to enable calculation of income-eligible, age-, size-, and tenure-appropriate household populations;

(iii) For Elderly Developments, all demographic reports must provide a detailed breakdown of households by age and by income; and

(iv) A complete copy of all demographic reports relied upon for the demand analysis, including the reference index that indicates the census tracts on which the report is based.

(E) Demand. Provide a comprehensive evaluation of the need for the proposed housing for the Development as a whole and each Unit Type by number of Bedrooms proposed and rent restriction category within the defined market areas using the most current census and demographic data available.

(i) Demographics. The Market Analyst should use demographic data specific to the characteristics of the households that will be living in the proposed Development. For example, the Market Analyst should use demographic data specific to the elderly populations (and any other qualifying residents for Elderly Developments) to be served by an Elderly Development, if available, and should avoid making adjustments from more general demographic data. For HOME-ARP, demand for Qualifying Populations must be identified in accordance with Section VI B.10.a.ii of CPD Notice 21-10. If adjustment rates are used based on more general data for any of the criteria described in subclauses (I) - (V) of this clause, they should be clearly identified and documented as to their source in the report.

(I) Population. Provide population and household figures, supported by actual demographics, for a five year period with the year of Application submission as the base year.

(II) Target. If applicable, adjust the household projections for the qualifying demographic characteristics such as the minimum age of the population to be served by the proposed Development.

(III) Household Size-Appropriate. Adjust the household projections or target household projections, as applicable, for the appropriate household size for the proposed Unit Type by number of Bedrooms proposed and rent restriction category based on 2 persons per Bedroom or one person for Efficiency Units.

(IV) Income Eligible. Adjust the household size appropriate projections for income eligibility based on the income bands for the proposed Unit Type by number of Bedrooms proposed and rent restriction category with:

(-a-) the lower end of each income band calculated based on the lowest gross rent proposed divided by 40% for the general population and 50% for elderly households; and

(-b-) the upper end of each income band equal to the applicable gross median income limit for the largest appropriate household size based on 2 persons per Bedroom (round up) or one person for Efficiency Units.

(V) Tenure-Appropriate. Adjust the income-eligible household projections for tenure (renter or owner). If tenure appropriate income eligible target household data is available, a tenure appropriate adjustment is not necessary.

(ii) Gross Demand. Gross Demand is defined as the sum of Potential Demand from the PMA, Demand from Other Sources, and External Demand.

(iii) Potential Demand. Potential Demand is defined as the number of income-eligible, age-, size-, and tenure-appropriate target households in the designated market area at the proposed placed in service date.

(I) Maximum eligible income is equal to the applicable gross median income limit for the largest appropriate household size.

(II) For Developments targeting the general population:

(-a-) minimum eligible income is based on a 40% rent to income ratio;

(-b-) appropriate household size is defined as two persons per Bedroom (rounded up); and

(-c-) the tenure-appropriate population for a rental Development is limited to the population of renter households.

(III) For Developments consisting solely of single family residences on separate lots with all Units having three or more Bedrooms:

(-a-) minimum eligible income is based on a 40% rent to income ratio;

(-b-) appropriate household size is defined as two persons per Bedroom (rounded up); and

(-c-) Gross Demand includes both renter and owner households.

(IV) For Elderly Developments:

(-a-) minimum eligible income is based on a 50% rent to income ratio; and

(-b-) Gross Demand includes all household sizes and both renter and owner households within the age range (and any other qualifying characteristics) to be served by the Elderly Development.

(V) For Supportive Housing:

(-a-) minimum eligible income is $1; and

(-b-) households meeting the occupancy qualifications of the Development (data to quantify this demand may be based on statistics beyond the defined PMA but not outside the historical service area of the Applicant).

(VI) For Developments with rent assisted units (Project Based Vouchers, Project-Based Rental Assistance, Public Housing Units):

(-a-) minimum eligible income for the assisted units is $1; and

(-b-) maximum eligible income for the assisted units is the minimum eligible income of the corresponding affordable unit.

(iv) For External Demand, assume an additional 10% of Potential Demand from the PMA to represent demand coming from outside the PMA.

(v) For Demand from Other Sources:

(I) the source of additional demand and the methodology used to calculate the additional demand must be clearly stated;

(II) consideration of Demand from Other Sources is at the discretion of the Underwriter;

(III) Demand from Other Sources must be limited to households that are not included in Potential Demand; and

(IV) if households with Section 8 vouchers are identified as a source of demand, the Market Study must include:

(-a-) documentation of the number of vouchers administered by the local Housing Authority; and

(-b-) a complete demographic report for the area in which the vouchers are distributed.

(F) Employment. Provide a comprehensive analysis of employment trends and forecasts in the Primary Market Area. Analysis must discuss existing or planned employment opportunities with qualifying income ranges.

(10) Conclusions. Include a comprehensive evaluation of the subject Property, separately addressing each housing type and specific population to be served by the Development in terms of items in subparagraphs (A) - (J) of this paragraph. All conclusions must be consistent with the data and analysis presented throughout the Market Analysis.

(A) Unit Mix. Provide a best possible unit mix conclusion based on the occupancy rates by Bedroom type within the PMA and target, income-eligible, size-appropriate and tenure-appropriate household demand by Unit Type and income type within the PMA.

(B) Rents. Provide a separate Market Rent conclusion for each proposed Unit Type by number of Bedrooms and rent restriction category. Conclusions of Market Rent below the maximum Net Program Rent limit must be well documented as the conclusions may impact the feasibility of the Development under §11.302(i) of this chapter (relating to Feasibility Conclusion). In support of the Market Rent conclusions, provide a separate attribute adjustment matrix for each proposed Unit Type by number of Bedrooms and rental restriction category. For HOME-ARP, Units for Qualified Populations will be underwritten at $0 income, unless the Unit has project-based rental assistance or subsidy, or is supported by a capitalized operating reserve agreement.

(i) The Department recommends use of HUD Form 92273.

(ii) A minimum of three developments must be represented on each attribute adjustment matrix.

(iii) Adjustments for concessions must be included, if applicable.

(iv) Adjustments for proximity and drive times to employment centers and services narrated in the Comparable Unit description, and the rationale for the amount of the adjustments must be included.

(v) Total adjustments in excess of 15% must be supported with additional narrative.

(vi) Total adjustments in excess of 25% indicate the Units are not comparable for the purposes of determining Market Rent conclusions.

(C) Effective Gross Income. Provide rental income, secondary income, and vacancy and collection loss projections for the subject derived independent of the Applicant's estimates.

(D) For Demand:

(i) state the Gross Demand for each Unit Type by number of Bedrooms proposed and rent restriction category (e.g. one-Bedroom Units restricted at 50% of AMGI; two-Bedroom Units restricted at 60% of AMGI);

(ii) state the Gross Demand for the proposed Development as a whole. If some households are eligible for more than one Unit Type due to overlapping eligible ranges for income or household size, Gross Demand should be adjusted to avoid including households more than once; and

(iii) state the Gross Demand generated from each AMGI band. If some household incomes are included in more than one AMGI band, Gross Demand should be adjusted to avoid including households more than once.

(E) Relevant Supply. The Relevant Supply of proposed and Unstabilized Comparable Units includes:

(i) the proposed subject Units to be absorbed;

(ii) Comparable Units in previously approved Developments in the PMA that have no achieved 90% occupancy for a minimum of 90 days. Approved Developments should be determined by:

(I) the HTC Property Inventory that is published on the Department's website as of December 31, 2022, for competitive housing tax credit Applications;

(II) the most recent HTC Property Inventory that is published on the Department's website one month prior to the Application date of non-competitive housing tax credit and Direct Loan Applications.

(iii) proposed and Unstabilized Comparable Units that are located in close proximity to the subject PMA if they are likely to share eligible demand or if the PMAs have overlapping census tracts. Underwriter may require Market Analyst to run a combined PMA including eligible demand and Relevant Supply from the combined census tracts; the Gross Capture Rate generated from the combined PMA must meet the feasibility criteria as defined in §11.302(i) (relating to Feasibility Conclusion).

(F) Gross Capture Rate. The Gross Capture Rate is defined as the Relevant Supply divided by the Gross Demand. Refer to §11.302(i) of this chapter (relating to Feasibility Conclusion).

(G) Individual Unit Capture Rate. For each Unit Type by number of Bedrooms and rent restriction categories, the individual unit capture rate is defined as the Relevant Supply of proposed and Unstabilized Comparable Units divided by the eligible demand for that Unit. Some households are eligible for multiple Unit Types. In order to calculate individual unit capture rates, each household is included in the capture rate for only one Unit Type.

(H) Capture Rate by AMGI Band. For each AMGI band (30%, 40%, 50%, 60%, and also 20%, 70%, and 80% if the Applicant will make the Income Average election), the capture rate by AMGI band is defined as Relevant Supply of proposed and Unstabilized Comparable Units divided by the eligible demand from that AMGI band. Some households are qualified for multiple income bands. In order to calculate AMGI band rates, each household is included in the capture rate for only one AMGI band.

(I) Absorption. Project an absorption period for the subject Development to achieve Breakeven Occupancy. State the absorption rate.

(J) Market Impact. Provide an assessment of the impact the subject Development, as completed, will have on existing Developments supported by Housing Tax Credits in the Primary Market. (§2306.67055)

(11) Photographs. Provide labeled color photographs of the subject Property, the neighborhood, street scenes, and comparables. An aerial photograph is desirable but not mandatory.

(12) Appendices. Any Third Party reports including demographics relied upon by the Market Analyst must be provided in appendix form. A list of works cited including personal communications also must be provided, and the Modern Language Association (MLA) format is suggested.

(13) Qualifications. Current Franchise Tax Account Status from the Texas Comptroller of Public Accounts (not applicable for sole proprietorships) and any changes to items listed in subsection (c)(1)(B) and (C) of this section (relating to Market Analyst Qualifications).

(e) The Department reserves the right to require the Market Analyst to address such other issues as may be relevant to the Department's evaluation of the need for the subject Development and the provisions of the particular program guidelines.

(f) In the event that the PMA for a subject Development overlaps the PMA's of other proposed or Unstabilized comparable Develop-

ments, the Underwriter may perform an extended Sub-Market Analysis considering the combined PMA's and all proposed and Unstabilized Units in the extended Sub-Market Area; the Gross Capture Rate from such an extended Sub-Market Area analysis may be used by the Underwriter as the basis for a feasibility conclusion.

(g) All Applicants shall acknowledge, by virtue of filing an Application, that the Department shall not be bound by any such opinion or Market Analysis, and may substitute its own analysis and underwriting conclusions for those submitted by the Market Analyst.

§11.304. Appraisal Rules and Guidelines.

(a) General Provision.

(1) An appraisal prepared for the Department must conform to the Uniform Standards of Professional Appraisal Practice (USPAP) as adopted by the Appraisal Standards Board of the Appraisal Foundation. The appraisal must be prepared by a general certified appraiser by the Texas Appraisal Licensing and Certification Board. The appraisal must include a statement that the report preparer has read and understood the requirements of this section. The appraisal must include a statement that the person or company preparing the appraisal, or reviewing the appraisal, is a disinterested party and will not materially benefit from the Development in any other way than receiving a fee for performing the appraisal and that the fee is in no way contingent upon the outcome of the appraisal.

(2) If an appraisal is required by the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, the appraisal must also meet the requirements of 49 CFR Part 24 and HUD Handbook 1378. (b) Self-Contained. An appraisal prepared for the Department must describe sufficient and adequate data and analyses to support the final opinion of value. The final value(s) must be reasonable, based on the information included. Any Third Party reports relied upon by the appraiser must be verified by the appraiser as to the validity of the data and the conclusions.

(b) Appraiser Qualifications. The appraiser must be appropriately certified or licensed by the Texas Appraiser Licensing and Certification Board.

(c) Appraisal Contents. An appraisal prepared for the Department must be organized in a format that follows a logical progression. In addition to the contents described in USPAP Standards Rule 2, the appraisal must include items addressed in paragraphs (1) - (12) of this subsection.

(1) Title Page. Include a statement identifying the Department as the client, acknowledging that the Department is granted full authority to rely on the findings of the report, and name and address of person authorizing report. The title page must also include the following statement, "any person signing this Report acknowledges that the Department may publish the full report on the Department's website, release the report in response to a request for public information and make other use of the report as authorized by law."

(2) Letter of Transmittal. Include reference to accompanying appraisal report, reference to all person(s) that provided significant assistance in the preparation of the report, date of report, effective date of appraisal, date of property inspection, name of person(s) inspecting the property, tax assessor's parcel number(s) of the site, estimate of marketing period, and signatures of all appraisers authorized to work on the assignment including the appraiser who inspected the property. Include a statement indicating the report preparer has read and understood the requirements of this section.

(3) Table of Contents. Number the exhibits included with the report for easy reference.

(4) Disclosure of Competency. Include appraiser's qualifications, detailing education and experience.

(5) Statement of Ownership of the Subject Property. Discuss all prior sales of the subject Property which occurred within the past three years. Any pending agreements of sale, options to buy, or listing of the subject Property must be disclosed in the appraisal report.

(6) Property Rights Appraised. Include a statement as to the property rights (e.g., fee simple interest, leased fee interest, leasehold, etc.) being considered. The appropriate interest must be defined in terms of current appraisal terminology with the source cited.

(7) Site/Improvement Description. Discuss the site characteristics including subparagraphs (A) - (E) of this paragraph.

(A) Physical Site Characteristics. Describe dimensions, size (square footage, acreage, etc.), shape, topography, corner influence, frontage, access, ingress-egress, etc. associated with the Development Site. Include a plat map or survey.

(B) Floodplain. Discuss floodplain (including flood map panel number) and include a floodplain map with the subject Property clearly identified.

(C) Zoning. Report the current zoning and description of the zoning restrictions and any deed restrictions, where applicable, and type of Development permitted. Any probability of change in zoning should be discussed. A statement as to whether or not the improvements conform to the current zoning should be included. A statement addressing whether or not the improvements could be rebuilt if damaged or destroyed, should be included. If current zoning is not consistent with the highest and best use, and zoning changes are reasonable to expect, time and expense associated with the proposed zoning change should be considered and documented. A zoning map should be included.

(D) Description of Improvements. Provide a thorough description and analysis of the improvements including size (Net Rentable Area, gross building area, etc.), use (whether vacant, occupied by owner, or being rented), number of residents, number of stories, number of buildings, type/quality of construction, condition, actual age, effective age, exterior and interior amenities, items of deferred maintenance, energy efficiency measures, etc. All applicable forms of depreciation should be addressed along with the remaining economic life.

(E) Environmental Hazards. It is recognized appraisers are not experts in such matters and the impact of such deficiencies may not be quantified; however, the report should disclose any potential environmental hazards (such as discolored vegetation, oil residue, asbestos-containing materials, lead- based paint etc.) noted during the inspection.

(8) Highest and Best Use. Market Analysis and feasibility study is required as part of the highest and best use. The highest and best use analysis should consider paragraph (7)(A) - (E) of this subsection as well as a supply and demand analysis.

(A) The appraisal must inform the reader of any positive or negative market trends which could influence the value of the appraised Property. Detailed data must be included to support the appraiser's estimate of stabilized income, absorption, and occupancy.

(B) The highest and best use section must contain a separate analysis "as if vacant" and "as improved" (or "as proposed to be improved/renovated"). All four elements (legally permissible, physically possible, feasible, and maximally productive) must be considered.

(9) Appraisal Process. It is mandatory that all three approaches, Cost Approach, Sales Comparison Approach and Income Approach, are considered in valuing the Property. If an approach is not applicable to a particular property an adequate explanation must be provided. A land value estimate must be provided if the Cost Approach is not applicable.

(A) Cost Approach. This approach should give a clear and concise estimate of the cost to construct the subject improvements. The source(s) of the cost data should be reported.

(i) Cost comparables are desirable; however, alternative cost information may be obtained from Marshall & Swift Valuation Service or similar publications. The section, class, page, etc. should be referenced. All soft costs and entrepreneurial profit must be addressed and documented.

(ii) All applicable forms of depreciation must be discussed and analyzed. Such discussion must be consistent with the description of the improvements.

(iii) The land value estimate should include a sufficient number of sales which are current, comparable, and similar to the subject in terms of highest and best use. Comparable sales information should include address, legal description, tax assessor's parcel number(s), sales price, date of sale, grantor, grantee, three year sales history, and adequate description of property transferred. The final value estimate should fall within the adjusted and unadjusted value ranges. Consideration and appropriate cash equivalent adjustments to the comparable sales price for subclauses (I) - (VII) of this clause should be made when applicable:

(I) Property rights conveyed;

(II) Financing terms;

(III) Conditions of sale;

(IV) Location;

(V) Highest and best use;

(VI) Physical characteristics (e.g., topography, size, shape, etc.); and

(VII) Other characteristics (e.g., existing/proposed entitlements, special assessments, etc.).

(B) Sales Comparison Approach. This section should contain an adequate number of sales to provide the Underwriter with a description of the current market conditions concerning this property type. Sales data should be recent and specific for the property type being appraised. The sales must be confirmed with buyer, seller, or an individual knowledgeable of the transaction.

(i) Sales information should include address, legal description, tax assessor's parcel number(s), sales price, financing considerations and adjustment for cash equivalency, date of sale, recordation of the instrument, parties to the transaction, three year sale history, complete description of the Property and property rights conveyed, and discussion of marketing time. A scaled distance map clearly identifying the subject and the comparable sales must be included.

(ii) The method(s) used in the Sales Comparison Approach must be reflective of actual market activity and market participants.

(I) Sale Price/Unit of Comparison. The analysis of the sale comparables must identify, relate, and evaluate the individual adjustments applicable for property rights, terms of sale, conditions of sale, market conditions, and physical features. Sufficient narrative must be included to permit the reader to understand the direction and magnitude of the individual adjustments, as well as a unit of comparison value indicator for each comparable.

(II) Net Operating Income/Unit of Comparison. The Net Operating Income statistics for the comparables must be calculated in the same manner. It should be disclosed if reserves for replacement have been included in this method of analysis. At least one other method should accompany this method of analysis.

(C) Income Approach. This section must contain an analysis of both the actual historical and projected income and expense aspects of the subject Property.

(i) Market Rent Estimate/Comparable Rental Analysis. This section of the report should include an adequate number of actual market transactions to inform the reader of current market conditions concerning rental Units. The comparables must indicate current research for this specific property type. The comparables must be confirmed with the landlord, tenant or agent and individual data sheets must be included. The individual data sheets should include property address, lease terms, description of the property (e.g., Unit Type, unit size, unit mix, interior amenities, exterior amenities, etc.), physical characteristics of the property, and location of the comparables. Analysis of the Market Rents should be sufficiently detailed to permit the reader to understand the appraiser's logic and rationale. Adjustment for lease rights, condition of the lease, location, physical characteristics of the property, etc. must be considered.

(ii) Comparison of Market Rent to Contract Rent. Actual income for the subject along with the owner's current budget projections must be reported, summarized, and analyzed. If such data is unavailable, a statement to this effect is required and appropriate assumptions and limiting conditions should be made. The Contract Rents should be compared to the market-derived rents. A determination should be made as to whether the Contract Rents are below, equal to, or in excess of market rates. If there is a difference, its impact on value must be qualified.

(iii) Vacancy/Collection Loss. Historical occupancy data and current occupancy level for the subject should be reported and compared to occupancy data from the rental comparables and overall occupancy data for the subject's Primary Market.

(iv) Expense Analysis. Actual expenses for the subject, along with the owner's projected budget, must be reported, summarized, and analyzed. If such data is unavailable, a statement to this effect is required and appropriate assumptions and limiting conditions should be made. Historical expenses should be compared to comparables expenses of similar property types or published survey data (such as IREM, BOMA, etc.). Any expense differences should be reconciled. Include historical data regarding the subject's assessment and tax rates and a statement as to whether or not any delinquent taxes exist.

(v) Capitalization. The appraiser should present the capitalization method(s) reflective of the subject market and explain the omission of any method not considered in the report.

(I) Direct Capitalization. The primary method of deriving an overall rate is through market extraction. If a band of investment or mortgage equity technique is utilized, the assumptions must be fully disclosed and discussed.

(II) Yield Capitalization (Discounted Cash Flow Analysis). This method of analysis should include a detailed and supportive discussion of the projected holding/investment period, income and income growth projections, occupancy projections, expense and expense growth projections, reversionary value and support for the discount rate.

(10) Value Estimates. Reconciliation of final value estimates is required. The Underwriter may request additional valuation information based on unique existing circumstances that are relevant for deriving the market value of the Property.

(A) All appraisals shall contain a separate estimate of the "as vacant" market value of the underlying land, based upon current sales comparables. The "as vacant" value assumes that there are no improvements on the property and therefore demolition costs should not be considered. The appraiser should consider the fee simple or leased fee interest as appropriate.

(B) For existing Developments with any project-based rental assistance that will remain with the property after the acquisition, the appraisal must include an "as-is as-currently-restricted value at current contract rents." For public housing converting to project-based rental assistance, the appraiser must provide a value based on the future restricted rents. The value used in the analysis may be based on the unrestricted market rents if supported by the appraisal. Regardless of the rents used in the valuation, the appraiser must consider any other on-going restrictions that will remain in place even if not affecting rents. If the rental assistance has an impact on the value, such as use of a lower capitalization rate due to the lower risk associated with rental rates or occupancy rates on project-based developments, this must be fully explained and supported to the satisfaction of the Underwriter.

(C) For existing Developments with rent restrictions, the appraisal must include the "as-is as-restricted" value. In particular, the value must be based on the proposed restricted rents when deriving the value based on the income approach.

(D) For all other existing Developments, the appraisal must include the "as-is" value.

(E) For any Development with favorable financing (generally below market debt) that will remain in place and transfer to the new owner, the appraisal must include a separate value for the existing favorable financing with supporting information.

(F) If required the appraiser must include a separate assessment of personal property, furniture, fixtures, and equipment (FF&E) or intangible items. If personal property, FF&E, or intangible items are not part of the transaction or value estimate, a statement to such effect should be included.

(11) Marketing Time. Given property characteristics and current market conditions, the appraiser(s) should employ a reasonable marketing period. The report should detail existing market conditions and assumptions considered relevant.

(12) Photographs. Provide good quality color photographs of the subject Property (front, rear, and side elevations, on-site amenities, interior of typical Units if available). Photographs should be properly labeled. Photographs of the neighborhood, street scenes, and comparables should be included. An aerial photograph is desirable but not mandatory.

(d) Additional Appraisal Concerns. The appraiser(s) must be aware of the Department program rules and guidelines and the appraisal must include analysis of any impact to the subject's value.

§11.305. Environmental Site Assessment Rules and Guidelines.

(a) General Provisions. The Environmental Site Assessments (ESA) prepared for the Department must be conducted and reported in conformity with the standards of the American Society for Testing and Materials (ASTM). The initial report must conform with the Standard Practice for Environmental Site Assessments: Phase I Assessment Process (ASTM Standard Designation: E1527-13 or any subsequent standards as published). Any subsequent reports should also conform to ASTM standards and such other recognized industry standards as a reasonable person would deem relevant in view of the Property's anticipated use for human habitation. The ESA shall be conducted by a Third Party environmental professional at the expense of the Applicant, and addressed to the Department as a User of the report (as defined by ASTM standards). Copies of reports provided to the Department which were commissioned by other financial institutions must either address Texas Department of Housing and Community Affairs as a co-recipient of the report or letters from both the provider and the recipient of the report may be submitted extending reliance on the report to the Department. The ESA report must also include a statement that the person or company preparing the ESA report will not materially benefit from the Development in any other way than receiving a fee for performing the ESA, and that the fee is in no way contingent upon the outcome of the assessment. The report must also include the following statement, "any person signing this Report acknowledges that the Department may publish the full report on the Department's website, release the report in response to a request for public information and make other use of the report as authorized by law." The ESA report must contain a statement indicating the report preparer has read and understood the requirements of this section.

(b) In addition to ASTM requirements, the report must:

(1) State if a noise study is recommended for a property in accordance with current HUD guidelines and identify its proximity to industrial zones, major highways, active rail lines, civil and military airfields, or other potential sources of excessive noise;

(2) Provide a copy of a current survey, if available, or other drawing of the site reflecting the boundaries and adjacent streets, all improvements on the site, and any items of concern described in the body of the ESA or identified during the physical inspection;

(3) Provide a copy of the current FEMA Flood Insurance Rate Map showing the panel number and encompassing the site with the site boundaries precisely identified and superimposed on the map;

(4) If the subject Development Site includes any improvements or debris from pre-existing improvements, state if testing for Lead Based Paint or asbestos containing materials would be required pursuant to local, state, and federal laws, or recommended due to any other consideration;

(5) State if testing for lead in the drinking water would be required pursuant to local, state, and federal laws, or recommended due to any other consideration such as the age of pipes and solder in existing improvements. For all Rehabilitation Developments, the ESA provider must state whether the on-site plumbing is a potential source of lead in drinking water;

(6) Assess the potential for the presence of Radon on the Development Site, and recommend specific testing if necessary;

(7) Identify and assess the presence of oil, gas or chemical pipelines, processing facilities, storage facilities or other potentially hazardous explosive activities (does not include liquified petroleum gas containers with a capacity of less than 125 gallons on-site or within 0.25 miles of the site that could potentially adversely impact the Development. Location of these items must be shown on a drawing or map in relation to the Development Site and all existing or future improvements. The drawing must depict any blast zones (in accordance with HUD guidelines) and include HUD blast zone calculations; and

(8) Include a vapor encroachment screening in accordance with the ASTM "Standard Guide for Vapor Encroachment Screening on Property Involved in Real Estate Transactions" (E2600-10 or any subsequent standards as published).

(c) If the report recommends further studies or establishes that environmental hazards currently exist on the Property, or are originating off-site, but would nonetheless affect the Property, the Development Owner must act on such a recommendation, or provide a plan for either the abatement or elimination of the hazard. Evidence of action or a plan for the abatement or elimination of the hazard must be presented upon Application submittal.

(d) For Developments in programs that allow a waiver of the Phase I ESA such as an existing USDA funded Development, the Development Owners are hereby notified that it is their responsibility to ensure that the Development is maintained in compliance with all state and federal environmental hazard requirements.

(e) Those Developments which have or are to receive first lien financing from HUD may submit HUD's environmental assessment report, provided that it conforms to the requirements of this section.

§11.306. Scope and Cost Review Guidelines.

(a) General Provisions. The objective of the Scope and Cost Review Report (SCR) required for Rehabilitation Developments (excluding Reconstruction) and Adaptive Reuse Developments is to provide a self-contained report that provides a comprehensive description and evaluation of the current conditions of the Development and identifies a scope of work for the proposed repairs, replacements and improvements to an existing multifamily property or identifies a scope of work for the conversion of a non-multifamily property to multifamily use. The SCR author must evaluate the sufficiency of the Applicant's scope of work and provide an independent review of the Applicant's proposed costs. The report must be in sufficient detail for the Underwriter to fully understand all current conditions, scope of work and cost estimates. It is the responsibility of the Applicant to ensure that the scope of work and cost estimates submitted in the Application is provided to the author. The SCR must include a copy of the Development Cost Schedule submitted in the Application. The report must also include the following statement, "any person signing this Report acknowledges that the Department may publish the full report on the Department's website, release the report in response to a request for public information and make other use of the report as authorized by law."

(b) For Rehabilitation Developments, the SCR must include analysis in conformity with the ASTM "Standard Guide for Property Condition Assessments. Baseline Property Condition Assessment Process (ASTM Standard Designation: E 2018, or any subsequent standards as published)" except as provided for in subsections (f) and (g) of this section.

(c) The SCR must include good quality color photographs of the subject Real Estate (front, rear, and side elevations, on-site amenities, interior of the structure). Photographs should be properly labeled.

(d) The SCR must also include discussion and analysis of:

(1) Description of Current Conditions. For both Rehabilitation and Adaptive Reuse, the SCR must contain a detailed description with good quality photographs of the current conditions of all major systems and components of the Development regardless of whether the system or component will be removed, repaired or replaced. For historic structures, the SCR must contain a description with photographs of each aspect of the building(s) that qualifies it as historic and must include a narrative explaining how the scope of work relates to maintaining the historic designation of the Development. Replacement or relocation of systems and components must be described;

(2) Description of Scope of Work. The SCR must provide a narrative of the consolidated scope of work either as a stand-alone section of the report or included with the description of the current conditions for each major system and components. Any New Construction must be described. Plans or drawings (that are in addition to any plans or drawings otherwise required by rule) and that relate to any part of the scope of work should be included, if available;

(3) Useful Life Estimates. For each system and component of the property the SCR must estimate its remaining useful life, citing the basis or the source from which such estimate is derived;

(4) Code Compliance. The SCR must document any known violations of any applicable federal, state, or local codes. In developing the cost estimates specified herein, it is the responsibility of the Applicant to ensure that the SCR adequately considers any and all applicable federal, state, and local laws and regulations which are applicable and govern any work and potentially impact costs. For Applications requesting Direct Loan funding from the Department, the SCR author must include a comparison between the local building code and the International Existing Building Code of the International Code Council;

(5) Program Rules. The SCR must assess the extent to which any systems or components must be modified, repaired, or replaced in order to comply with any specific requirements of the housing program under which the Development is proposed to be financed, the Department's Uniform Physical Condition Standards, and any scoring criteria including amenities for which the Applicant may claim points. It is the responsibility of the Applicant to inform the report author of those requirements in the scope of work; for Direct Loan Developments this includes, but is not limited to the requirements in the Lead-Based Paint Poisoning Prevention Act (42 USC §§4821-4846), the Residential Lead- Based Paint Hazard Reduction Act of 1992 (42 USC §§4851-4856), and implementing regulations, Title X of the 1992 Housing and Community Development Act at 24 CFR Part 35 (including subparts A, B, J, K, and R), and the Lead: Renovation, Repair, and Painting Program Final Rule and Response to Children with Environmental Intervention Blood Lead Levels (40 CFR Part 745);

(6) Accessibility Requirements. The SCR report must include an analysis of compliance with the Department's accessibility requirements pursuant to Chapter 1, Subchapter B and §11.101(b)(8) of this title (relating to Site and Development Requirements and Restrictions) and identify the specific items in the scope of work and costs needed to ensure that the Development will meet these requirements upon Rehabilitation (including conversion and Adaptive Reuse);

(7) Reconciliation of Scope of Work and Costs. The SCR report must include the Department's Scope and Cost Review Supplement (SCR Supplement) with the signature of the SCR author. The SCR Supplement must reconcile the scope of work and costs of the immediate physical needs identified by the SCR author with the Applicant's scope of work and costs. The costs presented on the SCR Supplement must be consistent with both the scope of work and immediate costs identified in the body of the SCR report and the Applicant's scope of work and costs as presented in the Application. Variations between the costs listed on the SCR Supplement and the costs listed in the body of the SCR report or on the Applicant's Development Cost Schedule must be reconciled in a narrative analysis from the SCR provider. The consolidated scope of work and costs shown on the SCR Supplement will be used by the Underwriter in the analysis to the extent adequately supported in the report; and

(8) Cost Estimates. The Development Cost Schedule and SCR Supplement must include all costs identified below:

(A) Immediately Necessary Repairs and Replacement. For all Rehabilitation developments, and Adaptive Reuse developments if applicable, immediately necessary repair and replacement should be identified for systems or components which are expected

to have a remaining useful life of less than one year, which are found to be in violation of any applicable codes, which must be modified, repaired or replaced in order to satisfy program rules, or which are otherwise in a state of deferred maintenance or pose health and safety hazards. The SCR must provide a separate estimate of the costs associated with the repair, replacement, or maintenance of each system or component which is identified as being an immediate need, citing the basis or the source from which such cost estimate is derived.

(B) Proposed Repair, Replacement, or New Construction. If the development plan calls for additional scope of work above and beyond the immediate repair and replacement items described in subparagraph (A) of this paragraph, the additional scope of work must be evaluated and either the nature or source of obsolescence to be cured or improvement to the operations of the Property discussed. The SCR must provide a separate estimate of the costs associated with the additional scope of work, citing the basis or the source from which such cost estimate is derived.

(C) Reconciliation of Costs. The combined costs described in subparagraphs (A) and (B) of this paragraph should be consistent with the costs presented on the Applicant's Development Cost Schedule and the SCR Supplement.

(D) Expected Repair and Replacement Over Time. The term during which the SCR should estimate the cost of expected repair and replacement over time must equal the lesser of 30 years or the longest term of any land use or regulatory restrictions which are, or will be, associated with the provision of housing on the Property. The SCR must estimate the periodic costs which are expected to arise for repairing or replacing each system or component or the property, based on the estimated remaining useful life of such system or component as described in paragraph (1) of this subsection adjusted for completion of repair and replacement immediately necessary and proposed as described in subparagraphs (A) and (B) of this paragraph. The SCR must include a separate table of the estimated long term costs which identifies in each line the individual component of the property being examined, and in each column the year during the term in which the costs are estimated to be incurred for a period and no less than 30 years. The estimated costs for future years should be given in both present dollar values and anticipated future dollar values assuming a reasonable inflation factor of not less than 2.5% per annum.

(e) Any costs not identified and discussed in sufficient detail in the SCR as part of subsection (d)(6), (d)(8)(A) and (d)(8)(B) of this section will not be included in the underwritten Total Development Cost in the Report.

(f) If a copy of such standards or a sample report have been provided for the Department's review, if such standards are widely used, and if all other criteria and requirements described in this section are satisfied, the Department will also accept copies of reports commissioned or required by the primary lender for a proposed transaction, which have been prepared in accordance with:

(1) Fannie Mae's criteria for Physical Needs Assessments;

(2) Federal Housing Administration's criteria for Project Capital Needs Assessments;

(3) Freddie Mac's guidelines for Engineering and Property Condition Reports; and

(4) USDA guidelines for Capital Needs Assessment.

(g) The Department may consider for acceptance reports prepared according to other standards which are not specifically named in this section, if a copy of such standards or a sample report have been provided for the Department's review, if such standards are widely used, and if all other criteria and requirements described in this section are satisfied.

(h) The SCR shall be conducted by a Third Party at the expense of the Applicant, and addressed to Texas Department of Housing and Community Affairs as the client. Copies of reports provided to the Department which were commissioned by other financial institutions should address Texas Department of Housing and Community Affairs as a co-recipient of the report, or letters from both the provider and the recipient of the report should be submitted extending reliance on the report to Texas Department of Housing and Community Affairs.

(i) The SCR report must include a statement that the individual or company preparing the SCR report will not materially benefit from the Development in any other way than receiving a fee for performing the SCR. Because of the Department's heavy reliance on the independent cost information, the provider must not be a Related Party to or an Affiliate of any other Development Team member. The SCR report must contain a statement indicating the report preparer has read and understood the requirements of this section.

(j) The SCR report must include the Department's SCR Compliance checklist containing the signatures of both the Applicant and SCR author.

(k) Scope of Work Narrative. For Tax-Exempt Bond Developments that do not include a request for Direct Loan or where the Department is not the bond issuer, a Scope and Cost Review prepared by a Third Party is not required. The application must provide a Scope of Work Narrative, consisting of:

(1) A detailed description of the current conditions of all major systems and components of the Development regardless of whether the system or component will be removed, repaired or replaced;

(2) For historic structures, a description of each aspect of the building(s) that qualifies it as historic, including a narrative explaining how the scope of work relates to maintaining the historic designation of the Development; and

(3) a narrative of the consolidated scope of work for the proposed rehabilitation for each major system and components.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on December 6, 2022.

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Bobby Wilkinson
Executive Director
Texas Department of Housing and Community Affairs
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SUBCHAPTER E. FEE SCHEDULE, APPEALS, AND OTHER PROVISIONS

10 TAC §§11.901 - 11.907

STATUTORY AUTHORITY. The new sections are adopted pursuant to Texas Government Code, §2306.053, which authorizes the Department to adopt rules.

Except as described herein the adopted new sections affect no other code, article, or statute.

§11.901. Fee Schedule.

Any unpaid fees, as stated in this section, will cause an Applicant to be ineligible to apply for Department funding, ineligible to receive additional Department funding associated with a Commitment, Determination Notice or Contract, and ineligible to submit extension requests, ownership transfers, and Application amendments until such time the Department receives payment. Payments of the fees shall be in the form of a check and to the extent there are insufficient funds available, it may cause the Application, Commitment, Determination Notice or Contract to be terminated or Allocation rescinded. Other forms of payment may be considered on a case-by-case basis. Applicants will be required to pay any insufficient payment fees charged to the Department by the State Comptroller. The Executive Director may extend the deadline for specific extenuating and extraordinary circumstances, unless prohibited by other parts of this Chapter, provided the Applicant submits a written request for an extension to a fee deadline no later than five business days prior to the deadline associated with the particular fee.

(1) Competitive Housing Tax Credit Pre-Application Fee. A pre-application fee, in the amount of $10 per Unit, based on the total number of Units reflected in the pre-application, must be submitted with the pre-application in order for the pre-application to be considered accepted by the Department. Pre-applications in which a Community Housing Development Corporation (CHDO) or a private Qualified Nonprofit Organization intends to serve as the Managing General Partner of the Development Owner, or Control the Managing General Partner of the Development Owner, may be eligible to receive a discount of 10% off the calculated pre-application fee provided such documentation is submitted with the fee. (§2306.6716(d))

(2) Refunds of Pre-application Fees. (§2306.6716(c)) Upon written request from the Applicant, the Department shall refund the balance of the pre-application fee for a pre-application that is withdrawn by the Applicant and that is not fully processed by the Department. The amount of refund will be commensurate with the level of review completed. Initial processing will constitute 50% of the review, threshold review prior to a deficiency being issued will constitute 30% of the review, and review after deficiencies are submitted and reviewed will constitute 20% of the review. In no instance will a refund of the pre-application fee be made after the Full Application Delivery Date.

(3) Application Fee. Each Application must be accompanied by an Application fee.

(A) Housing Tax Credit Applications. For Applicants having submitted a Competitive Housing Tax Credit pre-application which met the pre-application threshold requirements, and for which a pre-application fee was paid, the Application fee will be $20 per Unit based on the total number of Units in the full Application. Otherwise, the Application fee will be $30 per Unit based on the total number of Units in the full Application. Applications in which a CHDO or Qualified Nonprofit Organization intends to serve as the Managing General Partner of the Development Owner, or Control the Managing General Partner of the Development Owner, may be eligible to receive a discount of 10% off the calculated Application fee, provided such documentation is submitted with the fee. (§2306.6716(d))

(B) Direct Loan Applications. The fee will be $1,000 per Application except for those Applications that are layered with Housing Tax Credits and submitted simultaneously with the Housing Tax Credit Application. Pursuant to Tex. Gov't Code §2306.147(b), the Department is required to waive Application fees for private nonprofit organizations that offer expanded services such as child care, nutrition programs, job training assistance, health services, or human services and if HOME funds are awarded. In lieu of the Application fee, these organizations must include proof of their exempt status and a description of their supportive services as part of the Application. The Application fee is not a reimbursable cost under the HOME Program.

(4) Refunds of Application Fees. Upon written request from the Applicant, the Department shall refund the balance of the Application fee for an Application that is withdrawn by the Applicant and that is not fully processed by the Department. The withdrawal must occur prior to any Board action regarding eligibility or appeal. The amount of refund will be commensurate with the level of review completed. Initial processing will constitute 10% of the review, the site visit will constitute 10% of the review, program evaluation review will constitute 40% of the review, and the underwriting review will constitute 40% of the review. For Competitive HTC Applications, in no instance will a refund of the Application fee be made after final awards are made in July.

(5) Third Party Underwriting Fee. Applicants will be notified in writing prior to the evaluation in whole or in part of a Development by an independent external underwriter if such a review is required. The fee must be received by the Department prior to the engagement of the underwriter. The fees paid by the Development Owner to the Department for the external underwriting will be credited against the Commitment or Determination Notice Fee, as applicable, established in paragraphs (6) and (7) of this section, in the event that a Commitment or Determination Notice is issued by the Department to the Development Owner.

(6) Housing Tax Credit Commitment Fee. No later than the expiration date in the Commitment, a fee equal to 4% of the annual Housing Credit Allocation amount must be submitted. If the Development Owner has paid the fee and returns the credits by November 1 of the current Application Round, then a refund of 50% of the Commitment Fee may be issued upon request.

(7) Tax Exempt Bond Development Determination Notice Fee. No later than the expiration date in the Determination Notice, a fee equal to 4% of the annual Housing Credit Allocation amount must be submitted. If the Development Owner has paid the fee and is not able close on the bonds, then a refund of 50% of the Determination Notice Fee may be issued upon request. The refund must be requested no later than 30 days after the Certificate of Reservation deadline.

(8) Tax-Exempt Bond Credit Increase Request Fee. Requests for increases to the credit amounts to be issued on IRS Forms 8609 than what was reflected in the Determination Notice for Tax-Exempt Bond Developments must be submitted with a fee equal to 4% of the amount of the credit increase for one year.

(9) Extension Fees. All extension requests for deadlines relating to the Carryover, 10% Test (submission and expenditure), Construction Status Reports, or Cost Certification requirements submitted at least 30 calendar days in advance of the applicable original deadline will not be required to submit an extension fee. Any extension request submitted fewer than 30 days in advance or after the original deadline must be accompanied by an extension fee of $2,500. Fees for each subsequent extension request on the same activity will increase by increments of $500, regardless of whether the first request was submitted thirty (30) calendar days in advance of the applicable deadline. An extension fee will not be required for extensions requested on Developments that involve Rehabilitation when the Department or U.S. Department of Agriculture (USDA) is the primary lender, if USDA or the Department is the cause for the Applicant not meeting the deadline. For each Construction Status Report received after the applicable dead-

line, extension fees will be automatically due (regardless of whether an extension request is submitted). Unpaid extension fees related to Construction Status Reports will be accrued and must be paid prior to issuance of IRS Forms 8609. For purposes of Construction Status Reports, each report will be considered a separate activity.

(10) Amendment Fees. An amendment request for a non-material change that has not been implemented will not be required to pay an amendment fee. Material amendment requests (whether implemented or not), or non-material amendment requests that have already been implemented will be required to submit an amendment fee of $2,500 in order for the request to be processed. Fees for each subsequent amendment request related to the same Application will increase by increments of $500. A subsequent request, related to the same Application, regardless of whether the first request was non-material and did not require a fee, must include a fee of $3,000. Amendment fees and fee increases are not required for the Direct Loan programs during the Federal Affordability Period.

(11) Right of First Refusal Fee. Requests for approval of the satisfaction of the Right of First Refusal provision of the Land Use Restriction Agreement (LURA) must be accompanied by a non-refundable fee of $2,500.

(12) Qualified Contract Pre-Request Fee. A Development Owner must file a preliminary Qualified Contract Request to confirm eligibility to submit a Qualified Contract request. The Pre-Request must be accompanied by a non-refundable processing fee of $250.

(13) Qualified Contract Fee. Upon eligibility approval of the Qualified Contract Pre-Request, the Development Owner may file a Qualified Contract Request. Such request must be accompanied by a non-refundable processing fee of $3,000.

(14) Ownership Transfer Fee. Requests to approve an ownership transfer must be accompanied by a non-refundable processing fee of $1,000. Ownership Transfer fees are not required for Direct Loan only Developments during the Federal Affordability Period.

(15) Unused Credit or Penalty Fee for Competitive HTC Applications. Development Owners who have more tax credits allocated to them than they can substantiate through Cost Certification will return those excess tax credits prior to issuance of IRS Form 8609. A penalty fee equal to the one year credit amount of the lost credits (10% of the total unused tax credit amount) will be required to be paid by the Owner prior to the issuance of IRS Form 8609 if the tax credits are not returned, and 8609's issued, within 180 days of the end of the first year of the credit period. This penalty fee may be waived without further Board action if the Department recaptures and re-issues the returned tax credits in accordance with Code, §42. If an Applicant returns a full credit allocation after the Carryover Allocation deadline required for that allocation, the Executive Director may recommend to the Board the imposition of a penalty on the score for any Competitive Housing Tax Credit Applications submitted by that Applicant or any Affiliate for any Application in an Application Round occurring concurrent to the return of credits as further provided for in §11.9(f) of this chapter (relating to Factors Affecting Scoring and Eligibility in current and future Application Rounds), or if no Application Round is pending, the Application Round immediately following the return of credits. If any such point penalty is recommended to be assessed and presented for final determination by the Board, it must include notice from the Department to the affected party not less than 14 calendar days prior to the scheduled Board meeting. The Executive Director may, but is not required to, issue a formal notice after disclosure if it is determined that the matter does not warrant point penalties.

(16) Compliance Monitoring Fee. Upon receipt of the cost certification for HTC Developments, HTC Developments that are layered with Direct Loan funds, or upon the completion of the 24-month development period and the beginning of the repayment period for Direct Loan only Developments, the Department will invoice the Development Owner for compliance monitoring fees. For HTC only the amount due will equal $40 per low-income unit. For Direct Loan Only Developments the fee will be $34 per Direct Loan Designated Units. Developments with both HTCs and Direct Loan will only pay one fee equal to $40 per low income unit. Existing HTC developments with a Land Use Restriction Agreement that require payment of a compliance monitoring fee that receive a second allocation of credit will pay only one fee; the fee required by the original Land Use Restriction Agreement will be disregarded. For HTC Developments, the fee will be collected, retroactively if applicable, beginning with the first year of the credit period. For Direct Loan only Developments, the fee will be collected beginning with the first year of after Project completion. The invoice must be paid prior to the issuance of IRS Form 8609 for HTC properties. For Direct Loan only Developments, the fee must be paid prior to the release of final retainage. Subsequent anniversary dates on which the compliance monitoring fee payments are due shall be determined by the month the first building is placed in service. Compliance fees may be adjusted from time to time by the Department.

(17) Public Information Request Fee. Public information requests are processed by the Department in accordance with the provisions of Tex. Gov't Code, Chapter 552. The Department uses the guidelines promulgated by the Office of the Attorney General to determine the cost of copying and other costs of production.

(18) Adjustment of Fees by the Department and Notification of Fees. (§2306.6716(b)) All fees charged by the Department in the administration of the Housing Tax Credit and Direct Loan programs may be revised by the Department from time to time as necessary to ensure that such fees compensate the Department for its administrative costs and expenses. Unless otherwise determined by the Department, all revised fees shall apply to all Applications in process and all Developments in operation at the time of such revisions.

§11.902. Appeals Process.

(a) For Competitive HTC Applications, an Applicant or Development Owner may appeal decisions made by the Department pursuant to Tex. Gov't Code §2306.0321 and §2306.6715 using the process identified in this section. For Tax-Exempt Bond Developments and Direct Loan Developments (not layered with a Competitive HTC Application), an Applicant or Development Owner may appeal decisions made by the Department pursuant to §1.7 of this title (relating to Appeals). Matters that can be appealed include:

(1) A determination regarding the Application's satisfaction of applicable requirements, Subchapter B of this chapter (relating to Site and Development Requirements and Restrictions) and Subchapter C of this chapter (relating to Application Submission Requirements, Ineligibility Criteria, Board Decisions and Waiver of Rules for Applications), pre-application threshold criteria, and underwriting criteria;

(2) The scoring of the Application under the applicable selection criteria;

(3) A recommendation as to the amount of Department funding to be allocated to the Application;

(4) Misplacement of an Application or parts of an Application, mathematical errors in scoring an Application, or procedural errors resulting in unequal consideration of the Applicant's proposal;

(5) Denial of a requested change to a Commitment or Determination Notice;

(6) Denial of a requested change to a loan agreement;

(7) Denial of a requested change to a LURA;

(8) Any Department decision that results in the termination or change in set-aside of an Application; and

(9) Any other matter for which an appeal is permitted under this chapter.

(b) An Applicant or Development Owner may not appeal a decision made regarding an Application filed by or an issue related to another Applicant or Development Owner.

(c) An Applicant or Development Owner must file its appeal in writing with the Department not later than the seventh calendar day after the date the Department publishes the results of any stage of the Application evaluation or otherwise notifies the Applicant or Development Owner of a decision subject to appeal. The appeal must be made by a Person designated to act on behalf of the Applicant or an attorney that represents the Applicant. For Application related appeals, the Applicant must specifically identify the Applicant's grounds for appeal, based on the original Application and additional documentation filed with the original Application as supplemented in accordance with the limitations and requirements of this chapter.

(d) The Executive Director may respond in writing not later than 14 calendar days after the date of actual receipt of the appeal by the Department. If the Applicant is not satisfied with the Executive Director's response to the appeal or the Executive Director does not respond, the Applicant may appeal directly in writing to the Board. While information can be provided in accordance with any rules related to public comment before the Board, full and complete explanation of the grounds for appeal and circumstances warranting the granting of an appeal must be disclosed in the appeal documentation filed with the Executive Director.

(e) An appeal filed with the Board must be received in accordance with Tex. Gov't Code §2306.6715(d).

(f) If there is insufficient time for the Executive Director to respond to a Competitive Housing Tax Credit Application appeal prior to the agenda being posted for the July Board meeting at which awards from the Application Round will be made, the appeal may be posted to the Board agenda prior to the Executive Director's issuance of a response.

(g) Board review of an Application related appeal will be based on the original Application. A witness in an appeal may not present or refer to any document, instrument, or writing not already contained within the Application as reflected in the Department's records.

(h) The decision of the Board regarding an appeal is the final decision of the Department.

(i) The Department will post to its website an appeal filed with the Department or Board and any other document relating to the processing of an Application related appeal. (§2306.6717(a)(5))

§11.903. Adherence to Obligations. (§2306.6720).

Any Applicant, Development Owner, or other Person that fails to adhere to its obligations with regard to the programs of the Department, whether contractual or otherwise, made false or misleading representations to the Department with regard to an Application, request for funding, or compliance requirements, or otherwise violated a provision of Tex. Gov't Code, Chapter 2306 or a rule adopted under that chapter, may be subject to:

(1) Assessment of administrative penalties in accordance with Chapter 2, Subchapter C of this title (relating to Administrative Penalties) the Department's rules regarding the assessment of such penalties. Each day the violation continues or occurs is a separate violation for purposes of imposing a penalty; or

(2) In the case of the competitive Low Income Housing Tax Credit Program, a point reduction for any Application involving that Applicant over the next two Application Rounds succeeding the date on which the Department first gives written notice of any such failure to adhere to obligations or false or misleading representations. Point reductions under this section may be appealed to the Board.

§11.904. Alternative Dispute Resolution (ADR) Policy.

In accordance with Tex. Gov't Code, §2306.082, it is the Department's policy to encourage the use of appropriate ADR procedures under the Governmental Dispute Resolution Act, Tex. Gov't Code Chapter 2010, to assist in resolving disputes under the Department's jurisdiction, as provided for in §1.17 of this title (relating to Alternative Dispute Resolution).

§11.905. General Information for Commitments or Determination Notices.

(a) A Commitment or Determination Notice shall not be issued with respect to any Development for an unnecessary amount in accordance with §42(m)(2)(A) or where the cost for the total development, acquisition, construction or rehabilitation exceeds the limitations established by the Department and the Board.

(b) All Commitments or Determination Notices, whether reflected in the Commitment or Determination Notice or not, are made subject to full compliance with all applicable provisions of law and the Department's rules, all provisions of Commitment, Determination Notice, and Contract, satisfactory completion of underwriting, and satisfactory resolution of any conditions of underwriting, award, and administrative deficiencies.

(c) The Department shall notify, in writing, the mayor, county judge, or other appropriate official of the municipality or county, as applicable, in which the Development is located informing him/her of the Board's issuance of a Commitment Notice, as applicable.

(d) The Department may cancel a Commitment, Determination Notice or Carryover Allocation prior to the issuance of IRS Form(s) 8609 (for Housing Tax Credits) or completion of construction with respect to a Development and/or apply administrative penalties if:

(1) The Applicant, Development Owner, or the Development, as applicable, fails after written notice and a reasonable opportunity to cure, to meet any of the conditions of such Commitment, Determination Notice or Carryover Allocation or any of the undertakings and commitments made by the Development Owner in the Application process for the Development;

(2) Any material statement or representation made by the Development Owner or made with respect to the Development Owner or the Development is untrue or misleading;

(3) An event occurs with respect to the Applicant or the Development Owner which would have made the Application ineligible for funding pursuant to Subchapter C of Chapter 11 of this title (relating to Application Submission Requirements, Ineligibility Criteria, Board Decisions and Waiver of Rules) if such event had occurred prior to issuance of the Commitment, Determination Notice or Carryover Allocation; or

(4) The Applicant, Development Owner, or the Development, as applicable, fails after written notice and a reasonable opportunity to cure, to comply with this chapter or other applicable Department rules, procedures, or requirements of the Department.

§11.906. Commitment and Determination Notice General Requirements and Required Documentation.

(a) Commitment. For Competitive HTC Developments, the Department shall issue a Commitment to the Development Owner which shall confirm that the Board has approved the Application and state the Department's commitment to make a Housing Credit Allocation to the Development Owner in a specified amount, subject to the feasibility determination described in Chapter 11, Subchapter D of this title (relating to Underwriting and Loan Policy) and the determination that the Development satisfies the requirements of this chapter and other applicable Department rules. The Commitment shall expire on the date specified therein, which shall be 30 calendar days from the effective date, unless the Development Owner indicates acceptance by executing the Commitment, pays the required fee specified in §11.901 of this title (relating to Fee Schedule), and satisfies any conditions set forth therein by the Department. The Commitment expiration date may not be extended.

(b) Determination Notices. For Tax Exempt Bond Developments, the Department shall issue a Determination Notice which shall confirm that the Development satisfies the requirements of this chapter as applicable and other applicable Department rules in accordance with the §42(m)(1)(D) of the Internal Revenue Code (the Code). The Determination Notice shall also state the Department's determination of a specific amount of housing tax credits that the Development may be eligible for, subject to the requirements set forth in the Department's rules, as applicable. The Determination Notice shall expire on the date specified therein, which shall be 30 calendar days from the effective date, unless the Development Owner indicates acceptance by executing the Determination Notice, pays the required fee specified in Chapter 11, Subchapter E of this title, and satisfies any conditions set forth therein by the Department. The Determination Notice expiration date may not be extended. If the requirements of the Determination Notice, and any conditions of the Determination Notice are met, the Determination Notice shall be valid for a period of one year from the effective date of the Determination Notice, without distinction between a Certificate of Reservation or Traditional Carryforward Reservation. In instances where the Certificate of Reservation is withdrawn after the Determination Notice has been issued and a new Certification of Reservation is issued, staff will not re-issue the Determination Notice. After one year from the effective date of the Determination Notice, if a new Certificate of Reservation or Traditional Carryforward Reservation is issued, the Applicant will be required to contact the Department in order to have a new Determination Notice issued and a new Application must be submitted. Such Application submission must meet the requirements of §11.201(2) of this chapter (relating to Procedural Requirements for Application Submission). If more than a year has not passed from the effective date of the Determination Notice, yet an Applicant desires to have a new Determination Notice issued that reflects a different recommended credit amount, then a new Application must be submitted that meets the requirements of §11.201(2) of this chapter.

(c) Documentation Submission Requirements at Commitment of Funds. No later than the expiration date of the Commitment (or no later than December 31 for Competitive HTC Applications, whichever is earlier) or Determination Notice, the documentation described in paragraphs (1) - (7) of this subsection must be provided. Failure to provide these documents may cause the Commitment or Determination Notice to be rescinded.

(1) For entities formed outside the state of Texas, evidence that the entity filed a Certificate of Application for foreign qualification in Texas, a Franchise Tax Account Status from the Texas Comptroller of Public Accounts, and a Certificate of Fact from the Office of the Secretary of State. If the entity is newly registered in Texas and the Franchise Tax Account Status or Certificate of Fact are not available, a statement can be provided to that effect.

(2) For Texas entities, a copy of the Certificate of Filing for the Certificate of Formation from the Office of the Secretary of State; a Certificate of Fact from the Secretary of State, and a Franchise Tax Account Status from the Texas Comptroller of Public Accounts. If the entity is newly registered and the Certificate of Fact and the Franchise Tax Account Status are not available, a statement can be provided to that effect.

(3) Evidence that the signer(s) of the Commitment or Determination Notice have sufficient authority to sign on behalf of the Applicant in the form of a corporate resolution which indicates the sub-entity in Control consistent with the entity contemplated and described in the Application.

(4) Evidence of final zoning that was proposed or needed to be changed pursuant to the Development plan.

(5) Evidence of satisfaction of any conditions identified in the Credit Underwriting Analysis Report, any conditions from the Executive Award Review and Advisory Committee as provided for in Chapter 1, Subchapter C of this title (relating to Previous Participation and Executive Award Review and Advisory Committee), or any other conditions of the award required to be met at Commitment or Determination Notice.

(6) Documentation of any changes to representations made in the Application subject to §10.405 of this title (relating to Amendments and Extensions).

(7) For Applications underwritten with a property tax exemption, documentation must be submitted in the form of a letter from an attorney identifying the statutory basis for the exemption and indicating that the exemption is reasonably achievable, subject to appraisal district review. Additionally, any Development with a proposed Payment in Lieu of Taxes (PILOT) agreement must provide evidence regarding the statutory basis for the PILOT and its terms.

(d) Post Bond Closing Documentation Requirements. Regardless of the issuer of the bonds, no later than 60 calendar days following closing on the bonds, the Development Owner must submit the documentation in paragraphs (1) - (5) of this subsection.

(1) Training certificate(s) from a Department approved "property owner and manager Fair Housing trainer" showing that the Development Owner and on-site or regional property manager has attended and passed at least five hours of Fair Housing training. The certificate(s) must not be older than two years from the date of submission and must verify that all parts or phases of the offered training have been completed; two certificates supplied for the same part or phase of an offered training will not be counted towards the five hour required minimum, even if they were attended on different dates.

(2) A training certificate from a Department approved "architect and engineer Fair Housing trainer" showing that the lead architect or engineer responsible for certifying compliance with the Department's accessibility and construction standards has attended and passed at least five hours of Fair Housing training. The certificate must not be older than two years from the date of submission and must verify that all parts or phases of the offered training have been completed; two certificates supplied for the same part or phase of an offered training will not be counted towards the five hour required minimum, even if they were attended on different dates.

(3) Evidence that the financing has closed, such as an executed settlement statement.

(4) A confirmation from the Compliance Division evidencing receipt of the CMTS Filing Agreement form pursuant to §10.607(a) of this title (relating to Reporting Requirements).

(5) An initial construction status report consisting of items from subsection (h)(1) - (5) of of this title (relating to Construction Status Reports).

§11.907. Carryover Agreement General Requirements and Required Documentation.

Carryover (Competitive HTC Only). All Developments that received a Commitment, and will not be placed in service and receive IRS Form(s) 8609 in the year the Commitment was issued, must submit the Carryover documentation, in the form prescribed by the Department in the Carryover Manual, no later than the Carryover Documentation Delivery Date as identified in §11.2 of this title (relating to Program Calendar for Competitive Housing Tax Credits) of the year in which the Commitment is issued pursuant to §42(h)(1)(C) of the Code.

(1) Commitments for credits will be terminated if the Carryover documentation has not been received by this deadline, unless an extension has been approved. This termination is subject to right of appeal directly to the Board, and if so determined by the Board, immediately upon final termination by the Board, staff is directed to award the credits to other qualified Applicants on the approved waiting list.

(2) If the interim or permanent financing structure, syndication rate, amount of debt or syndication proceeds are finalized but different at the time of Carryover from what was proposed in the original Application, applicable documentation of such changes must be provided and the Development may be re-evaluated by the Department for a reduction of credit or change in conditions.

(3) All Carryover Allocations will be contingent upon the Development Owner providing evidence that they have and will maintain Site Control through the 10% Test or through the anticipated closing date, whichever is earlier. For purposes of this paragraph, any changes to the Development Site acreage between Application and Carryover must be addressed by written explanation or, as appropriate, in accordance with §10.405 of this title (relating to Amendments and Extensions).

(4) Confirmation of the right to transact business in Texas, as evidenced by the Franchise Tax Account Status (the equivalent of the prior Certificate of Account Status) from the Texas Comptroller of Public Accounts and a Certificate of Fact from the Office of the Secretary of State must be submitted with the Carryover Allocation.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on December 6, 2022.

TRD-202204842
Bobby Wilkinson
Executive Director
Texas Department of Housing and Community Affairs
Effective date: December 26, 2022
Proposal publication date: September 23, 2022
For further information, please call: (512) 475-3959

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SUBCHAPTER F. SUPPLEMENTAL HOUSING TAX CREDITS

10 TAC §§11.1001 - 11.1009

STATUTORY AUTHORITY. The new sections are adopted pursuant to Texas Government Code, §2306.053, which authorizes the Department to adopt rules.

Except as described herein the adopted new sections affect no other code, article, or statute.

§11.1001. General.

(a) This subchapter applies only to 2023 Housing Tax Credits (HTC) requested to supplement Competitive HTC awards from the 2021 ceilings or forward commitments of 2022 9% Housing Tax Credits made in 2021, hereinafter referred to as Supplemental Credits. Applications eligible for Supplemental Allocations are only those that received an award from the Competitive 9% HTC ceiling in 2021, including forward commitments of credits made during that year. Applications receiving 2023 credits as part of the regular 2023 Housing Credit Cycle are not subject to the policies in this subchapter. Applicants with 2018, 2019, and 2020 allocations that received Force Majeure treatment in 2021 are prohibited from requesting Supplemental allocations, as are 2022 applicants.

(b) Submissions required to make such a request are considered a supplement to the Original Application. Requests for Supplemental Allocations are not considered Applications under the 2023 HTC Competitive Cycle nor are they part of the 2023 Application Round.

(c) Requests for Supplemental Allocations are not considered an Amendment to the Original Application. Requests for Supplemental Allocations may only include the items described in this subchapter, and submissions may not include changes to the Application that would be classified as an Amendment under §10.405 of this title (relating to Amendments and Extensions). Applicants that have Application changes that would constitute an Amendment must pursue approval of those changes separately by following the process for Amendments identified in §10.405 of this title. Issuance of a Supplemental Allocation does not constitute implicit approval of any items that may require approval as an Amendment.

(d) Any and all required notifications, submissions, satisfaction of deadlines, or resolutions required in association with Housing De-concentration Factors and satisfaction of Housing De-concentration Factor requirements, or resolution of any deficiencies, undertaken by an Applicant in association with their Original Application were satisfactorily addressed in the year of the Original Application, as evidenced by having received an allocation, are considered by extension to have been sufficiently satisfied for the Supplemental Credits with no further actions required by the Applicant.

(e) Funding decisions, satisfaction of deadlines, final scoring, or other Departmental processes that were undertaken in the award year are considered, by extension, to have been sufficiently satisfied for the Supplemental Credits; revisions to costs will not have an impact on points originally awarded for Costs of Development per Square Foot or Leveraging (§§11.9(e)(2) and (4) of this title, respectively).

(f) Developments that have Placed in Service are not eligible to receive Supplemental Credits. Applications awarded in 2021 that have already closed their financing, Applications requesting or being awarded Multifamily Development Loans, and Applications originally funded in 2021 that have been approved for force majeure consideration by the Department's Board are eligible to receive Supplemental Credits. However, for Developments that have contracted for Multifamily Loan funds, the increased expenses must have occurred after the execution date of the Multifamily Contract.

(g) Except where preempted by federal or state law, the Qualified Allocation Plan (QAP) for the year of the original award will con-

tinue to apply. Proposed Developments and Applications will maintain their eligibility determinations from the Original Application, along with having met threshold requirements under Subchapters B and C of this Chapter, unless specifically stated otherwise in this subchapter.

(h) All awards of Supplemental Credits will constitute the Department's approval of the original allocation being qualified for Force Majeure and the original allocation will be accompanied with Force Majeure treatment. The previously-executed Carryover Allocation Agreement will be void and a new Carryover Allocation Agreement will be issued that reflects a new total allocation that includes the full amount of the original award plus any Supplemental Credits awarded. The Department's Governing Board may impose a deadline that is earlier than the Placed in Service Deadline and may impose conditions that were not placed on the original allocation.

§11.1002. Program Calendar for Supplemental Housing Tax Credits.
Supplemental HTC Deadlines. Non-statutory deadlines specifically listed in the Program Calendar may be extended by the Department for a period of not more than 5 business days provided that the Applicant has, in writing, requested an extension prior to the date of the original deadline and has established to the reasonable satisfaction of the Department that there is good cause for the extension.
Figure: 10 TAC §11.1002

§11.1003. Maximum Supplemental Housing Tax Credits, Requests, and Award Limits.

(a) Applications for which a request for Supplemental Credits is submitted will not be eligible to receive an allocation from the 2023 Competitive Housing Tax Credit ceiling.

(b) Maximum Supplemental Request Limit for any given Development. Supplemental Allocations are limited to the increase in eligible costs. Supplemental Allocations will not be awarded for costs that were excluded from basis in the underwriting of the original Application. The limit on Supplemental Credit requests will be announced by the Department no later than December 1, 2022, but will not exceed 15% of the original allocation for each Application that requests Supplemental Credits. The final limit on Supplemental requests may be lower than 15% of the original allocation. For all requests, the Department will consider the amount in the funding request of the Application to be the amount of Housing Tax Credits requested and will reduce the Applicant's request to the maximum allowable under this subsection through the Cost Certification process. (§2306.6711(b)).

(c) Increase in Eligible Basis (30% Boost). Applications having received an increase in Eligible Basis in their Original Application are determined by the Department, on the basis of having been previously determined eligible for this purpose, to be eligible for the basis boost for the Supplemental Allocation. However, at Cost Certification, the credit allocation will be adjusted so that the Development is not over sourced, as determined by the Department.

§11.1004. Competitive HTC Set-Asides. (§2306.111(d)).
All Supplemental Allocation amounts will be associated with the Set-Aside for which the Original allocation qualified. Developments having been awarded under a set-aside in 2021 will be considered to meet the set-aside requirements for that same set-aside in 2023. Supplemental Credits issued by the Board will be attributed to each 2023 Set-aside for the 2023 Application round as appropriate (for instance, for a 2021 development awarded out of the 2021 Non-Profit Set-Aside, now receiving $100,000 in Supplemental Credits, $100,000 would be attributed to the 2023 Non-Profit Set-Aside).

§11.1005. Supplemental Credit Allocation Process.

(a) Intent to Request a Supplemental Allocation. Only those Applicants who submit an Intent to Request a Supplemental Allocation form to the Department by the deadline specified in §11.1002 of this Subchapter (relating to Program Calendar for Supplemental Housing Tax Credits) are eligible to submit a Request for Supplemental Allocation. The Intent to Request a Supplemental Allocation must include at a minimum, the application name and number, the year of the award, the subregion and an estimate of the amount of Supplemental credits being requested.

(b) Request for Supplemental Allocation. Requests for Supplemental Allocations must be received by the deadline specified in §11.1002 of this Subchapter (relating to Program Calendar for Supplemental Housing Tax Credits) in the format required by the Department. Changes in the amount of the Supplemental credits requested between submission of an Intent to Request a Supplemental Allocation and the actual Request for Supplemental Allocation are permitted.

(c) Third Party Requests for Administrative Deficiency. Due to the nature of the Supplemental Credit process and reliance on the Original Application and scores, the Third Party Request for Administrative Deficiency process will not be utilized during the Supplement Allocation process under this subchapter.

§11.1006. Procedural Requirements for Supplemental Credit Application Submission.

(a) The procedures and requirements of §11.201 of this chapter (relating to Procedural Requirements for Application Submission) will generally apply to the Supplemental Credit Application, unless otherwise specified in this Subchapter.

(b) The Original Application will be relied upon, as deemed final and reviewed by staff as part of the original award; the request for Supplemental Credits must only include the items authorized in this subchapter. Architectural drawings, or other documents that relate to changes to the Application other than revisions to the financing structure may not be submitted. The Applicant must submit the required documents as a single PDF document and all spreadsheet exhibits must also be provided in a usable spreadsheet format as further specified in the Department's released materials, which will be incorporated into the Original Application by staff, and become the full request for Supplemental Allocation.

§11.1007. Required Documentation for Supplemental Credit Application Submission.

The purpose of this section is to identify the threshold documentation that is specific to the request for Supplemental Allocation submission, unless specifically indicated or otherwise required by Department rule. Only those documents listed herein may be submitted.

(1) Certification, Acknowledgement, and Consent of Development Owner. A certification of the information in this subchapter as well as Subchapter B of this chapter must be executed by the Development Owner and addresses the specific requirements associated with the Development. The Person executing the certification is responsible for ensuring all individuals referenced therein are in compliance with the certification and that they have given it with all required authority and with actual knowledge of the matters certified. Applicants must certify that there has been no change to the Applicant Eligibility or Original Owner Certification since the Original Application was submitted.

(2) Site Requirements and Restrictions. The Applicant must certify that there have been no changes from the Original Application that would require additional disclosure or mitigation, or render the proposed Development Site ineligible. Any change must be addressed under the requirements of §10.405 of this title (relating to Amendments and Extensions).

(3) Financing Requirements. If the Development also has Multifamily Direct Loan Funding from the Department that has not

closed by the deadline to submit the Notice to Intent for Supplemental Allocations, the request must include updated exhibits and supporting information required under §11.204(7) of this chapter (relating to Required Documentation for Application Submission), along with construction contracts or contractor bids with a detailed schedule of values to support the Development Cost Schedule. The Financing Narrative should describe changes to the financial structure of the Supplemental Credit Application since the Original Application was submitted. Applicants should utilize 2022 rents in their updated exhibits; any resulting changes to operating expenses must include an explanation and rationale for the changes. Requests must include evidence from the Applicant's equity investor that the additional credits will be purchased and state the dollar value associated with that purchase. Eligible cost increases are not limited to construction costs, additionally, all cost increases must be substantiated. Supplemental Credit Applications that include Rehabilitation or Adaptive Reuse activities must include a letter from the Original Application Scope and Cost Review provider certifying that the scope of the project has not changed from the Original Application; the Development Cost Schedule must be supported by either:

(A) construction contracts or contractor bids, or

(B) an updated Scope and Cost Review Supplement.

(4) Site Control. Applicants must certify that there has been no change to Site Control, other than extensions or purchase by the Applicant, since the Original Application was submitted. If the nature of Site Control has changed, Supplemental Credit Applicants must submit the appropriate documentation as described in §11.204(10) of this chapter.

(5) Zoning. (§2306.6705(5)) If the zoning status of the Development has changed since the Original Application, the Supplemental Credit Application must include all requirements of §11.204(11) of this chapter (relating to Zoning).

§11.1008. Supplemental Credit Applications Underwriting and Loan Policy.

Requests for Supplemental Credits will only be reviewed for items addressed in this subchapter. In requests for Supplemental Credits the Total Developer Fee and Developer Fee included in Eligible Basis cannot exceed the Developer Fee amounts in the published Real Estate Analysis report for the Original Application. Requests may not reduce the Deferred Developer Fee from the amount included in the published Real Estate Analysis report for the Original Application, and any updates made to the Original Application that is reflected in an executed Multifamily Direct Loan Contract. The Real Estate Analysis Division will publish a memo for the Supplemental allocation serving as a supplement to the report for the Original Application.

§11.1009. Supplemental Credit Fee Schedule.

Supplemental Credit Commitment Fee. No later than the expiration date in the Commitment, a fee equal to 4% of the annual Supplemental Housing Credit Allocation amount must be submitted.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on December 6, 2022.

TRD-202204843

Bobby Wilkinson

Executive Director

Texas Department of Housing and Community Affairs

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For further information, please call: (512) 475-3959

CHAPTER 13. MULTIFAMILY DIRECT LOAN RULE

10 TAC §§13.1 - 13.13

The Texas Department of Housing and Community Affairs (the Department) adopts the repeal of 10 TAC Chapter 13, Multifamily Direct Loan Rule, §§13.1 - 13.13, without changes to the proposed text as published in the October 28, 2022 issue of the *Texas Register* (47 TexReg 7175) and will not be republished. The purpose of the repeal is to provide for clarification of the existing rule through new rulemaking action.

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

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

1. Mr. Bobby Wilkinson, Executive Director, has determined that, for the first five years the repeal would be in effect, the repeal does not create or eliminate a government program, but relates to the repeal, and simultaneous readoption making changes to an existing activity, administration of the Multifamily Direct Loan Program.

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

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

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

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

6. The action will repeal an existing regulation, but is associated with a simultaneous readoption making changes to an existing activity, administration of the Multifamily Direct Loan Program.

7. The repeal will not increase or decrease the number of individuals subject to the rule's applicability.

8. The repeal will not negatively or positively affect this state's economy.

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

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

c. TAKINGS IMPACT ASSESSMENT REQUIRED BY TEX. GOV'T CODE §2007.043. The repeal does not contemplate

or authorize a taking by the Department, therefore no Takings Impact Assessment is required.

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

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

e. PUBLIC BENEFIT/COST NOTE REQUIRED BY TEX. GOV'T CODE §2001.024(a)(5). Mr. Wilkinson has determined that, for each year of the first five years the repeal is in effect, the public benefit anticipated as a result of the repealed section would be increased clarity and improved access to the Multifamily Direct Loan funds. There will not be economic costs to individuals required to comply with the repealed section.

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

SUMMARY OF PUBLIC COMMENT. The public comment period was held from October 28 to November 17, 2022, to receive input on the proposed repealed section. No comments on the repeal were received.

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

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on December 12, 2022.

TRD-202204926
Bobby Wilkinson
Executive Director
Texas Department of Housing and Community Affairs
Effective date: January 1, 2023
Proposal publication date: October 28, 2022
For further information, please call: (512) 475-3959

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10 TAC §§13.1 - 13.13

The Texas Department of Housing and Community Affairs (the Department) adopts new 10 TAC Chapter 13, Multifamily Direct Loan Rule, §§13.1 - 13.13. Sections 13.1 - 13.4 and 13.6 - 13.13 are adopted without changes to the proposed text as published in the October 23, 2022 publication of the *Texas Register* (47 TexReg 7176) and will not be republished. Section 13.5 is adopted with changes to the proposed text as published in the October 23, 2022 publication of the *Texas Register* (47 TexReg 7176) and will be republished. The purpose of the new sections is to provide compliance with Tex. Gov't Code §2306.111 and to update the rule to: clarify program requirements in multiple sections, codify in rule practices of the division, and change citations to align with changes to other multifamily rules. In general, most changes are corrective in nature, intended to gain consistency with state or federal rules, delete duplicative language or provisions, correct or update rule references, and clarify language or processes to more adequately communicate the language or process.

Tex. Gov't Code §2001.0045(b) does not apply to the rule because it was determined that no costs are associated with this action, and therefore no costs warrant being offset.

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

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

Mr. Bobby Wilkinson, Executive Director, has determined that, for the first five years the new rule would be in effect:

1. The rule does not create or eliminate a government program, but relates to the readoption of this rule which makes changes to an existing activity, administration of the Multifamily Direct Loan Program.

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

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

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

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

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

7. The rule will not increase or decrease the number of individuals subject to the rule's applicability; and

8. The rule will not negatively or positively affect the state's economy.

b. ADVERSE ECONOMIC IMPACT ON SMALL OR MICRO-BUSINESSES OR RURAL COMMUNITIES AND REGULATORY FLEXIBILITY REQUIRED BY TEX. GOV'T CODE §2006.002. The Department, in drafting this rule, has attempted to reduce any adverse economic effect on small or micro-business or rural communities while remaining consistent with the statutory requirements of Tex. Gov't Code §2306.111.

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

2. This rule relates to the procedures for multifamily direct loan applications and award through various Department fund sources. Other than in the case of a small or micro-business that is an applicant for such a loan product, no small or micro-businesses are subject to the rule. It is estimated that approximately 200 small or micro-businesses are such applicants; for those entities the new rule provides for a more clear, transparent process for applying for funds and does not result in a negative impact for those small or micro-businesses. There are not likely to be any rural communities subject to the rule because this rule is applicable only to direct loan applicants for development of

properties, which are not generally municipalities. The fee for applying for a Multifamily Direct Loan product is $1,000, unless the Applicant is a nonprofit that provides supportive services or the Applicant is applying for Housing Tax Credits in conjunction with Multifamily Direct Loan funds, in which case the application fee may be waived. These fee costs are not inclusive of external costs required by the basic business necessities underlying any real estate transaction, from placing earnest money on land, conducting an Environmental Site Assessment, conducting a market study, potentially retaining counsel, hiring an architect and an engineer to construct basic site designs and elevations, and paying any other related, third-party fees for securing the necessary financing to construct multifamily housing.

There are 1,296 rural communities potentially subject to the rule for which the economic impact of the rule is projected to be $0. 10 TAC Chapter 13 places no financial burdens on rural communities, as the costs associated with submitting an Application are born entirely by private parties. In an average year the volume of applications for MFDL resources that are located in rural areas is approximately fifteen. In those cases, a rural community securing a loan will experience an economic benefit, including, potentially, increased property tax revenue from a multifamily Development.

3. The Department has determined that because there are rural MFDL awardees, this program helps promote construction activities and long term tax base in rural areas of Texas. Aside from the fees and costs associated with submitting an Application, there is a probable positive economic effect on small or micro-businesses or rural communities that receive MFDL awards and successfully use those awards to construct multifamily housing, although the specific impact is not able to be quantified in advance.

c. TAKINGS IMPACT ASSESSMENT REQUIRED BY TEX. GOV'T CODE §2007.043. The rule does not contemplate or authorize a taking by the Department, therefore no Takings Impact Assessment is required.

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

The Department has evaluated the rule as to its possible effects on local economies and has determined that for the first five years the rule will be in effect the rule may provide a possible positive economic effect on local employment in association with this rule since MFDL Developments, layered with housing tax credits, often involve a typical minimum investment of $10 million in capital, and more commonly an investment from $20 million to $30 million. Such a capital investment has direct, indirect, and induced effects on the local and regional economies and local employment. However, because the exact location of where program funds or developments are directed is not determined in rule, and is driven by real estate demand, there is no way to predict during rulemaking where these positive effects may occur. Furthermore, while the Department believes that any and all impacts are positive, that impact is not able to be quantified for any given community until MFDL awards and LIHTCs are actually awarded to a proposed Development, given the unique characteristics of each proposed multifamily Development.

Texas Gov't Code §2001.022(a) states that this "impact statement must describe in detail the probable effect of the rule on employment in each geographic region affected by this rule… Considering that significant construction activity is associated with any MFDL Development layered with LIHTC and each apartment community significantly increases the property value of the land being developed, there are no probable negative effects of the new rule on particular geographic regions. If anything, positive effects will ensue in those communities where developers receive MFDL awards.

e. PUBLIC BENEFIT/COST NOTE REQUIRED BY TEX GOV'T CODE §2001.024(a)(5). Mr. Wilkinson has determined that, for each year of the first five years the new sections are in effect, the public benefit anticipated as a result of the new sections will be improved clarity of program requirements in multiple sections, codification in rule practices of the division, and change citations to align with changes to other multifamily rules. There will not be any economic cost to any individuals required to comply with the new sections because this rule does not have any new requirements that would cause additional costs to applicants.

f. FISCAL NOTE REQUIRED BY TEX. GOV'T CODE §2001.024(a)(4). Mr. Wilkinson also has determined that for each year of the first five years the new sections are in effect, enforcing or administering the new sections does not have any foreseeable implications related to costs or revenues of the state or local governments because it does not have any new requirements that would cause additional costs to applicants.

SUMMARY OF PUBLIC COMMENT. The public comment period was held from October 28, 2022, to November 17, 2022, to receive input on the proposed new sections. Comment was received from: Foundation Communities (Commenter 1) and True Casa Consulting (Commenter 2). A summary of comments pertinent to the proposed rule and the Department's response is provided.

13.1(c)(e) Waivers under Closed NOFA

COMMENT SUMMARY: Commenter 2 states there should be some kind of waiver for a NOFA that has closed. The Commenter notes that, by the time an Application is reviewed, the NOFA may be closed with no opportunities available for a waiver remaining.

STAFF RESPONSE: 10 TAC §11.207 allows for an Applicant to request a waiver from the Board in writing at or prior to the submission of the Application or subsequent to an award. Waivers of closed NOFAs are not allowable because the Department must follow the method of distribution represented to HUD and to the public, which is the NOFA. Closing a NOFA and then allowing for waivers of its requirements alters the method of distribution in a way that is not available to all applicants, as no additional Applications are accepted once the NOFA is closed. No change is recommended based on this comment.

13.3(e) Ineligible Costs

COMMENT SUMMARY: Commenter 1 suggests current language regarding costs that have been allocated to or paid by another fund source conflicts with NHTF and HOME rules and suggests rewriting to mirror federal language.

Commenter 2 is unclear why interest on construction was added as an ineligible cost.

STAFF RESPONSE: Both NHTF and HOME federal regulations limit repayment of construction, bridge financing, or guaranteed loans. For both programs, in order for the repayment of these loans to be eligible, the loan must have been used for eligible costs under the specific program in question, and the HOME or NHTF assistance is required to have been part of the original financing for the project. For NHTF, these costs could not have

occurred before the Department enters into the Contract with the Owner. In addition, repayment of these loans would require that the Department review all costs paid out of those loans to ensure that all are eligible under the relevant program. Given the Department's current workload related to these funds, staff is unable to assume the additional responsibility of these reviews. Accordingly, no change is recommended related to this comment.

13.5(d) Required Site Control Agreement Provisions

COMMENT SUMMARY: Commenter 1 and 2 propose that 13.5(d)(1) is not applicable to NHTF applications due to differing rules regarding environmental clearance. Commenter 1 requests that this provision be waived for NHTF applicants.

Commenter 2 suggests that 13.5(d)(2) should not be applicable to NHTF only applications. They state that this provision as well as 13.5(d)(1) make sellers nervous and complicates an already tumultuous timeline.

STAFF RESPONSE: These comments propose that NHTF Applications not be required to include language related to choice-limiting actions and eminent domain in the required site control documentation. It has historically been common for an Application to switch between funding sources for various administrative and programmatic reasons, and making this change could limit staff's ability to make similar funding-source changes in the future. The eminent domain language is a requirement of the Uniform Relocation Assistance and Real Property Act of 1970, and is applicable for NHTF. Accordingly, no change to the rule is recommended.

13.6 Scoring Criteria

COMMENT SUMMARY: Commenters 1 and 2 suggest removing the scoring criteria for subsidy per unit, suggesting it is unfitting in this cost environment.

STAFF RESPONSE: Development cost as a scoring item is consistent with the Department's charge to make efficient use of resources, and therefore no change is recommended.

13.7 Maximum Funding Request

COMMENT SUMMARY: Commenter 1 recommends an increase to the maximum funding request. Commenter 1 cites an environment of escalating costs and suggests more MFDL funds per unit is needed. Potential applications being conceived by Commenter 1 will need more MFDL funds than the Section 234 Condo limits and MFDL per unit limits would allow.

STAFF RESPONSE: The actual funding request limit is set in the NOFA rather than the rule. The Section 234 Condo limits are set by HUD for HOME, and approved by HUD for NHTF as published in the Department's Consolidated Planning Documents. There is no change available to make to the rule in response to these comments.

13.8 Criteria for Construction-to-Permanent Loans

COMMENT SUMMARY: Commenter 2 recommends an alternative to the required CPA letter, stating these are expensive to provide. Commenter 2 believes a bank statement proving available funds and an owner certification are an acceptable alternative.

STAFF RESPONSE: TDHCA staff is not able to evaluate an organization's true capacity to provide funds into a deal. The CPA letter is required to give the Department third-party assurance that the Applicant can provide short-term financial relief to the Development if necessary. No change is recommended.

13.8(5) and (6) 10% Equity

COMMENT SUMMARY: Commenter 1 recommends allowing 10% equity requirement to be met with additional soft sources such as local subsidy or grants. Commenter 2 suggests this requirement should be waived or eliminated.

STAFF RESPONSE: The rule currently allows Applicants to request Board approval to have an equity requirement of less than 10% without having to meet the waiver requirements of 10 TAC §11.207. If the Applicant chooses this option, then the request must specify the amount of equity to be provided and support for why this amount will allow the Development to complete construction and stabilize timely. Because an alternative to this requirement already exists in the rule, no changes are recommended.

13.11(14) Disbursement of Funds

Comment Summary: Commenter 1 and 2 recommend the removal of certain timing requirements related to the drawdown of awarded funds post-closing.

STAFF RESPONSE: Staff is currently completing a full evaluation of the draw process with the intention of streamlining and finding any available efficiency. At this time, staff does not recommend any changes to the rules related to this process. Changes may be recommended upon completion of the evaluation of this process, which would be included in future versions of this rule.

STATUTORY AUTHORITY. The new sections are adopted pursuant to Tex. Gov't Code §2306.053, which authorizes the Department to adopt rules. Except as described herein the new sections affect no other code, article, or statute. The rule has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

§13.5. Application and Award Process.

(a) Applications. MFDL Applicants must follow the applicable requirements in 10 TAC Chapter 11, Subchapter C (relating to Application Submission Requirements, Ineligibility Criteria, Board Decisions and Waiver of Rules) and the Notice of Funding Availability for which the Application is submitted.

(b) Application Acceptance Date. Applications will be considered received on the business day of receipt, unless a different time period is described in the Department's rules or NOFA. If an Application is received after 5:00 p.m., Austin local time, it will be determined to have been received on the following business day. Applications received on a non-business day will be considered received on the next day the Department is open. Applications will be considered complete at the time all Application materials, required third party reports and application fee(s) are received by the Department. Within certain Set-Asides or priorities, the date of receipt may be fixed, regardless of the earlier actual date a complete Application is received, if so specified in the Department's rules or NOFA. If multiple Applications have the same Application Acceptance Date, in the same region or subregion (as applicable), and within the same Set-Aside, then score and tiebreaker factors, as described in §13.6 of this chapter (relating to Scoring Criteria) for MFDL or 10 TAC §11.7 and §11.9 of this title (relating to Tie Breaker Factors and Competitive HTC Selection Criteria, respectively) for Applications layered with Competitive HTC, will be used to determine the Application's rank.

(c) Market Analysis. Applications proposing Rehabilitation that request MFDL as the only source of Department funding may be exempted from the Market Analysis requirement in 10 TAC §11.205(2) (relating to Required Third Party Reports) if the Development's rent

rolls for the most recent six months reflect occupancy of at least 80% of all Units.

(d) Required Site Control Agreement Provisions. All Applicants for MFDL funds must include the following provisions in the purchase contract or site control agreement if the subject property is not already owned by the Applicant:

(1) "Notwithstanding any other provision of this Contract, Purchaser shall have no obligation to purchase the Property, and no transfer of title to the Purchaser may occur, unless and until the Department has provided Purchaser and/or Seller with a written notification that: (A) It has completed a federally required environmental review and its request for release of federal funds has been approved and, subject to any other Contingencies in this Contract, (i) the purchase may proceed, or (ii) the purchase may proceed only if certain conditions to address issues in the environmental review shall be satisfied before or after the purchase of the property; or (B) It has determined that the purchase is exempt from federal environmental review and a request for release of funds is not required."; and

(2) "The Buyer does not have the power of eminent domain relating to the purchase and acquisition of the Property. The Buyer may use federal funds from the U.S. Department of Housing and Urban Development (HUD) to complete this purchase. HUD will not use eminent domain authority to condemn the Property. All parties entered this transaction voluntarily and the Buyer has notified the Seller of what it believes the value of the Property to be in accordance with 49 CFR Part 24 Appendix A. If negotiations between both parties fail, Buyer will not take further action to acquire the Property."

(e) Oversubscribed Funds for Competitive HTC-Layered Applications. Should MFDL funds be oversubscribed in a Set-Aside or for a fund source that has geographic limitations within a Set-Aside, Applications concurrently requesting Competitive HTC will be notified and may amend their Application to accommodate another fund source and make changes that still meet threshold requirements in 10 TAC Chapters 11 and 13 of this title, if such changes do not impact scoring under 10 TAC §11.9 (relating to Competitive HTC Selection Criteria). The Department will provide notice to all impacted Applicants in the case of over-subscription, which will include a deadline by which the Applicant must respond to the Department. Multiple Applications from a single or affiliated Applicants do not constitute oversubscription, and the Applicant(s) will not be able to amend their Applications as described in this subsection. If MFDL funds become available between the Market Analysis Delivery Date, and the date of the Department's Board meeting at which final Competitive HTC awards are made, the MFDL funds will not be reserved for Competitive HTC-layered Applications, unless the reservation is described in the NOFA.

(f) Availability of funds for Non-Competitive HTC-layered Applications. If an Application requesting layered Non-Competitive HTC and Direct Loan funds is terminated under 10 TAC §11.201(2)(E) (relating to Withdrawal of Certificate of Reservation), the Application will receive a new Application Acceptance Date for purposes of Direct Loan funds upon submission to the Department of the new Certificate of Reservation. Direct Loan funds will not be reserved for terminated Applications, and may not be available for the Application with a new Reservation.

(g) Source of Direct Loan Funds. To the extent that an Application is submitted under a Set-Aside where multiple sources of Direct Loan funds are available, the Department will select sources of funds for recommended Applications, as provided in paragraphs (1) - (4) of this subsection:

(1) The Department will generally select the recommended source of MFDL funds to award to an Application in the order described in subparagraphs (A) - (C) of this paragraph, which may be limited by the type of activity an Application is proposing or the proposed Development Site of an Application:

(A) Federal funds with commitment and expenditure deadlines will be selected first;

(B) Federal funds that do not have commitment and expenditure deadlines will be selected next; and

(C) Nonfederal funds that do not have commitment and expenditure deadlines will be selected last; however,

(2) The Department may also consider repayment risk or ease of compliance with other fund sources when assigning the source of funds to be recommended for award to an Application;

(3) The Department may move to the next fund source prior to exhausting another selection; and

(4) The Department will make the final decision regarding the fund source to be recommended for an award (within a Set-Aside that has multiple fund sources), and this recommendation may be not be appealed.

(h) Eligibility Criteria and Determinations. The Department will evaluate Applications received under a NOFA for eligibility and threshold pursuant to the requirements of this chapter and Chapter 11 of this title (relating to the Qualified Allocation Plan). The Department may terminate the Application if there are changes at any point prior to MFDL loan closing that would have had an adverse effect on the score and ranking order of the Application that would have resulted in the Application not being recommended for an award or being ranked below another Application received prior to the subject Application.

(1) Applicants requesting MFDL as the only source of Department funds must meet the Experience Requirement as provided in either subparagraph (A) or (B) of this paragraph:

(A) The Experience Requirement as provided in 10 TAC §11.204(6) of this title (relating to Experience Requirement); or

(B) Alternatively by providing the acceptable documentation listed in §11.204(6) of this title evidencing the successful development, and at least five years of the successful operation, of a project or projects with at least twice as many affordability restricted Units as requested in the Application.

(2) The Executive Director or authorized designee must make eligibility determinations for Applications for Developments that meet the criteria in subparagraph (A) or (B) of this paragraph regardless of available fund sources:

(A) Received an award of funds or resources for the Development from the Department within 15 years preceding the Application Acceptance Date; or

(B) Started or completed construction, and are not proposing acquisition or rehabilitation.

(3) An Application that requires an eligibility determination in accordance with paragraph (2) of this subsection must identify that fact prior to, or in their Application so that an eligibility determination may be made subject to the Applicant's appeal rights under 10 TAC §11.902 or 10 TAC §1.7 of this title (both relating to Appeals), as applicable. A finding of eligibility under this paragraph does not guarantee an award. Applications requiring eligibility determinations generally will not be funded with HOME or NSP funds, unless a 24 CFR Part 58 review was done by another fund source.

(A) Requests under this paragraph will not be considered more than 60 calendar days prior to the first Application Accep-

tance Date published in the NOFA, for the Set-Aside in which the Applicant plans to apply.

(B) Criteria for consideration include clauses (i) - (iii) of this subparagraph:

(i) Evidence of circumstances beyond the Applicant's control that could not have been prevented with appropriate due diligence; or

(ii) Force Majeure events (not including weather events); and

(iii) Evidence that no further exceptional conditions exist that will delay or cause further cost increases.

(C) Criteria for consideration shall not include typical weather events, typical construction, or financing delays.

(D) Applications for Developments that previously received an award from the Department within 15 years preceding the Application Acceptance Date will be evaluated at no more than the amount of Developer Fee underwritten the last time that the Department published an Underwriting Report. MFDL funds may not be used to fund increased Developer Fee, regardless of whether the increase is allowed under other Department rules.

(E) Proposed Developments must provide evidence that the Development will comply with Site and Neighborhood Standards, which can be in the form of narrative with supporting documentation, accompanied by required census data found in American Community Survey Table DP-05.

(i) Request for Preliminary Determination. Applicants considering a request for Direct Loan layered with a Competitive HTC Application may submit a Request for Preliminary Determination with the HTC Pre-Application. The results of evaluation of the request may be used as evidence of review of the Development and the Principals for purposes of scoring under 10 TAC §11.9(f)(1)(E). Submission of a Request for Preliminary Determination does not obligate the Applicant to request Multifamily Direct Loan funds with their full Application. The Preliminary Determination is based solely on the information provided in the request, and does not indicate that the full Application will be accepted. It is not a guarantee that Direct Loan funds will be available or awarded to the full Application.

(j) Effective rules and contractual terms. The contractual terms of an award will be governed by and reflect the rules in effect at the time of Application; however, any changes in federal requirements will be reflected in the contractual terms. Further provided, that if after award, but prior to execution of such Contract, there are new rules in effect, the Direct Loan awardee may elect to be governed by the new rules, provided the Application would continue to have been eligible for award under the rules and NOFA in effect at the time of Application.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on December 12, 2022.

TRD-202204927

Bobby Wilkinson
Executive Director
Texas Department of Housing and Community Affairs
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Proposal publication date: October 28, 2022
For further information, please call: (512) 465-3959

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TITLE 16. ECONOMIC REGULATION

PART 4. TEXAS DEPARTMENT OF LICENSING AND REGULATION

CHAPTER 59. CONTINUING EDUCATION REQUIREMENTS

16 TAC §59.3

The Texas Commission of Licensing and Regulation (Commission) adopts amendments to an existing rule at 16 Texas Administrative Code (TAC), Chapter 59, §59.3, regarding Continuing Education Requirements, without changes to the proposed text as published in the September 23, 2022, issue of the *Texas Register* (47 TexReg 6029). The rule will not be republished.

EXPLANATION OF AND JUSTIFICATION FOR THE RULES

The rules under 16 TAC, Chapter 59, implement Texas Occupations Code, Chapter 51, Texas Department of Licensing and Regulation.

The adopted rule is necessary to implement House Bill (HB) 1560, 87th Legislature, Regular Session (2021). Article 2 of HB 1560 removed the requirement for polygraph examiners to hold a license. Article 3 of HB 1560 consolidated the licensing and regulation of barbering and cosmetology into a single program administered under Texas Occupations Code, Chapter 1603. The adopted rule also implements Senate Bill (SB) 2065, Article 14, 85th Legislature, Regular Session (2017), which removed the requirement for booting operators to hold a license. The adopted rule modifies the list of occupations which are subject to the continuing education requirements of 16 TAC, Chapter 59, by removing booting operators and polygraph examiners and adding barbers.

SECTION-BY-SECTION SUMMARY

The adopted rule amends §59.3, Purpose and Applicability, by removing current subdivision (3) to remove booting operators from the list of professions that are subject to Chapter 59; relabeling current subdivision (4) to become new subdivision (3) and amending its language to add barbers to the list of professions that are subject to Chapter 59 and update references to statute; removing current subdivision (7) to remove polygraph examiners from the list of professions that are subject to Chapter 59; and renumbering the remaining subdivisions accordingly.

PUBLIC COMMENTS

The Department drafted and distributed the proposed rule to persons internal and external to the agency. The proposed rule was published in the September 23, 2022, issue of the *Texas Register* (47 TexReg 6029). The public comment period closed on October 24, 2022. The Department received comments from seven interested parties on the proposed rule. The public comments are summarized below.

Comment: One commenter suggested adding a requirement for applicants to fingerprint.

Department Response: The Department disagrees with the comment because it is outside the scope of the proposed rule, which only updates the list of professions subject to Chapter 59. The Department made no changes to the proposed rule as a result of the comment.

Comment: One commenter opposed removing polygraph examiners from the list of professions subject to Chapter 59.

Department Response: The Department disagrees with the comment because HB 1560 deregulated polygraph examiners. The Department did not make any changes to the proposed rule as a result of the comment.

Comment: One commenter submitted questions about the commenter's personal licensing matters unrelated to the proposed rule.

Department Response: The Department disagrees with the comment because it is outside the scope of the proposed rule. The Department did not make any changes to the proposed rule as a result of the comment.

Comment: One commenter opposed requiring cosmetologists to take continuing education on human trafficking prevention and sanitation.

Department Response: The Department disagrees with the comment because it is outside the scope of the proposed rule, which only updates the list of professions subject to Chapter 59. The Department did not make any changes to the proposed rule in response to the comment.

Comment: One commenter questioned whether someone holding a barber license and a cosmetology license will be required to complete separate hours of continuing education.

Department Response: The Department disagrees with the comment because it is outside the scope of the proposed rule, which only updates the list of professions subject to Chapter 59. The Department did not make any changes to the proposed rule as a result of the comment.

Comment: One commenter was opposed to the repeal of the barber instructor license.

Department Response: The Department disagrees with the comment because it is outside the scope of the proposed rule, which only updates the list of professions subject to Chapter 59. The Department did not make any changes to the proposed rule as a result of the comment.

Comment: One commenter stated that the certification statement at the end of the proposed rule notice was misleading because it mentioned the earliest possible date of adoption and the Department did not give notice of the rule's adoption.

Department Response: The Department disagrees with the comment. The certification statement does not indicate the Department's intention to adopt the rule on the earliest possible date. The Department did not make any changes to the proposed rule as a result of the comment.

COMMISSION ACTION

At its meeting on December 6, 2022, the Commission adopted the proposed rules as published in the *Texas Register.*

STATUTORY AUTHORITY

The adopted rule is proposed under Texas Occupations Code, Chapters 51 and 1603, which authorize the Texas Commission of Licensing and Regulation, the Department's governing body, to adopt rules as necessary to implement these chapters and any other law establishing a program regulated by the Department.

The statutory provisions affected by the adopted rule are those set forth in Texas Occupations Code, Chapters 51 and 1603. No other statutes, articles, or codes are affected by the adopted rule.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on December 12, 2022.

TRD-202204923
Brad Bowman
General Counsel
Texas Department of Licensing and Regulation
Effective date: January 1, 2023
Proposal publication date: September 23, 2022
For further information, please call: (512) 475-4879

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CHAPTER 60. PROCEDURAL RULES OF THE COMMISSION AND THE DEPARTMENT

The Texas Commission of Licensing and Regulation (Commission) adopts amendments to existing rules at 16 Texas Administrative Code (TAC), Chapter 60, Subchapter A, §60.1; Subchapter B, §§60.20 - 60.23; Subchapter D, §§60.40 - 60.42; Subchapter F, §§60.80, 60.81, and 60.83; Subchapter G, §60.100 and §60.101; adopts new rules at Subchapter C, §60.36; Subchapter D, §60.43; and new Subchapter L, §60.600 and §60.601; and adopts the repeal of existing rules at Subchapter D, §60.36, regarding the Procedural Rules of the Commission and the Department, without changes to the proposed text as published in the September 30, 2022, issue of the *Texas Register* (47 TexReg 6364). These rules will not be republished.

The Commission also adopts amendments to existing rules at 16 TAC Chapter 60, Subchapter G, §60.102, regarding the Procedural Rules of the Commission and the Department, with changes to the proposed text as published in the September 30, 2022, issue of the *Texas Register* (47 TexReg 6364). These rules will be republished.

EXPLANATION OF AND JUSTIFICATION FOR THE RULES

The rules under 16 TAC Chapter 60 implement Texas Occupations Code, Chapter 51, the enabling statute of the Texas Commission of Licensing and Regulation (Commission) and the Department, and other laws applicable to the Commission and the Department.

The Chapter 60 rules are the procedural rules of the Commission and the Department. These rules apply to all of the agency's programs and to all license applicants and licensees, except where there is a conflict with the statutes and rules of a specific program.

The adopted rules update multiple subchapters and sections under Chapter 60. These changes include: (1) substantive and clean up changes suggested by the General Counsel's Office and during past strategic planning sessions; (2) changes as a re-

sult of the required four-year rule review conducted under Texas Government Code §2001.039; and (3) changes as a result of House Bill (HB) 1560, Article 1, Sec. 1.11, 87th Legislature, Regular Session (2021), the Department's Sunset legislation.

The adopted rules are necessary to update the current processes and procedures; to reflect the current authority and responsibilities of the Commission, the Executive Director, and the Department; to clarify and supplement the existing rule provisions; to implement necessary statutory requirements and changes; to promote consistency in terminology; and to reorganize and clean up existing rules where necessary. The Department expects to propose additional changes to Chapter 60 in the future in separate rulemakings.

Substantive and Clean Up Changes

The adopted rules include substantive and clean up changes suggested by the General Counsel's Office and during past strategic planning sessions. These changes include updates to the rules regarding applicability; general powers and duties of the Department and the Executive Director; license eligibility after revocation; criminal history and license eligibility; charges for providing copies of public information; rulemaking; and Department personnel. The changes also include reorganization of existing rules and clean up changes in terminology. The adopted rules make editorial changes to "Commission," "Department," and "Executive Director" to use lower case terminology to be consistent with the statutes and consistent across the Chapter 60 rule subchapters.

Four-Year Rule Review Changes

The adopted rules include changes as a result of the required four-year rule review conducted under Texas Government Code §2001.039. The Department conducted the required rule review of the rules under 16 TAC Chapter 60, and the Commission readopted the rule chapter in its entirety and in its current form. (Proposed Rule Review, 46 TexReg 2589, April 16, 2021. Adopted Rule Review, 46 TexReg 4701, July 30, 2021).

In response to the Notice of Intent to Review that was published, the Department received public comments from six interested parties regarding Chapter 60, with two of these interested parties commenting on the criminal history rules under Subchapter D. The two interested parties commented that a person with a criminal history should still be able to obtain a license. The Department did not propose any changes to the rules based on these public comments. The adopted rules provide the license eligibility requirements for persons with criminal histories in accordance with the applicable statutes and the Department's criminal conviction guidelines.

The adopted rules include changes identified by Department staff during the rule review process. These changes are reflected throughout the adopted rules and include updates to the rules regarding Commission meeting procedures; general powers and duties of the Department and the Executive Director; imposing sanctions and penalties; criminal history and license eligibility; fees; and rulemaking. The changes also include clarifying the rules, using plain talk language, and making the same editorial changes to "Commission," "Department," and "Executive Director" to use lower case terminology.

Bill Implementation

The adopted rules include changes as a result of House Bill (HB) 1560, Article 1, Sec. 1.11, 87th Legislature, Regular Session (2021), the Department's Sunset legislation. This section of HB 1560 amended Texas Occupations Code §51.4012(a), License Eligibility Requirements Regarding Applicant's Background; Determination Letter, to remove the "honesty, trustworthiness, or integrity" provision as a factor for license eligibility. The adopted rules implement this section of HB 1560 by repealing the same provision from the rules under Subchapter D.

SECTION-BY-SECTION SUMMARY

Subchapter A. General Provisions.

The adopted rules amend §60.1, Authority. The adopted rules update the title of the section to "Authority and Applicability" to reflect the scope of the rule; clarify the statutory authority under which the rules are promulgated; and explain the interaction between this rule chapter and the statutes and rules of the programs regulated by the Commission and the Department. The adopted rules make editorial changes to "Commission" and "Department" to use lower case terminology.

Subchapter B. Powers and Responsibilities.

The adopted rules amend §60.20, General Powers and Duties of the Commission. The adopted rules make clean-up changes. The adopted rules make editorial changes to "Commission" and "Department" to use lower case terminology.

The adopted rules amend §60.21, Commission Meetings--Procedures. The adopted rules make clean-up and reorganization changes; add provisions for electronic signatures; and update the provisions regarding providing public comments at the commission meetings. The adopted rules make editorial changes to "Commission" to use lower case terminology.

The adopted rules amend §60.22, General Powers and Duties of the Department and the Executive Director. The adopted rules update the provisions regarding the powers and duties of the Executive Director and the Department; clarify the Executive Director's duties pursuant to a Governor-issued executive order or proclamation declaring a state of disaster; and make clean-up changes. The adopted rules make editorial changes to "Commission," "Department," and "Executive Director" to use lower case terminology.

The adopted rules amend §60.23, Commission and Executive Director--Imposing Sanctions and Penalties. The adopted rules update the provisions regarding the authority of the Commission and the Executive Director to impose sanctions for violations related to inspections and investigations and related to criminal history and license eligibility; align the rule language with the sanctions authority under Texas Occupations Code §51.353(a) and §51.103(c)(1); and clarify that a combination of sanctions or administrative penalties may be imposed.

Subchapter C. License Applications.

The adopted rules update the title of Subchapter C to "License Applications and Renewals" to reflect the scope of the subchapter.

The adopted rules add new rule §60.36, License Eligibility After Revocation. Current §60.36 under Subchapter D is being repealed and relocated in part to Subchapter C as new §60.36. Subchapter C includes rule sections in the series §§60.30 - 60.39, and Subchapter D includes rule sections in the series §§60.40 - 60.49.

New §60.36 under Subchapter C includes subsections (a) through (c) from current §60.36 under Subchapter D. These provisions address license revocations that are not due to

criminal history. This rule implements Texas Occupations Code §51.355, License Eligibility of Person Whose License Has Been Revoked. The statutory reference was added to the adopted rules for clarity. The adopted rules also add language reflecting the Department's insufficient funds fee policy.

Subchapter D. Criminal History and License Eligibility.

The adopted rules repeal existing rule §60.36, License Eligibility After Denial or Revocation. Current §60.36 under Subchapter D is being repealed, and the provisions are being relocated. Subchapter C includes rule sections in the series §§60.30 - 60.39, and Subchapter D includes rule sections in the series §§60.40 - 60.49.

The subsections of current §60.36 under Subchapter D have been relocated as follows: (1) subsections (a) - (c), which address revocations that are not due to criminal history, have been moved to new §60.36 under Subchapter C; (2) subsection (a), which also applies to revocations due to criminal history, has been copied and added to current §60.40 as new subsection (b) and current §60.41 as new subsection (c); (3) subsection (d) has been moved to current §60.40 as new subsection (c)(2); and (4) subsection (e) has been moved to new §60.43.

The adopted rules amend §60.40, License Eligibility for Persons with Criminal Convictions. Subsection (a) is revised to align the text more closely with the statute, Texas Occupations Code §53.021, Authority to Revoke, Suspend, or Deny License. The provision in new subsection (b) was copied from current §60.36(a) under Subchapter D, and the statutory reference was added for clarity. This rule implements Texas Occupations Code §51.355, License Eligibility of Person Whose License Has Been Revoked, as it relates to revocations based on criminal history.

Current subsection (b) is re-lettered as new subsection (c) with a new heading and organization. The incarceration provisions are grouped together under subsection (c). Existing subsection (c)(1) prohibits a person who is currently incarcerated from obtaining or renewing a license issued by the Department. The provision in new subsection (c)(2), which was relocated from §60.36(d) under Subchapter D, requires a person whose license was revoked by operation of law under Occupations Code §53.021(b) for imprisonment after a felony conviction, felony community supervision revocation, revocation of parole, or revocation of mandatory supervision, to wait until release from imprisonment to apply for a license issued by the Department. New subsection (c)(3) adds an exception to these provisions for certain student permits issued to persons enrolled in the Windham School District, which is a school district operated by the Texas Department of Criminal Justice for incarcerated persons. The provisions in subsection (c)(3) are necessary to allow incarcerated persons to attend barbering or cosmetology school while in prison and to accumulate educational hours towards licenses issued in the barbering and cosmetology program. These permits do not permit students to practice barbering or cosmetology outside of a licensed school setting.

The adopted rules amend §60.41, License Eligibility for Persons with Deferred Adjudications or Non-Conviction Activities. The adopted rules update the title of the section to "License Eligibility for Persons with Deferred Adjudications or Other Criminal History" to reflect the changes in the section. The adopted rules amend subsection (a) to add the statutory reference to Texas Occupations Code §51.356, Deferred Adjudication; License Suspension, License Revocation, or Denial or Refusal to Renew License, for clarity and to make other clean-up changes.

The adopted rules amend subsection (b) to add the statutory reference to Texas Occupations Code §51.4012(a), License Eligibility Requirements Regarding Applicant's Background; Determination Letter, for clarity and to implement HB 1560, Article 1, Section 1.11. HB 1560 amended Texas Occupations Code §51.4012(a) to remove the "honesty, trustworthiness, or integrity" provision as a factor for license eligibility, along with other editorial changes. The adopted rules make the same changes to the rules.

The provision in new subsection (c) was copied from current §60.36(a) under Subchapter D, and the statutory reference was added for clarity. This rule implements Texas Occupations Code §51.355, License Eligibility of Person Whose License Has Been Revoked, as it relates to revocations based on criminal history.

The adopted rules amend §60.42, Criminal History Evaluation Letters. The adopted rules update subsection (b) to implement HB 1560, Article 1, Sec. 1.11. HB 1560 amended Texas Occupations Code §51.4012(a) to remove the "honesty, trustworthiness, or integrity" provision as a factor for license eligibility, along with other editorial changes. The adopted rules make the same changes to the rules. The adopted rules also clean up a statutory reference in subsection (h).

The adopted rules add new rule §60.43, License Denial or Revocation for Certain Health Professionals with a Criminal History. The provisions in this new section were moved from current §60.36(e) under Subchapter D. The existing provisions have been supplemented. This section implements Texas Occupations Code, Chapter 108, Subchapter B, Automatic Denial or Revocation of Health Care Professional License, for the specified health-related programs.

Subchapter F. Fees.

The adopted rules amend §60.80, Program Fees. The adopted rules clarify the existing language regarding program fees. The adopted rules make editorial changes to "Commission" and "Department" to use lower case terminology.

The adopted rules amend §60.81, Charges for Providing Copies of Public Information. The adopted rules adopt by reference the Office of the Attorney General rules regarding charges for copies of public information and update the rule citations.

The adopted rules amend §60.83, Late Renewal Fees. The adopted rules add clarifying language to the existing provisions regarding renewal fees and late renewal fees. The adopted rules also restructure and plain talk the language under subsection (c). This rule implements Texas Occupations Code §51.401, License Expiration and Renewal.

Subchapter G. Rulemaking.

The adopted rules amend §60.100, Rulemaking. The adopted rules clean up a statutory reference and make editorial changes to "Commission" and "Department" to use lower case terminology.

The adopted rules amend §60.101, Negotiated Rulemaking. The adopted rules make editorial changes to "Commission" and "Department" to use lower case terminology.

The adopted rules amend §60.102, Petition for Adoption of Rules. The adopted rules provide additional details regarding rulemaking petitions submitted to the Department under Texas Government Code §2001.021, Petition for Adoption of Rules. These provisions include: who is an "interested person" as defined under the statute and rules; what information must be

provided for a rulemaking petition to be considered; the reasons why a rulemaking petition will be denied; where and how the rulemaking petition shall be submitted to the Department; the Department's responsibilities in responding to a rulemaking petition; and the handling of repetitive rulemaking petitions.

The adopted rules include one change made by the Department to proposed rule §60.102 as published. The change updates the website address of the online form for submitting rulemaking petitions.

Subchapter L. Department Personnel.

The adopted rules add new Subchapter L, Department Personnel. This new subchapter includes personnel-related rules that are required by statute.

The adopted rules add new §60.600, Department Employee Training and Education. This new rule implements Texas Government Code, Chapter 656, Subchapter C, Training, and is required by Texas Government Code §656.048, Rules Relating to Training and Education. This rule addresses training and education programs for Department employees; the tuition reimbursement program; training with extended absence from job duties; and the payment of costs and expenses for approved training. The rule incorporates by reference the Department's personnel manual.

The adopted rules add new §60.601, Department Sick Leave Pool. This new rule implements Texas Government Code, Chapter 661, Subchapter A, State Employee Sick Leave Pool, and is required by Texas Government Code §661.002, Sick Leave Pool. This rule provides that the Department's sick leave pool shall be administered by the Executive Director and that the Executive Director shall develop and prescribe policies and procedures for the operation of the sick leave pool and include those policies and procedures in the Department's personnel manual.

PUBLIC COMMENTS

The Department drafted and distributed the proposed rules to persons internal and external to the agency. The proposed rules were published in the September 30, 2022, issue of the *Texas Register* (47 TexReg 6364). The public comment period closed on October 31, 2022. The Department received comments from two interested parties on the proposed rules. The public comments are summarized below.

Comment: The first interested party offered comments that questioned the necessity of the proposed updates and the amendments to use lower case terminology, and that opposed the removal of the phrase "honesty, trustworthiness, or integrity" from the rules. The interested party expressed concerns about the direction and the impact of the proposed rule changes being made.

Department Response: The Department disagrees with the comments. The proposed rules make various substantive and technical clean-up changes to the agency's procedural rules and include changes resulting from staff and strategic planning, the required four-year rule review, and the Department's Sunset legislation, HB 1560. The various changes are included in a comprehensive rule package to reduce the number of separate rulemakings. Regarding the removal of the phrase "honesty, trustworthiness, or integrity" from the rules, this is a result of HB 1560, the Department's Sunset legislation. The bill removed that phrase from the Department's enabling statute, Texas Occupations Code, Chapter 51. The proposed rule changes are necessary to align the rules with the statute. The Department did not make any changes to the proposed rules as a result of the public comments.

Comment: The second interested party submitted a comment about trying to obtain a security non-commission card and being denied.

Department Response: The Department disagrees with the comment. It is outside of the scope of the proposed rules. The Department did not make any changes to the proposed rules as a result of the public comment.

COMMISSION ACTION

At its meeting on December 6, 2022, the Commission adopted the proposed rules with changes to §60.102 as published in the *Texas Register.*

SUBCHAPTER A. GENERAL PROVISIONS

16 TAC §60.1

STATUTORY AUTHORITY

The adopted rules are adopted under Texas Occupations Code, Chapter 51, which authorizes the Texas Commission of Licensing and Regulation, the Department's governing body, to adopt rules as necessary to implement that chapter and any other law establishing a program regulated by the Department. The adopted rules also are adopted under Texas Government Code, Chapter 411, Subchapter F, and Texas Occupations Code, Chapters 51 and 53, which establish the Department's statutory authority to conduct criminal history background checks on an applicant for or a holder of a license, certificate, registration, title, or permit issued by the Department.

In addition, the adopted rules are adopted under the authority of other state laws that apply to state agencies. These laws include Texas Occupations Code, Chapters 55 and 108 (Subchapter B); Texas Government Code, Chapters 551, 552, 656 (Subchapter C), 661 (Subchapter A), 2001, 2005, 2008, 2009, and 2110; Civil Practice and Remedies Code, Chapter 154; and Family Code, Chapters 231 and 232.

The statutory provisions affected by the adopted rules are those set forth in Texas Occupations Code, Chapter 51, and the program statutes for all the Department programs: Agriculture Code, Chapter 301 (Weather Modification and Control); Business and Commerce Code, Chapter 607 (Motor Fuel Metering and Quality); Education Code, Chapter 1001 (Driver and Traffic Safety Education); Government Code, Chapters 171 (Court-Ordered Programs); and 469 (Elimination of Architectural Barriers); Health and Safety Code, Chapters 401, Subchapter M (Laser Hair Removal); 754 (Elevators, Escalators, and Related Equipment); and 755 (Boilers); Labor Code, Chapter 91 (Professional Employer Organizations); Occupations Code, Chapters 202 (Podiatrists); 203 (Midwives); 401 (Speech-Language Pathologists and Audiologists); 402 (Hearing Instrument Fitters and Dispensers); 403 (Dyslexia Practitioners and Therapists); 451 (Athletic Trainers); 455 (Massage Therapy); 506 (Behavioral Analysts); 605 (Orthotists and Prosthetists); 701 (Dietitians); 802 (Dog or Cat Breeders); 1151 (Property Tax Professionals); 1152 (Property Tax Consultants); 1202 (Industrialized Housing and Buildings); 1302 (Air Conditioning and Refrigeration Contractors); 1304 (Service Contract Providers and Administrators); 1305 (Electricians); 1601 (Barbers); 1602 (Cosmetologists); 1603 (Barbers and Cosmetologists); 1802 (Auctioneers); 1901 (Water Well Drillers); 1902 (Water Well Pump Installers): 1952 (Code Enforcement Officers); 1953 (Sanitarians); 1958 (Mold

Assessors and Remediators); 2052 (Combative Sports); 2303 (Vehicle Storage Facilities); 2308 (Vehicle Towing and Booting); 2309 (Used Automotive Parts Recyclers); 2310 and 2312 (Motor Fuel Metering and Quality); and 2402 (Transportation Network Companies); and Transportation Code, Chapters 551A (Off-Highway Vehicle Training and Safety); and 662 (Motorcycle Operator Training and Safety).

In addition, the statutory provisions affected by the adopted rules are those set forth in Texas Occupations Code, Chapters 53, 55, and 108 (Subchapter B); Texas Government Code, Chapters 411 (Subchapter F), 551, 552, 656 (Subchapter C), 661 (Subchapter A), 2001, 2005, 2008, 2009, and 2110; Civil Practice and Remedies Code, Chapter 154; and Family Code, Chapters 231 and 232. No other statutes, articles, or codes are affected by the adopted rules.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on December 12, 2022.

TRD-202204974
Brad Bowman
General Counsel
Texas Department of Licensing and Regulation
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For further information, please call: (512) 475-4879

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SUBCHAPTER B. POWERS AND RESPONSIBILITIES

16 TAC §§60.20 - 60.23

STATUTORY AUTHORITY

The adopted rules are adopted under Texas Occupations Code, Chapter 51, which authorizes the Texas Commission of Licensing and Regulation, the Department's governing body, to adopt rules as necessary to implement that chapter and any other law establishing a program regulated by the Department. The adopted rules also are adopted under Texas Government Code, Chapter 411, Subchapter F, and Texas Occupations Code, Chapters 51 and 53, which establish the Department's statutory authority to conduct criminal history background checks on an applicant for or a holder of a license, certificate, registration, title, or permit issued by the Department.

In addition, the adopted rules are adopted under the authority of other state laws that apply to state agencies. These laws include Texas Occupations Code, Chapters 55 and 108 (Subchapter B); Texas Government Code, Chapters 551, 552, 656 (Subchapter C), 661 (Subchapter A), 2001, 2005, 2008, 2009, and 2110; Civil Practice and Remedies Code, Chapter 154; and Family Code, Chapters 231 and 232.

The statutory provisions affected by the adopted rules are those set forth in Texas Occupations Code, Chapter 51, and the program statutes for all the Department programs: Agriculture Code, Chapter 301 (Weather Modification and Control); Business and Commerce Code, Chapter 607 (Motor Fuel Metering and Quality); Education Code, Chapter 1001 (Driver and Traffic Safety Education); Government Code, Chapters 171 (Court-Ordered Programs); and 469 (Elimination of Architectural Barriers); Health and Safety Code, Chapters 401, Subchapter M (Laser Hair Removal); 754 (Elevators, Escalators, and Related Equipment); and 755 (Boilers); Labor Code, Chapter 91 (Professional Employer Organizations); Occupations Code, Chapters 202 (Podiatrists); 203 (Midwives); 401 (Speech-Language Pathologists and Audiologists); 402 (Hearing Instrument Fitters and Dispensers); 403 (Dyslexia Practitioners and Therapists); 451 (Athletic Trainers); 455 (Massage Therapy); 506 (Behavioral Analysts); 605 (Orthotists and Prosthetists); 701 (Dietitians); 802 (Dog or Cat Breeders); 1151 (Property Tax Professionals); 1152 (Property Tax Consultants); 1202 (Industrialized Housing and Buildings); 1302 (Air Conditioning and Refrigeration Contractors); 1304 (Service Contract Providers and Administrators); 1305 (Electricians); 1601 (Barbers); 1602 (Cosmetologists); 1603 (Barbers and Cosmetologists); 1802 (Auctioneers); 1901 (Water Well Drillers); 1902 (Water Well Pump Installers): 1952 (Code Enforcement Officers); 1953 (Sanitarians); 1958 (Mold Assessors and Remediators); 2052 (Combative Sports); 2303 (Vehicle Storage Facilities); 2308 (Vehicle Towing and Booting); 2309 (Used Automotive Parts Recyclers); 2310 and 2312 (Motor Fuel Metering and Quality); and 2402 (Transportation Network Companies); and Transportation Code, Chapters 551A (Off-Highway Vehicle Training and Safety); and 662 (Motorcycle Operator Training and Safety).

In addition, the statutory provisions affected by the adopted rules are those set forth in Texas Occupations Code, Chapters 53, 55, and 108 (Subchapter B); Texas Government Code, Chapters 411 (Subchapter F), 551, 552, 656 (Subchapter C), 661 (Subchapter A), 2001, 2005, 2008, 2009, and 2110; Civil Practice and Remedies Code, Chapter 154; and Family Code, Chapters 231 and 232. No other statutes, articles, or codes are affected by the adopted rules.

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. LICENSE APPLICATIONS AND RENEWALS

16 TAC §60.36

STATUTORY AUTHORITY

The adopted rules are adopted under Texas Occupations Code, Chapter 51, which authorizes the Texas Commission of Licensing and Regulation, the Department's governing body, to adopt rules as necessary to implement that chapter and any other law establishing a program regulated by the Department. The adopted rules also are adopted under Texas Government Code,

Chapter 411, Subchapter F, and Texas Occupations Code, Chapters 51 and 53, which establish the Department's statutory authority to conduct criminal history background checks on an applicant for or a holder of a license, certificate, registration, title, or permit issued by the Department.

In addition, the adopted rules are adopted under the authority of other state laws that apply to state agencies. These laws include Texas Occupations Code, Chapters 55 and 108 (Subchapter B); Texas Government Code, Chapters 551, 552, 656 (Subchapter C), 661 (Subchapter A), 2001, 2005, 2008, 2009, and 2110; Civil Practice and Remedies Code, Chapter 154; and Family Code, Chapters 231 and 232.

The statutory provisions affected by the adopted rules are those set forth in Texas Occupations Code, Chapter 51, and the program statutes for all the Department programs: Agriculture Code, Chapter 301 (Weather Modification and Control); Business and Commerce Code, Chapter 607 (Motor Fuel Metering and Quality); Education Code, Chapter 1001 (Driver and Traffic Safety Education); Government Code, Chapters 171 (Court-Ordered Programs); and 469 (Elimination of Architectural Barriers); Health and Safety Code, Chapters 401, Subchapter M (Laser Hair Removal); 754 (Elevators, Escalators, and Related Equipment); and 755 (Boilers); Labor Code, Chapter 91 (Professional Employer Organizations); Occupations Code, Chapters 202 (Podiatrists); 203 (Midwives); 401 (Speech-Language Pathologists and Audiologists); 402 (Hearing Instrument Fitters and Dispensers); 403 (Dyslexia Practitioners and Therapists); 451 (Athletic Trainers); 455 (Massage Therapy); 506 (Behavioral Analysts); 605 (Orthotists and Prosthetists); 701 (Dietitians); 802 (Dog or Cat Breeders); 1151 (Property Tax Professionals); 1152 (Property Tax Consultants); 1202 (Industrialized Housing and Buildings); 1302 (Air Conditioning and Refrigeration Contractors); 1304 (Service Contract Providers and Administrators); 1305 (Electricians); 1601 (Barbers); 1602 (Cosmetologists); 1603 (Barbers and Cosmetologists); 1802 (Auctioneers); 1901 (Water Well Drillers); 1902 (Water Well Pump Installers): 1952 (Code Enforcement Officers); 1953 (Sanitarians); 1958 (Mold Assessors and Remediators); 2052 (Combative Sports); 2303 (Vehicle Storage Facilities); 2308 (Vehicle Towing and Booting); 2309 (Used Automotive Parts Recyclers); 2310 and 2312 (Motor Fuel Metering and Quality); and 2402 (Transportation Network Companies); and Transportation Code, Chapters 551A (Off-Highway Vehicle Training and Safety); and 662 (Motorcycle Operator Training and Safety).

In addition, the statutory provisions affected by the adopted rules are those set forth in Texas Occupations Code, Chapters 53, 55, and 108 (Subchapter B); Texas Government Code, Chapters 411 (Subchapter F), 551, 552, 656 (Subchapter C), 661 (Subchapter A), 2001, 2005, 2008, 2009, and 2110; Civil Practice and Remedies Code, Chapter 154; and Family Code, Chapters 231 and 232. No other statutes, articles, or codes are affected by the adopted rules.

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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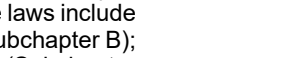

SUBCHAPTER D. CRIMINAL HISTORY AND LICENSE ELIGIBILITY

16 TAC §60.36

STATUTORY AUTHORITY

The adopted repeal is adopted under Texas Occupations Code, Chapter 51, which authorizes the Texas Commission of Licensing and Regulation, the Department's governing body, to adopt rules as necessary to implement that chapter and any other law establishing a program regulated by the Department. The adopted repeal also is adopted under Texas Government Code, Chapter 411, Subchapter F, and Texas Occupations Code, Chapters 51 and 53, which establish the Department's statutory authority to conduct criminal history background checks on an applicant for or a holder of a license, certificate, registration, title, or permit issued by the Department.

In addition, the adopted repeal is adopted under the authority of other state laws that apply to state agencies. These laws include Texas Occupations Code, Chapters 55 and 108 (Subchapter B); Texas Government Code, Chapters 551, 552, 656 (Subchapter C), 661 (Subchapter A), 2001, 2005, 2008, 2009, and 2110; Civil Practice and Remedies Code, Chapter 154; and Family Code, Chapters 231 and 232.

The statutory provisions affected by the adopted repeal are those set forth in Texas Occupations Code, Chapter 51, and the program statutes for all the Department programs: Agriculture Code, Chapter 301 (Weather Modification and Control); Business and Commerce Code, Chapter 607 (Motor Fuel Metering and Quality); Education Code, Chapter 1001 (Driver and Traffic Safety Education); Government Code, Chapters 171 (Court-Ordered Programs); and 469 (Elimination of Architectural Barriers); Health and Safety Code, Chapters 401, Subchapter M (Laser Hair Removal); 754 (Elevators, Escalators, and Related Equipment); and 755 (Boilers); Labor Code, Chapter 91 (Professional Employer Organizations); Occupations Code, Chapters 202 (Podiatrists); 203 (Midwives); 401 (Speech-Language Pathologists and Audiologists); 402 (Hearing Instrument Fitters and Dispensers); 403 (Dyslexia Practitioners and Therapists); 451 (Athletic Trainers); 455 (Massage Therapy); 506 (Behavioral Analysts); 605 (Orthotists and Prosthetists); 701 (Dietitians); 802 (Dog or Cat Breeders); 1151 (Property Tax Professionals); 1152 (Property Tax Consultants); 1202 (Industrialized Housing and Buildings); 1302 (Air Conditioning and Refrigeration Contractors); 1304 (Service Contract Providers and Administrators); 1305 (Electricians); 1601 (Barbers); 1602 (Cosmetologists); 1603 (Barbers and Cosmetologists); 1802 (Auctioneers); 1901 (Water Well Drillers); 1902 (Water Well Pump Installers): 1952 (Code Enforcement Officers); 1953 (Sanitarians); 1958 (Mold Assessors and Remediators); 2052 (Combative Sports); 2303 (Vehicle Storage Facilities); 2308 (Vehicle Towing and Booting); 2309 (Used Automotive Parts Recyclers); 2310 and 2312 (Motor Fuel Metering and Quality); and 2402 (Transportation Network Companies); and Transportation Code, Chapters 551A

(Off-Highway Vehicle Training and Safety); and 662 (Motorcycle Operator Training and Safety).

In addition, the statutory provisions affected by the adopted repeal are those set forth in Texas Occupations Code, Chapters 53, 55, and 108 (Subchapter B); Texas Government Code, Chapters 411 (Subchapter F), 551, 552, 656 (Subchapter C), 661 (Subchapter A), 2001, 2005, 2008, 2009, and 2110; Civil Practice and Remedies Code, Chapter 154; and Family Code, Chapters 231 and 232. No other statutes, articles, or codes are affected by the adopted repeal.

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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16 TAC §§60.40 - 60.43

STATUTORY AUTHORITY

The adopted rules are adopted under Texas Occupations Code, Chapter 51, which authorizes the Texas Commission of Licensing and Regulation, the Department's governing body, to adopt rules as necessary to implement that chapter and any other law establishing a program regulated by the Department. The adopted rules also are adopted under Texas Government Code, Chapter 411, Subchapter F, and Texas Occupations Code, Chapters 51 and 53, which establish the Department's statutory authority to conduct criminal history background checks on an applicant for or a holder of a license, certificate, registration, title, or permit issued by the Department.

In addition, the adopted rules are adopted under the authority of other state laws that apply to state agencies. These laws include Texas Occupations Code, Chapters 55 and 108 (Subchapter B); Texas Government Code, Chapters 551, 552, 656 (Subchapter C), 661 (Subchapter A), 2001, 2005, 2008, 2009, and 2110; Civil Practice and Remedies Code, Chapter 154; and Family Code, Chapters 231 and 232.

The statutory provisions affected by the adopted rules are those set forth in Texas Occupations Code, Chapter 51, and the program statutes for all the Department programs: Agriculture Code, Chapter 301 (Weather Modification and Control); Business and Commerce Code, Chapter 607 (Motor Fuel Metering and Quality); Education Code, Chapter 1001 (Driver and Traffic Safety Education); Government Code, Chapters 171 (Court-Ordered Programs); and 469 (Elimination of Architectural Barriers); Health and Safety Code, Chapters 401, Subchapter M (Laser Hair Removal); 754 (Elevators, Escalators, and Related Equipment); and 755 (Boilers); Labor Code, Chapter 91 (Professional Employer Organizations); Occupations Code, Chapters 202 (Podiatrists); 203 (Midwives); 401 (Speech-Language Pathologists and Audiologists); 402 (Hearing Instrument Fitters and Dispensers); 403 (Dyslexia Practitioners and Therapists); 451 (Athletic Trainers); 455 (Massage Therapy); 506 (Behavioral Analysts); 605 (Orthotists and Prosthetists); 701 (Dietitians); 802 (Dog or Cat Breeders); 1151 (Property Tax Professionals); 1152 (Property Tax Consultants); 1202 (Industrialized Housing and Buildings); 1302 (Air Conditioning and Refrigeration Contractors); 1304 (Service Contract Providers and Administrators); 1305 (Electricians); 1601 (Barbers); 1602 (Cosmetologists); 1603 (Barbers and Cosmetologists); 1802 (Auctioneers); 1901 (Water Well Drillers); 1902 (Water Well Pump Installers): 1952 (Code Enforcement Officers); 1953 (Sanitarians); 1958 (Mold Assessors and Remediators); 2052 (Combative Sports); 2303 (Vehicle Storage Facilities); 2308 (Vehicle Towing and Booting); 2309 (Used Automotive Parts Recyclers); 2310 and 2312 (Motor Fuel Metering and Quality); and 2402 (Transportation Network Companies); and Transportation Code, Chapters 551A (Off-Highway Vehicle Training and Safety); and 662 (Motorcycle Operator Training and Safety).

In addition, the statutory provisions affected by the adopted rules are those set forth in Texas Occupations Code, Chapters 53, 55, and 108 (Subchapter B); Texas Government Code, Chapters 411 (Subchapter F), 551, 552, 656 (Subchapter C), 661 (Subchapter A), 2001, 2005, 2008, 2009, and 2110; Civil Practice and Remedies Code, Chapter 154; and Family Code, Chapters 231 and 232. No other statutes, articles, or codes are affected by the adopted rules.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on December 12, 2022.

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Brad Bowman
General Counsel
Texas Department of Licensing and Regulation
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SUBCHAPTER F. FEES

16 TAC §§60.80, 60.81, 60.83

STATUTORY AUTHORITY

The adopted rules are adopted under Texas Occupations Code, Chapter 51, which authorizes the Texas Commission of Licensing and Regulation, the Department's governing body, to adopt rules as necessary to implement that chapter and any other law establishing a program regulated by the Department. The adopted rules also are adopted under Texas Government Code, Chapter 411, Subchapter F, and Texas Occupations Code, Chapters 51 and 53, which establish the Department's statutory authority to conduct criminal history background checks on an applicant for or a holder of a license, certificate, registration, title, or permit issued by the Department.

In addition, the adopted rules are adopted under the authority of other state laws that apply to state agencies. These laws include Texas Occupations Code, Chapters 55 and 108 (Subchapter B); Texas Government Code, Chapters 551, 552, 656 (Subchapter

C), 661 (Subchapter A), 2001, 2005, 2008, 2009, and 2110; Civil Practice and Remedies Code, Chapter 154; and Family Code, Chapters 231 and 232.

The statutory provisions affected by the adopted rules are those set forth in Texas Occupations Code, Chapter 51, and the program statutes for all the Department programs: Agriculture Code, Chapter 301 (Weather Modification and Control); Business and Commerce Code, Chapter 607 (Motor Fuel Metering and Quality); Education Code, Chapter 1001 (Driver and Traffic Safety Education); Government Code, Chapters 171 (Court-Ordered Programs); and 469 (Elimination of Architectural Barriers); Health and Safety Code, Chapters 401, Subchapter M (Laser Hair Removal); 754 (Elevators, Escalators, and Related Equipment); and 755 (Boilers); Labor Code, Chapter 91 (Professional Employer Organizations); Occupations Code, Chapters 202 (Podiatrists); 203 (Midwives); 401 (Speech-Language Pathologists and Audiologists); 402 (Hearing Instrument Fitters and Dispensers); 403 (Dyslexia Practitioners and Therapists); 451 (Athletic Trainers); 455 (Massage Therapy); 506 (Behavioral Analysts); 605 (Orthotists and Prosthetists); 701 (Dietitians); 802 (Dog or Cat Breeders); 1151 (Property Tax Professionals); 1152 (Property Tax Consultants); 1202 (Industrialized Housing and Buildings); 1302 (Air Conditioning and Refrigeration Contractors); 1304 (Service Contract Providers and Administrators); 1305 (Electricians); 1601 (Barbers); 1602 (Cosmetologists); 1603 (Barbers and Cosmetologists); 1802 (Auctioneers); 1901 (Water Well Drillers); 1902 (Water Well Pump Installers): 1952 (Code Enforcement Officers); 1953 (Sanitarians); 1958 (Mold Assessors and Remediators); 2052 (Combative Sports); 2303 (Vehicle Storage Facilities); 2308 (Vehicle Towing and Booting); 2309 (Used Automotive Parts Recyclers); 2310 and 2312 (Motor Fuel Metering and Quality); and 2402 (Transportation Network Companies); and Transportation Code, Chapters 551A (Off-Highway Vehicle Training and Safety); and 662 (Motorcycle Operator Training and Safety).

In addition, the statutory provisions affected by the adopted rules are those set forth in Texas Occupations Code, Chapters 53, 55, and 108 (Subchapter B); Texas Government Code, Chapters 411 (Subchapter F), 551, 552, 656 (Subchapter C), 661 (Subchapter A), 2001, 2005, 2008, 2009, and 2110; Civil Practice and Remedies Code, Chapter 154; and Family Code, Chapters 231 and 232. No other statutes, articles, or codes are affected by the adopted rules.

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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Brad Bowman
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SUBCHAPTER G. RULEMAKING

16 TAC §§60.100 - 60.102

STATUTORY AUTHORITY

The adopted rules are adopted under Texas Occupations Code, Chapter 51, which authorizes the Texas Commission of Licensing and Regulation, the Department's governing body, to adopt rules as necessary to implement that chapter and any other law establishing a program regulated by the Department. The adopted rules also are adopted under Texas Government Code, Chapter 411, Subchapter F, and Texas Occupations Code, Chapters 51 and 53, which establish the Department's statutory authority to conduct criminal history background checks on an applicant for or a holder of a license, certificate, registration, title, or permit issued by the Department.

In addition, the adopted rules are adopted under the authority of other state laws that apply to state agencies. These laws include Texas Occupations Code, Chapters 55 and 108 (Subchapter B); Texas Government Code, Chapters 551, 552, 656 (Subchapter C), 661 (Subchapter A), 2001, 2005, 2008, 2009, and 2110; Civil Practice and Remedies Code, Chapter 154; and Family Code, Chapters 231 and 232.

The statutory provisions affected by the adopted rules are those set forth in Texas Occupations Code, Chapter 51, and the program statutes for all the Department programs: Agriculture Code, Chapter 301 (Weather Modification and Control); Business and Commerce Code, Chapter 607 (Motor Fuel Metering and Quality); Education Code, Chapter 1001 (Driver and Traffic Safety Education); Government Code, Chapters 171 (Court-Ordered Programs); and 469 (Elimination of Architectural Barriers); Health and Safety Code, Chapters 401, Subchapter M (Laser Hair Removal); 754 (Elevators, Escalators, and Related Equipment); and 755 (Boilers); Labor Code, Chapter 91 (Professional Employer Organizations); Occupations Code, Chapters 202 (Podiatrists); 203 (Midwives); 401 (Speech-Language Pathologists and Audiologists); 402 (Hearing Instrument Fitters and Dispensers); 403 (Dyslexia Practitioners and Therapists); 451 (Athletic Trainers); 455 (Massage Therapy); 506 (Behavioral Analysts); 605 (Orthotists and Prosthetists); 701 (Dietitians); 802 (Dog or Cat Breeders); 1151 (Property Tax Professionals); 1152 (Property Tax Consultants); 1202 (Industrialized Housing and Buildings); 1302 (Air Conditioning and Refrigeration Contractors); 1304 (Service Contract Providers and Administrators); 1305 (Electricians); 1601 (Barbers); 1602 (Cosmetologists); 1603 (Barbers and Cosmetologists); 1802 (Auctioneers); 1901 (Water Well Drillers); 1902 (Water Well Pump Installers): 1952 (Code Enforcement Officers); 1953 (Sanitarians); 1958 (Mold Assessors and Remediators); 2052 (Combative Sports); 2303 (Vehicle Storage Facilities); 2308 (Vehicle Towing and Booting); 2309 (Used Automotive Parts Recyclers); 2310 and 2312 (Motor Fuel Metering and Quality); and 2402 (Transportation Network Companies); and Transportation Code, Chapters 551A (Off-Highway Vehicle Training and Safety); and 662 (Motorcycle Operator Training and Safety).

In addition, the statutory provisions affected by the adopted rules are those set forth in Texas Occupations Code, Chapters 53, 55, and 108 (Subchapter B); Texas Government Code, Chapters 411 (Subchapter F), 551, 552, 656 (Subchapter C), 661 (Subchapter A), 2001, 2005, 2008, 2009, and 2110; Civil Practice and Remedies Code, Chapter 154; and Family Code, Chapters 231 and 232. No other statutes, articles, or codes are affected by the adopted rules.

§60.102. Petition for Adoption of Rules.

(a) In accordance with Texas Government Code §2001.021, any interested person may request that a rule be adopted, amended, or

repealed by submitting a written petition for rulemaking to the department (rulemaking petition).

(b) An interested person, as defined by Texas Government Code §2001.021, must be:

(1) a resident of this state;

(2) a business entity located in this state;

(3) a governmental subdivision located in this state; or

(4) a public or private organization located in this state that is not a state agency.

(c) The written rulemaking petition must include:

(1) the person's full name, mailing address, telephone number, and email address;

(2) a statement explaining how the person qualifies as an "interested person" as explained under subsection (b);

(3) a summary and explanation of the draft rule change;

(4) the rationale and justification for the draft rule change or the reasons why the person believes the rulemaking is necessary;

(5) a statement addressing whether there would be a cost to anyone impacted by the draft rule change, if the cost information is known or readily available;

(6) if proposing a new rule, the text of the new rule in the exact form that is desired to be adopted, with the new text underlined; and

(7) if proposing an amendment or repeal, the specific section and text of the rule the person wants to change, with deletions crossed through and additions underlined.

(d) A rulemaking petition will be denied if:

(1) it is submitted by a person who does not qualify as an "interested person"; or

(2) it does not contain the required information listed under subsection (c).

(e) The rulemaking petition must be submitted electronically on the department's website at *https://ga.tdlr.texas.gov:1443/form/RulemakingPetition* (select the appropriate chapter name); by facsimile to (512) 475-3032; or by mail to Office of the General Counsel, ATTN: Rules Coordinator, Texas Department of Licensing and Regulation, P.O. Box 12157, Austin, Texas 78711.

(f) Not later than 60 days after the date of submission of a petition that complies with the requirements of this section, the executive director or the executive director's designee shall review the petition and shall respond in writing either:

(1) denying the petition and stating the reasons for the denial; or

(2) informing the petitioner that the department will initiate a rulemaking proceeding under Texas Government Code, Chapter 2001.

(g) Repetitive Petitions. The executive director may deny a rulemaking petition if, within the preceding year, the executive director or the executive director's designee has considered a previously submitted petition for the same rule.

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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Brad Bowman
General Counsel
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SUBCHAPTER L. DEPARTMENT PERSONNEL

16 TAC §60.600, §60.601

STATUTORY AUTHORITY

The adopted rules are adopted under Texas Occupations Code, Chapter 51, which authorizes the Texas Commission of Licensing and Regulation, the Department's governing body, to adopt rules as necessary to implement that chapter and any other law establishing a program regulated by the Department. The adopted rules also are adopted under Texas Government Code, Chapter 411, Subchapter F, and Texas Occupations Code, Chapters 51 and 53, which establish the Department's statutory authority to conduct criminal history background checks on an applicant for or a holder of a license, certificate, registration, title, or permit issued by the Department.

In addition, the adopted rules are adopted under the authority of other state laws that apply to state agencies. These laws include Texas Occupations Code, Chapters 55 and 108 (Subchapter B); Texas Government Code, Chapters 551, 552, 656 (Subchapter C), 661 (Subchapter A), 2001, 2005, 2008, 2009, and 2110; Civil Practice and Remedies Code, Chapter 154; and Family Code, Chapters 231 and 232.

The statutory provisions affected by the adopted rules are those set forth in Texas Occupations Code, Chapter 51, and the program statutes for all the Department programs: Agriculture Code, Chapter 301 (Weather Modification and Control); Business and Commerce Code, Chapter 607 (Motor Fuel Metering and Quality); Education Code, Chapter 1001 (Driver and Traffic Safety Education); Government Code, Chapters 171 (Court-Ordered Programs); and 469 (Elimination of Architectural Barriers); Health and Safety Code, Chapters 401, Subchapter M (Laser Hair Removal); 754 (Elevators, Escalators, and Related Equipment); and 755 (Boilers); Labor Code, Chapter 91 (Professional Employer Organizations); Occupations Code, Chapters 202 (Podiatrists); 203 (Midwives); 401 (Speech-Language Pathologists and Audiologists); 402 (Hearing Instrument Fitters and Dispensers); 403 (Dyslexia Practitioners and Therapists); 451 (Athletic Trainers); 455 (Massage Therapy); 506 (Behavioral Analysts); 605 (Orthotists and Prosthetists); 701 (Dietitians); 802 (Dog or Cat Breeders); 1151 (Property Tax Professionals); 1152 (Property Tax Consultants); 1202 (Industrialized Housing and Buildings); 1302 (Air Conditioning and Refrigeration Contractors); 1304 (Service Contract Providers and Administrators); 1305 (Electricians); 1601 (Barbers); 1602 (Cosmetologists);

1603 (Barbers and Cosmetologists); 1802 (Auctioneers); 1901 (Water Well Drillers); 1902 (Water Well Pump Installers): 1952 (Code Enforcement Officers); 1953 (Sanitarians); 1958 (Mold Assessors and Remediators); 2052 (Combative Sports); 2303 (Vehicle Storage Facilities); 2308 (Vehicle Towing and Booting); 2309 (Used Automotive Parts Recyclers); 2310 and 2312 (Motor Fuel Metering and Quality); and 2402 (Transportation Network Companies); and Transportation Code, Chapters 551A (Off-Highway Vehicle Training and Safety); and 662 (Motorcycle Operator Training and Safety).

In addition, the statutory provisions affected by the adopted rules are those set forth in Texas Occupations Code, Chapters 53, 55, and 108 (Subchapter B); Texas Government Code, Chapters 411 (Subchapter F), 551, 552, 656 (Subchapter C), 661 (Subchapter A), 2001, 2005, 2008, 2009, and 2110; Civil Practice and Remedies Code, Chapter 154; and Family Code, Chapters 231 and 232. No other statutes, articles, or codes are affected by the adopted rules.

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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General Counsel
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For further information, please call: (512) 475-4879

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CHAPTER 82. BARBERS

The Texas Commission of Licensing and Regulation (Commission) adopts amendments to existing rules at 16 Texas Administrative Code (TAC), Chapter 82, §§82.10, 82.20, and 82.120; and the repeal of existing rules at §§82.21 - 82.23, 82.26, 82.28, 82.29, 82.31, 82.40, 82.50 - 82.52, 82.54, 82.65, 82.70 - 82.74, 82.77, 82.78, 82.90, and 82.100 - 82.114, regarding the Barbering program, without changes to the proposed text as published in the September 23, 2022, issue of the *Texas Register* (47 TexReg 6031). These rules will not be republished.

The Commission also adopts amendments to an existing rule at 16 TAC Chapter 82, §82.80, regarding the Barbering program, with changes to the proposed text as published in the September 23, 2022, issue of the *Texas Register* (47 TexReg 6031). This rule will be republished.

EXPLANATION OF AND JUSTIFICATION FOR THE RULES

The rules under 16 TAC, Chapter 82, implement Texas Occupations Code, Chapter 1603, Barbering and Cosmetology, and former Chapter 1601, Barbers, which was repealed by House Bill (HB) 1560, Article 3, 87th Legislature, Regular Session (2021).

The adopted rules are necessary to implement House Bill (HB) 1560, Article 3, 87th Legislature, Regular Session (2021), which consolidates the bifurcated licensing and regulation of barbers and cosmetologists into a single Barbering and Cosmetology program. HB 1560 adopts the recommendations of the Texas Sunset Advisory Commission to consolidate and administer the two programs as one; consolidate comparable barbering and cosmetology license types for individuals, establishments, and schools; align requirements for all licenses; eliminate instructor licenses and wig-related licenses; replace the separate advisory boards with the Barbering and Cosmetology Advisory Board; replace the separate tuition protection accounts with a single account; and eliminate state regulation of barber poles. HB 1560 repeals former Texas Occupations Code, Chapter 1601, Barbers, which applied only to barbering; repeals former Texas Occupations Code, Chapter 1602, Cosmetologists, which applied only to cosmetology; and amends Texas Occupations Code, Chapter 1603, Regulation of Barbering and Cosmetology, to provide the consolidated statutory requirements for the licensing and regulation of both barbering and cosmetology.

The adopted rules implement HB 1560 by facilitating a transition from the two current rule chapters providing the rules for barbering and cosmetology, consisting of current 16 TAC, Chapter 82, Barbers, and Chapter 83, Cosmetologists, into a single, revised Chapter 83, Barbers and Cosmetologists, providing standardized rules for barbering and cosmetology. The adopted rules repeal from Chapter 82 the provisions that will no longer be necessary because they will be addressed in streamlined provisions for barbering and cosmetology in Chapter 83. The adopted rules amend the current license types for barbers to remove instructor licenses, which were repealed by HB 1560, and provide the requirements that will be in effect before September 1, 2023, the date the Department will begin issuing the new barbering and cosmetology license types created by HB 1560 under streamlined provisions in Chapter 83. The adopted rules amend the current barbering curriculum requirements to remove instructor courses, which were repealed by HB 1560, and provide the barbering curriculum standards that will be in effect before August 1, 2023, the date the streamlined curriculum standards for barbering and cosmetology will take effect under Chapter 83.

Separate from the adopted rules, the Department is pursuing a concurrent rulemaking to amend Chapter 83 to include streamlined provisions that apply to barbering and cosmetology.

SECTION-BY-SECTION SUMMARY

The adopted rules amend §82.10, Definitions, by amending the definition for "Barber Instructor" to provide consistency with the repeal of instructor licenses by HB 1560 and to make clear that a person holding a practitioner license may provide instruction for services that are within the scope of the license; removing the definition for "Specialty Instructor" to provide consistency with the repeal of instructor licenses by HB 1560; and renumbering the remaining definitions accordingly.

The adopted rules amend §82.20, "License Requirements--Individuals", by amending the section title to instead read "License Requirements--Individuals (before September 1, 2023)" to indicate the time during which the section will be in effect. The adopted rules amend subsection (a) by removing a reference to the barber instructor license, which was repealed by HB 1560; remove current subsection (d), which relates to the barber instructor license repealed by HB 1560; relabel current subsection (e) to become new subsection (d); relabel current subsection (f) to become new subsection (e) and amend its language by correcting capitalization for consistency; relabel current subsection (g) to become new subsection (f); relabel current subsection (h) to become new subsection (g) and amend its language by correcting capitalization for consistency; relabel current subsection (i) to become new subsection (h); relabel current subsection (j) to become new subsection (i); add new subsection (j) to ex-

plain that §82.20 provides the minimum requirements for applications received before September 1, 2023; remove subsection (k), which relates to specialty instructor licenses repealed by HB 1560; remove subsection (l), which consists of provisions relating to operation of a remote service business that will instead be addressed in streamlined provisions for barbering and cosmetology in Chapter 83; and remove subsection (m), which consists of transition provisions that are no longer necessary.

The adopted rules repeal §82.21, "License Requirements--Examinations", which consists of examination provisions that will instead be addressed in streamlined provisions for barbering and cosmetology in Chapter 83.

The adopted rules repeal §82.22, "Permit Requirements--Barbershops, Specialty Shops, Dual Shops, Mini-Barbershops, Mini-Dual Shops, Mobile Shops, and Booth Rental", which consists of licensing provisions for specialty establishments that will instead be addressed in streamlined provisions for barbering and cosmetology in Chapter 83.

The adopted rules repeal §82.23, "Permit Requirements--Barber Schools", which consists of licensing provisions for establishments that will instead be addressed in streamlined provisions for barbering and cosmetology in Chapter 83.

The adopted rules repeal §82.26, "License Requirements--Renewals", which consists of license renewal provisions that will instead be addressed in streamlined provisions for barbering and cosmetology in Chapter 83.

The adopted rules repeal §82.28, "Substantial Equivalence or Endorsement and Provisional Licensure", which consists of licensing provisions that will instead be addressed in streamlined provisions for barbering and cosmetology in Chapter 83.

The adopted rules repeal §82.29, "Establishment Relocation, Change of Ownership, Owner Death or Incompetency", which consists of provisions relating to establishments that will instead be addressed in streamlined provisions for barbering and cosmetology in Chapter 83.

The adopted rules repeal §82.31, "Licenses--License Terms", which consists of licensing provisions that will instead be addressed in streamlined provisions for barbering and cosmetology in Chapter 83.

The adopted rules repeal §82.40, "Barber School Tuition Protection Account", because HB 1560 repealed the statutory authority for this account in former Texas Occupations Code, Chapter 1601, and created the Barbering and Cosmetology School Tuition Protection Account in Texas Occupations Code, Chapter 1603, which will be addressed in Chapter 83.

The adopted rules repeal §82.50, "Inspections--General", which consists of inspection provisions that will instead be addressed in streamlined provisions for barbering and cosmetology in Chapter 83.

The adopted rules repeal §82.51, "Initial Inspections--Inspection of Barber Schools Before Operation", which consists of inspection provisions that will instead be addressed in streamlined provisions for barbering and cosmetology in Chapter 83.

The adopted rules repeal §82.52, "Periodic Inspections", which consists of inspection provisions that will instead be addressed in streamlined provisions for barbering and cosmetology in Chapter 83.

The adopted rules repeal §82.54, "Corrective Modifications Following Inspection", which consists of inspection provisions that will instead be addressed in streamlined provisions for barbering and cosmetology in Chapter 83.

The adopted rules repeal §82.65, "Advisory Board on Barbering", because HB 1560 repealed the statutory authority for this advisory board in former Texas Occupations Code, Chapter 1601, and created the Barbering and Cosmetology Advisory Board in Texas Occupations Code, Chapter 1603, which will be addressed in Chapter 83.

The adopted rules repeal §82.70, "Responsibilities of Individuals", which consists of provisions relating to responsibilities of individual practitioners that will instead be addressed in streamlined provisions for barbering and cosmetology in Chapter 83.

The adopted rules repeal §82.71, "Responsibilities of Barbershops, Specialty Shops, Dual Shops, Mini-Barbershops and Mini-Dual Shops", which consists of provisions relating to responsibilities of establishments that will instead be addressed in streamlined provisions for barbering and cosmetology in Chapter 83.

The adopted rules repeal §82.72, "Responsibilities of Barber Schools", which consists of provisions relating to responsibilities of establishments that will instead be addressed in streamlined provisions for barbering and cosmetology in Chapter 83.

The adopted rules repeal §82.73, "Responsibilities of Students", which consists of provisions relating to responsibilities of students that will instead be addressed in streamlined provisions for barbering and cosmetology in Chapter 83.

The adopted rules repeal §82.74, "Responsibilities--Withdrawal, Reentry, or Transfer of Student", which consists of provisions relating to students that will instead be addressed in streamlined provisions for barbering and cosmetology in Chapter 83.

The adopted rules repeal §82.77, "Remote Service Business Responsibilities", which consists of provisions relating to remote service businesses that will instead be addressed in streamlined provisions for barbering and cosmetology in Chapter 83.

The adopted rules repeal §82.78, "Responsibilities of Mobile Shops", which consists of provisions relating to responsibilities of mobile shops that will instead be addressed in streamlined provisions for barbering and cosmetology in Chapter 83.

The adopted rules amend §82.80, "Fees", by amending the section title to instead read, "Fees (before September 1, 2023)", to indicate the time during which the section will be in effect. The adopted rules amend subsection (a) by removing current subsection (a)(2), which relates to the barber instructor license repealed by HB 1560; removing current subsection (a)(6), which relates to specialty instructor licenses repealed by HB 1560; removing current subsection (a)(10), which relates to booth rental permits, which were repealed by HB 1560; and renumbering the remaining provisions accordingly. The adopted rules amend subsection (b) by removing current subsection (b)(2), which relates to the barber instructor license repealed by HB 1560; removing current subsection (b)(5), which relates to specialty instructor licenses repealed by HB 1560; removing current subsection (b)(9), which relates to the booth rental permit repealed by HB 1560; and renumber the remaining provisions accordingly. The adopted rules amend subsection (g) by rewording to correct grammar and removing unnecessary language. The adopted rules add new subsection (k) to explain that §82.80 provides the barbering fees in effect before September 1, 2023. The

adopted rules include a change recommended by the Advisory Board to remove current subsection (b)(9), which relates to the booth rental permit repealed by HB 1560.

The adopted rules repeal §82.90, "Administrative Penalties and Sanctions", which consists of enforcement provisions that will instead be addressed in streamlined provisions for barbering and cosmetology in Chapter 83.

The adopted rules repeal §82.100, "Health and Safety Definitions", which consists of health and safety provisions that will instead be addressed in streamlined provisions for barbering and cosmetology in Chapter 83.

The adopted rules repeal §82.101, "Health and Safety Standards--Department-Approved Disinfectants", which consists of health and safety provisions that will instead be addressed in streamlined provisions for barbering and cosmetology in Chapter 83.

The adopted rules repeal §82.102, "Health and Safety Standards--General Requirements", which consists of health and safety provisions that will instead be addressed in streamlined provisions for barbering and cosmetology in Chapter 83.

The adopted rules repeal §82.103, "Health and Safety Standards--Hair Cutting, Styling, Treatment and Shaving Services", which consists of health and safety provisions that will instead be addressed in streamlined provisions for barbering and cosmetology in Chapter 83.

The adopted rules repeal §82.104, "Health and Safety Standards--Facial Services", which consists of health and safety provisions that will instead be addressed in streamlined provisions for barbering and cosmetology in Chapter 83.

The adopted rules repeal §82.105, "Health and Safety Standards--Waxing Services", which consists of health and safety provisions that will instead be addressed in streamlined provisions for barbering and cosmetology in Chapter 83.

The adopted rules repeal §82.106, "Health and Safety Standards--Manicure and Pedicure Services", which consists of health and safety provisions that will instead be addressed in streamlined provisions for barbering and cosmetology in Chapter 83.

The adopted rules repeal §82.107, "Health and Safety Standards--Electric Drill Bits", which consists of health and safety provisions that will instead be addressed in streamlined provisions for barbering and cosmetology in Chapter 83.

The adopted rules repeal §82.108, "Health and Safety Standards--Footspas", which consists of health and safety provisions that will instead be addressed in streamlined provisions for barbering and cosmetology in Chapter 83.

The adopted rules repeal §82.109, "Health and Safety Standards--Wig and Hairpiece Services", which relates to standards for wig services that were deregulated by HB 1560.

The adopted rules repeal §82.110, "Health and Safety Standards--Hair Weaving Services", which consists of health and safety provisions that will instead be addressed in streamlined provisions for barbering and cosmetology in Chapter 83.

The adopted rules repeal §82.111, "Health and Safety Standards--Blood and Body Fluids", which consists of health and safety provisions that will instead be addressed in streamlined provisions for barbering and cosmetology in Chapter 83.

The adopted rules repeal §82.112, "Health and Safety Standards--Prohibited Products or Practices", which consists of health and safety provisions that will instead be addressed in streamlined provisions for barbering and cosmetology in Chapter 83.

The adopted rules repeal §82.113, "Health and Safety Standards--FDA", which consists of health and safety provisions that will instead be addressed in streamlined provisions for barbering and cosmetology in Chapter 83.

The adopted rules repeal §82.114, "Health and Safety Standards--Establishments", which consists of health and safety provisions that will instead be addressed in streamlined provisions for barbering and cosmetology in Chapter 83.

The adopted rules amend §82.120, "Technical Requirements--Curricula Standards", by amending the section title to instead read, "Technical Requirements--Curricula Standards (before August 1, 2023)" to indicate the time during which the rule will be in effect. The adopted rules remove current subsection (a), which relates to instructor courses repealed by HB 1560; remove current subsection (b), which consists of curriculum standards for the barber instructor license repealed by HB 1560; remove current subsection (c), which consists of curriculum standards for the barber instructor license repealed by HB 1560; relabel current subsection (d) to become new subsection (a); relabel current subsection (e) to become new subsection (b); relabel current subsection (f) to become new subsection (c) and amend its language to remove the requirement for 500 hours of related high school courses from the curriculum standards for the class A barber certificate in a public secondary program for high school students; relabel current subsection (g) to become new subsection (d); relabel current subsection (h) to become new subsection (e); relabel current subsection (i) to become new subsection (f); relabel current subsection (j) to become new subsection (g); and relabel current subsection (k) to become new subsection (h). The adopted rules remove current subsections (l)(2)(G) and (l)(2)(H), which relate to instructor courses repealed by HB 1560, and relabel the remaining subdivisions accordingly; relabel current subsection (l) to become new subsection (i); and amend new subsection (i)(3) by removing reference to the instructor license repealed by HB 1560. The adopted rules add new subsection (j) to explain that §82.120 provides the barbering curriculum standards in effect before August 1, 2023.

PUBLIC COMMENTS

The Department drafted and distributed the proposed rules to persons internal and external to the agency. The proposed rules were published in the September 23, 2022, issue of the *Texas Register* (47 TexReg 6031). The public comment period closed on October 24, 2022. The Department received comments from 19 interested parties on the proposed rules. The public comments are summarized below.

Comment: Seven commenters, including Remington College, were opposed to combining the barbering and cosmetology programs.

Department Response: The Department disagrees with the comments because HB 1560 requires the programs to be combined. The Department did not make any changes to the proposed rules as a result of the comments.

Comment: Three commenters were in favor of combining the barbering and cosmetology programs.

Department Response: The Department appreciates the comments in support of the proposed rules; however, HB 1560 requires the barbering and cosmetology programs to be combined. The Department did not make any changes to the proposed rules as a result of the comments.

Comment: One commenter questioned whether the combination of the barber and cosmetology programs will cause all the license types to be combined so that all cosmetologists become barbers.

Department Response: The Department disagrees with the conclusion suggested by the comment. Cosmetology operators will continue to be cosmetology operators, and Class A barbers will continue to be Class A barbers. The Department did not make any changes to the proposed rules as a result of the comment.

Comment: Two commenters questioned whether the scope of practice will change for current practitioner or establishment license holders.

Department Response: The Department agrees with the conclusion suggested by the comment. Although the scope of practice for most individual practitioner license holders will remain the same, HB 1560 adds to the scope of practice for Class A barbers the services described under Texas Occupations Code §1603.0011(a)(6) regarding the removal of superfluous body hair. Also, as a result of HB 1560, establishment license holders will be able to offer any barbering or cosmetology services with a single establishment license. The Department did not make any changes to the proposed rules as a result of the comment.

Comment: One commenter questioned whether barber poles are being taken away from barbers.

Department Response: The Department disagrees with conclusion suggested by the comment. Barbers will continue to be allowed to display a barber pole, but they will no longer be the only ones allowed to display the pole. This change implements the Sunset staff recommendation to end state regulation of barber poles. The Department did not make any changes to the proposed rules as a result of the comment.

Comment: Five commenters, including Blade Craft Barber Academy, were opposed to the repeal of instructor licenses.

Department Response: The Department disagrees with the comments because HB 1560 requires the repeal of instructor licenses. The Department did not make any changes to the proposed rules as a result of the comments.

Comment: One commenter suggested adding non-license requirements for individuals teaching courses, such as requiring a high school diploma or the passing of an exam.

Department Response: The Department disagrees with the comment because it is inconsistent with Texas Occupations Code §1603.2303(a)(2), which provides that a person who holds a practitioner license may provide instruction in the barbering or cosmetology services for which the person holds a license to perform. The Department did not make any changes to the proposed rules as a result of the comment.

ADVISORY BOARD RECOMMENDATIONS AND COMMISSION ACTION

The Barbering and Cosmetology Advisory Board met on October 31, 2022, to discuss the proposed rules and the public comments received. The Advisory Board recommended that the Commission adopt the proposed rules as published in the Texas Register with a change to §82.80(b) to remove a reference to the booth rental license repealed by HB 1560. At its meeting on December 6, 2022, the Commission adopted the proposed rules with a change as recommended by the Advisory Board.

16 TAC §§82.10, 82.20, 82.80, 82.120

STATUTORY AUTHORITY

The adopted rules are adopted under Texas Occupations Code, Chapters 51 and 1603, which authorize the Texas Commission of Licensing and Regulation, the Department's governing body, to adopt rules as necessary to implement these chapters and any other law establishing a program regulated by the Department. The adopted rules are also adopted under former Texas Occupations Code, Chapter 1601, which was repealed by HB 1560, Article 3, Section 3.33, but remains in effect by authority of the transition provisions in HB 1560, Article 3, Sections 3.34-3.42.

The statutory provisions affected by the adopted rules are those set forth in Texas Occupations Code, Chapters 51 and 1603. No other statutes, articles, or codes are affected by the adopted rules.

§82.80. Fees (before September 1, 2023).

(a) Application Fees:

(1) Class A Barber Certificate--$55

(2) Specialty License--Barber Technician, Manicurist, Barber Technician/Manicurist, Barber Technician/Hair Weaving--$30

(3) Student Permit--$25

(4) Specialty Certificate of Registration--Hair Weaving--$30

(5) Barbershop Permit--$60

(6) Mini-Barbershop Permit--$60

(7) Specialty Shop Permit--$50

(8) School Original Permit--$300

(9) Dual Shop--$130

(10) Mini-Dual Shop Permit--$60

(11) Mobile Shop--$60

(b) Renewal Fees:

(1) Class A Barber Certificate--$55

(2) Specialty License--Barber Technician, Manicurist, Barber Technician/Manicurist, Barber Technician/Hair Weaving--$30

(3) Specialty Certificate of Registration--Hair Weaving--$30

(4) Barbershop Permit--$60

(5) Mini-Barbershop Permit--$60

(6) Specialty Shop Permit--$50

(7) School Permit--$200

(8) Dual Shop--$100

(9) Mini-Dual Shop Permit--$60

(10) Mobile Shop--$60

(c) Substantial equivalence or Endorsement Fee--$55

(d) Revised/Duplicate License/Certificate/Permit/Registration--$25

(e) Verification of license, permit or certificate to other states--$15

(f) Law and Rules Book Fee--$10

(g) Late renewal fees for licenses, certificates, and permits issued under this chapter are provided under §60.83 (relating to Late Renewal Fees).

(h) Initial Inspection or Re-inspection of school Fees (for each occurrence)--$200

(i) All fees are nonrefundable, except as otherwise provided by law or commission rule.

(j) Law and rule book fee is included in the application and renewal fees for student, individual and establishment licenses, certificates, and permits.

(k) This section provides the fees that are required before September 1, 2023. Section 83.201 provides the fees that are required on or after September 1, 2023.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on December 9, 2022.

TRD-202204898
Brad Bowman
General Counsel
Texas Department of Licensing and Regulation
Effective date: January 1, 2023
Proposal publication date: September 23, 2022
For further information, please call: (512) 463-7750

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16 TAC §§82.21 - 82.23, 82.26, 82.28, 82.29, 82.31, 82.40, 82.50 - 82.52, 82.54, 82.65, 82.70 - 82.74, 82.77, 82.78, 82.90, 82.100 - 82.114

STATUTORY AUTHORITY

The adopted repeals are adopted under Texas Occupations Code, Chapters 51 and 1603, which authorize the Texas Commission of Licensing and Regulation, the Department's governing body, to adopt rules as necessary to implement these chapters and any other law establishing a program regulated by the Department. The adopted repeals are also adopted under former Texas Occupations Code, Chapter 1601, which was repealed by HB 1560, Article 3, Section 3.33, but remains in effect by authority of the transition provisions in HB 1560, Article 3, Sections 3.34 - 3.42.

The statutory provisions affected by the adopted repeals are those set forth in Texas Occupations Code, Chapters 51 and 1603. No other statutes, articles, or codes are affected by the adopted repeals.

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 83. BARBERS AND COSMETOLOGISTS

The Texas Commission of Licensing and Regulation (Commission) adopts amendments to existing rules at 16 Texas Administrative Code (TAC), Chapter 83, §§83.1, 83.10, 83.20 - 83.26, 83.29, 83.40, 83.51, 83.70, 83.71, 83.73, 83.74, 83.77, 83.78, 83.80, 83.90, 83.100-83.108, 83.110-83.115, and 83.120; new rules at §§83.2, 83.31, 83.50, 83.65, and 83.201; the repeal of existing rules at §§83.31, 83.50, 83.52, 83.54, 83.65, and 83.109; and an amendment to the rule chapter title, regarding the Barbering and Cosmetology program, without changes to the proposed text as published in the September 23, 2022, issue of the *Texas Register* (47 TexReg 6039). These rules will not be republished.

The Commission also adopts amendments to existing rules at 16 Texas Administrative Code (TAC), Chapter 83, §83.28 and §83.72, and new rules at §83.200 and §83.202, regarding the Barbering and Cosmetology program, with changes to the proposed text as published in the September 23, 2022, issue of the *Texas Register* (47 TexReg 6039). These rules will be republished.

EXPLANATION OF AND JUSTIFICATION FOR THE RULES

The rules under 16 TAC, Chapter 83, implement Texas Occupations Code, Chapter 1603, Barbering and Cosmetology, and former Chapter 1602, Cosmetologists, which was repealed by House Bill (HB) 1560, Article 3, 87th Legislature, Regular Session (2021).

The adopted rules are necessary to implement HB 1560, which consolidates the bifurcated licensing and regulation of barbers and cosmetologists into a single Barbering and Cosmetology program. HB 1560 adopts the recommendations of the Texas Sunset Advisory Commission to consolidate and administer the two programs as one; consolidate comparable barbering and cosmetology license types for individuals, establishments, and schools; align requirements for all licenses; eliminate instructor licenses and wig-related licenses; replace the separate advisory boards with the Barbering and Cosmetology Advisory Board (Advisory Board); replace the separate tuition protection accounts with a single account; and eliminate state regulation of barber poles. HB 1560 repeals former Texas Occupations Code, Chapter 1601, Barbers, which applied only to barbering; repeals former Texas Occupations Code, Chapter 1602, Cosmetologists, which applied only to cosmetology; and amends Texas Occupations Code, Chapter 1603, Regulation of Barbering and Cosmetology, to provide the consolidated statutory requirements for the licensing and regulation of both barbering and cosmetology.

The adopted rules implement HB 1560 by creating a transition from the two current rule chapters providing the rules for barbering and cosmetology, consisting of current 16 TAC, Chapter 82, Barbers, and Chapter 83, Cosmetologists, into a single, revised Chapter 83, Barbers and Cosmetologists, providing standardized rules for barbering and cosmetology. The adopted rules

harmonize the rules for barbers and cosmetologists by aligning health and safety standards, license requirements, and responsibilities for comparable practitioner, school, and establishment license types, in accordance with the new statutory framework provided by HB 1560. The adopted rules include transition provisions to explain how each current license type will transition to the corresponding new license type. The adopted rules provide curriculum standards for each new license type that become effective on August 1, 2023, a date that enables schools to adjust their courses for the fall semester. The adopted rules provide for the Department to begin issuing the new license types on September 1, 2023, with updated fees set in amounts reasonable and necessary to cover the costs of administering the program.

Separate from the adopted rules, the Department is pursuing a concurrent rulemaking to amend Chapter 82 by repealing provisions that will become unnecessary due to the changes to Chapter 83 in the adopted rules.

Health and Safety Workgroup Recommendations

The adopted rules include recommendations by the Health and Safety Workgroup of the Advisory Board to exclude isopropyl and ethyl alcohol from the list of Department-approved chemicals that may be used as a disinfectant for implements and tools; and align establishment equipment requirements with the type of services being offered rather than the type of establishment license held, to alleviate unnecessary expenses for licensees.

Education and Examination Workgroup Recommendations

The adopted rules include recommendations by the Education and Examination Workgroup of the Advisory Board to impose a requirement of four hours of continuing education for the renewal of a practitioner license, with a temporary exemption for current holders of barbering licenses; update the topics required and allowed for continuing education hours; streamline the curriculum standards between similar barbering and cosmetology license types; allow class A barber students and cosmetology operator students to be taught together for 700 hours of the 1,000-hour course; and increase the percentage of hours that may be obtained through field trips.

SECTION-BY-SECTION SUMMARY

The adopted rules amend the title of Chapter 83 to read "Barbers and Cosmetologists" to reflect the chapter's expanded applicability to barbers and cosmetologists.

The adopted rules amend §83.1, Authority, by revising the list of rulemaking authority to include HB 1560, Article 3, and remove Chapter 1602, which was repealed by HB 1560.

The adopted rules add new §83.2, Transition Provisions, to provide guidance regarding the transition to the new license types and requirements created by HB 1560. The adopted rules add new subsection (a) to clarify the services that may be performed by current holders of a cosmetology hair weaving specialty certificate until the certificate expires or is replaced by a hair weaving license. The adopted rules add new subsection (b) to provide the services that may be performed by current holders of barber specialty licenses and the applicable replacement license types, including new subsection (b)(1) for holders of barber technician licenses, new subsection (b)(2) for holders of barber manicurist licenses, new subsection (b)(3) for holders of barber technician/manicurist specialty licenses, new subsection (b)(4) for holders of barber technician/hair weaving specialty licenses, and new subsection (b)(5) for holders of barber hair weaving specialty certificates of registration. The adopted rules add new subsection (c) to clarify that current holders of barber or cosmetology practitioner licenses may provide instruction for the same activities they are allowed to perform under their license; add new subsection (d) to provide an exemption for current holders of barber school permits from the requirement in §83.72(u) and to clarify that they are eligible for a private or public school license; and add new subsection (e) to specify what course types schools can apply to the Department for approval to provide, including new subsection (e)(1) to provide the standards in effect before September 1, 2023, and new subsection (e)(2) to specify the standards in effect on or after September 1, 2023. The adopted rules add new subsection (f) to clarify the services that may be provided by current holders of establishment licenses and the applicable replacement license types, including new subsection (f)(1) for holders of barbershop permits, new subsection (f)(2) for holders of beauty shop licenses, new subsection (f)(3) for holders of dual shop licenses, new subsection (f)(4) for holders of barber manicurist specialty shop permits, new subsection (f)(5) for holders of hair weaving specialty shop permits, and new subsection (f)(6) for holders of mini or mobile licenses. The adopted rules add new subsection (g) to clarify that a reference to a license issued under the Act also refers to the corresponding license type issued before the license transition.

The adopted rules amend §83.10, Definitions, to provide consistency with the changes and terminology in HB 1560, by amending the definition for "Act"; adding a definition for "Barbering"; removing the definition for "Beauty Culture School"; amending the definition for "Board"; removing the definition for "Booth rental license"; adding a definition for "Class A Barber"; amending the definition for "Common Area"; adding a definition for "Cosmetology"; removing the definition for "Cosmetology establishment"; relocating the definition for "Department"; amending the definition for "Digitally Prearranged Remote Service"; removing the definition for "Dual Shop"; adding a definition for "Establishment"; amending the definition for "Esthetician"; amending the definition for "Esthetician/Manicurist"; adding a definition for "Executive Director"; relocating the definition for "Eyelash Extension Application"; relocating and amending the definition for "Eyelash Extension Specialist"; adding a definition for "Full-service Establishment"; amending the term "Hair weaver" to become "Hair weaving specialist" and amending its definition; adding a definition for "Hair weaving specialist/esthetician"; amending the definition for "Instructor"; amending the definition for "Law and Rules Book"; amending the definition for "License"; amending the definition for "License by substantial equivalence"; amending the definition for "Manicurist"; amending the term "Mini-Salon" to become "Mini-Establishment" and amending its definition; amending the term "Mobile Shop" to become "Mobile Establishment" and amending its definition; amending the definition for "Operator"; adding a definition for "Practitioner"; adding a definition for "Private School"; amending the definition for "Provisional license"; adding a definition for "Public School"; amending the definition for "Remote Service Business"; relocating the definition for "Safety Razor"; adding a definition for "School"; amending the definition for "Special Event"; adding a definition for "Specialty Establishment"; amending the definition for "Specialty Instructor"; removing the definition for "Specialty Salon or Specialty Shop"; amending the definition for "Student Permit"; removing the definition for "Wig Specialist"; and renumbering the remaining provisions accordingly.

The adopted rules amend §83.20, License Requirements--Individuals, by amending the rule title to read "License Requirements--Individuals (before September 1, 2023)" to clarify the rule's applicability to practitioner license applications received by the Department before September 1, 2023; amending subsection (a) to rephrase subsection (a)(1) for clarity, add clarifying language to subsection (a)(2), remove the text in current subsection (a)(5)(B) that allowed instruction hours to be completed in a public school vocational program, and relabel the remaining subsections accordingly; amending subsection (b)(5)(C)(i) to clarify that an application for an esthetician/manicurist specialty license received by the Department on or after August 1, 2023, is only required to have 800 hours of esthetician/manicure instruction; rephrasing subsection (c) for clarity; amending subsection (e) to remove references to the wig specialty certificate that was repealed by HB 1560, remove the text of current subsection (e)(4)(B) providing the instruction hours for a wig specialty certificate, relocate the text of current subsection (e)(4)(A) to the main body of subsection (e)(4), and relabel subsection (e)(4) to remove subsections (e)(4)(A) and (e)(4)(B); removing the current text in subsection (f) providing the eligibility requirements for an instructor or specialty instructor license, which were repealed by HB 1560; relocating the current text in subsection (g) to subsection (f) and rephrasing the text for clarity; adding new text to subsection (g) to clarify the applicability of the rule; removing subsection (h), which provided that a license application is valid for one year from the date it is filed with the Department, because the subject is addressed in the Department's general procedural rules in 16 TAC, Chapter 60, which are applicable to all programs administered by the Department; removing subsection (i), which contained requirements for operating a remote service business, and relocating its substance to §83.77(a); and removing subsection (j), which contained transition provisions that are no longer necessary.

The adopted rules amend §83.21, License Requirements--Examinations, by rephrasing subsection (a)(1) for clarity; amending subsection (b) to expand its applicability beyond operator hours; amending subsection (d) to rephrase its wording for clarity and expand its applicability to barbering services; amending subsection (e) to rephrase its wording for clarity and remove the numerical designation for the passing grade of an examination; and amending subsection (h) to clarify that the Department may require proof of parental approval for models under 18 years of age.

The adopted rules amend §83.22, License Requirements--Beauty Salons, Specialty Salons, Mini-Salons, Dual Shops, Mini-Dual Shops, Mobile Shops, and Booth Rentals (Independent Contractors). The adopted rules amend the section title to read "License Requirements--Establishments" to clarify the section's expanded applicability to all establishments; amend subsection (a) to expand its applicability to all establishments; rephrase subsection (a)(3) for clarity and to add the requirement for the establishment application to be verified; amend the punctuation of subsection (a)(4) to allow for additional subsections; add new subsection (a)(5) to require an applicant to own or rent the establishment; add new subsection (a)(6) to require the applicant to have not committed an act that constitutes a ground for denial of a license; amending subsection (b) by removing the current text regarding applications for dual shop or mini-dual shop licenses, which were repealed by HB 1560, and adding text to provide additional requirements for establishment license applicants, including new subsection (b)(1) to require the establishment to meet minimum health and safety standards for an establishment, and new subsection (b)(2) to require the establishment to comply with all other requirements; amending subsection (c) to update a cross-reference and expand the rule's applicability to all mobile establishments; and removing subsection (d), which provided requirements for operating a remote services business that are duplicative of new §83.77(a), and provided requirements for operating a beauty salon, specialty salon, dual shop, mobile shop, mini-salon, or mini-dual shop, all of which were repealed by HB 1560.

The adopted rules amend §83.23, License Requirements--Beauty Culture Schools. The adopted rules amend the rule title to read "License Requirements--Schools" to clarify the section's expanded applicability to all barber and cosmetology schools; amend subsection (a) to expand its applicability to all barber and cosmetology schools; rephrase subsection (a)(3) for clarity; amend subsection (a)(4) to remove subsection (a)(4)(A) regarding fees for a private beauty culture school and subsection (a)(4)(B) regarding fees for a public beauty culture school, and add text referring to fees required for any barber or cosmetology school; add new subsection (a)(5) to require a school license applicant to meet the health and safety standards; add new subsection (a)(6) to contain text relocated from current subsection (a)(5) regarding financial statements for private beauty schools and amend the text to expand its applicability to all private school license applicants, to require the financial statement to be provided in the format prescribed by the Department, and to require the applicant to demonstrate sufficient financial resources to operate for at least 12 months without relying on student tuition; amend subsection (b) to expand its applicability to all barber and cosmetology schools; amend subsection (c) to expand its applicability to all private barber and cosmetology schools and remove unnecessary language; amend subsection (c)(1) by changing "adequate drinking fountain facilities" to "adequate drinking water"; amend subsection (d) to expand its applicability to all barber and cosmetology schools and remove unnecessary language; amend subsection (d)(1) by removing the requirement for a public school to have an office and a dispensary; and amend subsection (e) to expand its applicability to all barber and cosmetology schools and remove unnecessary language.

The adopted rules amend §83.24, Inactive Status, by amending subsection (a) to rephrase and reorganize the text to include new subsection (a)(1), containing the requirements for submitting an application, and new subsection (a)(2), containing the requirement to pay a fee; amending subsection (b) to expand its applicability to any act of barbering or cosmetology; and rephrasing subsection (d)(1) for clarity.

The adopted rules amend §83.25, License Requirements--Continuing Education. The adopted rules amend subsection (b) to expand its applicability to all practitioner licenses, to remove unnecessary language, and to rephrase its language for clarity; amend subsection (b)(1) to provide consistency in capitalization of terminology; amend subsection (b)(2) to require renewals on or after September 1, 2025, to include completion of one hour of continuing education on human trafficking prevention; add new subsections (b)(2)(A) through (b)(2)(C) to specify the information that must be included in the hour on human trafficking prevention; add new subsection (b)(3) to require the remaining continuing education hours to cover any topics listed in new subsection (h); amend subsection (c) to require continuing education taught before September 1, 2025, to include required information about human trafficking prevention, without a minimum time requirement for the topics; remove current subsection (d), which con-

tained the requirements for renewal of instructor licenses, which were repealed by HB 1560; remove current subsection (e), which contains continuing education requirements that unnecessarily duplicate the requirements in new subsection (b)(2); relabel current subsection (f) to become new subsection (d); reorganize current subsection (g) by relabeling current subsection (g)(1) as new subsection (e) and relabeling current subsection (g)(2) as new subsection (f) and adding a reference to 16 TAC, Chapter 59, for clarity; relabel current subsection (h) to become new subsection (g) and rephrase its language for clarity; relabel current subsection (i) to become new subsection (h); amend new subsection (h)(1) and (h)(2) to provide consistency in capitalization; amend new subsection (h)(3) to rephrase its wording for clarity and to add a reference to the curriculum standards in §83.202; add new subsection (h)(4) to include mental health awareness as an approved topic for continuing education courses; add new subsection (h)(5) to include human trafficking prevention as an approved topic for continuing education, including new subsections (h)(5)(A) through (h)(5)(C), which detail the required information for the topic; relabel current subsection (j) to become new subsection (i); relabel current subsection (k) to become new subsection (j); relabel current subsection (l) to become new subsection (k); amend new subsection (k) to provide alternate continuing education requirements for practitioners who have been licensed for at least 15 years, including new subsection (k)(1) for renewals before September 1, 2025, and new subsection (k)(2) for renewals on or after September 1, 2025; and add new subsection (l) to provide an exemption from continuing education requirements for barber licensees until September 1, 2025.

The adopted rules amend §83.26, Licensing Requirements--Renewals. The adopted rules amend subsection (a)(2) by rephrasing its wording for clarity; amend subsection (b) to expand its applicability to all practitioner licenses; and amend subsection (c) to expand its applicability to barbering.

The adopted rules amend §83.28, Substantial Equivalence or Endorsement and Provisional Licensure. The adopted rules amend the rule title to read "Substantial Equivalence and Provisional Licensure"; amend the body of subsection (a) by removing unnecessary language; rephrase subsection (a)(1) for clarity; amending subsections (a)(4) and (a)(5) to provide grammatical consistency; adding new subsection (a)(6) to provide an age requirement of 17 years for applicants on or after September 1, 2023; remove unnecessary language from subsection (c); amend subsection (d) to remove the exception that prohibited the Department from waiving operator license requirements for the purpose of substantial equivalence licensing; amend subsection (e) to expand its applicability to barbering and cosmetology licenses; amend subsection (f)(1) by adding the requirement for the provisional license application to be submitted in the manner prescribed by the Department, and expanding its applicability to all barber and cosmetology licenses; remove unnecessary language from subsection (f)(2); amend subsection (f)(3) to provide the Department authority to recognize examinations for purposes of provisional licensing; amend subsection (g) to expand its applicability to barbering and remove unnecessary language; amend subsection (h) by removing unnecessary language and adding language allowing the Department to extend the provisional license period if examination results have not been received; amend subsection (i) by removing unnecessary language; amend subsection (j) by expanding its applicability to all barber and cosmetology licenses; and add new subsection (k), which allows an applicant for a class A barber or operator license to substitute documented work experience for required course hours, and provides the maximum allowed rate of substitution per month and the maximum total hours that may be substituted. The adopted rules include changes to subsection (k) recommended by the Advisory Board to add language clarifying that the work experience must be performed in the jurisdiction in which the person is licensed.

The adopted rules amend §83.29 by amending its title to read "Establishment or School Relocation, Change of Ownership, Owner Death or Incompetency"; amending subsection (b) to remove unnecessary language and to extend its exemption to all mobile establishments; relabel current subsection (c) to become new subsection (d); add new subsection (c) to provide the requirements for the relocation of a school; amend new subsection (d) to expand its applicability to schools; and amend subsection (d)(4) to add clarifying language.

The adopted rules repeal current §83.31, "Licenses--License Terms", and add new §83.31, with the same section title, consisting of new subsection (a) to provide a license term of two years for practitioner licenses and establishment licenses; new subsection (b) to provide a license term of one year for school licenses; and new subsection (c) to provide that a student permit does not expire.

The adopted rules amend §83.40 by amending its title to read "Barbering and Cosmetology School Tuition Protection Account"; amending subsection (a) provide consistency with the barbering and cosmetology school tuition protection account established in Occupations Code §1603.3608; amending subsections (a)(1) and (a)(2) to expand their applicability to all private schools; amending subsection (b) to expand its applicability to all private schools, update terminology, and increase the required minimum account balance from $200,000 to $225,000 to provide consistency with Occupations Code §1603.3608(a); amending subsections (d) and (e) to expand their applicability to all private schools; amending subsection (f) by updating terminology and increasing the maximum total claim payment from $10,000 to $35,000 to provide consistency with Occupations Code §1603.3607(c); amending subsections (g) and (h) to expand their applicability to all private schools and update terminology; amending subsection (j) to expand its applicability to all private schools; and amending subsection (k) to expand its applicability to all private schools and update terminology.

The adopted rules repeal current §83.50, "Inspections--General", and add new §83.50, with the same section title. By repealing and replacing this section, the adopted rules effectively amend subsection (a) by replacing its current language with new language requiring schools and establishments to be inspected in accordance with Texas Occupations Code, Chapter 51, and the Department's inspection rules in 16 TAC, Chapter 60; amend subsection (b) by replacing its current language with new language requiring an establishment to provide the Department upon request a list of all independent contractors and all mini-establishment licensees who work in the establishment; amend subsection (c) by replacing its current language with new language providing that the Department will make information available to establishments and schools regarding best practices for risk-reduction techniques; and amend subsection (d) by adding references investigators and investigations.

The adopted rules amend §83.51 by amending its title to read "Initial Inspections--Inspection of Schools Before Operation" to clarify its expanded applicability to all schools; amending sub-

section (a) to expand its applicability to all schools; amending subsection (b) to expand its applicability to all schools; amending subsection (d) by replacing its current language with new language providing that schools must be inspected in accordance with Texas Occupations Code, Chapter 51, and the Department's inspection rules in 16 TAC, Chapter 60; removing current subsection (e) and relabeling current subsection (f) to become new subsection (e) and amending its language to expand its applicability to all schools and remove its reference to a fee for a reinspection request.

The adopted rules repeal §83.52, Periodic Inspections, to remove requirements for inspections to be conducted within a specified period of time and allow the Department to focus its resources on the risk-based inspections required by Texas Occupations Code §51.211.

The adopted rules repeal §83.54, Corrective Modifications Following Inspection, because the requirements relating to corrective actions are addressed in the Department's procedural rules at 16 TAC, Chapter 60, which apply to all programs administered by the Department.

The adopted rules repeal current §83.65, Advisory Board on Cosmetology, and replace it with new §83.65, Barbering and Cosmetology Advisory Board, to provide consistency with the advisory board established in Occupations Code §1603.051, as amended by HB 1560. The new section consists of new subsection (a), which provides the purpose of the advisory board, and new subsection (b), which provides the composition of the advisory board and the length of terms of its members.

The adopted rules amend §83.70, Responsibilities of Individuals, by amending the section title to read "Responsibilities of Individual Practitioners" to provide clarity; amending subsections (a) through (c) to update terminology for consistency and clarity; removing current subsection (d) to remove requirements relating to booth rental permits, which were repealed by HB 1560; relabeling current subsection (e) to become new subsection (d) and updating its terminology for consistency and clarity; relabeling current subsection (f) to become new subsection (e) and amending its language to require current licenses to be either posted near the licensee's workstation or made available at the establishment reception desk; relabeling current subsection (g) to become new subsection (f) and amending its language to provide the minimum size of the photograph of the licensee that must be attached to the front of a practitioner license or permit, to allow the photograph to be digitally displayed along with an image of the license or permit, and to prohibit the photograph from obscuring any information on the license or permit; relabeling current subsection (h) to become new subsection (g) and updating its terminology for consistency and clarity; relabeling current subsection (i) to become new subsection (h) and updating its terminology for consistency and clarity; relabeling current subsection (j) to become new subsection (i) and amending its text to remove unnecessary language and update terminology for consistency and clarity; and amending current subsection (k) to become new subsection (j) and updating its terminology for consistency and clarity.

The adopted rules amend §83.71, Responsibilities of Beauty Salons, Mini-Salons, Specialty Salons, Dual Shops, Mini-Dual Shops, and Booth Rentals. The adopted rules amend the section title to read "Responsibilities of Establishments" to reflect the section's expanded applicability to all barbering and cosmetology establishments; amend subsection (a) to require each establishment to have the current law and rules book issued by the Department, rather than just a copy of the book; amend subsection (c) to expand its applicability to all establishments and remove the requirement for a booth rental license, which was repealed by HB 1560; amend subsection (d) to expand its applicability to all establishments and update its terminology for consistency; amend subsection (e) to expand its applicability to all mini-establishment license holders and update its terminology for consistency; amend subsection (f) to expand its applicability to all establishments and update its terminology for consistency; amend subsection (g) to expand its applicability to all establishments; amend subsection (g)(1) to clarify that the sink required for each establishment must be "in an area where services are performed"; amend subsection (g)(2) to update its terminology for consistency; amend subsection (h)(1) to expand its applicability to all full-service establishments and mini-establishments and update its terminology for consistency; amend subsection (h)(1)(B) to update its terminology for consistency; amend subsection (h)(1)(C) to improve grammar and to identify the services that, if provided, would require an establishment to have at least one shampoo bowl or would require a mini-establishment to have access to at least one shampoo bowl; amend subsection (h)(2) to expand its applicability to all establishments providing manicure services and update its terminology for consistency and clarity; amend subsection (h)(3) to expand its applicability to all establishments providing esthetician services and update terminology for consistency and clarity; amend subsection (h)(4) to expand its applicability to all establishments providing combination esthetician/manicure services and update terminology for consistency; amend subsection (h)(5) to expand its applicability to all establishments providing eyelash extension services and update terminology for consistency; amend subsection (h)(5)(A) to allow a chair to fulfill the requirement for equipment allowing the consumer to lie completely flat and to rephrase its language for clarity; amend subsections (h)(5)(B) and (h)(5)(C) to provide grammar and punctuation that allows for the addition of new subsection (h)(5)(D), which adds the requirement for "one mirror"; remove current subsection (h)(6) because it addresses requirements for wig salons, which were repealed by HB 1560; relabel current subsection (h)(7) as new subsection (h)(6), expand its applicability to all establishments providing hair weaving services and update terminology for consistency, add a requirement for "one chair dryer or handheld dryer" in new subsection (h)(6)(C), and add new subsection (h)(6)(D) to require at least one shampoo bowl; remove current subsection (h)(8) because it provides requirements applicable to dual shops, which were repealed by HB 1560; remove current subsection (h)(9) because it provides requirements applicable to mini-dual shops, which were repealed by HB 1560; amend subsection (i) to expand its applicability to all practitioners acting as independent contractors; amend subsection (j) to expand its applicability to all practitioners acting as independent contractors; amend subsection (j)(1) to expand its applicability to all independent contractor practitioners in full-service establishments and update terminology for consistency; amend subsection (j)(2) to expand its applicability to all independent contractor practitioners in establishments providing esthetician services and updating its terminology for consistency and grammar; amend subsection (j)(3) to expand its applicability to all independent contractor practitioners in establishments providing manicure services and updating its terminology for consistency and clarity; amend subsection (j)(4) to expand its applicability to all independent contractor practitioners in establishments providing eyelash extension services, to allow a chair to fulfill the requirement for equipment allowing the consumer to lie completely flat, and to add the requirement for a mir-

ror; amend subsection (k) to expand its applicability to all practitioners acting as independent contractors; amend subsection (l) to expand its applicability to all establishments and to change the current requirement to display their most recent inspection report to instead require only that they display a notice that a copy of the inspection report is available upon request; amend subsection (m) to expand its applicability to all licensed establishments and update its statutory references for consistency; add new subsection (n) to impose a duty on establishments to ensure their practitioners are properly licensed; add new subsection (o) to prohibit establishments from performing or offering services outside the scope of their license; add new subsection (p) to provide restrictions on operating multiple establishments or schools on the same premises at the same time, with an exception for mini-establishments and mobile establishments; and add new subsection (q) to require establishments to display a copy of the health and safety rules and to clarify that this requirement may be met by making the law and rules book accessible to all practitioners working in the establishment.

The adopted rules amend §83.72, Responsibilities of Beauty Culture Schools, by amending the section title to read "Responsibilities of Schools" to reflect the section's expanded applicability to all barbering and cosmetology schools; amending subsection (a) to update terminology for consistency and to clarify that each school must have the current law and rules book issued by the Department and not merely a copy of the book; amending subsection (b) to update terminology for consistency; amending subsection (c) by rephrasing language for clarity and updating terminology for consistency; amending subsection (d) to update terminology for clarity; removing current subsection (d) because it addresses student-instructors, which were repealed by HB 1560; relabeling current subsection (f) to become new subsection (e) and amending its language to remove references to licensed instructors and student-instructors, which were repealed by HB 1560, to require an instructor's physical presence for practical curriculum activities and an instructor's physical presence or participation through distance education for theory curriculum activities, and to update terminology for consistency; relabeling current subsection (g) to become new subsection (f); relabeling current subsection (h) to become new subsection (g) and updating its terminology for clarity; relabeling current subsection (i) to become new subsection (h); relabeling current subsection (j) to become new subsection (i), adding language to require schools to ensure compliance with the subsection's requirements, and updating its phrasing and terminology for clarity and consistency; relabeling current subsection (k) to become new subsection (j) and removing its references to licensed instructors and student-instructors, which were repealed by HB 1560; relabeling current subsection (l) to become new subsection (k) and updating its language to add clarity and correct grammar; relabeling current subsection (m) to become new subsection (l) and updating its language to add clarity; relabeling current subsection (n) to become new subsection (m) and updating its language to improve clarity; relabeling current subsection (o) to become new subsection (n); relabeling current subsection (p) to become new subsection (o); relabeling current subsection (q) to become new subsection (p) and updating its language to improve clarity; removing current subsection (r) to remove the requirement for public schools to submit a student's accrual of 500 hours in math, lab science, and English; relabel current subsection (s) to become new subsection (q) and amend its language to expand its applicability to barbering and cosmetology; relabel current subsection (t) to become new subsection (r) and amend its language to expand its applicability to barbering and cosmetology; relabel current subsection (u) to become new subsection (s); and relabel current subsection (v) to become new subsection (t) and amend its language to remove reference to a licensed instructor, which was repealed by HB 1560. The adopted rules relabel current subsection (w) to become new subsection (u) and amend its language to expand its applicability to all schools and to remove unnecessary language; amend paragraph (4) to remove the requirement to have a dispensary and to add a requirement for the mandatory storage space to be secure; amend paragraphs (6) and (7) to improve grammar and punctuation; add language to paragraph (8) to enumerate the qualitative requirements for equipment that must be provided for each student; relabel current paragraph (8) to become new paragraph (9) and amend its language to expand its applicability to all schools offering the class A barber or operator curriculum standards, to update terminology in subparagraph (E) for consistency, to remove the requirement in subparagraph (F) for the mannequin to include a table or be attached to a styling station, to remove the requirement in subparagraph (H) for the manicure station to have a table, to add a requirement in subparagraph (I) for the chair to recline, to remove current subparagraph (J) and its requirement to have a lighted magnifying glass, and to relabel the remaining subparagraphs accordingly; relabel current paragraph (9) to become new paragraph (10) and amend its language to improve grammar, to remove unnecessary language, to add a requirement in subparagraph (A) for the chair to recline, to remove current subparagraph (J) and its requirement to have a paraffin bath and paraffin wax, and to relabel the remaining subparagraphs accordingly; relabel current paragraph (10) to become new paragraph (11) and amend its language to improve grammar, to remove unnecessary language, to remove the requirement in subparagraph (B) for a manicure station to include a table and add a requirement for its lighting to be sufficient, to remove the requirement in subparagraph (I) for an air brush system, and to relocate the language in current subparagraph (J) to become new subparagraph (I); relabel current paragraph (11) to become new paragraph (12) and amend its language to improve grammar, update cross-references, and remove the requirement to have a wax warmer and paraffin warmer for each service; relabel current paragraph (12) to become new paragraph (13) and amend its language to correct grammar and punctuation, to remove unnecessary language, and to add to subparagraph (A) the ability for a facial chair to meet the requirement for equipment allowing the consumer to lie completely flat; relabel current paragraph (x) to become new paragraph (v) and amending its language to expand its applicability to all schools, to update subparagraph (1) to require schools only to post a notice that their most recent inspection report is available upon request, to update subparagraph (2) by updating statutory references, and to add new subparagraph (3) to add the requirements for the sign reading "SCHOOL--STUDENT PRACTITIONERS" that schools must display to meet the requirements of Occupations Code §1603.2305, as added by HB 1560; add new subsection (w) to provide a cap of 184 hours per month for the hours that a school may provide to a student; and add new subsection (x) to add the requirement for each school to display a copy of the sanitation rules, as required by Occupations Code §1603.357, as added by HB 1560, and to allow for the requirement to be met by making the law and rules book accessible to all students and staff. The adopted rules include a change made by the Department to subsection (f)(3) to correct references to §83.120(c) and §83.202(e).

The adopted rules amend §83.73, Responsibilities of Students, by rephrasing subsection (b) for clarity.

The adopted rules amend §83.74, Responsibilities--Withdrawal, Termination, Transfer, School Closure. The adopted rules amend subsection (a) to expand its applicability to all schools; amend subsection (b) to provide gender neutrality; amend subsection (d) to expand its applicability to all schools and update references to statute and rule; amend subsection (e) by rephrasing its language for clarity; amend subsection (f) to update a reference to statute; amend subsection (g) to expand its applicability to all out-of-state students; amend subsection (h) to expand its applicability to all barbering and cosmetology courses and remove unnecessary language.

The adopted rules amend §83.77, Remote Service Business Responsibilities. The adopted rules rephrase subsection (a) for clarity and restructure subsection (a) by adding new subsection (a)(1) to require notice of intent to operate a remote service business, adding new subsection (a)(2) to require a permanent mailing address for the remote service business, and adding new subsection (a)(3) to require verification of compliance with applicable statutes and rules. The adopted rules amend subsection (b) by updating terminology for consistency; amend subsection (d) to expand its applicability to barbering services; amend subsection (e) to expand its applicability to barbering services; amend subsection (e)(1) to remove the terms "wigs" and "artificial hairpieces" because the wig specialty certificate was repealed by HB 1560; amend subsection (e)(2) to remove the requirement for a safety razor because class A barber license holders are allowed to shave without a safety razor; amend subsection (e)(3) by removing a comma to correct punctuation; amend subsection (e)(5) by adding a comma to correct punctuation and adding the preposition "a" to correct grammar; amend subsection (g) by updating terminology for consistency; rephrase subsection (h) for clarity; update terminology in subsection (h)(1) for consistency; remove unnecessary language from subsection (h)(1)(B); correct capitalization in subsection (h)(2)(A); amend subsection (h)(3) by correcting capitalization for clarity and updating terminology for consistency; amend subsection (i) by rephrasing its language for clarity; amend subsection (j) by updating terminology for consistency and correcting grammar for clarity; amend subsection (k) by rephrasing its language for clarity and updating its terminology for consistency; amend subsection (l) by updating its terminology for consistency and correcting its grammar for clarity; amend subsection (m) by updating its language for clarity and correcting its grammar for clarity; and amend subsection (n) by rephrasing its language for clarity.

The adopted rules amend §83.78, Responsibilities of Mobile Shop, by amending its title to read "Responsibilities of Mobile Establishment" to indicate the section's expanded applicability to all mobile establishments. The adopted rules amend subsection (a) by updating terminology to expand its applicability to all mobile establishments and rephrasing its language for clarity; amend subsection (b) by updating terminology to expand its applicability to all mobile establishments, rephrasing its language for clarity, and removing the requirement to notify the Department of a change in physical address; amend subsection (c) by updating terminology to expand its applicability to all mobile establishments and rephrasing its language for clarity; amend subsection (d) by updating terminology to expand its applicability to all mobile establishments, correcting capitalization for clarity, and rewording for clarity; amend subsection (e) by rewording for clarity and updating terminology for consistency; amend subsection (f) by updating terminology to expand its applicability to all mobile establishments and rewording for clarity; amend subsection (g) by updating terminology to expand its applicability to all mobile establishments and rewording for clarity; amend subsection (h) by updating terminology to include all mobile establishments and rewording for clarity; amend subsection (i) by updating terminology for consistency and rewording for clarity; amend subsection (j) by updating terminology to include all mobile establishments, rephrasing for clarity, and removing unnecessary language; amend subsection (k) by updating terminology to include all mobile establishments; amend subsection (l) by updating terminology to include all mobile establishments and all barbering or cosmetology services.

The adopted rules amend §83.80, Fees, by amending the section title to read "Fees (before September 1, 2023)" to indicate the section's provision of fees for the period before September 1, 2023. The adopted rules amend the list of application fees in subsection (a) by amending subsections (a)(2) and (a)(3) to remove the hair weaving specialty certificate from subsection (a)(3) and add hair weaving as a specialty license in subsection (a)(2); removing from subsection (a)(5) the instructor license, which was repealed by HB 1560; removing from subsection (a)(6) the instructor specialty licenses, which were repealed by HB 1560; removing from subsection (a)(9) the booth rental license, which was repealed by HB 1560; removing from subsection (a)(11) the dual shop license, which was repealed by HB 1560; removing from subsection (a)(12) the mini-dual shop permit, which was repealed by HB 1560; and renumbering the remaining list as new subsections (a)(1) through (a)(7). The adopted rules amend the list of renewal fees in subsection (b) by amending subsections (b)(2) and (b)(3) to remove the hair weaving specialty certificate from subsection (b)(3) and add hair weaving as a specialty license in subsection (b)(2); removing from subsection (b)(4) the instructor license, which was repealed by HB 1560; removing from subsection (b)(5) the instructor specialty licenses, which were repealed by HB 1560; removing from subsection (b)(8) the mini-dual shop license, which was repealed by HB 1560; removing from subsection (b)(9) the booth rental license, which was repealed by HB 1560; removing from subsection (b)(11) the dual shop license, which was repealed by HB 1560; and renumbering the remaining list as new subsections (b)(1) through (b)(6). The adopted rules amend subsection (e) by rephrasing for clarity and updating terminology for consistency; amend subsection (g) by removing the requirement for the fee to be paid for each occurrence, because inspections will be conducted on a risk basis rather than a periodic basis; amend subsection (h) by removing unnecessary language; amend subsection (j) by removing unnecessary language; amend subsection (l) by updating terminology for consistency; and add new subsection (m) to explain which rules provide the fees that are required before, on, and after September 1, 2023.

The adopted rules amend §83.90, Administrative Sanctions and Penalties, by updating references to statutes, rewording for clarity, and removing unnecessary language.

The adopted rules amend §83.100, Health and Safety Definitions, by removing an unnecessary use of "shall".

The adopted rules amend §83.101, Health and Safety Standards--Department-Approved Disinfectants. The adopted rules amend subsection (a) to replace all instances of "shall" with "must" for clarity; add clarifying language to subsection (a)(4); and correct a hyphenation in subsection (a)(5). The adopted rules amend subsection (b) to replace all instances of "shall" with "must" for clarity; update terminology in subsection (b)(1) to include all establishments; add a comma in subsection (b)(4)

to improve grammar; and amend subsection (b)(5) by adding a comma to improve grammar and updating terminology to include all establishments.

The adopted rules amend §83.102, Health and Safety Standards--General Requirements. The adopted rules amend subsection (a) by updating terminology to clarify which requirements apply only to practitioners, rewording for clarity; and updating terminology to include barbering and cosmetology; amend subsection (b) by updating terminology to clarify which requirements apply only to practitioners; amend subsection (c) by rewording for clarity; amend subsection (d) by rewording for clarity; amend subsection (e) by rewording for clarity; amend subsection (f) by rewording for clarity and updating terminology to include barbering and cosmetology; amend subsection (g) by removing a comma to improve grammar and rewording for clarity; add new subsection (h) to provide requirements for proper disinfection of tools and implements; relabel current subsections (h) through (n) to become new subsections (i) through (o); amend new subsection (i) by updating terminology to include all establishments and schools, rewording for clarity, and updating the standard for how often hair cuttings must be removed; amend new subsection (l) by rewording for clarity; amend new subsection (m) by rewording for clarity; amend new subsection (n) by updating terminology to include all establishments and schools and rewording for clarity; amend new subsection (o) by rewording for clarity.

The adopted rules amend §83.103, Health and Safety Standards--Hair Cutting, Styling, Shaving, and Treatment Services. The adopted rules amend subsection (a) by updating terminology to include all practitioners and rewording for clarity; amend subsection (b) by rewording for clarity; amend subsection (c) by updating terminology to include only implements that are not single-use, rewording for clarity, and adding razors and clippers to the list of materials that must be cleaned and disinfected; and amend subsection (d) by correcting grammar and rewording for clarity.

The adopted rules amend §83.104, Health and Safety Standards--Esthetician Services. The adopted rules amend subsection (a) by updating terminology to include all practitioners providing esthetician services and rewording for clarity; amend subsection (b) by rewording for clarity and replacing "to" with "with" to improve grammar; amend subsection (c) by rewording for clarity, updating terminology to include a chair "or bed", and adding the requirement for "non-porous" material to provide a clear standard for ensuring proper disinfection; amend subsection (d) by rewording for clarity; amend subsection (e) by rewording for clarity; amend subsection (f) by rewording for clarity; and amend subsection (g) by rewording for clarity.

The adopted rules amend §83.105, Health and Safety Standards--Temporary Hair Removal Services. The adopted rules amend subsection (a) by updating terminology to include all practitioners providing temporary hair removal services and rewording for clarity; amend subsection (b) by updating terminology to include all practitioners providing temporary hair removal services and rewording for clarity; amend subsection (c) by updating terminology to include all practitioners providing hair removal services and to include services involving the use of wax and rewording for clarity; amend subsection (d) by rewording for clarity; and amend subsection (e) by rewording for clarity.

The adopted rules amend §83.106, Health and Safety Standards--Manicure and Pedicure Services. The adopted rules amend subsection (a) by updating terminology to include all practitioners providing manicure and pedicure services and rewording for clarity; amend subsection (b) by updating terminology to include all practitioners providing manicure and pedicure services and rewording for clarity; amend subsection (c) by rewording for clarity; amend subsection (d) by rewording for clarity; amend subsection (e) by rewording for clarity; amend subsection (f) by rewording for clarity, removing unnecessary language, and amending terminology to include a "high level disinfection chlorine bleach solution", a term defined by §83.100(1)(B); and amend subsection (g) by rewording for clarity.

The adopted rules amend §83.107, Health and Safety Standards--Electric Drill Bits. The adopted rules amend subsection (a) by updating terminology to include all establishments and schools and amend subsections (b), (c), and (d) by rewording for clarity.

The adopted rules amend §83.108, Health and Safety Standards--Foot Spas, Foot Basins, and Spa Liners. The adopted rules amend subsection (a) by updating terminology to include all establishments and schools; amend subsections (b) and (c) by rewording for clarity; amend subsection (c)(2) by updating terminology to include a "high level disinfection chlorine bleach", a term defined in §83.100(1)(B), and removing unnecessary language that repeats the definition; amend subsection (d) by rewording for clarity; amend subsections (d)(1) and (d)(2) by updating terminology to include a "high level disinfection chlorine bleach", a term defined in §83.100(1)(B), and removing unnecessary language that repeats the definition; amend subsections (e), (f), (g), and (j) by rewording for clarity; amend subsection (j)(1) to include all establishments and schools; and amend subsections (k), (l), and (n) by rewording for clarity.

The adopted rules repeal §83.109, "Health and Safety Standards--Wig and Hairpiece Services" because the regulation of wig and hairpiece services was repealed by HB 1560.

The adopted rules amend §83.110, Health and Safety Standards--Hair Weaving Services. The adopted rules amend subsection (a) by updating terminology to include all practitioners providing hair weaving services; amend subsections (a), (b), (c), and (d) by rewording for clarity; and amend subsection (d) by updating terminology to include combs and hair clips.

The adopted rules amend §83.111, Health and Safety Standards--Blood and Body Fluids. The adopted rules amend subsection (a) by rewording for clarity; amend subsections (b) and (c) by updating terminology to include "blood and body fluid cleanup and disinfection chlorine", a term defined by §83.100(1)(C), and remove unnecessary language repeating that definition, and rewording for clarity; and amending subsection (d) by rewording for clarity.

The adopted rules amend §83.112, Health and Safety Standards--Prohibited Products or Practices. The adopted rules amend subsection (a) by updating terminology to include all practitioners and all barbering and cosmetology services and amend subsection (a)(1) by rephrasing for clarity.

The adopted rules amend §83.113, Health and Safety Standards--FDA. The adopted rules amend subsection (a) by updating terminology to include all practitioners and rewording for clarity; amend subsection (b) by replacing "shall" with "will" to improve clarity; and amend subsection (c) by updating terminology to include all practitioners and rewording for clarity.

The adopted rules amend §83.114, Health and Safety Standards--Establishments. The adopted rules amend the section title to read "Health and Safety Standards--Establishments and Schools" to clarify the section's applicability to schools; amend subsection (a) by updating terminology to include schools and rewording for clarity; amend subsection (c) by rewording for clarity; amend subsection (d) by updating terminology to include schools; amend subsection (e) by updating terminology to include schools and rewording for clarity; amend subsection (f) by rewording for clarity; amend subsection (g) by rewording for clarity; amend subsection (h) by rewording for clarity and updating terminology to include schools; and amend subsection (i) by updating terminology to include schools.

The adopted rules amend §83.115, Health and Safety Standards--Eyelash Extension Application Services. The adopted rules amend subsection (a) by updating terminology to include practitioners offering eyelash extension application services and rewording for clarity; amend subsections (b) through (f) by rewording for clarity; amend subsection (g) by updating terminology to include practitioners and rewording for clarity; and amend subsection (h) by rewording for clarity.

The adopted rules amend §83.120, Technical Requirements--Curriculum Standards. The adopted rules amend the section title to read "Technical Requirements--Curriculum Standards (before August 1, 2023)" to indicate the section's applicability; remove current subsection (c) because it contains curriculum requirements for instructor licenses, which were repealed by HB 1560; amend subsection (d) by removing current subsections (d)(2)(H) and (d)(2)(I), which address instructor courses repealed by HB 1560, and relabeling current subsection (d) to become new subsection (c); amend subsection (e) by removing subsections (e)(2)(F) and (e)(2)(G), which address instructor courses repealed by HB 1560, relabeling subsection (e) to become new subsection (d), and rewording for clarity; and add new subsection (e) to specify which rule sections provide the curriculum standards in effect before, on, and after August 1, 2023.

The adopted rules add new §83.200, "License Requirements--Individuals (on or after September 1, 2023)", to provide the license requirements in effect for individual practitioner licenses on or after September 1, 2023. The adopted rules add new subsection (a) to provide the practitioner license eligibility requirements, including new subsection (a)(1) to provide application requirement; new subsection (a)(2) to provide fee payment requirements; new subsection (a)(3) to provide a minimum age requirement of 17 years; new subsection (a)(4) to provide requirements for completion of hours of instruction; new subsection (a)(5) to provide examination requirements; new subsection (a)(6) to provide requirements related to prohibited actions; and new subsection (a)(7) to require compliance with other applicable statutes and rules. The adopted rules add new subsection (b) to provide the eligibility requirements for a person who holds both an esthetician license and a manicurist license to obtain an esthetician/manicurist specialty license; add new subsection (c) to provide the eligibility requirements for a person who holds both a hair weaving specialist license and an esthetician license to obtain a hair weaving specialist/esthetician license; add new subsection (d) to provide the eligibility requirements for a student permit, including new subsection (d)(1) to provide application requirements and new subsection (d)(2) to provide fee requirements; and add new subsection (e) to explain that §83.200 provides the requirements for practitioner license applications received on or after September 1, 2023. The adopted rules include changes recommended by the Advisory Board to subsections (a)(2), (a)(4), (b), (c), and (d)(2) to correct references to §83.201 and §83.202.

The adopted rules add new §83.201, "Fees (on or after September 1, 2023)", to provide the list of fees in effect on or after September 1, 2023. The adopted rules add new subsection (a) to provide the application fees for the new license types, including new subsection (a)(1) for class A barber licenses and operator licenses; new subsection (a)(2) for specialty practitioner licenses; new subsection (a)(3) for full-service establishment licenses; new subsection (a)(4) for specialty establishment licenses; new subsection (a)(5) for mini-establishment licenses; new subsection (a)(6) for mobile establishment licenses; new subsection (a)(7) for school licenses; and new subsection (a)(8) for student permits. The adopted rules add new subsection (b) to provide the renewal fees for each new license type, including new subsection (b)(1) for the class A barber license and operator License; new subsection (b)(2) for specialty practitioner licenses; new subsection (b)(3) for full-service establishment licenses; new subsection (b)(4) for specialty establishment licenses; new subsection (b)(5) for mini-establishment licenses; new subsection (b)(6) for mobile establishment licenses; and new subsection (b)(7) for school licenses. The adopted rules add new subsection (c) to provide the fee for a license granted through substantial equivalence; new subsection (d) to provide the fees relating to inactive license status, including new subsection (d)(1) for renewal of a license on inactive status and new subsection (d)(2) for a change from inactive status to active status; add new subsection (e) to provide the fee for a revised or duplicate license; add new subsection (f) to provide the fee for the law and rule book; add new subsection (g) to provide the fee for school inspections; add new subsection (h) to provide the fee for verification of a license to other states; add new subsection (i) to provide the student transcript fee; add new subsection (j) to address late renewal fees; add new subsection (k) to explain that fees are nonrefundable; add new subsection (l) to explain that the law and rule book fee is included in the application and renewal fees; and add new subsection (m) to explain that §83.201 provides the fees that are in effect on or after September 1, 2023.

The adopted rules add new §83.202, "Technical Requirements--Curriculum Standards (on or after August 1, 2023)" to provide the curriculum standards for practitioner licenses in effect on or after August 1, 2023. The adopted rules add new subsection (a) to provide the required subjects and hours for the cosmetology operator and class A barber curricula, including new subsection (a)(1) for theory and related practice; new subsection (a)(2) for specialty practice and related theory for the operator curriculum; new subsection (a)(3) for specialty practice and related theory for the class A barber curriculum; and new subsection (a)(4) to provide that a school may enroll a student simultaneously in both the cosmetology operator course and the class A barber course. The adopted rules add new subsection (b) to provide the curriculum requirements for a person holding the class A barber license who seeks to also obtain the cosmetology operator license. The adopted rules add new subsection (c) to provide the curriculum requirements for a person holding the cosmetology operator license who seeks to also obtain the class A barber license. The adopted rules add new subsection (d) to provide the required subject and hours for the specialist curricula, including new subsection (d)(1) for the esthetician curriculum; new subsection (d)(2) for the manicurist curriculum; new subsection (d)(3) for the manicurist/esthetician curriculum; new subsection

(d)(4) for the eyelash extension specialist curriculum; new subsection (d)(5) for the hair weaving specialist curriculum; and new subsection (d)(6) for the hair weaving specialist/esthetician curriculum. The adopted rules add new subsection (e) to provide the standards for distance education, including new subsection (e)(1) to provide a limit on the percentage of total course hours that may be designated as theory hours delivered via distance education and new subsection (e)(2) to provide the limit on distance education hours for each course type, itemized in new subsections (e)(2)(A) through (e)(2)(J). The adopted rules add new subsection (f) to provide the curriculum standards relating to field trips, including new subsection (f)(1) to explain the purpose and applicability of subsection (f); new subsection (f)(2) to provide the maximum field trip hours for each course, itemized in new subsections (f)(2)(A) through (f)(2)(H); new subsection (f)(3) to provide the supervision and instructor-student ratio requirements for field trips; new subsection (f)(4) to provide documentation requirements for field trips; new subsection (f)(5) to prohibit course hours from being granted for travel; and new subsection (f)(6) to explain that field trips are not required to be pre-approved by the Department. The adopted rules add new subsection (g) to allow students previously enrolled in a 1,200-hour manicurist/esthetician program to transfer certain hours to an 800-hour manicurist/esthetician program, and new subsection (h) to explain that §83.202 provides the curriculum standards that are in effect on or after August 1, 2023.

The adopted rules include changes to §83.202 recommended by the Advisory Board to remove the separation of theory hours and practical hours in the curriculum requirements for each practitioner license type in subsections (a) through (d); add missing topics required for the cosmetology operator and class A barber curriculum in subsection (a)(1), the esthetician curriculum in subsection (d)(1), and the manicurist curriculum in subsection (d)(2); allow for students to complete both the cosmetology operator course and the class A barber course in subsection (a); increase to 50% the percentage of total hours in each course that may be designated as theory hours delivered via distance education in subsection (e); and increase the number of clock hours required for the hair weaving specialist/esthetician curriculum in subsection (d)(6). The adopted rules include additional changes recommended by the Department to consolidate language and remove duplicative subjects in subsection (a)(1) for the cosmetology operator and class A barber curricula, in subsection (d)(1) for the esthetician curriculum, and in subsection (d)(2) for the manicurist curriculum; use alternative language to that recommended by the Advisory Board in subsection (a)(4) to avoid the necessity for approval of a combined course for the class A barber and cosmetology operator licenses; simplify the curriculum requirements for the 'crossover' courses in subsections (b) and (c) by make them equivalent to the corresponding specialty practice requirements in subsection (a); and modify the required total hours for the hair weaving specialist/esthetician curriculum in subsection (d)(6) from the 900 hours recommended by the Advisory Board, to 800 hours, to provide consistency with the 800-hour curriculum for the manicurist/esthetician license, which is the only other combination specialty license.

PUBLIC COMMENTS

The Department drafted and distributed the proposed rules to persons internal and external to the agency. The proposed rules were published in the September 23, 2022, issue of the *Texas Register* (47 TexReg 6039). The public comment period closed on October 24, 2022. The Department received comments from 70 interested parties on the proposed rules. The public comments are summarized below.

Comments regarding the combined programs generally.

Comment: Seven commenters, including Remington College, were opposed to combining the barbering and cosmetology programs.

Department Response: The Department disagrees with the comments because HB 1560 requires the programs to be combined. The Department did not make any changes to the proposed rules as a result of the comments.

Comment: Three commenters were in favor of combining the barbering and cosmetology programs.

Department Response: The Department appreciates the comments in support of the proposed rules; however, HB 1560 requires the barbering and cosmetology programs to be combined. The Department did not make any changes to the proposed rules as a result of the comments.

Comment: One commenter questioned whether the combination of the barber and cosmetology programs will cause all the license types to be combined so that all cosmetologists become barbers.

Department Response: The Department disagrees with the conclusion suggested by the comment. Cosmetology operators will continue to be cosmetology operators, and Class A barbers will continue to be Class A barbers. The Department did not make any changes to the proposed rules as a result of the comment.

Comments regarding the scope of practice of barbering and cosmetology.

Comment: Two commenters questioned whether the scope of practice will change for current practitioner or establishment license holders.

Department Response: The Department agrees with the conclusion suggested by the comment. Although the scope of practice for most individual practitioner license holders will remain the same, HB 1560 adds to the scope of practice for Class A barbers the services described under Texas Occupations Code §1603.0011(a)(6) regarding the removal of superfluous body hair. Also, as a result of HB 1560, establishment license holders will be able to offer any barbering or cosmetology services with a single establishment license. The Department did not make any changes to the proposed rules as a result of the comment.

Comment: Three commenters stated that barbers and cosmetologists should be allowed to provide the exact same services.

Department Response: The Department disagrees with the comments. Under Texas Occupations Code §1603.0011(b), only the practice of barbering includes shaving with an unguarded razor, and under §1603.0011(c) only the practice of cosmetology includes eyelash extensions. The Department did not make any changes to the proposed rules as a result of the comments.

Comment: One commenter questioned whether a current cosmetologist would be required to perform barbering services after the transition to the new license types.

Department Response: The Department disagrees with the conclusion suggested by the comment. The proposed rules do not require a current license holder to provide any additional ser-

vices. The Department did not make any changes to the proposed rules as a result of the comment.

Comment: One commenter questioned whether barbers would be authorized to provide eyelash extension services as part of their services to beautify a person's face.

Department Response: The Department disagrees with the conclusion suggested by the comment. Under Texas Occupations Code §1603.0011(c), only the practice of cosmetology includes eyelash extension services. The Department did not make any changes to the proposed rules as a result of the comment.

Comment: One commenter stated that barbers are not schooled in manicuring, massage, and other services which they are now allowed to provide.

Department Response: The Department disagrees with the comment. Before HB 1560, the definition of barbering already included manicuring a person's nails and massaging a person's hands, scalp, face, neck, arms, or shoulders. The only new service added by HB 1560 to the definition of barbering is removal of superfluous body hair as described under Texas Occupations Code §1603.0011(a)(6). The Department did not make any changes to the proposed rules as a result of the comment.

Comment: One commenter questioned whether cosmetologists will be able to shave.

Department Response: The Department agrees with conclusion suggest by the comment, but only as applied to shaving with a safety razor. Under Texas Occupations Code §1603.0011(b), only the practice of barbering includes shaving with a razor that is not a safety razor. The Department did not make any changes to the proposed rules as a result of the comment.

Comment: One commenter stated that only barbers should be allowed to shave with safety razors.

Department Response: The Department disagrees with the comment. Under Texas Occupations Code §1603.0011(a)(2), the practice of cosmetology includes shaving a person's neck, mustache, or beard with a safety razor. The Department did not make any changes to the proposed rules as a result of the comment.

Comment: One commenter opposed the creation of the hair weaving specialist/esthetician license.

Department Response: The Department disagrees with the comment because Texas Occupations Code §1603.2103(a)(7) requires the creation of the license. The Department did not make any changes to the proposed rules as a result of the comment.

Comment: One commenter questioned whether barber poles are being taken away from barbers.

Department Response: The Department disagrees with conclusion suggested by the comment. Barbers will continue to be allowed to display a barber pole, but they will no longer be the only ones allowed to display the pole. This change implements the Sunset staff recommendation to end state regulation of barber poles. The Department did not make any changes to the proposed rules as a result of the comment.

Comments regarding license requirements.

Comment: Nine commenters, including Central Texas Beauty College, were opposed to proposed §83.200 because it does not include a requirement for practitioner license applicants to have obtained a high school diploma or G.E.D.

Department Response: The Department disagrees with the comments. Texas Occupations Code §1603.2001(c) advises that any education level requirement should be "the least restrictive requirement possible to ensure public safety without creating a barrier into the licensed occupation." In accordance with the Advisory Board's recommendation, the Department has determined that the appropriate standard is not to require an educational level for a practitioner license. The Department did not make any changes to the proposed rules as a result of the comments.

Comment: Five commenters, including Blade Craft Barber Academy, were opposed to the repeal of instructor licenses.

Department Response: The Department disagrees with the comments because HB 1560 requires the repeal of instructor licenses. The Department did not make any changes to the proposed rules as a result of the comments.

Comment: One commenter suggested adding non-license requirements for individuals teaching courses, such as requiring a high school diploma or the passing of an exam.

Department Response: The Department disagrees with the comment because it is inconsistent with Texas Occupations Code §1603.2303(a)(2), which provides that a person who holds a practitioner license may provide instruction in the barbering or cosmetology services for which the person holds a license to perform. The Department did not make any changes to the proposed rules as a result of the comment.

Comment: One commenter stated that students enrolled in specialty courses should be eligible to take the written examination when they have completed 90% of the course, just as students enrolled in 1,000-hour programs are able to do under proposed §83.21(b).

Department Response: The Department agrees with the logic of the comment; however, the Department will need more time to determine the feasibility of making such a change. The Department did not make any changes to the proposed rules as a result of the comment.

Comment: One commenter questioned whether high school programs would still be allowed and what license would be needed.

Department Response: The Department agrees with the conclusion suggested by the comment. Under the proposed rules, a public secondary school may obtain a single school license allowing the school to provide instruction in the barbering or cosmetology services for which the license holder has been approved by the Department. Schools will no longer need two separate licenses to offer instruction in both barbering and cosmetology, but instruction may only be provided by a person holding a practitioner license to perform the acts of barbering or cosmetology being taught. The Department did not make any changes to the proposed rules as a result of the comment.

Comment: One commenter questioned whether fees would increase for cosmetology practitioners.

Department Response: The Department disagrees with the conclusion suggested by the comment. License application and renewal fees under proposed §83.201 would not result in an increase in fees paid by current cosmetology practitioners. The Department did not make any changes to the proposed rules as a result of the comment.

Comment: Three commenters, including Central Texas Beauty College, questioned whether the substantial equivalence licensing provision in proposed §83.28(k), allowing 300 hours of work experience to be substituted for missing curriculum hours, can also be used to fulfill curriculum hours for other licensing purposes.

Department Response: The Department disagrees with the conclusion suggested by the comments. Work experience may only be substituted for curriculum hours in the context of licensing through substantial equivalence, which applies only to individuals who hold a license from another state or country that has requirements that are substantially equivalent to the requirements in Texas. The Department did not make any changes to the proposed rules as a result of the comments.

Comment: One commenter, Central Texas Beauty College, suggested that proposed §83.28(k) seems to allow or encourage unlicensed activity.

Department Response: The Department agrees with the comment and has modified proposed §83.28(k) by adding language to clarify that the work experience must be performed in the jurisdiction in which the person is licensed.

Comments regarding continuing education requirements.

Comment: One commenter suggested requiring barbers to complete continuing education hours upon license renewal because barbers provide similar services, have the same number of required curriculum hours for licensure, and are subject to the same health and safety concerns as cosmetologists.

Department Response: The Department agrees with the comment. Proposed §83.25 would require barber licensees to complete the same continuing education hours as cosmetologist licensees for renewals on or after September 1, 2025, allowing time for barbers to adjust to the new requirement. The Department did not make any changes to the proposed rules as a result of the comment.

Comment: One commenter questioned whether a person holding both a barber license and a cosmetology license will need to complete separate continuing education hours for each license.

Department Response: The Department disagrees with the conclusion suggested by the comment. The proposed rules do not include a prohibition on using the same continuing education hours to fulfill the requirements for multiple license types. The Department did not make any changes to the proposed rules as a result of the comment.

Comment: Regarding proposed §83.25(b)(1), one commenter suggested that the requirement for practitioners to complete one hour of continuing education in sanitation for each license renewal should be replaced with a one-time exam on sanitation.

Department Response: The Department disagrees with the comment because it is inconsistent with the recommendation of the Advisory Board to require completion of one hour of continuing education in sanitation for each license renewal. The Department did not make any changes to the proposed rules as a result of the comment.

Comment: Regarding proposed §83.25(l), two commenters suggested that the requirement for continuing education should take effect for barber licensees sooner than September 1, 2025.

Department Response: The Department disagrees with the comment because September 1, 2025, is an effective date that provides each barber licensee a full license term to adjust to the new requirement. The Department did not make any changes to the proposed rules as a result of the comment.

Comment: Regarding proposed §83.25(b)(2), two commenters opposed the requirement for practitioners to complete one hour of continuing education on human trafficking prevention for each license renewal on or after September 1, 2025.

Department Response: The Department disagrees with the comments. Barbers and cosmetologists are in a unique position to detect possible signs of human trafficking while providing in-person services to their clients, and a requirement to complete one hour of continuing education on human trafficking prevention for each license renewal helps to ensure licensees have the knowledge to detect those signs. The Department did not make any changes to the proposed rules as a result of the comments.

Comment: Regarding proposed §83.25(b)(2), one commenter suggested that the requirement for one hour of continuing education on human trafficking prevention should take effect sooner than September 1, 2025, in the interest of human trafficking victims.

Department Response: The Department disagrees with the comment because September 1, 2025, is an effective date that provides each barber licensee a full license term to adjust to the new requirement. The Department did not make any changes to the proposed rules as a result of the comment.

Comments regarding Advisory Board provisions.

Comment: One commenter suggested getting rid of the Advisory Board and replacing it with a secretary position.

Department Response: The Department disagrees with the comment because the Advisory Board is required under Texas Occupations Code, Chapter 1603, Subchapter B. The Department did not make any changes to the proposed rules as a result of the comment.

Comment: One commenter opposed six-year terms for Advisory Board members.

Department Response: The Department disagrees with the comment because Texas Occupations Code §1603.053(a) requires six-year terms for members of the Advisory Board. The Department did not make any changes to the proposed rules as a result of the comment.

Comments regarding schools.

Comment: One commenter opposed the requirement in proposed §83.72(e) for an instructor to be physically present during all practical curriculum activities and stated that schools should have the flexibility to teach practical hours via distance education.

Department Response: The Department disagrees with the comment because Texas Occupations Code §1603.351(c) provides that distance education does not satisfy the requirements of the practical portion of the curriculum. The Department did not make any changes to the proposed rules as a result of the comment.

Comment: One commenter opposed the requirement in proposed §83.72(v)(3) for a school to have a sign in 10-inch block letters.

Department Response: The Department disagrees with the comment. In accordance with the Advisory Board's recommendation, the Department has determined that the appropriate standard at this time is the default standard provided in Texas Occupations Code §1603.2305(1) for schools to have a sign in 10-inch block letters. The Department did not make any changes to the proposed rules as a result of the comment.

Comment: One commenter opposed the 184-hour limitation on the monthly hours a student may earn per calendar month in proposed §83.72(w) because it reduces the flexibility for make-up hours.

Department Response: The Department disagrees with the comment. The 184-hour limitation on monthly hours is necessary to ensure students receive a quality education. The Department did not make any changes to the proposed rules as a result of the comment.

Comment: One commenter, Central Texas Beauty College, stated that field trip hours should be excluded from the 184-hour limitation on monthly hours in proposed §83.72(w) because it could result in students being excluded from field trips.

Department Response: The Department disagrees with the comment. The 184-hour limitation on monthly hours is necessary to ensure students receive a quality education, and it does not prohibit students from attending field trips. The Department did not make any changes to the proposed rules as a result of the comment.

Comments regarding health and safety standards.

Comment: One commenter stated that rubbing alcohol of 70% or higher concentration should be allowed for disinfection.

Department Response: The Department disagrees with the comment because it is inconsistent with the recommendation of the Health and Safety Workgroup of the Advisory Board not to include alcohol as an approved disinfectant. The Department did not make any changes to the proposed rules as a result of the comment.

Comment: One commenter recommended removing the requirement for a whirlpool spa cleaning log in proposed §83.108(e).

Department Response: The Department disagrees with the comment because the requirement to keep records of cleaning and disinfecting whirlpool spas is necessary to ensure the health and safety of the public. The Department did not make any changes to the proposed rules as a result of the comment.

Comments regarding curriculum standards.

Comment: Six commenters, including the American Association of Cosmetology Schools, Aveda Arts & Sciences Institutes, Career Colleges & Schools of Texas, Milady, and Vogue Colleges of Cosmetology, opposed the separation and limiting of theory hours and practical hours in proposed §83.202 and suggested that all topics should be allowed to be taught as theory or practical hours at the school's discretion.

Department Response: The Department agrees with the comment and has made changes to proposed §83.202 to remove the separation of theory hours and practical hours and allow schools to determine how each subject should be taught.

Comment: One commenter stated that some of the curriculum topics in proposed §83.202 are only listed under the practice hours and that those topics should also be included in the theory hours because students will need to learn the theory before practicing.

Department Response: The Department agrees with the comment and has made changes to proposed §83.202 to remove the separation of theory hours and practical hours and allow schools to determine how each subject should be taught.

Comment: One commenter stated that the topics listed under specialty practice in proposed §83.202 should also be covered in theory hours because students must be taught the theory for a subject before beginning its practice.

Department Response: The Department agrees with the comment and has made changes to proposed §83.202 to remove the separation of theory hours and practical hours and allow schools to determine how each subject should be taught.

Comment: Seven commenters, including the American Association of Cosmetology Schools, Aveda Arts & Sciences Institutes, Career Colleges & Schools of Texas, Milady, Milan Institute, and Vogue Colleges of Cosmetology, opposed the 25% limitation on distance education hours in proposed §83.202(e) and suggested that the limit should be increased or removed.

Department Response: The Department agrees with the comment and has made changes to proposed §83.202(e) to provide that schools offering distance education may not designate more than 50% of the total hours in each course as theory hours delivered via distance education.

Comment: One commenter, Vogue Colleges of Cosmetology, suggested the addition to proposed §83.202 of specific rule language to provide guidelines for distance education time tracking and to ensure that distance education is reserved for theory hours only and not practical hours.

Department Response: The Department agrees that it may be beneficial to add such guidelines for distance education, and the Department, in consultation with the Advisory Board, will consider adding such provisions in a future rulemaking. The Department did not make any changes to the proposed rules as a result of the comment.

Comment: One commenter questioned whether the curriculum requirements for licensure of barbers or cosmetologists would change as a result of the proposed rules, and if so, what the new requirements would be.

Department Response: The Department agrees with conclusion suggested by the comment. Under the proposed rules, beginning September 1, 2023, the curriculum requirements for licensure in barbering and cosmetology would be the requirements stated under proposed §83.202. The Department did not make any changes to the proposed rules as a result of the comment.

Comment: One commenter, Have Shears Will Travel, questioned what date schools would be able to submit plans for and teach courses under the new curriculum requirements.

Department Response: Under the proposed rules, beginning August 1, 2023, schools will be able to submit requests for course approval and beginning teaching under the new curriculum standards in proposed §83.202. The Department did not make any changes to the proposed rules as a result of the comment.

Comment: Two commenters, including Barber College, questioned whether cosmetology students would be able to transfer

hours to barber courses and whether barber students would be able to transfer hours to cosmetology courses.

Department Response: The Department agrees with the conclusion suggested by the comments. Curriculum topics that are required for both a barbering license and a cosmetology license may be fulfilled with either a barbering course or a cosmetology course. The Department did not make any changes to the proposed rules as a result of the comment.

Comment: One commenter suggested that cosmetology operators who completed 1,500 hours of education for licensure should be allowed to take a quick course on straight razors and be allowed to receive a crossover license for barbering.

Department Response: The Department disagrees with the comment because it is inconsistent with the recommendation of the Education and Examination Workgroup of the Advisory Board to require completion of the 300-hour curriculum described in proposed §83.202(c) for cosmetology operators seeking to also obtain the class A barber license. The Department did not make any changes to the proposed rules as a result of the comment.

Comment: Two commenters, including Central Texas Beauty College, suggested allowing schools to offer a 1300-hour cosmetology operator and class A barber curriculum that includes both the 300 hours of specialty practice for the operator curriculum and the 300 hours of specialty practice for the class A barber curriculum.

Department Response: The Department agrees with the comment and has added language to proposed §83.202(a) to provide that a school may enroll a student simultaneously in both the cosmetology operator course and the class A barber course.

Comment: Two commenters, including Milady, opposed the required curriculum topics in proposed §83.202 because they are missing certain necessary topics. The commenters provided a list of topics that the commenter believes are missing from the cosmetology operator and class A barber curricula in proposed §83.202(a), the esthetician curriculum in proposed §83.202(d)(1), and the manicurist curriculum in proposed §83.202(d)(2).

Department Response: The Department agrees with the comment and has added language to proposed §83.202 to include the additional topics.

Comment: One commenter opposed the reduction of hours required for the esthetician/manicurist license from 1,200 hours to 800 hours because it will result in less knowledge and experience.

Department Response: The Department disagrees with the comment because the 800-hour manicurist/esthetician curriculum in proposed §83.202(d)(3) is a recommendation of the Education and Examination Workgroup of the Advisory Board. The Department did not make any changes to the proposed rules as a result of the comment.

Comment: One commenter was opposed to having a combined hair weaving specialist/esthetician curriculum.

Department Response: The Department disagrees with the comment because Texas Occupations Code §1603.2103(a)(7) provides for a hair weaving specialist/esthetician license, so it is necessary for the Department to provide the curriculum requirements for the license. The Department did not make any changes to the proposed rules as a result of the comment.

Comment: One commenter supported the increase from 5% to 10% of the percentage of curriculum hours allowed for field trips in proposed §83.202(f).

Department Response: The Department appreciates the comment in support of the proposed rules. The Department did not make any changes to the proposed rules as a result of the comment.

Comment: One commenter questioned whether field trips would be considered theory hours or practical hours.

Department Response: Under Texas Occupations Code §1603.2108, students may only obtain practical hours in a licensed school; therefore, a field trip could not be used for practical hours. The Department did not make any changes to the proposed rules as a result of the comment.

Comment: One comment stated that the field trip provisions in proposed §83.120(d) and proposed §83.202(f) contradict each other.

Department Response: The Department disagrees with the comment. Proposed §83.120(d) provides the field trip provisions that apply before August 1, 2023, and proposed §83.202(f) provides the provisions that apply on or after August 1, 2023. The Department did not make any changes to the proposed rules as a result of the comment.

Comment: One commenter stated that the certification at the end of the proposed rules is misleading because it refers to the earliest possible date of adoption of October 23, 2022, and the proposed rules notice does not refer to adoption of the rules.

Department Response: The Department disagrees with the comment. The certification statement is not an indication of the Department's intent to adopt the rules on a particular date. The Department did not make any changes to the proposed rules as a result of the comment.

Comment: Three commenters made comments or asked questions unrelated to the proposed rules.

Department Response: The Department disagrees with the comments because they are outside the scope of the proposed rules. The Department did not make any changes to the proposed rules as a result of the comments.

Public comments at the Commission meeting.

The Commission met on December 6, 2022, to consider adoption of the proposed rules. During the public comment period of the meeting, five individuals provided oral comments on the proposed rules. Two of those commenters also submitted written comments. The oral and written comments are summarized below.

Comment: Four commenters, including Texas Cosmetology Association, McLennan Community College, and Community College Cosmetology Educators of Texas, were opposed to proposed §83.200 because it does not include a requirement for practitioner license applicants to have obtained a high school diploma or G.E.D.

Department Response: The Department disagrees with the comments. Occupations Code §1603.2001(c) advises that any education level requirement should be "the least restrictive requirement possible to ensure public safety without creating a barrier into the licensed occupation." In accordance with the Advisory Board's recommendation, the Department has determined that the appropriate standard is not to require an

educational level for a practitioner license. The Department did not make any changes to the proposed rules as a result of the comments.

Comment: Three commenters, including Texas Cosmetology Association and Community College Cosmetology Educators of Texas, were opposed to raising the limitation on the percentage of total hours that may be designated as theory hours delivered via distance education in §83.202(e) from 25% to 50%.

Department Response: The Department disagrees with the comments. In accordance with the Advisory Board's recommendation, the Department has determined that 50% is the proper standard because it provides more flexibility to schools and students. The Department did not make any changes to the proposed rules as a result of the comments.

Comment: Two commenters, Texas Cosmetology Association, were opposed to the requirement in §83.72(v)(3) for a school to have a sign that reads "SCHOOL--STUDENT PRACTITIONERS" in at least 10-inch block letters because the size is too burdensome.

Department Response: The Department disagrees with the comments. In accordance with the Advisory Board's recommendation, the Department has determined that the appropriate standard at this time is the default standard provided in Texas Occupations Code §1603.2305(1) for schools to have a sign in 10-inch block letters. The Department did not make any changes to the proposed rules as a result of the comments.

Comment: One commenter, Texas Cosmetology Association, was against adoption of the proposed rules because the Advisory Board did not have sufficient information at its August 19, 2022, meeting to decide on whether to recommend publication of the proposed rules in the *Texas Register.*

Department Response: The Department disagrees with the comment. Any misunderstandings by the Advisory Board members were clarified in the October 31, 2022, meeting, before they voted on whether to recommend Commission adoption of the proposed rules. The Department did not make any changes to the proposed rules as a result of the comment.

Comment: One commenter, Texas Cosmetology Association, was against adoption of the proposed rules because the new curriculum requirements in §83.202 are out of alignment.

Department Response: The Department disagrees with the comment. Having considered the Advisory Board's recommendations, the Department has determined that the curriculum requirements in proposed §83.202, with the changes noted in the Section-by-Section Summary, are the appropriate standard at this time. The Department did not make any changes to the proposed rules as a result of the comment.

Comment: One commenter was against adoption of the proposed rules because they do not include a student-to-teacher ratio for distance education.

Department Response: The Department disagrees with the comment. The requirement in §83.72(e) for schools to have at least one instructor on duty for each 25 students in attendance would apply to all instruction, including instruction delivered via distance education. The Department did not make any changes to the proposed rules as a result of the comment.

ADVISORY BOARD RECOMMENDATIONS AND COMMISSION ACTION

The Advisory Board met on October 31, 2022, to discuss the proposed rules and the public comments received. The Advisory Board recommended that the Commission adopt the proposed rules as published in the *Texas Register* with changes to §§83.28, 83.200, and 83.202 made in response to public comments and Department recommendations, as explained in the Section-by-Section Summary.

At its meeting on December 6, 2022, the Commission adopted the proposed rules with changes to §§83.28, 83.200, and 83.202 as recommended by the Advisory Board and with additional changes to §83.202 in response to Department recommendations, as explained in the Section-by-Section Summary.

16 TAC §§83.1, 83.2, 83.10, 83.20 - 83.26, 83.28, 83.29, 83.31, 83.40 83.50, 83.51, 83.65, 83.70 - 83.74, 83.77, 83.78, 83.80, 83.90, 83.100 - 83.108, 83.110 - 83.115, 83.120, 83.200 - 83.202

STATUTORY AUTHORITY

The adopted rules are adopted under Texas Occupations Code, Chapters 51 and 1603, which authorize the Texas Commission of Licensing and Regulation, the Department's governing body, to adopt rules as necessary to implement these chapters and any other law establishing a program regulated by the Department. The adopted rules are also adopted under former Texas Occupations Code, Chapters 1601 and 1602, which were repealed by HB 1560, Article 3, Section 3.33, but remain in effect by authority of the transition provisions in HB 1560, Article 3, Sections 3.34-3.42. The adopted rules are also adopted under Texas Government Code, Chapter 411, Subchapter F, and Texas Occupations Code, Chapters 51 and 53, which establish the Department's statutory authority to conduct criminal history background checks on an applicant for or the holder of a license, certificate, registration, title, or permit issued by the Department.

The statutory provisions affected by the adopted rules are those set forth in Texas Occupations Code, Chapters 51 and 1603. No other statutes, articles, or codes are affected by the adopted rules.

§83.28. Substantial Equivalence and Provisional Licensure.

(a) To be granted a license through substantial equivalence, an applicant must:

(1) submit a completed application in the manner prescribed by the department;

(2) furnish a certified transcript of hours from the state board, territory, or foreign country from which the applicant is applying;

(3) provide one of the following:

(A) if an applicant is from another state of the United States, provide documentation that licensure in another state was obtained by standards substantially equivalent to those of Texas; or

(B) if an applicant is from a territory or foreign country, provide documents verified by the department or a certified credentialing agency confirming that licensure in the territory or foreign country was obtained by standards substantially equivalent to those of Texas;

(4) furnish an active and valid license or certificate to indicate that the applicant is licensed in good standing in another jurisdiction or foreign country;

(5) pay the substantial equivalence fee and applicable license application fee required under §83.80; and

(6) for applications on or after September 1, 2023, be at least 17 years of age.

(b) A person who cannot provide documentation of standards equivalent to those in Texas must pass the applicable written and practical examination for the license.

(c) A person issued a license through substantial equivalence may perform those acts of barbering and cosmetology authorized by the license.

(d) The department may waive any license requirement for an applicant who holds a license from another state or country that has license requirements substantially equivalent to those of Texas.

(e) The department may issue a provisional license to applicants currently licensed in another jurisdiction who file an application for a Texas license by substantial equivalence.

(f) To be eligible for a provisional license, an applicant must:

(1) file a completed application, in the manner prescribed by the department, for a Texas barbering or cosmetology license by substantial equivalence;

(2) provide information sufficient for the department to verify the applicant's licensure in good standing for at least two years in the license type for which the person seeks the license; and

(3) have been licensed in a jurisdiction or foreign country in which the requirements for obtaining the same license are substantially equivalent to the requirements under the Act, including passage of a national examination or other examination recognized by the department relating to the practice of the profession.

(g) A person issued a provisional license may perform those acts of barbering or cosmetology authorized by the provisional license pending the department's approval or denial of an applicant's license by substantial equivalence.

(h) A provisional license is valid until the date the department approves or denies the application for licensure by substantial equivalence. The department must approve or deny a provisional license holder's application for a license by substantial equivalence not later than the 180th day after the date the provisional license is issued. The department may extend the 180-day period if the results of an examination have not been received by the department before the end of that period.

(i) The department will issue a license by substantial equivalence to the provisional license holder if the person is eligible to hold a license under the Act.

(j) An applicant for licensure by substantial equivalence is eligible for a provisional license only once. A person who is denied licensure by substantial equivalence and subsequently reapplies for licensure by substantial equivalence is not eligible to obtain additional provisional licenses to practice barbering or cosmetology in Texas.

(k) If an applicant for a class A barber or operator license has not completed the hours required under this chapter or Chapter 82, documented work experience, performed in the jurisdiction in which the person is licensed, may be substituted at the rate of 25 hours per month worked, up to a maximum of 300 hours, or the applicant must complete the balance of hours required in an approved Texas school.

§83.72. Responsibilities of Schools.

(a) Each school must have the current law and rules book.

(b) Each school is responsible for compliance with the health and safety standards of this chapter.

(c) Each school must notify the department of any alterations to a school's floor plan.

(d) The certificate of curriculum approval must be posted in a conspicuous place in the school. A current syllabus and lesson plan for each course must be maintained by the school and be available for inspection.

(e) Schools must have at least one instructor on duty for each 25 students in attendance, including evening classes. An instructor must be physically present during all practical curriculum standard activities, and physically present or participating through distance education for theory curriculum standard activities. No credit for instructional hours can be granted to a student unless such hours are accrued under the supervision of an instructor.

(f) Schools offering distance education must:

(1) obtain department approval before offering a course;

(2) provide students with the educational materials necessary to fulfill course requirements; and

(3) comply with the curriculum standards in §83.120(c) and §83.202(e) by limiting distance education to instruction in theory.

(g) Schools must maintain one album to display each student permit, including affixed picture, of each enrolled student. The permits must be displayed in alphabetical order by last name, then alphabetical order by first name, and, if more than one student has the same name, by student permit number.

(h) Schools may use a time clock to track student hours and maintain a daily record of attendance or schools may use credit hours.

(i) Schools using time clocks must ensure compliance with the following requirements and post a sign at the time clock that states the following department requirements:

(1) Each student must personally clock in/out.

(2) No credit may be given for any times written in, except in a documented case of time clock failure or other situations approved by the department.

(3) If a student is in or out of the facility for lunch, the student must clock out.

(4) Students leaving the facility for any reason, including smoking breaks, must clock out, except when an instructional area on a campus is located outside the approved facility, that area is approved by the department and students are under the supervision of an instructor.

(j) Students are prohibited from preparing hour reports or supporting documents. Only school owners and school designees, including instructors, may electronically submit information to the department in accordance with this chapter. No student permit holder may electronically submit information to the department under this chapter.

(k) A school must properly account for the hours granted to each student. A school may not engage in any act directly or indirectly that grants or approves student credit that is not accrued in accordance with this chapter. A school must maintain and have available for a department and/or student inspection the following documents for a period of the student's enrollment through 48 months after the student completes the curriculum standards, withdraws, or is terminated:

(1) daily record of attendance;

(2) the following documents if a time clock is used:

(A) time clock record(s);

(B) time clock failure and repair record(s); and

(C) field trip records in accordance with §83.120(e)(5); and

(3) all other relevant documents that account for a student's credit under this chapter.

(l) Schools using time clocks must, at least one time per month submit to the department an electronic record of each student's accrued clock hours in a manner and format prescribed by the department. A school's initial submission of clock hours must include all hours accrued at the school. Delayed data submission(s) are permitted only upon department approval, and the department will prescribe the period of time for which a school may delay the electronic submission of data, to be determined on a case-by-case basis. Upon department approval, a school may submit data required under this subsection in an alternate manner and format as determined by the department, if the school demonstrates that the requirements of this subsection would cause a substantial hardship to the school.

(m) Schools using credit hours must, at the end of the course or module or if the student drops or withdraws, submit to the department an electronic record of each student's accrued credit hours in a manner and format prescribed by the department.

(n) Schools changing from clock hours to credit hours or from credit hours to clock hours must apply with the department for approval, on a department approved form, prior to making any changes.

(o) Successful completion of 1 credit hour is equal to 37.5 clock hours. This equivalency will be used for conversion between clock hours to credit hours or credit hours to clock hours and the department must periodically assess this equivalency conversion to ensure it is an acceptable industry standard.

(p) Except for a documented leave of absence, schools must electronically submit a student's withdrawal or termination to the department within 10 calendar days after the withdrawal or termination. Except for a documented leave of absence, a school must terminate a student who does not attend class for 30 consecutive days.

(q) All areas of a school or campus are acceptable as instructional areas for a public school, provided that the instructor is teaching barbering or cosmetology curricula required under §83.120.

(r) A private school or public post-secondary school may provide barbering and cosmetology instruction to public high school students by contracting with the school district and complying with Texas Education Agency law and rules. A public high school student receiving instruction under such contract is considered to be a public high school student enrolled in a public school barbering and cosmetology program for purposes of the Act and department rules.

(s) Schools may establish school rules of operation and conduct, including rules relating to absences and clothing, that do not conflict with this chapter.

(t) Schools must ensure that guest presenters possess the necessary knowledge and teaching ability to present a curriculum standard topic and that an instructor is present during the guest presenter's classroom teaching.

(u) Schools must have a classroom separated from the laboratory area by walls extending to the ceiling and equipped with the following equipment:

(1) if using a time clock to track student hours, one day/date formatted computer time clock;

(2) desks and chairs or table space for each student in attendance;

(3) multi-media equipment;

(4) a sink with hot and cold running water and secure space for storage and dispensing of supplies and equipment;

(5) a suitable receptacle for used towels/linens;

(6) covered trash cans in lab area;

(7) wet disinfectant soaking container, large enough to fully immerse tools and implements;

(8) for each student, equipment that is:

(A) sufficient to enable the student to perform the services associated with the curriculum standards for which the student is enrolled;

(B) in good working condition; and

(C) of adequate design to permit effective instruction;

(9) if offering the class A barber or operator curriculum standards, the following equipment available in adequate number for student use:

(A) shampoo bowl and shampoo chair;

(B) hair drying equipment or professional hand-held hair dryers;

(C) cold wave rods;

(D) thermal iron (electric or non-electric);

(E) styling station covered with a non-porous material that can be cleaned and disinfected, with mirror and styling or barber chair (swivel or hydraulic);

(F) mannequin with sufficient hair;

(G) professional hand clippers;

(H) manicure station and stool;

(I) facial bed or a chair that reclines;

(J) dry sanitizer; and

(K) wet disinfectant soaking containers, large enough to fully immerse tools and implements;

(10) if offering the esthetician curriculum standards, the following equipment available in adequate number for student use:

(A) facial bed or a chair that reclines;

(B) lighted magnifying glass;

(C) woods lamp;

(D) dry sanitizer;

(E) steamer machine;

(F) brush machine for cleaning;

(G) vacuum machine;

(H) high frequency machine for disinfection, product penetration, stimulation;

(I) galvanic machine for eliminating encrustations, product penetration;

(J) mannequin head; and

(K) wet disinfectant soaking containers, large enough to fully immerse tools and implements.

(11) if offering the manicure curriculum standards, the following equipment available in adequate number for student use:

(A) an autoclave, dry-heat sterilizer or ultra-violet sanitizer;

(B) manicure station with sufficient lighting;

(C) client chair;

(D) student stool or chair;

(E) whirlpool foot spa or foot basin;

(F) electric nail file;

(G) UV light curing system;

(H) paraffin bath and paraffin wax; and

(I) wet disinfectant soaking containers;

(12) if offering the esthetician/manicure curriculum standards, the equipment required for the esthetician curriculum standards as listed in paragraph (10); and the equipment required for the manicure curriculum standards as listed in paragraph (11); in adequate number for student use; and

(13) if offering the eyelash extension curriculum standards, the following equipment available in adequate number for student use:

(A) facial bed, facial chair, or massage table, all of which must allow the consumer to lie completely flat;

(B) stool or chair;

(C) lamp;

(D) mannequin head;

(E) wet disinfectant soaking containers; and

(F) dry sanitizer.

(v) Schools must display in the school, in a conspicuous place clearly visible to the public:

(1) a notice that a copy of the school's most recent inspection report issued by the department is available upon request;

(2) a sign, acceptable to the department, regarding human trafficking information as required by Texas Occupations Code §1603.356 and this chapter; and

(3) a sign that reads "SCHOOL--STUDENT PRACTITIONERS" in at least 10-inch block letters, visible from the outside of each client entrance to the licensed school.

(w) A school may not award credit or provide instruction for, and a student may not earn, more than 184 hours or equivalent credit hours per calendar month.

(x) Each school must display a copy of §§83.100-83.115. A school may meet this requirement by placing the law and rules book so that it is accessible to all students and all staff who work in the school.

§83.200. License Requirements--Individuals (on or after September 1, 2023).

(a) To be eligible for a practitioner license, an applicant must:

(1) submit a completed application in the manner prescribed by the department;

(2) pay the applicable fee required under §83.201;

(3) be at least 17 years of age;

(4) have completed the hours of instruction required under §83.202 at a licensed school;

(5) pass a written and practical examination required under §83.21;

(6) have not committed an act that constitutes a ground for denial of the license; and

(7) meet other applicable requirements of the Act and this chapter.

(b) A person who holds both an active esthetician license and an active manicurist license is eligible for an esthetician/manicurist specialty license by submitting a completed application in the manner prescribed by the department and paying the required fee under §83.201.

(c) A person who holds both an active hair weaving specialist license and an active esthetician license is eligible for a hair weaving specialist/esthetician license by submitting a completed application in the manner prescribed by the department and paying the required fee under §83.201.

(d) To be eligible for a student permit, an applicant must:

(1) submit a completed application in the manner prescribed by the department; and

(2) pay the fee required under §83.201.

(e) This section provides the minimum requirements for practitioner license applications received by the department on or after September 1, 2023. Until that date, §83.20 and §82.20 provide the minimum requirements.

§83.202. Technical Requirements--Curriculum Standards (on or after August 1, 2023).

(a) The cosmetology operator and class A barber curricula consist of 1,000 clock hours or equivalent credit hours, as follows:

(1) Theory and related practice: anatomy and physiology; diseases and disorders of the skin, scalp, hair and nails; chemistry (haircoloring, chemical waving, and relaxing); bacteriology, sterilization and sanitation, health, safety, first aid, laws and rules; tools and equipment; hair care and related theory; business skills and establishment management; skin care and related theory; hair removal; nail care and related theory; electricity; haircutting; hairstyling; hair and scalp treatments, scalp massage; hairweaving, extensions; chemical textures and applications; face and neck massage and treatments; facial hair removal; manicuring; waxing and removing body hair; customer service and professional ethics; makeup; pedicuring; artificial nails. 700 hours.

(2) The standards for the operator curriculum must include Specialty Practice and related theory: eyelash semi-permanent extensions; advanced hair care and advanced chemical services; and related practices. 300 hours.

(3) The standards for the class A barber curriculum must include Specialty Practice and related theory: shaving with any razor type and razor techniques; mustache and beard care; advanced hair care and men's haircutting; and related practices. 300 hours.

(4) A school may enroll a student simultaneously in both the cosmetology operator course and the class A barber course if the student seeks to obtain both license types. The student must complete all the requirements under subsections (a)(1) through (a)(3) to obtain both license types.

(b) A person holding the class A barber license who seeks to also obtain the cosmetology operator license must complete the requirements described under subsection (a)(2).

(c) A person holding the cosmetology operator license who seeks to also obtain the class A barber license must complete the requirements described under subsection (a)(3).

(d) Specialist Curricula.

(1) The esthetician curriculum consists of 750 clock hours or equivalent credit hours, as follows:

(A) Theory and related practice: anatomy and physiology; skin diseases and disorders; skin analysis; machines and related equipment; basic facials; chemistry; care of client; superfluous hair removal and related theory; sanitation law and rules; business management; facial treatments, cleansing, masking, and therapy; chemistry machines and related equipment; superfluous hair removal; sanitation, first aid, health and safety; makeup. 450 hours.

(B) Specialty Practice and related theory: advanced facial treatments and superfluous hair removal using devices or preparations; makeup; semi-permanent eyelash extension applications; and related practices. 300 hours.

(2) The manicurist curriculum consists of 600 clock hours or equivalent credit hours, as follows:

(A) Theory and related practice: anatomy and physiology; nail structure and growth; equipment and implements; bacteriology, sanitation and safety; hazardous chemicals and ventilation; basic manicures and pedicures; business management; laws and rules; nail and skin diseases and disorders; artificial nails; product chemistry; repair work, massage, buffing and application of polish and artificial nails; cosmetic fingernails, extensions, sculptured nails, tips, wraps, fiberglass/gels and odorless products; basic manicuring and pedicuring; nail art; electric filing. 300 hours.

(B) Specialty Practice and related theory: professional practices; advanced manicuring and pedicuring; advanced techniques, preparations and applications. 300 hours.

(3) The manicurist/esthetician curriculum consists of 800 clock hours or equivalent credit hours, as follows:

(A) Theory and related practice: anatomy and physiology; machines and related equipment; chemistry; care of client; basic facials; superfluous hair removal and related theory; nail structure and growth; equipment and implements; hazardous chemicals and ventilation; basic manicures and pedicures; business management; bacteriology, sanitation, health, and safety; laws and rules. 200 hours.

(B) Specialty Manicure Practice and related theory: repair work, massage, buffing and application of polish and artificial nails; cosmetic fingernails, extensions, sculptured nails, tips, wraps, fiberglass/gels and odorless products; professional practices, techniques and preparations; sanitation, first aid, health and safety. 300 hours.

(C) Specialty Esthetician Practice and related theory: facial treatments, cleansing, masking, and therapy; chemistry machines and related equipment; superfluous hair removal; devices or preparations; makeup; semi-permanent eyelash extension applications; sanitation, first aid, health and safety. 300 hours.

(4) The eyelash extension specialist curriculum consists of 320 clock hours or equivalent credit hours, as follows:

(A) Theory and related practice: eye shapes and eyelash growth; supplies and related equipment; contagious diseases and adverse reactions; sanitation, first aid, health and safety; client protection; business management, laws and rules. 80 hours.

(B) Specialty Practice and related theory: Semi-permanent eyelash extension isolation, separation and application. 240 hours.

(5) The hair weaving specialist curriculum consists of 300 clock hours or equivalent credit hours, as follows:

(A) Theory and related practice: basic hair weaving; anatomy and physiology; scalp and skin conditions, lesions and diseases; structure and composition; sterilization methods; chemistry and client protection; sanitation, health and safety; business management, laws and rules. 75 hours.

(B) Specialty Practice and related theory: hair weaving, repair, weft removal, sizing and finishing; procedures and hair weaving/braiding skills; compounds, mixtures and cosmetic applications; equipment, supplies and preparations. 225 hours.

(6) The hair weaving specialist/esthetician curriculum consists of 800 clock hours or equivalent credit hours, as follows:

(A) Theory and related practice: anatomy and physiology; scalp and skin conditions, lesions and diseases; structure and composition; basic hair weaving; sterilization methods; chemistry and client protection; basic facials; machines and related equipment; chemistry; care of client; superfluous hair removal and related theory. 200 hours.

(B) Specialty Hair Weaving Practice and related theory: hair weaving, repair, weft removal, sizing and finishing; procedures and hair weaving/braiding skills; compounds, mixtures and cosmetic applications; equipment, supplies and preparations. 260 hours.

(C) Specialty Esthetician Practice and related theory: facial treatments, cleansing, masking, and therapy; chemistry machines and related equipment; superfluous hair removal; devices or preparations; makeup; semi-permanent eyelash extension applications; sanitation, first aid, health and safety. 340 hours.

(e) Distance Education.

(1) Schools offering distance education may not designate more than 50% of the total hours in each course as theory hours delivered via distance education.

(2) A student may obtain the following distance education hours:

(A) a maximum of 500 hours out of the 1,000 hour cosmetology operator course;

(B) a maximum of 500 hours out of the 1,000 hour class A barber course;

(C) a maximum of 150 hours out of the 300 hour class A barber to cosmetology operator course;

(D) a maximum of 150 hours out of the 300 hour cosmetology operator to class A barber course;

(E) maximum of 300 hours out of the 600 hour manicurist course;

(F) a maximum of 375 hours out of the 750 hour esthetician course;

(G) a maximum of 400 hours out of the 800 hour esthetician/manicurist course;

(H) a maximum of 160 hours out of the 320 hour eyelash extension specialist course;

(I) a maximum of 150 hours out of the 300 hour hair weaving specialist course; and

(J) a maximum of 400 hours out of the 800 hour hair weaving specialist/esthetician course.

(f) Field Trips.

(1) Barbering and cosmetology related field trips are permitted under the following conditions for students enrolled in the following courses. The guidelines under this subsection must be strictly followed.

(2) A student may obtain the following field trip hours:

(A) a maximum of 100 hours out of the 1,000 hour cosmetology operator course;

(B) a maximum of 100 hours out of the 1,000 hour class A barber course;

(C) a maximum of 60 hours for the manicurist course;

(D) a maximum of 75 hours for the esthetician course;

(E) a maximum of 80 hours for the esthetician/manicurist course;

(F) a maximum of 32 hours for the eyelash extension specialist course;

(G) a maximum of 30 hours for the hair weaving specialist course; and

(H) a maximum of 70 hours for the hair weaving specialist/esthetician course.

(3) Students must be under the supervision of an instructor from the school where the student is enrolled at all times during the field trip. The instructor-student ratio required in a school is required on a field trip.

(4) Complete documentation is required, including student names, instructor names, activity, location, date, and duration of the activity.

(5) No hours are allowed for travel.

(6) Prior department approval is not required.

(g) The department may allow students previously enrolled in a 1,200-hour manicurist/esthetician program to transfer completed hours to an 800-hour manicurist/esthetician program if the hours meet the required technical standards. Upon request of a student, a school must apply completed hours toward a department-approved 800-hour manicurist/esthetician program if the school has such a program, or allow the student to transfer to another school.

(h) This section provides the curriculum standards that are effective on or after August 1, 2023. Until that date, §83.120 and §82.120 provide the required curriculum standards.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on December 9, 2022.

TRD-202204908
Brad Bowman
General Counsel
Texas Department of Licensing and Regulation
Effective date: January 1, 2023
Proposal publication date: September 23, 2022
For further information, please call: (512) 463-7750

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CHAPTER 83. COSMETOLOGISTS

16 TAC §§83.31, 83.50, 83.52, 83.54, 83.65, 83.109

STATUTORY AUTHORITY

The adopted repeals are adopted under Texas Occupations Code, Chapters 51 and 1603, which authorize the Texas Commission of Licensing and Regulation, the Department;s governing body, to adopt repeals as necessary to implement these chapters and any other law establishing a program regulated by the Department. The adopted repeals are also adopted under former Texas Occupations Code, Chapters 1601 and 1602, which were repealed by HB 1560, Article 3, Section 3.33, but remain in effect by authority of the transition provisions in HB 1560, Article 3, Sections 3.34-3.42. The adopted repeals are also adopted under Texas Government Code, Chapter 411, Subchapter F, and Texas Occupations Code, Chapters 51 and 53, which establish the Department's statutory authority to conduct criminal history background checks on an applicant for or the holder of a license, certificate, registration, title, or permit issued by the Department.

The statutory provisions affected by the adopted rules are those set forth in Texas Occupations Code, Chapters 51 and 1603. No other statutes, articles, or codes are affected by the adopted repeals.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on December 9, 2022.

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Brad Bowman
General Counsel
Texas Department of Licensing and Regulation
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For further information, please call: (512) 463-7750

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TITLE 19. EDUCATION

PART 2. TEXAS EDUCATION AGENCY

CHAPTER 89. ADAPTATIONS FOR SPECIAL POPULATIONS

The Texas Education Agency (TEA) adopts amendments to §§89.1601, 89.1603, 89.1605, 89.1609, 89.1611, 89.1613, 89.1615, and 89.1617; the repeal of §89.1607; and new §89.1607, concerning transition assistance for highly mobile students who are homeless or in substitute care. The amendments to §89.1601 and §89.1605 are adopted with changes to the proposed text as published in the August 19, 2022 issue of the *Texas Register* (47 TexReg 4908) and will be republished. The amendments to §§89.1603, 89.1609, 89.1611, 89.1613, 89.1615, and 89.1617; the repeal of §89.1607; and new §89.1607 are adopted without changes to the proposed text as published in the August 19, 2022 issue of the *Texas Register* (47 TexReg 4908) and will not be republished. The

adopted revisions provide clarification, simplify provisions, and align with statute.

REASONED JUSTIFICATION: The rules in Chapter 89, Subchapter FF, assist with the transition of students who are homeless or in substitute care from one school to another and provide school districts and open-enrollment charter schools with guidance on statutory requirements. The adopted revisions make the following changes.

The word "transfer" was removed throughout the rules because students who are homeless or in substitute care are not considered transfer students when moving from one school to another.

The adopted amendment to §89.1601, Definitions, adds definitions for "caseworker," "educational programs," and "welcome packet." The definition for "enrollment conference" was expanded and clarified, and the term "homeless liaison" was changed to "McKinney-Vento liaison." In addition, some of the other definitions were reordered to alphabetize the terms with no changes to the text.

In response to public comment, in the enrollment conference definition, the phrase "newly enrolled student and/or" was added, as well as the phrase "as soon as feasible" in reference to the timing of the conference. Also in response to public comment, a sentence was added to the definition of enrollment conference allowing a student's attendance in the conference to be addressed on a case-by-case basis.

The adopted amendment to §89.1603, Transfer of Student Records and Transcripts, reorders subsections and rewords phrasing to improve clarity on the responsibilities for school districts and charter schools to request, send, and receive student records and transcripts as required by Texas Education Code (TEC), §25.002(a-1), to ensure a seamless enrollment and transition.

The adopted amendment to §89.1605, Development of Systems to Ease Transitions and Establish Procedures to Lessen the Adverse Impact of Movement of a Student, updates phrasing to improve clarity on systems school districts and charter schools must develop to ease the transition during the first two weeks of enrollment at a new school. In subsection (a)(1), the list of contact information to be included in welcome packets was updated. Subsection (b) incorporates stakeholder input by updating the enrollment conference timeline so that districts and charter schools may conduct an enrollment conference after the first two weeks of a student's enrollment if necessary. New subsection (b)(2) was added to address a student's attendance at the enrollment conference. A requirement was added in subsection (c) that school districts and charter schools must provide professional development opportunities for staff on school transition support. Subsection (d) was updated to add specifications for the use of Texas Records Exchange (TREx), Personal Identification Database (PID), and Personal Enrollment Tracker (PET) applications.

In response to public comment, in §89.1605(b)(3)(H), "Texas Department of Family and Protective Services (DFPS)" was added to clarify which caseworker can be included in an enrollment conference. In §89.1605(b)(3)(J), the word "volunteer" was changed to "volunteers."

Section 89.1607, Award of Credit, is being repealed and adopted as new §89.1607, Evaluation of Student Records for Students Who Are Homeless or in Substitute Care. The new section includes reordered and adjusted content that clarifies school district and charter school responsibilities relating to the creation and examination of existing policies on award of credits. In addition, language was added to address the requirements for school districts and charter schools to evaluate student records, transcripts, and courses; develop processes to support on-time graduation; and align with existing personal graduation plans. Language related to credit recovery plans is not included in the new rule.

The adopted amendment to §89.1609, Placement in Educational Programs and Courses, moves the description of "educational programs" to the definitions in §89.1601 and clarifies district and charter school responsibilities relating to course and educational program placement. The requirement for districts and charter schools to promote placement in academically challenging and career preparation courses was moved from subsection (c) to new subsection (d).

The adopted amendment to §89.1611, Promotion of Access to Educational and Extracurricular Programs for Students Who Are Homeless or in Substitute Care, updates the section title to more specifically align with requirements in TEC, §25.007, related to summer programs, credit transfer services, electronic courses, and after-school tutoring programs. New subsections (a) and (b) outline district and charter school responsibilities to remove barriers and increase awareness of opportunities to participate in extracurricular programs, summer programs, credit transfer services, electronic courses, and after-school tutoring programs. Subsection (c) was amended to clarify information related to University Interscholastic League (UIL) requirements to align with UIL policy.

The adopted amendment to §89.1613, Promotion of Postsecondary Information, includes specific district and charter school responsibilities to promote postsecondary access for students who are homeless and students who are in substitute care. The new language is organized to present requirements based on the student's status. The amendment strengthens requirements based on existing statutory requirements concerning postsecondary promotion for students who are homeless or in substitute care.

The adopted amendment to §89.1615, Provision of Special Education Services, updates language to clarify district and charter school responsibilities to provide special education services and accept referrals made by previous districts or charter schools for special education evaluation to ensure the appropriate placement of services for students.

The adopted amendment to §89.1617, Notice to Student's Educational Decision-Maker and Caseworker, removes the requirement for districts and charter schools to comply with TEC, §25.007(b)(10), for students who are homeless because this section only pertains to students in substitute care.

SUMMARY OF COMMENTS AND AGENCY RESPONSES: The public comment period on the proposal began August 19, 2022, and ended September 19, 2022. Following is a summary of public comments received and corresponding responses.

Comment: A social worker commented in support of the proposed rule changes and provided feedback to ensure consistency in the enrollment conference definition. Specifically, the commenter requested the inclusion of the student in the enrollment conference and that the enrollment conference be conducted "as soon as feasible."

Response: The agency agrees that the definition of "enrollment conference" should be strengthened. Section 89.1601(4) was modified at adoption to include the newly enrolled student as an optional participant in the enrollment conference and specify that the timeframe for the enrollment conference should be within two weeks or as soon as feasible.

Comment: The Texas School Counselor Association commented that school counselors are not mandated and that §89.1613 adds duties for a position that is already overwhelmed. Additionally, the commenter noted that, in instances where there is not a school counselor to carry out post-secondary duty, the phrase "or persons assisting with postsecondary opportunities for students" should be added to §89.1613(b)(2).

Response: The agency disagrees, as this is a federal requirement. Specifically, the McKinney-Vento Homeless Assistance Act, 42 U.S.C. §11432(g)(1)(K), requires a counselor to assist students with postsecondary opportunities.

Comment: A school counselor commented that the agency should add information about how the welcome packet is provided. Specifically, the commenter suggested that the welcome packet could be provided electronically or through the campus website.

Response: The agency disagrees that this information should be added to the rule. Guidance can address how the welcome packets are provided. Districts have discretion in how they communicate this information. The agency will share this information as a strategy for training on the rule.

Comment: The Texas Department of Family and Protective Services (DFPS) suggested that "DFPS" be added in front of the word "caseworker" in the list of persons to include in the enrollment conference.

Response: The agency agrees and has modified §89.1605(b)(3)(H) at adoption to reflect this change.

SUBCHAPTER FF. COMMISSIONER'S RULES CONCERNING TRANSITION ASSISTANCE FOR HIGHLY MOBILE STUDENTS WHO ARE HOMELESS OR IN SUBSTITUTE CARE

19 TAC §§89.1601, 89.1603, 89.1605, 89.1607, 89.1609, 89.1611, 89.1613, 89.1615, 89.1617

STATUTORY AUTHORITY. The amendments and new section are adopted under Texas Education Code, §25.007, which requires the agency to assist the transitions of students who are homeless or in substitute care from one school to another.

CROSS REFERENCE TO STATUTE. The amendments and new section implement Texas Education Code, §25.007.

§89.1601. Definitions.

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

(1) Caseworker--A person who works on behalf of a student in the Texas Department of Family and Protective Services (DFPS) Managing Conservatorship to make decisions regarding the student's case.

(2) Educational and course programs--Programs intended to provide instruction to students in conjunction with or outside of the required curriculum, which may include, but are not limited to, gifted and talented services, bilingual or special language services for emergent bilingual students, career and technical education, and early college high school.

(3) Educational decision-maker--A person designated by DFPS or a court to make education decisions on behalf of youth in substitute care.

(4) Enrollment conference--A student-centered meeting between key school district or open-enrollment charter school staff and the newly enrolled student and/or the student's parent or guardian that occurs within the first two weeks of enrollment, as soon as feasible, at a new school to collaboratively ease transitions; identify the student's academic strengths and extracurricular interests; introduce school processes and opportunities for engagement; and identify any interventions and additional support services (e.g., special education or Section 504 services, academic and/or behavioral interventions, social and emotional needs, college and career readiness). The student's attendance in the conference should be addressed on a case-by-case basis.

(5) Foster care--Twenty-four-hour substitute care for children placed away from their parents or guardians for whom DFPS has placement and care responsibility. This includes, but is not limited to, placements in foster family homes, foster homes of relatives, group homes, emergency shelters, residential facilities, childcare institutions, and pre-adoptive homes.

(6) Foster care liaison--The individual each school district or open-enrollment charter school appoints to act as a liaison to facilitate enrollment or transfer of a child who is in conservatorship of the state, pursuant to Texas Education Code, §33.904.

(7) Homeless--This term has the meaning assigned to the term "homeless children and youths" under 42 United States Code (USC), §11434a.

(8) McKinney-Vento liaison--A person designated by a school district or an open-enrollment charter school pursuant to the McKinney-Vento Homeless Assistance Act (42 USC, §11432(g)(1)(J)(ii)), to ensure homeless children and youth are identified and enrolled, with a full and equal opportunity to succeed, in schools.

(9) Records--Documents in printed or electronic form that include, but are not limited to, student transcripts; individual course grades; academic achievement records; course credits, whether full or partial; individualized education program referrals; intervention data; immunizations; state assessment scores; student attendance data; disciplinary reports; graduation endorsements; special education/Section 504 committee records; performance acknowledgements; and personal graduation plans.

(10) Substitute care--The placement of a child who is in the conservatorship of DFPS in care outside the child's home. The term includes foster care, institutional care, pre-adoptive homes, placement with a relative of the child, or commitment to the Texas Juvenile Justice Department under Texas Family Code, §263.001(a)(4).

(11) Welcome packet--A compilation of school district or open-enrollment charter school and community resources provided to new students within the first two weeks of enrollment at a new school that helps to familiarize the student with the school.

§89.1605. Development of Systems to Ease Transitions and Establish Procedures to Lessen the Adverse Impact of Movement of a Student.

(a) School districts and open-enrollment charter schools shall develop systems to ease transition of a student who is homeless or in substitute care during the first two weeks of enrollment at a new school. These systems shall include the following:

(1) welcome packets containing applicable information regarding enrollment in extracurricular activities, club activities, information on fee waivers, tutoring opportunities, the student code of conduct, available student supports, and contact information for key school staff members such as principals, registrars, counselors, designated liaisons, nutrition coordinators, and transportation specialists;

(2) introductions for new students that maintain student privacy and confidentiality to the school environment and school processes by school district or charter school faculty, campus-based student leaders, or ambassadors; and

(3) mechanisms to ensure that a process is in place for all students who qualify to receive nutrition benefits upon enrollment, as all students who are homeless or in substitute care are eligible for United States Department of Agriculture Child Nutrition Programs. The process must expedite communication with the district or charter school nutrition coordinator to ensure that eligible students are not charged in error or experience delays in receiving these benefits.

(b) School districts and open-enrollment charter schools shall convene an enrollment conference within the first two weeks, or as soon as feasible, after a student who is homeless or in substitute care enrolls at a new school.

(1) The convening of the enrollment conference shall not delay or impede the enrollment of the student.

(2) The student's attendance in the conference should be addressed on a case-by-case basis. The enrollment conference may be used in conjunction with an existing meeting that is designed for similar purposes for newly enrolled students.

(3) The enrollment conference shall address the student's credit recovery, credit completion, attendance plans and trauma-informed interventions, interests and strengths, discipline or behavior concerns, previous successes, college readiness, and social and emotional supports as well as district policies relating to transfers and withdrawals and communication preferences with parents or guardians. The enrollment conference may be comprised of:

(A) school administrators;

(B) McKinney-Vento or foster care liaisons;

(C) social workers;

(D) teachers;

(E) school counselors;

(F) dropout prevention specialists;

(G) attendance/truancy officers;

(H) the relative caregiver, foster placement caregiver, or Texas Department of Family and Protective Services (DFPS) caseworker;

(I) the DFPS designated educational decision-maker;

(J) the DFPS caseworker, Court Appointed Special Advocates (CASA) volunteer, or other volunteers, as applicable; and

(K) a parent or guardian, unless the caseworker indicates the parent's or guardian's rights to participate have been restricted by the court.

(c) School districts and open-enrollment charter schools must provide professional development opportunities and resources to support key staff members such as principals, registrars, counselors, designated liaisons, nutrition coordinators, and transportation specialists on local processes and procedures for facilitating successful school transitions for students who are homeless or in substitute care.

(d) School districts and open-enrollment charter schools must use the Texas Records Exchange (TREx), the Personal Identification Database (PID), or the Person Enrollment Tracking (PET) application to facilitate records transfer and expedite coordination and communication between the sending and receiving schools. In cases where records from the student's previous school are missing or cannot be located, school districts and open-enrollment charter schools should use the Texas Student Data System (TSDS) Unique ID application to identify where the student was previously enrolled.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on December 12, 2022.

TRD-202204958
Cristina De La Fuente-Valadez
Director, Rulemaking
Texas Education Agency
Effective date: January 1, 2023
Proposal publication date: August 19, 2022
For further information, please call: (512) 475-1497

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19 TAC §89.1607

STATUTORY AUTHORITY. The repeal is adopted under Texas Education Code, §25.007, which requires the agency to assist the transitions of students who are homeless or in substitute care from one school to another.

CROSS REFERENCE TO STATUTE. The repeal implements Texas Education Code, §25.007.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on December 12, 2022.

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PART 7. STATE BOARD FOR EDUCATOR CERTIFICATION

CHAPTER 229. ACCOUNTABILITY SYSTEM FOR EDUCATOR PREPARATION PROGRAMS

19 TAC §§229.1 - 229.5, 229.9

The State Board for Educator Certification (SBEC) adopts amendments to 19 Texas Administrative Code (TAC)

§§229.1-229.5 and 229.9, concerning accountability system for educator preparation programs. The amendments are adopted without changes to the proposed text as published in the August 19, 2022 issue of the *Texas Register* (47 TexReg 4915) and will not be republished. Chapter 229 establishes the performance standards and procedures for educator preparation program (EPP) accountability. The adopted amendments provide for adjustments to the *2021-2022 Accountability System for Educator Preparation (ASEP) Manual;* implement Senate Bill (SB) 2066, 87th Texas Legislature, Regular Session, 2021; clarify assessments used for accountability; update procedures for EPP commendations; provide the SBEC additional flexibility when sanctioning programs; and clarify what data is used for the determination of accreditation statuses.

REASONED JUSTIFICATION: EPPs are entrusted to prepare educators for success in the classroom. Texas Education Code (TEC), §21.0443, requires EPPs to adequately prepare candidates for certification. Similarly, TEC, §21.031, requires the SBEC to ensure candidates for certification demonstrate the knowledge and skills necessary to improve the performance of the diverse student population of this state. TEC, §21.045, also requires SBEC to establish standards to govern the continuing accountability of all EPPs. The SBEC rules in 19 TAC Chapter 229 establish the process used for issuing annual accreditation ratings for all EPPs to comply with these provisions of the TEC and to ensure the highest level of educator preparation, which is codified in the SBEC Mission Statement.

Following is a description of the topics for adopted amendments to 19 TAC Chapter 229, including adopted amendments to Figure: 19 TAC §229.1(c), which is the *ASEP Manual.*

§229.1. General Provisions and Purpose of Accountability System for Educator Preparation Programs.

Update of ASEP Manual

The adopted amendment to Figure: 19 TAC §229.1(c) provides the following changes to portions of the *ASEP Manual.*

Updates to the table of contents simplify technical processes related to rulemaking.

Updates to Chapter 1 simplifies and streamlines language as it pertains to the updated description of Indicators 1a and 1b to align with updates to 19 TAC §229.4(a)(1)(C) and (D), which use the defined terms *pedagogy test* and *content pedagogy test.*

Updates to Chapter 3 align the description of Indicators 1a and 1b with updates to 19 TAC §229.4(a)(1)(C) and (D). Updates also clarify the exclusion procedures related to the Performance Assessment for School Leaders (PASL) per 19 TAC §229.4(a)(1)(B). Adopted updates strike the reference to the Core Subjects Adjustment as it is no longer needed, due to the reset of the years of data used for the small group aggregation, in adopted 19 TAC §229.4(c)(6). For the same reason, adopted updates strike a reference to the earliest available year of data for use in the small group aggregation procedure. Adopted updates to Chapter 3 also add clarification about the procedure to identify how tests 291 Core Subjects EC-6 and 391 Core Subjects EC-6 are counted in combination to ensure that candidates with results for both are not double counted in the pass rate. This is in response to a request for clarification from the field. Finally, the adopted updates modify the worked examples to provide demonstration of the PASL inclusion and the tests 291 Core Subjects EC-6 and 391 Core Subjects EC-6 procedure. This provides transparency to the field.

Updates to Chapter 4 update the term "English language learners" with the term "emergent bilingual students" to implement SB 2066, 87th Texas Legislature, Regular Session, 2021. Adopted updates also note the procedure for EPPs to complete a review of the roster of included candidates. This provides transparency of processes to the field. Additionally, updates to the worked example provide an example of how the rounding rule operates. This provides clarity to the field.

Updates to Chapter 5 clarify the teachers included in the calculation. These updates note that teachers who exit the teacher workforce prior to being employed for three years and then return to the workforce are not included in the calculation for the EPP following their workforce re-entry. This additional clarification was requested by EPP stakeholders. These updates also create a threshold of 10 or more students for a teacher's subject area to be included. This is based on recommendations from the working group that provided input to Texas Education Agency (TEA) during the original construction of the Indicator 3 methodology.

Updates to Chapter 6 remove the term "field experience" and use the terminology "internship or clinical teaching." This provides better clarity for EPPs, because "field experience" has a separate meaning in 19 TAC Chapter 228. Updates also clarify the exception procedure to provide transparency to the field. Updates modify the worked example for Indicator 4a to simplify the figure. Finally, updates to the worked example for Indicator 4b update the question number references to align with the survey currently in use. This provides clarity for the field.

Updates to Chapter 7 replace the term "English language learners" with the term "emergent bilingual students" to implement SB 2066, 87th Texas Legislature, Regular Session, 2021. Adopted updates also note the procedure for EPPs to complete a review of the roster of included candidates. This provides transparency of processes to the field.

Updates to Chapter 8 shift the performance standard for retention as a teacher and for retention in any public-school role from 95% to 85%. Over the past two years no EPPs have met the 95% retention standard, and this change allows for this commendation to be achievable while still requiring excellence in preparing educators who are retained in the field. Updates to the description of the rigorous and robust preparation section align language with adopted updates to 19 TAC §229.4(a)(1)(C) and (D) and align the procedure with adopted 19 TAC §229.4(a)(1)(A). Updates to this section also clarify that the calculations are done based on the number of candidates with certificates, rather than the number of certificates. This provides clarity for the field and simplifies the standard to address the percent of teachers with a certain type of certificate. This approach allows for clearer recognition of programs who prepare candidates who earn multiple certificates through their EPP. Additional updates to this section clarify that the percentage of candidates in teacher shortage areas are calculated separately by shortage area, that the percentage of teachers who identify as African American or Hispanic are calculated separately, and that the commendation is awarded separately for these separate results. This provides clarity to the field and addresses questions surfaced by the SBEC in prior meetings. Adopted updates to the preparing educators for long-term success section clarify that educators are identified as retained when they are continuously employed. This provides clarity for the field and aligns with the reporting specified in TEC, §21.0452. Updates to the Innovative Educator Preparation section remove the prior year recognition area and add the new

area of commendation recommended by the EPP Commendation Committee at its meeting on April 28, 2022. The new area of commendation will recognize EPPs that engage in innovative development of EPP faculty and staff, field supervisors, and/or cooperating and mentor teachers, in alignment with current research and best practices.

Adopted updates to Chapter 9 align language with adopted updates to 19 TAC §229.4(a)(1)(C) and (D) and align the procedure with adopted 19 TAC §229.4(a)(1)(A). Additional updates modify existing references to prior year performance to specify the most recent prior year for which the EPP has data. This ensures that only data from actionable years will be included in the ASEP index system calculations.

Updates throughout the *ASEP Manual* correct date references and minor technical errors, remove footnotes, and provide transparency to the field as to the calculations used to determine accreditation statuses.

§229.2. Definitions.

The updates to the definitions section add definitions for *content pedagogy test* and *pedagogy test* and renumber the terms in this section. This allows for alignment of ASEP Indicators 1a and 1b and the *ASEP Manual* with Figure: 19 TAC §230.21(e). This alignment provides transparency and clarity to the field concerning which exams are used in each calculation.

§229.3. Required Submissions of Information, Surveys, and Other Data.

The adopted updates to Figure: 19 TAC §229.3(f) update the required collections to add the systematic collection of data related to clinical teaching, internship, and practicum experiences, renumbering the Accountability System Data column. EPPs are already required to create and to retain this data locally; allowing EPPs to report this data to TEA using the Educator Certification Online system ensures proper record retention, simplifying the continuing review process for EPPs. Additionally, collecting this information allows TEA to connect this data with campus- and district-level data and to provide summaries and visualizations back to EPPs for their use in program monitoring and continuous improvement of their programs. This collection allows the TEA staff to address SBEC questions related to clinical teaching and internships to inform policy decisions. Finally, this collection is necessary under TEC, §21.045(b)(2), to allow the SBEC more efficiency in monitoring compliance with the SBEC's requirements for field supervision of candidates during their clinical teaching and internship experiences under 19 TAC §228.35(g). With the addition of data related to clinical teaching, internship, and practicum experiences, the subsequent rows under the Accountability System Data column are renumbered accordingly.

§229.4. Determination of Accreditation Status.

Update to ASEP Indicator 1

The adopted amendment to §229.4(a)(1) introduces the terms *content pedagogy tests* and *pedagogy tests* into the indicator description. This aligns with the updates to 19 TAC §229.2 and provides a clear connection to Figure: 19 TAC §230.21(e) and to this ASEP indicator.

The adopted amendment strikes §229.4(a)(1)(A) and reletters §229.4(a)(1)(B) to §229.4(a)(1)(A).

Updates to new §229.4(a)(1)(A) introduce the terms *content pedagogy tests* and *pedagogy tests* into the indicator description. Additional updates strike the outdated language related to completers issued a probationary certificate under a waiver that was in place for the 2020-2021 academic year (AY).

Updates to §229.4(a)(1)(C) and §229.4(a)(1)(D) introduce the terms *content pedagogy tests* and *pedagogy tests* into the indicator description.

Adopted new §229.4(a)(1)(B) specifies that the PASL will continue to be treated as a content pedagogy test through academic year 2022-2023. This is necessary because the PASL has historically been calculated as a content pedagogy test but is in the pedagogy test column in Figure: 19 TAC §230.21(e). The eventual inclusion of PASL into the pedagogy test calculation brings together all pedagogy tests into the same indicator. This timeline will allow for EPPs to be informed of this change and to plan for any necessary adjustments.

Update to Not Accredited-Revoked status

Adopted new §229.4(b)(3)(D) aligns with TEC, §21.0451(a)(4), to allow the SBEC to revoke an EPP's accreditation and approval to recommend candidates if the EPP violated SBEC rules, Board orders, or Chapter 21 of the TEC. The rules currently allow the SBEC to change an EPP's accreditation status to "Accredited-Warned" or "Accredited-Probation" but requires that the program remain in "Accredited-Probation" for a year before it can be revoked. The adopted addition allows the SBEC to seek revocation immediately if an EPP violates an SBEC rule, Board order or statute, so that the SBEC can quickly address severe problems with EPPs and thereby, limit the number of candidates, school districts, and students impacted by the EPP's continuing misconduct. Any EPP recommended for revocation will receive due process through an informal review by TEA staff and a contested case proceeding at the State Office of Administrative Hearings under the existing procedures set out in 19 TAC §§229.5-229.8.

Update to small group exception

Adopted amendments to §229.4(c)(3) and(c)(4) specify that for the purposes of the small group aggregation procedure, only data from years beginning in 2021-2022 would be used. This reset is aligned with prior approaches to the small group aggregation when indicators are reactivated after being report only. During the 2019-2020 and 2020-2021 AY, all indicators were report only. This update allows for EPPs that have 10 or fewer candidates in the aggregated or disaggregated groups in 2021-2022 AYs to have that data added to future years of data.

§229.5. Accreditation Sanctions and Procedures.

Update to available sanctions

Adopted new §229.5(b)(3) renumbers this section and allows the SBEC to order EPPs to provide TEA staff with verification that the EPP is in continued compliance with SBEC rules and the TEC. This will allow the SBEC to tailor EPP sanction orders specifically to the particular program's shortcomings or violations to determine whether an EPP has improved its program to comport with the requirements of SBEC rules and the TEC and will put the program in violation of an SBEC order if it is unable to produce proof of compliance. This will allow the SBEC more options to create sanction orders for EPPs that effectively and enforceably address an EPP's violations, without resorting to the blunt instrument of revocation.

Adopted new §229.5(b)(4) allows the SBEC to require EPPs with an accreditation status of "Accredited-Warned" or "Accredited-Probation" and EPPs with conditions for continuing approval to post information on their websites to inform the public about the

EPP's accreditation status or conditions for continuing approval and to post the documents that support and explain the SBEC's decision to order a particular accreditation status or conditions for continuing approval. This will give current candidates in the program and potential candidates considering whether to enter the program more information and insight regarding the quality of teacher preparation and training the EPP provides and the areas where the program has opportunities for improvement.

Update to certification class or category evaluation

The adopted update to §229.5(c) introduces the terms "content pedagogy tests" and "pedagogy tests" into the indicator description. This aligns with the updates above to 19 TAC §229.2 and provides a clear connection to Figure: 19 TAC §230.21(e).

§229.9. Fees for Educator Preparation Program Approval and Accountability.

The adopted amendment removes "internships" from the types of applications for out-of-state and out-of-country sites. This update provides clarity about the out-of-state and out-of-country school sites for field-based experiences, clinical teaching, and practicums fee because out-of-state internships are not allowed under 19 TAC §228.35(e)(9).

SUMMARY OF COMMENTS AND RESPONSES. The public comment period on the proposal began August 19, 2022, and ended September 19, 2022. The SBEC also provided an opportunity for registered oral and written comments on the proposal at the September 30, 2022 meeting in accordance with the SBEC board operating policies and procedures. The following public comments were received on the proposal.

Comment: Disability Rights Texas, Texas Parent to Parent, and Texans for Special Education Reform commented in opposition to the proposed amendments, specifically asking that the *ASEP Manual* be adjusted to require all respondents to complete the sections in the Principal Survey (ASEP Accountability Indicator 2) and in the New Teacher Satisfaction Survey (ASEP Accountability Indicator 5) related to preparedness to work with students with disabilities. Commentors argue that this requirement would be necessary to fully implement House Bill (HB) 159, 87th Texas Legislature, Regular Session, 2021.

Response: The SBEC disagrees. At the February 2022 meeting of the SBEC, the Board adopted amendments to 19 TAC Chapter 228, effective September 1, 2022, which implemented requirements for EPPs in HB 159. Implementing HB 159 included adopting new 19 TAC §228.30(c)(9), which specifies that EPP curriculum must include subject matter related to educating students with disabilities, including the use of proactive instructional planning techniques and evidence-based instructional practices, as enumerated in TEC, §21.044(a-1). It also included an additional component to Figure: 19 TAC §228.10(b)(1) that specifies the evidence that an EPP must provide during a continuing approval review to demonstrate compliance with 19 TAC §228.30(c)(9) and §228.35(e)(2)(A)(iii), (e)(2)(B)(ix), and (e)(8), which set out requirements for EPPs related to candidate training and support on instruction regarding students with disabilities, to the use of proactive instructional planning techniques and to evidence-based inclusive instructional practices. Adopting these amendments to Chapter 228 implemented the requirements in HB 159 referenced in the comments provided by the commenters.

The rationale for the optional nature of these survey sections related to students with disabilities is to allow for flexibility to match the practical experience of new teachers in the field. As noted by the commentors, most teachers do work with students with disabilities. This is reflected in the survey data, as respondents completed the optional sections on over 80% of surveys. This response rate provides evidence that principals and teachers recognize that it is highly common that they work with students with disabilities, even outside specific assignments. Consequently, EPPs are held accountable for preparing candidates to meet the needs of students with disabilities through these surveys. Retaining the optional nature of these survey sections provides flexibility for the minority of teachers who do not work with students with disabilities. Additionally, the amendments apply to the 2021-2022 survey data that has already been collected. While the SBEC could consider changing section requirements for future surveys at a forthcoming meeting, retroactively requiring that these sections be completed is out of scope for the amendments adopted at the September 2022 SBEC meeting.

The State Board of Education (SBOE) took no action on the review of amendments to §§229.1-229.5 and §229.9 at the November 18, 2022 SBOE meeting.

STATUTORY AUTHORITY. The amendments are adopted under Texas Education Code (TEC), §21.041(a), which allows the SBEC to adopt rules as necessary for its own procedures; TEC, §21.041(b)(1), which requires the SBEC to propose rules that provide for the regulation of educators and the general administration of the TEC, Chapter 21, Subchapter B, in a manner consistent with the TEC, Chapter 21, Subchapter B; TEC, §21.041(d), which states that the SBEC may adopt a fee for the approval and renewal of approval of an EPP, for the addition of a certificate or field of certification, and to provide for the administrative cost of appropriately ensuring the accountability of EPPs; TEC, §21.043(b) and (c), which require SBEC to provide EPPs with data, as determined in coordination with stakeholders, based on information reported through Public Education Information Management System (PEIMS) that enables an EPP to assess the impact of the program and revise the program as needed to improve; TEC, §21.0441(c) and (d), which requires the SBEC to adopt rules setting certain admission requirements for EPPs; TEC, §21.0443, as amended by House Bill (HB) 159, 87th Texas Legislature, Regular Session, 2021, which states that the SBEC shall propose rules to establish standards to govern the approval or renewal of approval of EPPs and certification fields authorized to be offered by an EPP. To be eligible for approval or renewal of approval, an EPP must incorporate proactive instructional planning techniques throughout coursework and across content areas to provide flexibility in the ways information is presented and students respond and are engaged, to reduce barriers in instruction, to provide appropriate accommodations, and to maintain high achievement expectations for all students; must integrate inclusive practices for all students and evidence-based instruction and intervention strategies throughout course work, clinical experience, and student teaching; must adequately prepare candidates for educator certification; and must meet the standards and requirements of the SBEC. The SBEC shall require that each EPP be reviewed for renewal of approval at least every five years. The SBEC shall adopt an evaluation process to be used in reviewing an EPP for renewal of approval; TEC, §21.045, as amended by HB 159, 87th Texas Legislature, Regular Session, 2021, which states that the board shall propose rules establishing standards to govern the continuing accountability of all EPPs; TEC, §21.0451, which states that the SBEC shall propose rules for the sanction of EPPs that do not meet accountability standards

and shall annually review the accreditation status of each EPP. It further states that the SBEC has authority to make rules to take any necessary action in sanctioning EPPs, including but not limited to requiring the program to obtain technical assistance or professional services, appointing a monitor to participate in and report to the SBEC on the activities of the EPP. The costs of technical assistance required under TEC, §21.0451(a)(2)(A), or the costs associated with the appointment of a monitor under TEC, §21.0451(a)(2)(C), shall be paid by the sponsor of the EPP; and TEC, §21.0452, as amended by Senate Bill 2066, 87th Texas Legislature, Regular Session, 2021, which states that to assist persons interested in obtaining teaching certification in selecting an EPP and to assist school districts in making staffing decisions, the SBEC shall make certain specified information regarding EPPs in this state available to the public through the SBEC's Internet website.

CROSS REFERENCE TO STATUTE. The amendments implement Texas Education Code (TEC), §§21.041(a), (b)(1), and (d); 21.043(b) and (c); 21.0441(c) and (d); 21.0443, as amended by House Bill (HB) 159, 87th Texas Legislature, Regular Session, 2021; 21.045, as amended by HB 159, 87th Texas Legislature, Regular Session, 2021; 21.0451; and 21.0452, as amended by Senate Bill 2066, 87th Texas Legislature, Regular Session, 2021.

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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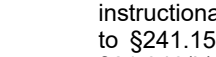

CHAPTER 241. PRINCIPAL CERTIFICATE

The State Board for Educator Certification (SBEC) adopts an amendment to 19 Texas Administrative Code (TAC) §§241.1, 241.5, 241.15, 241.20, 241.30, and 241.35 and the repeal of §§241.41, 241.45, 241.50, 241.55, 241.60, 241.65, and 241.70, concerning certification as principal. The revisions are adopted without changes to the proposed text as published in the August 19, 2022 issue of the *Texas Register* (47 TexReg 4924) and will not be republished. The adopted revisions implement House Bill (HB) 159, 87th Texas Legislature, Regular Session, 2021, to update the educator standards for the Principal as Instructional Leader certificate to reflect the qualifications of certification as a principal. The adopted revisions also repeal outdated Subchapter B, Principal Certificate, and provide technical edits where needed.

REASONED JUSTIFICATION: The SBEC rules in 19 TAC Chapter 241, Certification as Principal, establish all of the requirements for certification and educator preparation program (EPP) minimum standards for issuance of a principal certificate. The adopted revisions to Chapter 241 implement HB 159, 87th Texas Legislature, Regular Session, 2021. Additionally, the revisions update Chapter 241 to repeal the outdated Principal certificate. The following is a description of the adopted revisions.

HB 159 Implementation

To align with statutory requirements in HB 159, the adopted revisions update the educator standards for the Principal as Instructional Leader certificate to ensure that the qualifications for certification as a principal emphasize the ability to create an inclusive school environment and to foster parental involvement, as well as to include curriculum and instruction management for students with disabilities. The following changes update the standards as required by HB 159.

School Culture Educator Standard

The adopted amendment to §241.15(b)(12) implements HB 159's amendment to Texas Education Code (TEC), §21.046(b)(1), by adding the phrase, "creates an inclusive school environment," to the educator standard regarding the safety of staff and students. Similarly, the adopted amendment to §241.15(b)(13) implements HB 159's amendment to TEC, §21.046(b)(1), by adding the phrase, "fosters parent involvement," to the educator standard regarding campus culture.

Leading Learning Educator Standard

The adopted amendment to §241.15(c)(4) implements HB 159's amendment to TEC, §21.046(b)(3), by adding the phrase, "including the needs of students with disabilities," to the educator standard regarding campus curricular, co-curricular, and extracurricular programs. Additionally, the adopted amendment to §241.15(c)(7) implements HB 159's amendment to TEC, §21.046(b)(3), by adding the phrase, "including curriculum and instruction management for students with disabilities," to the educator standard regarding campus curriculum.

Ethics, Equity, and Diversity Educator Standard

The adopted amendment to §241.15(g)(7) implements HB 159's amendment to TEC, §21.046(b)(3), by adding the phrase, "including instructional and curricular supports for students with disabilities," to the educator standard regarding special instructional programs and services. The adopted amendment to §241.15(g)(10) implements HB 159's amendment to TEC, §21.046(b)(1), by adding the phrase, "to create an inclusive school environment," to the educator standard regarding developing strong, positive relationships with all members of the community.

Chapter Reorganization and Technical Edits

The adopted revisions to Chapter 241 reorganize the chapter. Subchapter B, Principal Certificate, is repealed to allow for the removal of the outdated Principal certificate that is no longer issued. This provides clarity to the field on the current SBEC-issued certification as principal. The title and distinction for Subchapter A, Principal as Instructional Leader Certificate and Endorsement, is deleted since it would no longer be necessary to distinguish it from the defunct Principal certificate requirements, given that all the requirements for the current certificate and endorsement are reflected in the chapter.

The adopted amendment provides a technical edit to the certificate naming convention in §§241.1, 241.5, 241.20, and 241.30.

The adopted amendment to §241.20 removes outdated language regarding the piloted Principal as Instructional Leader examination. This provides clarity to the field that the only examination for the certificate is the one noted in 19 TAC Chapter

230, Professional Educator Preparation and Certification, regarding the assessment of educators. The adopted amendment also provides a technical edit to fine-tune the cross reference to 19 TAC Chapter 153, Subchapter CC, and to §241.10.

The adopted amendment to §241.30 updates the title and subsection (a) to include the Principal certificate to clarify the provisions for individuals to renew a Principal certificate as prescribed in 19 TAC Chapter 232, Certificate Renewal and Continuing Professional Education Requirements. This provides clarity to the field with the repeal of Subchapter B, Principal Certificate, to ensure individuals have the proper information regarding renewing their Principal certificate.

The proposed amendment to §241.35(a) removes outdated language and reorders the section accordingly.

SUMMARY OF COMMENTS AND RESPONSES. The public comment period on the proposal began August 19, 2022, and ended September 19, 2022. The SBEC also provided an opportunity for registered oral and written comments on the proposal at the September 30, 2022 meeting in accordance with the SBEC board operating policies and procedures. The following public comments were received on the proposal.

Comment: One individual commented neither in support nor against the proposed revisions to Chapter 241, Certification as Principal. The individual stated that a master's degree should not be required for certification as a principal if the educator has more than five to seven years of experience and has successfully passed the required certification exams.

Response: The SBEC disagrees. The comment is outside the scope of the proposed rulemaking; however, Texas Education Agency staff will consider this feedback for future rulemaking under the jurisdiction of the SBEC.

The State Board of Education (SBOE) took no action on the review of amendments to §§241.1, 241.5, 241.15, 241.20, 241.30, and 241.35 and the repeal of §§241.41, 241.45, 241.50, 241.55, 241.60, 241.65, and 241.70 at the November 18, 2022 SBOE meeting.

19 TAC §§241.1, 241.5, 241.15, 241.20, 241.30, 241.35

STATUTORY AUTHORITY. The amendments are adopted under Texas Education Code (TEC), §21.003(a), which states a person may not be employed as a teacher, teacher intern or teacher trainee, librarian, educational aide, administrator, educational diagnostician, or school counselor by a school district unless the person holds an appropriate certificate or permit issued as provided by the TEC, Chapter 21, Subchapter B; TEC, §21.040(2), which requires the SBEC to appoint an advisory committee composed of members of each class of certificate to recommend standards for that class to the Board; TEC, §21.041(b)(1)-(4), which requires the SBEC to propose rules that provide for the regulation of educators and the general administration of the TEC, Chapter 21, Subchapter B, in a manner consistent with the TEC, Chapter 21, Subchapter B; and requires the SBEC to propose rules that specify the classes of educator certificates to be issued, including emergency certificates; the period for which each class of educator certificate is valid; and the requirements for the issuance and renewal of an educator certificate; TEC, §21.046(b), as amended by House Bill 159, 87th Texas Legislature, Regular Session, 2021, which states the qualifications for certification as a principal requires the SBEC to allow outstanding teachers to substitute approved experience and professional training for part of the educational requirements in lieu of classroom hours, and requires that the qualifications emphasize instructional leadership, including the ability to create an inclusive school environment and to foster parent involvement; administration, supervision, and communication skills; curriculum and instruction management, including curriculum and instruction management for students with disabilities; performance evaluation; organization; and fiscal management; TEC, §21.046(c), which requires the SBEC to ensure that principal candidates are of the highest caliber and that there is a multi-level screening process, along with assessment programs, and flexible internships to determine whether a candidate has the necessary skills for success; TEC, §21.046(d), which states that the SBEC shall consider competencies developed by relevant national organizations and the State Board of Education; and TEC, §21.054(a) and (e), which require the SBEC to propose rules establishing a process for identifying continuing education courses and programs that fulfill educators' continuing education requirements, including particular continuing education requirements for principals.

CROSS REFERENCE TO STATUTE. The amendments implement Texas Education Code (TEC), §§21.003(a); 21.040(2); 21.041(b)(1)-(4); 21.046(b), as amended by House Bill 159, 87th Texas Legislature, Regular Session, 2021, (c), and (d); and 21.054(a) and (e).

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

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SUBCHAPTER B. PRINCIPAL CERTIFICATE

19 TAC §§241.41, 241.45, 241.50, 241.55, 241.60, 241.65, 241.70

STATUTORY AUTHORITY. The repeals are adopted under Texas Education Code (TEC), §21.003(a), which states a person may not be employed as a teacher, teacher intern or teacher trainee, librarian, educational aide, administrator, educational diagnostician, or school counselor by a school district unless the person holds an appropriate certificate or permit issued as provided by the TEC, Chapter 21, Subchapter B; TEC, §21.040(2), which requires the SBEC to appoint an advisory committee composed of members of each class of certificate to recommend standards for that class to the Board; TEC, §21.041(b)(1)-(4), which requires the SBEC to propose rules that provide for the regulation of educators and the general administration of the TEC, Chapter 21, Subchapter B, in a manner consistent with the TEC, Chapter 21, Subchapter B; and requires the SBEC to propose rules that specify the classes of educator certificates to be issued, including emergency certificates; the period for which each class of educator certificate is valid; and the requirements for the issuance and renewal of

an educator certificate; TEC, §21.046(b), as amended by House Bill 159, 87th Texas Legislature, Regular Session, 2021, which states the qualifications for certification as a principal requires the SBEC to allow outstanding teachers to substitute approved experience and professional training for part of the educational requirements in lieu of classroom hours, and requires that the qualifications emphasize instructional leadership, including the ability to create an inclusive school environment and to foster parent involvement; administration, supervision, and communication skills; curriculum and instruction management, including curriculum and instruction management for students with disabilities; performance evaluation; organization; and fiscal management; TEC, §21.046(c), which requires the SBEC to ensure that principal candidates are of the highest caliber and that there is a multi-level screening process, along with assessment programs, and flexible internships to determine whether a candidate has the necessary skills for success; TEC,§21.046(d), which states that the SBEC shall consider competencies developed by relevant national organizations and the SBOE; and TEC, §21.054(a) and (e), which require the SBEC to propose rules establishing a process for identifying continuing education courses and programs that fulfill educators' continuing education requirements, including particular continuing education requirements for principals.

CROSS REFERENCE TO STATUTE. The repeals implement Texas Education Code (TEC), §§21.003(a); 21.040(2); 21.041(b)(1)-(4); 21.046(b), as amended by House Bill 159, 87th Texas Legislature, Regular Session, 2021, (c), and (d); and 21.054(a) and (e).

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TITLE 25. HEALTH SERVICES

PART 1. DEPARTMENT OF STATE HEALTH SERVICES

CHAPTER 265. GENERAL SANITATION

The Executive Commissioner of the Texas Health and Human Services Commission (HHSC), on behalf of the Department of State Health Services (DSHS), adopts the repeal of §§265.181 - 265.211 and new §§265.181 - 265.198, concerning Public Swimming Pools and Spas.

New §§265.181 - 265.183, 265.187, 265.189, 265.191 and 265.193 are adopted with changes to the proposed text as published in the July 15, 2022, issue of the *Texas Register* (47 TexReg 4053). These rules will be republished. The repeal of §§265.181 - 265.211 and new §§265.184 - 265.186, 265.188, 265.190, 265.192, and 265.194 - 265.198 are adopted without changes to the proposed text as published in the July 15, 2022, issue of the *Texas Register* (47 TexReg 4053). These rules will not be republished.

BACKGROUND AND JUSTIFICATION

The repeal of rules and new rules comply with House Bill (H.B.) 2205, 87th Legislature, Regular Session, 2021, which amended Texas Health and Safety Code, Chapter 341, by requiring the adoption, by reference, of a version of the International Swimming Pool and Spa Code (ISPSC), as defined by Texas Local Government Code, §214.103, that is not older than the version in effect on May 1, 2019, regarding all construction, alteration, renovation, enlargement, and repair of commercial swimming pools and spas.

H.B. 2205 does not require DSHS to adopt Chapter 1, Scope and Administration, of the ISPSC. H.B. 2205 does not affect requirements for pool yard enclosures imposed under Texas Health and Safety Code, Chapter 757. Texas Health and Safety Code, §341.0645(c)-(d) are added to comply with H.B. 2205.

H.B. 2205 states the Executive Commissioner is authorized, by rule, to allow a minor addition, alteration, renovation, or repair to an existing pool or spa and related mechanical, electrical, and plumbing systems in the same manner and arrangement as the Executive Commissioner authorized the construction of the pool or spa and related mechanical, electrical, and plumbing systems. H.B. 2205 provides that a person may use, maintain, and repair a pool or spa that was in compliance with the laws of this state on August 31, 2021, and related mechanical, electrical, and plumbing systems in accordance with the laws applicable to the pool or system on that date.

H.B. 2205, notwithstanding the above provisions, does not affect the authority of the Executive Commissioner to adopt rules regarding pool operation and management, water quality, safety standards unrelated to design and construction, signage, and enclosures.

H.B. 2205 also amended Texas Local Government Code, §214.103, to allow a municipality to adopt a more recent version of the ISPSC. To the extent a provision adopted by a municipality conflicts with a law of this state or a regulation on pool operation and management, water quality, safety standards unrelated to design and construction, signage, or enclosures, the state law or regulation controls.

COMMENTS

The 31-day comment period ended August 15, 2022.

During this period, DSHS received comments regarding the proposed rules from five commenters, including Educational Leverage LLC, Williamson County and Cities Health District, Solenis Pool Solutions, The Brannon Corporation, and Wichita Falls Health Department totaling five individuals. A summary of comments relating to the rules and DSHS's responses follows.

Comment: A commenter suggested that therapy pool turnover rates be added back in the rules because they are not in the ISPSC.

Response: DSHS disagrees and declines to add therapy pool turnover rates in response to this comment. The turnover rates for pools are adopted by reference in the 2021 ISPSC, Section 407, concerning Circulation Systems.

Comment: One commenter inquired if Chapter 265, Subchapter M, regarding Public Interactive Water Features and Fountains will be in effect after the adoption of Chapter 265, Subchapter L, regarding Public Swimming Pools and Spas.

Response: DSHS acknowledges the comment and declines to revise the rules in response to this comment. Chapter 265, Subchapter M is not impacted by the adoption of Chapter 265, Subchapter L.

Comment: A commenter stated that chapters and sections of the ISPSC appear to reference the 2018 ISPSC instead of the 2021 ISPSC.

Response: DSHS agrees and updates the references in §265.181(d) to the appropriate chapters and sections of the 2021 ISPSC.

Comment: A commenter requested a definition for minor addition, alteration, renovation, or repair in §265.182.

Response: DSHS disagrees and declines to revise the rule in response to this comment. DSHS adopts, by reference, the 2021 ISPSC, including §102.4, Additions, alterations, or repairs, which states, "minor additions, alterations, renovations and repairs to existing systems shall be permitted in the same manner and arrangement as in the existing system, provided that such repairs or replacement are not hazardous and are approved. In addition, Texas Health and Safety Code, §341.0645(e) states, "The executive commissioner by rule shall authorize a minor renovation, alteration, renovation, or repair to an existing pool or spa and related mechanical, electrical, and plumbing systems in the same manner and arrangement as the executive commissioner authorized the construction of the pool or spa and related mechanical, electrical, and plumbing systems."

Comment: A commenter questioned whether the executive commissioner has the experience and expertise to authorize a minor addition, alteration, renovation, or repair, as described in §265.183, or undertakes the liability for such an authorization.

Response: DSHS disagrees and revises §265.183 of the rule to clarify the allowable minor addition, alteration, renovation, or repair in response to this comment. The executive commissioner does not undertake the liability for authorization of any minor addition, alteration, renovation, or repair.

Comment: One commenter recommended that DSHS include local jurisdictions to §265.183(a) and (b) to allow for a local jurisdiction to review plans for compliance and authorize additions, alterations, renovations, or repairs.

Response: DSHS disagrees and declines to revise the rule in response to this comment. Texas Health and Safety Code, §341.0645(e) does not allow for a local jurisdiction to review plans or authorize additions, alterations, renovations, or repairs. A local jurisdiction may adopt a local pool ordinance, but it will not be mandated by DSHS.

Comment: A commenter requested that DSHS add back the provision that prohibits the use of carpet and wood for deck materials.

Response: DSHS disagrees and declines to add the provision that was in the previous §265.185. ISPSC establishes the requirements for the design, construction, alterations, repair, and maintenance of swimming pools and spas.

Comment: One commenter suggested changing the language in §265.187(d) to require drinking water for public pools and spas constructed before October 1, 1999.

Response: DSHS disagrees and declines to revise the rule in response to this comment. This is not a change from previous §265.198(e) and may be an increased cost to pool or spa owners constructed before October 1, 1999.

Comment: A commenter requested that DSHS include additional methods for backflow prevention to §265.188(c).

Response: DSHS disagrees and declines to revise the rule in response to this comment. Backflow prevention methods are consistent with those established in the 2021 ISPSC.

Comment: One commenter suggested that to meet minimum recommended chlorine level for proper pool operation and sanitation in §265.188(c), the backwash discharge would be in violation of the Texas Commission on Environmental Quality guidelines.

Response: DSHS disagrees and declines to revise the rule in response to this comment. The rules require that pool operators comply with the Texas Commission on Environmental Quality rules for backwashing and wastewater disposal.

Comment: Three commenters explained that the 2021 ISPSC §612.5.4 requires secondary disinfection systems instead of supplemental treatment systems and a single-pass, three log reduction of cryptosporidium required in §265.189(b) and (c).

Response: DSHS disagrees and declines to revise the rule in response to these comments. The 2021 ISPSC §612.5.4 applies to interactive water play features and not to public pools or spas.

Comment: A commenter suggested that DSHS prohibit the use of compressed chlorine gas in general instead of prohibiting the use of compressed chlorine gas for pools and spas constructed on or after January 1, 2021, as required in §265.189(e).

Response: DSHS disagrees and declines to revise the rule in response to this comment. This provision is consistent with the 2021 ISPSC.

Comment: One commenter requested that DSHS add the requirement for pH controllers in §265.189(g) for consistency with the previous public swimming pool and spa rules.

Response: DSHS agrees and revises the rule to include pH and reorganizes this section for clarity.

Comment: A commenter suggested that DSHS add the requirement to §265.190 for a one inch solid or broken line to visually set apart a leading edge for seats and benches, underwater lounges, and underwater toe ledges as required in the previous public swimming pool and spa rules.

Response: DSHS disagrees and declines to revise the rule in response to this comment. The ISPSC establishes the requirements for the design, construction, alterations, repair, and maintenance of swimming pools and spas, including single family residential pools and spas.

Comment: One commenter requested that DSHS add a requirement instead of the option for a rope and float line to signal a change in depth in addition to the required permanent transition line to §265.190(a)(3)(A).

Response: DSHS disagrees and declines to revise the rule in response to this comment. A transition line is a permanent distinction for an increase in depth in contrast to the temporary rope

and float line. In addition, rope and float lines can be tampered with, vandalized, or removed, and they may decompose over time.

Comment: A commenter asked for clarification about minimum or zero depth and the depth markers and the rescue equipment requirements when a pool is closed or for leisure rivers, wave pools, surf pools, vortex pools, and therapy pools in §265.190.

Response: DSHS declines to revise the rule in response to this comment. This comment is a request for rule interpretation and not a request to make changes to the rules.

Comment: One commenter suggested that DSHS require that "NO DIVING" signs be posted in the same location that "NO DIVING" markers are required in §265.190.

Response: DSHS disagrees and declines to revise the rule in response to this comment. Section 265.190(f)(5) requires a "NO DIVING" sign.

Comment: A commenter indicated that the figures for the required signs for pools and water quality were not included in the proposed rules published in the July 15, 2022, issue of the *Texas Register.*

Response: DSHS disagrees and declines to revise the rules in response to this comment. The hyperlinks for Figures 25 TAC §265.190(f)(5) and §265.190(h)(4) are available in the online version of the *Texas Register.* The figures were also published in the "In Addition" section of the *Texas Register* (47 TexReg 4160 - 4162). Signs are consistent with the previous public swimming pools and spas rules and the 2021 ISPSC.

Comment: A commenter requested that the hours of operation be allowed on the outside of the enclosure, the requirement for a border be replaced with the requirement for color contrasting and plain visibility, and the maximum user load limit sign be the same size in inches for pools and spas to be included in §265.190. The commenter also requested that DSHS add a requirement for "IN CASE OF EMERGENCY, DIAL 911", directions to and location of emergency phone, and glass sign for spas in §265.190.

Response: DSHS disagrees and declines to revise the rules in response to this comment. Signs are consistent with the previous public swimming pools and spas rules and the 2021 ISPSC.

Comment: One commenter thanked DSHS for defining specific safety features and fleshing out enclosure requirements and another commenter offered support for details in §265.190(g)(1) and (2) about the construction of the required reaching pole and ring buoy.

Response: DSHS acknowledges the comment, and no change is necessary.

Comment: One commenter requested DSHS require lifeguards based on the square foot of water or per visibility of the area in §265.191(a).

Response: DSHS disagrees and declines to revise the rule in response to this comment. The rules establish minimum lifeguard standards. Pool owners or operators may require additional lifeguards as they deem necessary.

Comment: One commenter stated that the requirement for logs stored on-site or off-site were contradictory and asked if logs should be available within three business days or five business days.

Response: DSHS agrees and revises §265.191(j), and §265.193(k) and (l) to require records be submitted to DSHS or local regulatory authority within five business days of the request.

Comment: A commenter stated that the requirement for one portable Automated External Defibrillator and one Bag-Valve Mask in §296.191(k)(3) is a life-saving provision.

Response: DSHS acknowledges the comment, and no change is necessary.

Comment: A commenter suggested that DSHS require that lifeguard chairs comply with the Occupational Safety and Health Administration (OSHA) requirements. The commenter explained that this provision may be important for older pools with lifeguard chairs that are not OSHA-compliant.

Response: DSHS disagrees and declines to revise §265.191 in response to this comment. The rule does not allow OSHA-noncompliant lifeguard chairs for older pools. OSHA-compliant lifeguard stands are required in §265.191(l).

Comment: One commenter requested that DSHS add pre-October 1, 1999, and post-October 1, 1999, for construction purposes in §265.192 if that is the intent.

Response: DSHS disagrees and declines to revise the rule in response to this comment. The section includes the door and window construction dates where they are intended.

Comment: A commenter suggested that in §265.192 DSHS specify that the barrier have horizontal rails at least 45 inches apart to reduce the ability to climb the barrier.

Response: DSHS disagrees and declines to revise the rule in response to this comment. DSHS has adopted by reference the 2021 ISPSC §305.2.5, related to Closely spaced horizontal members.

Comment: Two commenters requested that DSHS be consistent with other barrier hardware requirements of a minimum of 52 inches and greater than 54 inches in §265.192.

Response: DSHS disagrees and declines to revise the rule in response to these comments. The commenters did not provide a reference for the barrier requirements they requested in their comments. DSHS' requirement of 3.5 feet (42 inches) above the door or walkway is consistent with ISPSC §305.3.3, related to Latch release, that sets a maximum of 54 inches.

Comment: A commenter inquired whether the chemical balance testing frequency should be at least every 10 days as required in §265.193(k) or at least once each 30 days as required in §265.193(o)(4).

Response: DSHS agrees and revises §265.193(o)(4) to test at least every 10 days.

Comment: One commenter suggested requiring pool owners to test pool water more often than once per day and recommended testing first thing in the morning and every four hours while the pool is open to swimmers to §265.193(o)(3).

Response: DSHS disagrees and declines to revise the rule in response to this comment. Pool owners may manually check their automated systems as they deem necessary.

Comment: A commenter stated that for Class C pools and spas that do not have on-site staff primarily responsible for pools and spas, manually checking the system once per week is dangerous and could put swimmers at risk in §265.193(o)(3).

Response: DSHS disagrees and declines to revise the rule in response to this comment. The rule is a minimum standard and a pool operator may manually check their automated systems as they deem necessary.

Comment: One commenter suggested DSHS include the difference in cyanuric acid levels required for pools with public interactive water features in §265.193.

Response: DSHS disagrees and declines to revise the rule in response to this comment. Chapter 265, Subchapter M, related to Public Interactive Water Features and Fountains, is not included in Chapter 265, Subchapter L and may be revised at a future date.

Comment: A commenter suggested that the cyanuric acid limit in §265.193 be based on the free chlorine concentration and recommended a ratio of 15:1 of cyanuric acid to free chlorine.

Response: DSHS disagrees and declines to revise the rule in response to this comment. The rule requires the sanitizer levels be raised 2.0 ppm of free chlorine, and sanitizer level, pH, and cyanuric acid levels must be measured and recorded at least once per day when the cyanuric acid level goes above 100 ppm.

Comment: A commenter suggested a lower maximum cyanuric acid level in §265.193 for public pools and the correction to a high cyanuric acid level be mandatory and remedied quickly.

Response: DSHS disagrees and declines to revise the rule in response to this comment. The rule requires the sanitizer levels be raised 2.0 ppm of free chlorine, and sanitizer level, pH, and cyanuric acid levels must be measured and recorded at least once per day when the cyanuric acid level goes above 100 ppm.

Comment: One commenter suggested adding the requirement to provide a spare main drain cover in lieu of the required documentation.

Response: DSHS disagrees and declines to revise the rule in response to this comment. The documentation required in §265.194(e) is to confirm that the pool and spa suction outlets meet the required standard.

Comment: A commenter requested that DSHS add language for pools constructed before October 1, 1999, specifically the requirement in §265.194 for maintaining the water level within the designed operating water level for an indoor 1940s pool.

Response: DSHS disagrees and declines to revise the rule in response to this comment. DSHS adopts the 2021 ISPSC §102.2, regarding existing installations that addresses such issues.

Comment: One commenter suggested that in addition to not prohibiting a United States Coast Guard (USCG)-approved personal floatation device (PFD), §265.194 should also not prohibit a PFD of the proper size and fit.

Response: DSHS disagrees and declines to revise the rule in response to this comment. There is no existing guidance for size and fit of PFDs.

Comment: One commenter asked if the restroom and dressing room exemptions in previous §265.204(g) and (h) no longer apply.

Response: DSHS disagrees and declines to revise the rule in response to this comment. The provision for restroom and dressing rooms are adopted by reference in Section 609, concerning Dressing and Sanitary Facilities, of the 2021 ISPSC.

DSHS replaces a reference in §265.182(34), concerning fecal incidence response recommendations for aquatic staff.

DSHS edits §265.183(b) to clarify the requirement for minor additions, alterations, renovations, or repairs.

DSHS revises the reference in §265.187(b) to the American Society of Sanitary Engineering Standard 1013, concerning a water distribution system.

DSHS adds punctuation to §265.191(b) and (d) for clarity.

DSHS makes minor edits to §265.193(h) and (k) to clarify that referenced logs are the pools and spas logs required in the section.

SUBCHAPTER L. PUBLIC SWIMMING POOLS AND SPAS

25 TAC §§265.181 - 265.211

STATUTORY AUTHORITY

The repeals are authorized by Texas Health and Safety Code §341.002, which authorizes the Executive Commissioner of HHSC to adopt rules and establish standards and procedures for the management and control of sanitation and for health protection measures; and by Texas Government Code, §531.0055 and Texas Health and Safety Code, §1001.075, which authorize the Executive Commissioner of HHSC to adopt rules and policies necessary for the operation and provision of health and human services by DSHS and for the administration of Texas Health and Safety Code, Chapter 1001.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on December 12, 2022.

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Cynthia Hernandez
General Counsel
Department of State Health Services
Effective date: January 1, 2023
Proposal publication date: July 15, 2022
For further information, please call: (512) 834-6787

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25 TAC §§265.181 - 265.198

STATUTORY AUTHORITY

The new sections are authorized by Texas Health and Safety Code §341.002, which authorizes the Executive Commissioner of HHSC to adopt rules and establish standards and procedures for the management and control of sanitation and for health protection measures; and by Texas Government Code, §531.0055 and Texas Health and Safety Code, §1001.075, which authorize the Executive Commissioner of HHSC to adopt rules and policies necessary for the operation and provision of health and human services by DSHS and for the administration of Texas Health and Safety Code, Chapter 1001.

§265.181. General Provisions.

(a) Scope and purpose. The purpose of this subchapter is to implement Texas Health and Safety Code, §341.064, Swimming Pools,

Artificial Swimming Lagoons and Bathhouses, and §341.0645, Pool Safety.

(b) Adoption by reference. Department of State Health Services (DSHS) adopts by reference the 2021 International Swimming Pool and Spa Code (ISPSC) regarding construction, alteration, renovation, enlargement, and repair of commercial swimming pools and spas; the ANSI/APSP-16 American National Standard for Suction Outlet Fitting Assemblies (SOFA) for use in Pools Spas and Hot Tubs; and the ANSI/PHTA/ICC-7 American National Standard for Suction Entrapment Avoidance in Swimming Pools, Wading Pools, Spas, Hot Tubs, and Catch Basins as specified in subsection (c) of this section.

(c) ISPSC sections adopted. DSHS adopts by reference the following chapters and sections from the ISPSC, except as provided in subsection (d) of this section: Section 102 in Chapter 1, Scope and Administration; Chapter 2, Definitions; Chapter 3, General Compliance, only as these sections and chapters relate to the construction, alteration, renovation, enlargement, and repair of commercial swimming pools and spas; Chapter 4, Public Swimming Pools; Chapter 5, Public Spas and Public Exercise Spas; and Chapter 6, Aquatic Recreation Facilities.

(d) ISPSC sections not adopted. DSHS does not adopt by reference the following chapters and sections from the 2021 ISPSC: Sections 102.7.1, 103, 104, 105, 106, 107, 108, 109.2, 109.3, 110, 111, 112, 113, and 114 in Chapter 1, Scope and Administration; Definitions in Section 202 in Chapter 2: Code Official, Deep Area, Design Professional, and Jurisdiction; Section 412.2 in Chapter 4, Public Swimming Pools; Section 508.3 in Chapter 5, Public Spas and Public Exercise Spas; Section 603.3 in Chapter 6, Aquatic Recreation Facilities; Chapter 7, Onground Storable Residential Swimming Pools; Chapter 8, Permanent Inground Residential Swimming Pools; Chapter 9, Permanent Residential Spas and Permanent Residential Exercise Spas; and Chapter 10, Portable Residential Spas and Portable Residential Exercise Spas.

(e) Application of the rules. The rules in this subchapter establish minimum standards for swimming pools and spas concerning pool operation and management, water quality, safety standards unrelated to design and construction, signage, enclosures, and safety features intended to reduce to a practical minimum the possibility of drowning or injury to users.

(f) Date of construction. The date of construction of a pool, spa, or a bathhouse is the date that a building permit for construction is issued. If no building permit is required, the date that excavation or electrical service begins, whichever is earlier, is the date of construction. In the case of the latter, the owner or operator must produce adequate written documentation of the date of excavation or the beginning date of electrical service.

(g) Regulations not in the ISPSC. Regarding regulations in this subchapter not addressed by the ISPSC, local regulatory authorities may, with the exception of DSHS-approved alternate methods of disinfection set forth in §265.196 of this subchapter (relating to Request for Alternate Method of Disinfectant), adopt standards that vary from the standards in this subchapter; however, such standards must be equivalent to or more stringent than the standards in this subchapter.

(h) References to public swimming pools and public spas. The rules specify whether a particular provision concerns pool operation and management, water quality, safety standards unrelated to design and construction, signage, enclosures, and safety features applies to pools and spas constructed on or after the effective date of this subchapter or whether it applies to all public swimming pools and public spas regardless of the date of construction.

§265.182. Definitions.

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

(1) AED--Automated External Defibrillator. A device that automatically diagnoses the life-threatening cardiac arrhythmias of ventricular fibrillation and pulseless ventricular tachycardia and can treat those conditions by application of electricity which stops the arrhythmia, allowing the heart to re-establish an effective rhythm.

(2) Alternate method of disinfectant--A method of disinfectant for a pool or spa requiring approval by DSHS.

(3) Alternative communication system--Devices that alert multiple on-site staff when activated, such as pager systems, radios, or walkie-talkie communication systems. Used to notify on-site EMS, on-site medical staff, on-site certified staff such as lifeguards, or a commercial emergency monitoring service.

(4) ANSI--American National Standards Institute.

(5) APSP--Association of Pool and Spa Professionals now known as the Pool and Hot Tub Alliance (PHTA).

(6) ARC--American Red Cross.

(7) Artificial swimming lagoon--An artificial body of water used for recreational purposes with more than 20,000 square feet of surface area, an artificial liner, and a disinfectant method. The term does not include a body of water open to the public that continuously recirculates water from a spring or a pool.

(8) ASPSA--American Swimming Pool and Spa Association.

(9) ASTM International--American Society of Testing Materials International.

(10) ASTM F2376--Standard Practice For Classification, Design, Manufacture, Construction, And Operation Of Water Slide Systems.

(11) Backflow prevention device--A device designed to prevent a physical connection between a potable water system and a non-potable source, such as a pool or spa, or a physical connection between a pool or spa and a sanitary sewer or wastewater disposal system.

(12) Breakpoint chlorination--The addition of enough of the chlorination compound to water to destroy chlorine demand compounds, chloramines, and any combined chlorine that is present. The amount added is normally 10 times the combined chlorine concentration. Breakpoint chlorination, also called "superchlorination," results in a decrease in eye irritation potential and "chlorine odors."

(13) BVM--Bag-Valve Mask. A handheld device used to provide positive pressure ventilation to persons who are not breathing adequately. Also known by its proprietary name, Ambu bag.

(14) Chlorine--An element that at room temperature and pressure is a heavy green-yellow gas that is used to sanitize water. Chlorine, when mixed with water, forms hypochlorous acid, which is the disinfecting agent, and hydrochloric acid.

(15) Cleansing shower--A shower with hot and cold running water and soap for the purpose of removing dead skin, sweat, dirt, and waste material from users.

(16) Combined chlorine--Also known as "chloramine(s)." Formed when free chlorine combines with nitrogen-containing compounds such as perspiration and ammonia. Combined chlorine, or chloramines, can cause eye and skin irritation, strong and unpleasant "chlorine" odors, and is not as effective as a sanitizer or disinfectant.

(17) Commercial pool and spa--A public swimming pool and spa as defined in paragraph (51) of this section, referring to public pool and in paragraph (54) of this section, referring to public spa.

(18) Cross-connection control device--A backflow prevention device as defined in this section.

(19) *Cryptosporidium parvum*--A microscopic parasite that is highly tolerant to chlorine disinfection and that causes the diarrheal disease cryptosporidiosis. It is commonly referred to as Crypto.

(20) Day camp--A day camp as described in the Texas Youth Camps Safety and Health rules, §265.11 of this chapter (relating to Definitions).

(21) Disinfectant--Energy, chemicals, or a combination of both used to kill or irreversibly inactivate microorganisms such as bacteria, viruses, and parasites.

(22) DPD--A chemical testing reagent (N, N-Diethyl-P-Phenylenediamine) used to measure the levels of free chlorine or bromine in water by yielding a series of colors ranging from light pink to dark red.

(23) DSHS--Texas Department of State Health Services.

(24) EMS--Emergency medical services.

(25) Emergency monitoring service--A service that provides an emergency summoning device at pools and spas that is monitored 24 hours a day off-site by personnel trained to identify pool and spa related emergencies, such as drownings. A service capable of contacting local EMS, providing a precise location of the emergency call to local EMS, and that has personnel trained to offer the caller instructions for assisting when possible.

(26) Exercise spa or swim spa--For purposes of the rules in this subchapter related to safety, operation and management, signage, and enclosures, exercise spas or swim spas are a variant of a spa in which the design and construction includes specific features and equipment to produce a water flow intended to allow recreational physical activity including swimming in place.

(27) Facility--A pool, spa, public interactive water feature or fountain, and restrooms, dressing rooms, equipment rooms, deck or walkways, beach entries, enclosure, and other appurtenances directly serving the pool or spa.

(28) FIFRA--The Federal Insecticide, Fungicide, and Rodenticide Act.

(29) Filter media--A finely graded material (for example, sand, diatomaceous earth, or polyester fabric) that removes filterable particles from the water.

(30) FINA--Fédération Internationale de Natation. The organization that administers international competition in aquatic sports.

(31) Floatation system--A combination of a float solution holding vessel and treatment system for the immersion and floatation of a person or persons in a temperature-controlled environment. Also known as a flotation system, sensory deprivation system or floatation chamber. For purposes of this subchapter, a floatation system is not considered a pool or spa.

(32) Free available chlorine or free chlorine residual--That portion of the total chlorine remaining in chlorinated water that is not combined with ammonia or nitrogen compounds and that will react chemically with bacteria or other pathogenic organisms in the water of a pool, spa, or lagoon.

(33) Gpm--Gallons per minute.

(34) Hyperchlorination--The intentional and specific raising of chlorine levels for a prolonged period-of-time to inactivate pathogens following a diarrheal release in a pool or spa as per the Centers for Disease Control and Prevention's guidance titled "Healthy Swimming: Fecal Incident Response Recommendations for Aquatic Staff".

(35) Island--A structure inside a pool where the perimeter is surrounded by the water in the pool and the top is above the surface of the pool.

(36) Langelier Saturation Index--A number indicating the degree of saturation in water related to calcium carbonate solubility. The number represents the ability of water to deposit calcium carbonate, or dissolve metal, concrete, or grout.

(37) Licensed design professional--A person licensed to engage in the practice of design in the state of Texas in accordance with relevant licensing laws, including an architect, electrician, and engineer.

(38) Licensed architect--A person licensed to engage in the practice of architecture in the State of Texas in accordance with the Texas Occupations Code, Chapter 1051, and related rules.

(39) Licensed electrician--A person licensed to perform electrical work on pools and spas in accordance with the Texas Electrical Safety and Licensing Act, Texas Occupations Code, Chapter 1305, and related rules.

(40) Licensed engineer--A person licensed to engage in the practice of engineering in the State of Texas in accordance with the Texas Engineering Practice Act, Texas Occupations Code, Chapter 1001, and related rules.

(41) Lifeguard--A person who supervises the safety and rescue of swimmers, surfers, and other water sports participants and who has successfully completed and holds a current ARC, Young Men's Christian Association, or equivalent Lifeguard Certificate from an aquatic safety organization, a current First Aid Certificate, and a current cardiopulmonary resuscitation (CPR) certificate received for training in CPR for adults, infants, and children and the use of an AED and BVM.

(42) Local regulatory authority--A county, municipality, or other political subdivision of the state having jurisdiction over pools and spas and associated facilities.

(43) mV--Millivolt.

(44) NCAA--National Collegiate Athletic Association.

(45) NRPA--National Recreation and Parks Association.

(46) ORP--Oxidation Reduction Potential. The measure of the oxidation-reduction potential of chemicals in water or the tendency for a solution to either gain or lose electrons. It is generally measured in millivolts (mV) by means of an electronic meter and depends upon types and concentrations of oxidizing and reducing chemicals in water.

(47) pH--A value expressing the relative acidic or basic tendencies of liquids, such as water, on a scale from 0 to 14 with 7.0 being neutral, values less than 7.0 being acidic, and values greater than 7.0 being basic.

(48) PHTA--Pool and Hot Tub Alliance. Formerly APSP.

(49) PIWF--Public interactive water feature and fountain. A PIWF includes any indoor or outdoor installation maintained for public recreation that includes water sprays, dancing water jets, waterfalls, dumping buckets, or shooting water cannons in various arrays for the purpose of wetting the persons playing in the spray streams. It may be a stand-alone PIWF, also known as a splash pad, spray pad, or wet deck, or may share a water supply, disinfection system, filtration system, circulation system, or other treatment system that allows water to co-mingle with a pool.

(50) Pool yard or spa yard--An area that has an enclosure containing a pool or spa.

(51) Public pool--For purposes of the rules in this subchapter related to safety, operation and management, signage and enclosures, pools are classified and referred to as follows: any man-made permanently installed or non-portable structure, basin, chamber, or tank containing an artificial body of water that is maintained or used expressly for public recreation, swimming, diving, aquatic sports, or other aquatic activity. Public pools include but are not limited to activity pools, catch pools, lazy or leisure river pools, wave action pools, vortex pools, therapy pools, and wading pools. A public pool may be publicly or privately owned and may be operated by an owner, lessee, operator, licensee, or concessionaire. A fee for use may or not be charged. The term does not include a residential pool, artificial swimming lagoon, floatation system or chamber, or a body of water that continuously recirculates water from a spring.

(A) Class A pool--Any pool maintained or used, with or without a fee, for accredited competitive events such as FINA, United States Swimming, United States Diving, NCAA, or National Federation of State High School Association events. A Class A pool may also be used for recreational swimming.

(B) Class B pool--Any pool maintained or used for public recreation and open to the general public with or without a fee.

(C) Class C pool--Any pool that is not a Class A or B pool that is limited to occupants, members, or students and their guests, but not to the general public. It is a pool operated for and in conjunction with:

(i) lodging, such as hotels, motels, apartments, condominiums, RV parks, or mobile home parks;

(ii) youth camps, property owner associations, private organizations, or clubs; or

(iii) schools, colleges, or universities while operated for academic or continuing education classes.

(52) Pools and Spas--Public swimming pools and public spas are referred to as pools and spas throughout this subchapter.

(53) Ppm--Parts per million.

(54) Public spa--A body of water intended for the immersion of persons in either hot or cold water circulated in a closed system and not intended to be drained and refilled after each use. A spa can include a filter, heater, a pump or pumps, blowers, and water sanitizing equipment. The term includes a swim spa or exercise spa. For purposes of the rules in this subchapter related to safety, operation and management, signage, and enclosures, spas are classified and referred to as follows:

(A) Class A spa--Any spa maintained or used, with or without a fee, for accredited competitive events such as FINA, United States Swimming, United States Diving, NCAA, and National Federation of State High School Association events.

(B) Class B spa--Any spa maintained or used for public recreation and open to the general public with or without a fee.

(C) Class C spa--A spa that is not a Class A or Class B spa that is open to occupants, members, or students and their guests, but not to the general public. It is a spa that is operated for and in conjunction with:

(i) lodging, such as hotels, motels, apartments, condominiums, RV parks, or mobile home parks;

(ii) youth camps, property owner associations, private organizations, or clubs; or

(iii) schools, colleges, or universities while operated for academic or continuing education classes, or hospitals or medical centers.

(55) Regulatory authority--A federal or state agency or local regulatory authority having jurisdiction over pools and spas, and associated facilities.

(56) Rescue tube--A piece of lifesaving equipment that is a part of the equipment used by lifeguards to make water rescue easier by helping support the victim's and rescuer's weight.

(57) Resident youth camp--A resident youth camp as described in the Texas Youth Camps Safety and Health rules, §265.11 of this chapter.

(58) Residential pool or spa--A pool or spa that is located on private property under the control of the property owner or the owner's tenant and that is intended for use by not more than two resident families and their guests. It includes a pool or a spa serving only a single-family home or duplex.

(59) Rinsing shower--A shower located on the pool or spa deck for the purpose of removing sand, dirt, sweat, and user hygiene products without the use of hot water or soap.

(60) Secchi disk--An 8-inch diameter disk with alternating black and white quadrants that is lowered in the pool and spa and is used to measure water turbidity and clarity.

(61) Secondary disinfection system--A process or system installed in addition to the standard disinfection system required on all pools and spas.

(62) Self-closing and self-latching device--A device or mechanism that causes a gate to automatically close without human or electrical power after it has been opened and to automatically latch without human or electrical power when the gate closes.

(63) Slide--A recreational feature with a flow of water and an inclined flume or channel by which a user is conveyed downward into a pool.

(A) Drop slide--A slide that drops users into the water from an elevated height into water.

(B) Pool slide--A slide having a configuration as defined in the Code of Federal Regulations, Chapter II, Title 16, Part 1207 by United States Consumer Product Safety Commission or is similar in construction to a playground slide that allows users to slide from an elevated height to a pool. This includes children's (tot) slides.

(C) Waterslide--A slide that runs into a landing pool or runout through a fabricated channel with flowing water.

(64) Supplemental treatment system--A system, process, or water treatment which is not required on a public pool or spa for health and safety reasons that may be used to enhance overall system performance and improve water quality.

(65) Surf pool--A pool with less than 20,000 square feet of water surface area in which waves are generated and dedicated to the activity of surfing on a surfboard or analogous surfing device commonly used in the ocean and intended for sport. A surf pool is intended for the sport of surfing as opposed to general play activities in wave pools.

(66) Superchlorination--See paragraph (12) of this section, Breakpoint chlorination.

(67) TCEQ--Texas Commission on Environmental Quality.

(68) TDLR--Texas Department of Licensing and Regulation.

(69) Therapeutic pool or spa--A pool or spa that is operated exclusively for therapeutic purposes, such as physical therapy, and is under the direct supervision and control of licensed or certified medical personnel.

(70) Total alkalinity--A measure of the ability or capacity of water to resist change in pH, also known as the buffering capacity of water. Total alkalinity is measured with a test kit and expressed as parts per million (ppm) and consists mainly of carbonates, bicarbonates and hydroxides.

(71) Total chlorine--The sum of both the free available chlorine and combined chlorine (chloramines).

(72) UL--An independent testing laboratory (formerly Underwriters Laboratories).

(73) USCG--United States Coast Guard.

(74) User--A person using a pool, spa, or lagoon or adjoining deck.

(75) VGBA--The Virginia Graeme Baker Pool and Spa Safety Act. A federal law that requires drain covers to comply with entrapment protection requirements specified by the American National Standards Institute (ANSI) ANSI/APSP 16 performance standard or any successor standard, and ANSI/PHTA/ICC-7 American National Standard for Suction Entrapment Avoidance in Swimming Pools, Wading Pools, Spas, Hot Tubs, and Catch Basins.

(76) Wading pool--A pool with a maximum water depth that is no greater than 18 inches. A wading pool may contain a PIWF.

(77) Wave pool--A pool, with less than 20,000 square feet of water surface area, designed to simulate breaking or cyclic waves for purposes of general play. A wave pool is intended for general play as opposed to a surf pool that is intended for sport.

(78) Written instructions--Written communication that provides directions for carrying out a procedure or performing a task. Written instructions can include manuals, journals, lists, printed materials, computer-generated materials, and handwritten materials. Written instructions may be maintained in electronic form so long as electronic use and transmission of the electronic materials does not present a risk to the health and safety of individuals accessing the electronic materials.

§265.183. Plans and Instructions.

(a) Plans for new construction of pools and spas. DSHS may review plans for pools and spas to ensure compliance with construction requirements. If DSHS intends to review plans, DSHS will notify the owner or operator in writing.

(b) Additions, alterations, renovations, or repairs authorized. A minor addition, alteration, renovation, or repair to an existing pool or spa and related mechanical, electrical, and plumbing systems may be performed in accordance with the construction standard that was in place when the pool and spa was constructed.

(c) Accepted practice for pools and spas. The structural design and materials for pools and spas constructed before the effective date of this subchapter must be in accordance with accepted industry engineering practices and methods prevailing at the time of original construction unless otherwise stated in this subchapter.

§265.187. Pool or Spa Water Supply and Drinking Water for All Pools and Spas.

(a) Water supply. For all pools and spas, the initial fill water and make-up water used to maintain the water level and water used as a vehicle for sanitizers or other chemicals for pump priming or for other additions must be from a public water system, as defined by 30 TAC §290.38 (relating to Definitions), or from a water well that complies with the requirements of subsection (c) of this section.

(b) Water distribution system. All portions of the water distribution system must be protected against backflow and back siphonage using a high hazard preventer such as a reduced-pressure-principle backflow preventer meeting the requirements of the American Society of Sanitary Engineering Standard 1013, as amended, and approved for use in potable water systems possibly subjected to back siphonage or high back pressure or an air gap designed to ASME Standard A112.1.2.

(c) Private water supply. If the water supply providing water to the pool or spa does not meet the definition of a public water system, as defined in subsection (a) of this section, that water supply must comply with the following requirements.

(1) Water pressure system must be designed to:

(A) maintain a minimum pressure of 35 pounds per square inch (psi) at all points within the distribution network at flow rates of at least 1.5 gallons per minute per connection;

(B) maintain a minimum pressure of 20 psi under combined fire and drinking water flow conditions when the system is intended to provide firefighting capability; and

(C) maintain a minimum distribution pressure not less than 20 psi at any time.

(2) Coliform testing of the well water must be performed each month the pool or spa is open for use. Records of any bacteriological tests must be kept on-site for three years and made available during inspection.

(3) Chemical analysis must be for the secondary constituent levels set out by 30 TAC §290.118 (relating to Secondary Constituent Levels).

(A) Water samples for chemical analysis obtained from the entry point to the distribution system must be submitted once every three years to a laboratory certified by the TCEQ.

(B) Records of all chemical testing must be kept on-site for three years and made available during inspection.

(d) Drinking water provided. At least one drinking water fountain or other source of drinking water, such as bottled water, must be provided and available for pool and spa users at all pools and spas constructed on or after October 1, 1999, and must be available at all times the pool or spa is open for use. A faucet, spigot, or sink does not satisfy the requirements for providing drinking water. Glass containers must not be allowed on a deck, in the pool or spa, or anywhere within the pool yard or spa yard.

(1) The drinking water is not required to be chilled.

(2) The drinking water is not required to be in the pool or spa yard.

(3) When the drinking water is not located in the pool yard or spa yard, a sign with letters a minimum of 1 inch in height is required. The sign must be posted so that it is visible to users that informs the users of the location of the drinking water.

(e) Hose bibs. Hose bibs in the pool yard or spa yard must be protected with a vacuum breaker.

§265.189. Disinfectant Equipment and Chemical Feeders.

(a) Disinfectant agent. Pool and spa water must be continuously disinfected by a chlorine or bromine disinfectant agent that can be easily measured by simple and accurate field tests.

(b) Supplemental treatment systems. Supplemental treatment systems may be installed and used on pools and spas.

(1) Supplemental treatment systems used only to treat water in a pool or spa and not a public interactive water feature or fountain (PIWF) are not required to meet the minimum 3-log or 2-log inactivation of *Cryptosporidium parvum.*

(2) Supplemental treatment systems used to treat water in a PIWF must comply with the requirements in §265.306(g) of this chapter (relating to Water Quality at Public Interactive Water Features and Fountains) referring to supplemental water treatment systems for PIWFs.

(3) Supplemental treatment systems must meet NSF Standard 50 or NSF Standard 60, have an Environmental Protection Agency (EPA) or FIFRA registration, and be used in accordance with the manufacturer's instructions.

(c) Secondary disinfection systems. Secondary disinfection systems may be installed and used on a pool or spa and must be certified, listed, and labeled to NSF Standard 50.

(1) Secondary disinfection systems must achieve a minimum 2-log (99%) reduction in the number of infective *Cryptosporidium parvum* oocysts per pass though the treatment system; and

(2) must be located in the treatment system so that the 2-log reduction is obtained.

(3) Validation records, as applicable, and operation records must be maintained for any secondary disinfection system or treatment, and must be maintained on-site, or made available to the inspector within five business days upon request if kept off-site.

(d) Water treatment chemicals. Treatment chemicals must be certified, listed, and labeled to either NSF Standard 50 or NSF Standard 60 or have an EPA FIFRA registration and be used only in accordance with the manufacturer's instructions.

(e) Chlorine gas prohibited. Use of compressed chlorine gas is prohibited in pools and spas constructed on or after January 1, 2021.

(f) Training and protection. Personnel responsible for the operation of the disinfectant agent and other potentially hazardous chemicals, whether it is the trained and certified operator, or someone assigned to maintain a pool or spa when the trained and certified operator is not on-site, must be properly trained and provided with appropriate protective equipment and clothing, including rubber gloves and goggles, safety information, and safety data sheets. Safety data sheets covering all chemicals for which personnel are responsible must be kept on-site and be readily available.

(g) Application of disinfectant in a pool or spa.

(1) Automatic distribution of chemicals. If using automatic feeders, automated controllers that adjust chemical feed based on demand or manually, or remotely managed controllers for pool and spa disinfection and pH control, must be installed. Automatic feeders must meet NSF Standard 50 for use in public pools and spas and must operate in a manner that does not invalidate the NSF rating for the system and equipment.

(A) Controllers that adjust chemical feed either manually or automatically are required.

(B) Disinfection equipment must be selected and monitored so that continuous and effective disinfection can be achieved under all conditions.

(C) Disinfectant feed systems must have the capacity to maintain up to 5 parts per million (ppm) chlorine (or equivalent bromine level) in outdoor pools and spas and up to 3 ppm chlorine (or equivalent bromine level) in indoor pools and spas under all conditions of intended use.

(D) Skimmer baskets or floating dispensers may not be used to dispense disinfectant, chemicals that adjust pH, or algaecides.

(2) Hand distribution of chemicals. Hand distribution of disinfectant chemicals, chemicals used to adjust pH, or algaecides is prohibited when users are in the pool or spa. Before users reenter the pool or spa following hand distribution of disinfectant chemicals, chemicals used to adjust pH, or algaecides, the following applies:

(A) tests of disinfectant levels and pH must be performed 30 minutes after hand distribution; and

(B) no one may reenter the pool or spa until the disinfectant levels and pH are checked and are found to be within the required range.

(h) Bulk chemical tanks. All chemical bulk and day tanks must be clearly labeled to indicate the tank's contents.

(i) Chemical storage areas.

(1) Disinfectant agents, other chemicals, and feed equipment must be stored so that pool and spa users and other unauthorized persons do not have access.

(2) Dry chemicals must be stored off the floor or in waterproof containers in a dry room and protected against flooding or wetting from floors, walls and ceiling.

(3) Chlorine compounds must not be stored in the same storage room or storage area as petroleum products.

§265.191. Lifeguard Personnel Requirements and Standards at Pools.

(a) Lifeguards required. Pools and spas are required to meet the operational standard that is most applicable to their respective use. For example, a pool or spa that is normally operated as a Class C pool or spa but is occasionally made available to the public, with or without a fee, must meet Class B lifeguard standards when the pool is open to the general public, with or without a fee. A minimum of two lifeguards must be provided at:

(1) Class A pools during competitive events;

(2) Class B pools whenever the Class B pool is open;

(3) any pool where a user enters the water from any height above the deck or wall, including from diving boards, diving platforms, drop slides, waterslides, starting platforms, zip lines, or climbing walls that are open for use;

(4) any wave or surf pool; or

(5) any pool while it is being used for the recreation of youth groups, including youth camps, visiting childcare groups, or visiting school groups, and a minimum of two lifeguards must be provided by either the aquatic facility or by the youth group using the aquatic facility.

(b) Closing diving boards, diving platforms, drop slides, waterslides, starting platforms, zip line, or climbing wall. A diving board, diving platform, drop slide, waterslide, starting platform, zip line, climbing wall, or any other structure that allows entry from any height above the deck will be considered open unless there is a lock, chain, or other method used to prevent access to these structures, and a sign is posted on the entry to these structures stating that they are closed.

(c) Lifeguards at spas. Lifeguards are not required at spas.

(d) Lifeguard staffing plan required. A staffing plan specifying the number of on-duty lifeguards must be prepared by the pool operator, lifeguard supervisor, or pool owner, and must provide adequate supervision and close observation of all users at all times. A copy of the plan must be available on-site and be provided to a DSHS or local regulatory authority inspector upon request.

(e) Surveillance area. Each lifeguard must be given an assigned surveillance area commensurate with ability and training. The lifeguard must be able to view the entire assigned surveillance area.

(f) Other duties must not distract. Lifeguards conducting surveillance of users must not be assigned duties that would distract the lifeguard's attention from proper observation of the users or that would prevent immediate assistance to persons in the water.

(g) Lifeguard rotation required. When lifeguards are provided or required, a rotation procedure for lifeguards is required. Lifeguards must have break time from guarding activities as recommended by ARC or equivalent aquatic safety organization.

(h) Lifeguard training and drills. When lifeguards are provided or required, alertness and response drills and any other training is required, including:

(1) a pre-season training program;

(2) a continual "in-service" program of at least a minimum of 60 minutes for every 40 hours of employment by the lifeguard or other aquatic safety personnel;

(3) a review of the Centers for Disease Control and Prevention standards for responding to formed-stool contamination, diarrheal-stool contamination, vomit contamination, and contamination involving blood;

(4) performance audits as recommended by the ARC, Young Men's Christian Association, or by an equivalent aquatic safety organization; and

(5) a facility emergency action plan for an event, such as submersion, suspected spinal injury, medical emergency, thunderstorm, missing person, bad weather, or chemical exposure.

(i) Emergency action plan. Any pool or spa emergency action plan must contain the following:

(1) a list of emergency phone numbers and contacts, including the trained and certified operator;

(2) the location of the first-aid kit and other rescue equipment such as the AED, BVM, and backboard;

(3) a response plan for inclement weather such as a thunderstorm, lightning, or high wind, including evacuation areas; and

(4) a plan following the Centers for Disease Control and Prevention standards for responding to formed-stool contamination, diarrheal-stool contamination, vomit contamination, and contamination involving blood.

(j) Lifeguard records. All training must be kept current. Records confirming the status of training must be made available upon request. If records are not kept on-site, records must be provided to DSHS or local regulatory authority within five business days of the request. The following records pertaining to lifeguards must be kept three years:

(1) each lifeguard's certification, including the expiration date; and

(2) records of the most current training, including date, length of training, training topic, trainer name, and attendee.

(k) Lifeguard access to safety equipment. Lifeguards must have access to safety equipment including:

(1) an Occupational Safety and Health Administration (OSHA) compliant, minimum 24-unit first aid kit housed in a durable weather-resistant container that is fully stocked and ready for use. The kit must include disease transmission barriers and cleaning kits meeting OSHA standards;

(2) at least one backboard equipped with a head immobilizer and sufficient straps to immobilize a person to the backboard located close enough to a pool or spa to enable a two-minute response time to an incident in a pool or spa.

(3) at least one portable AED and one BVM kept in a secure location that can be easily and quickly accessed by lifeguards or other trained personnel.

(l) Lifeguard stands. OSHA-compliant lifeguard stands with platforms for lifeguards are required where water depth is greater than 5 feet and must have a protective umbrella or sunshade high enough to give lifeguards a complete and unobstructed view of the assigned area of surveillance for the lifeguards. Lifeguard stands and platforms must be located such that there are no hazards such as electrical wires directly overhead.

(m) Personal lifeguard equipment. Each lifeguard must be provided with the following personal equipment:

(1) uniform attire that readily identifies the lifeguard as a staff member and a lifeguard;

(2) a rescue tube with attached rope or strap;

(3) personal protective devices including a resuscitation mask with one-way valve and non-latex, non-powdered, single use disposable gloves worn in a hip pack or attached to the rescue tube; and

(4) a whistle or other signaling device for communicating to users, other lifeguards, or staff.

(n) Minimum lifeguard standards. The standards in this subsection are considered minimum standards. Pool owners or operators may require additional and more stringent lifeguard policies, procedures, staffing requirements, training requirements, and performance audits.

§265.193. Water Quality at Pools and Spas.

(a) Environmental Protection Agency (EPA) registration. A sanitizer, disinfectant, or other chemical used to disinfect or sanitize the pool or spa water must be EPA-registered for use in pools and spas under the Federal Insecticide, Fungicide, and Rodenticide Act.

(b) Algae. Pools and spas must be treated to eliminate algae in order to prevent creation of a slip hazard, to prevent the water from becoming cloudy reducing visibility in the pool or spa, and to prevent uncontrolled growth of algae that could harbor pathogens.

(c) Required chemical levels. Water quality for a pool or spa must meet the following criteria when the pool or spa is open for use. The water quality parameters in Figure: 25 TAC §265.193(c) apply to both pools and spas unless otherwise indicated.
Figure: 25 TAC §265.193(c)

(d) Cyanuric acid. Cyanuric acid and stabilized chlorine such as dichlor, must not be used in any indoor pool or spa or in therapy pools.

(e) Water clarity. Water clarity must be sufficient such that an 8-inch black disk or Secchi disk on the floor at the deepest part of the pool can be clearly and immediately seen by an observer on the water surface above the disk or by someone standing on the deck closest to the disk.

(f) Reliable means of water testing required. A reliable means of testing for pH, free and total (combined) chlorine, bromine, cyanuric acid, alkalinity, and calcium hardness to minimum and maximum levels and levels in between, must be provided and available for the pool operator at the pool or spa when the pool or spa is open for use.

(g) DPD chemical test. Free available chlorine levels and bromine levels must be determined using the DPD testing method.

(h) ORP reading frequency. ORP readings must be recorded at the same time required sanitizer and pH tests are performed where in-line ORP meters are used. The date and the mV level must be recorded in the required pool or spa logs required in this section.

(i) Storage of test kits and reagents. Test kits and reagents must be stored according to the manufacturer's instructions and protected from extreme heat and cold and from exposure to water, chemicals, petroleum products, or any other element or environment that could adversely affect the efficacy of water quality test results.

(j) Accuracy of test reagents. Testing reagents must be changed at frequencies recommended by the manufacturer to ensure accuracy of the tests.

(k) Chemical balance. Water in the pool or spa must be chemically balanced. Testing methods to determine the chemical balance of the water in the pool or spa, such as the Langelier Saturation Index, must be conducted at least once every 10 days while the pool or spa is open. The date of the test and the results of the testing and any adjustments made to the pool or spa to correct water quality must be recorded in the required pool or spa logs required in this section. Logs must be made available upon request. If logs are not kept on-site, logs must be provided to DSHS or local regulatory authority within five business days of the request.

(l) Water monitoring records of public pools and spas. A record of all pool and spa water chemical testing must be recorded in a pool or spa log, either electronically or manually in a logbook, and must be made available upon request. If logs are not kept on-site, logs must be provided to DSHS or local regulatory authority within five business days of the request. Records shall be maintained for a minimum of three years and must include:

(1) if multiple pools or spas on-site, identification of the pool or spa tested;

(2) date and time of testing;

(3) chemical levels as required in Figure: 25 TAC §265.193(c) in accordance with the testing schedule requirements in subsection (o) of this section;

(4) mV of ORP meter where applicable; and

(5) any action taken to correct chemical readings including addition of sanitizer, algaecide, or chemical to correct pH and tests to ensure chemical levels return to required levels, closure of the pool or spa, formed stool or diarrhea in a pool or spa and remedial actions taken as a result, or any other significant action taken which impacts pool and spa water quality.

(m) Skimmers. Skimmers must not be used for dispensing chemicals into the pool or spa.

(n) Off-season circulation system operation. When an outdoor pool or spa is not in use for an extended period of time (such as off-season), clarity must be maintained. Circulation rates must provide acceptable water clarity as required in this section.

(o) Testing frequency and record keeping when pools and spas are open for use.

(1) When Class A and Class B pools and spas are open for use:

(A) Tests for disinfectant levels and pH must be made and recorded in pool or spa logs every two hours.

(B) If a system is used to automatically control disinfectant and pH, tests for disinfectant level and pH must be performed and the results recorded in the pool or spa logs at least three times per day and a reading of the automatic control device must also be made and recorded in the pool or spa logs.

(C) Where cyanuric acid is used either in stabilized chlorine or used as needed, tests for cyanuric acid levels must be performed once each week and the results recorded in the pool or spa log.

(2) Class C pools and spas that have on-site staff primarily responsible for pool and spa operations, such as lifeguards, must be tested for disinfectant levels and pH a minimum of three times a day. Results of the testing must be recorded in pool or spa logs.

(A) If a system is used to automatically control disinfectant and pH, testing for disinfectant level and pH must be performed and the results recorded a minimum of once a day and a reading of the automatic control device must also be made and the results recorded in the pool or spa log.

(B) Where cyanuric acid is used either in stabilized chlorine or as needed, tests for levels of cyanuric acid must be performed once each week and the results recorded in the pool or spa log.

(3) Class C pools and spas that do not have on-site staff primarily responsible for pool and spa operations, such as lifeguards, must be tested for disinfectant levels and pH a minimum of one time a day and the results must be recorded in the pool or spa log.

(A) If a system is used to control disinfectant and pH electronically, and the system has the ability to record and transmit the mV level or free chlorine level and pH to the trained and certified operator once a day, sanitizer level and pH must be measured once each week using a test kit and recorded in the pool or spa log.

(B) A reading of the automatic control device must also be recorded at the same time the sanitizer level and pH are measured using the test kit and recorded in the pool or spa log.

(C) Where cyanuric acid is used either in stabilized chlorine or as needed, tests for levels of cyanuric acid must also be performed once each week and the results recorded in the pool or spa log.

(4) Other required tests for pools and spas. Tests for alkalinity, calcium hardness, and chemical balance must be performed at least once every 10 days, or more often, if necessary, to maintain required water quality parameters in subsection (c) of this section and water clarity requirements in subsection (e) of this section. Results of the tests must be recorded in the pool or spa log.

(5) Records of all testing of the pool and spa water must be maintained for at least three years and be available or made available upon request by DSHS or local regulatory authority. If records are stored off-site, they must be provided within five business days.

(p) Cyanuric acid levels must not exceed 100 ppm. Whenever cyanuric acid levels exceed 100 ppm the following is required.

(1) Sanitizer level must be raised to 2.0 ppm free available chlorine and maintained at that level until the cyanuric acid level drops to less than 100 ppm.

(2) Sanitizer level, pH, and cyanuric acid levels must be measured and recorded at least once a day in the pool or spa log until the cyanuric acid level drops below 100 ppm.

(3) Records of cyanuric acid levels exceeding 100 ppm and actions taken to return those levels to at or below the allowable maximum must be recorded in the pool or spa log.

(q) Clarifiers, flocculants, and defoamers.

(1) Clarifiers, flocculants, and defoamers must be used per manufacturer's instructions and must not create a hazardous condition, compromise disinfectant efficacy, or interfere with other water quality measures in Figure: 25 TAC §265.193(c).

(2) Clarifiers, flocculants, defoamers, and any other chemical used in a pool or spa must be certified, listed, and labeled to either NSF Standard 50 or NSF Standard 60.

(r) Chemical feed equipment. All chemical feed equipment must be maintained in good working condition at all times.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on December 12, 2022.

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Cynthia Hernandez
General Counsel
Department of State Health Services
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TITLE 26. HEALTH AND HUMAN SERVICES

PART 1. HEALTH AND HUMAN SERVICES COMMISSION

CHAPTER 110. HEARINGS UNDER THE ADMINSTRATIVE PROCEDURE ACT

26 TAC §§110.1, 110.3, 110.5, 110.7, 110.9, 110.11, 110.13, 110.15

As required by Texas Government Code §531.0202(b), the Texas Department of Aging and Disability Services (DADS) was abolished effective September 1, 2017, after all 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 new 26 TAC, Part 1, Chapter 110, concerning Hearings Under the Administrative Procedure Act, comprised of §§110.1, 110.3, 110.5, 110.7, 110.9, 110,11, 110.13, and 110.15.

The new rules in §110.1 and §110.3 are adopted without changes to the proposed text as published in the August 26, 2022, issue of the *Texas Register* (47 TexReg 5070). These rules will not be republished.

The new rules in §§110.5, 110.7, 110.9, 110.11, 110.13, and 110.15 are adopted with changes to the proposed text as published in the August 26, 2022, issue of the *Texas Register* (47 TexReg 5070). These rules will be republished.

BACKGROUND AND JUSTIFICATION

The purpose of the new rules is to move appeals for Home and Community-based Services (HCS) and Texas Home Living (TxHmL) administrative penalties, contract terminations, vendor holds, recoupments, and denial of payment appeal cases from the HHSC Appeals Division to the Texas State Office of Administrative Hearings (SOAH).

The rules make HCS and TxHmL consistent with other long-term care regulation programs that are heard by SOAH. The project will also update outdated rule references, change references from DADS to HHSC, improve readability.

COMMENTS

The 31-day comment period ended September 26, 2022. During this period, HHSC did not receive any comments regarding the proposed rules.

HHSC made changes to §§110.5, 110.7, 110.9, 110.11, 110.13, and 110.15 to remove and update information related to internal processes that are no longer applicable now that DADS functions have transferred to HHSC.

STATUTORY AUTHORITY

The 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 §531.021, which 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 Government Code §531.033, which provides the Executive Commissioner of HHSC with broad rule-making authority; and Texas Human Resources Code §32.021, which provides that HHSC shall adopt necessary rules for the proper and efficient operation of the Medicaid program.

§110.5. Contested Case Heard by SOAH.

(a) The State Office of Administrative Hearings (SOAH) hears a contested case arising from the following Texas Health and Human Services Commission (HHSC) programs, services, or activities:

(1) primary home care services;

(2) community attendant services;

(3) day activity and health services;

(4) the Community Living Assistance and Support Services Program;

(5) the Home and Community-based Services Program;

(6) the Texas Home Living Program;

(7) the Deaf-Blind Multiple Disabilities Program;

(8) the Medically Dependent Children Program;

(9) social services authorized by Title XX of the Social Security Act (42 United States Code §§1397 - 1397f);

(10) In-Home and Family Support services for a person without a diagnosis of an intellectual disability;

(11) the Program of All-Inclusive Care for the Elderly;

(12) licensure, certification, or contracting of a nursing facility, including a determination related to the Resource Utilization Group Classification System or other utilization review;

(13) hospice services;

(14) licensure or certification of an intermediate care facility for persons with an intellectual disability or related condition;

(15) licensure of a nursing facility administrator;

(16) licensure of an assisted living facility;

(17) licensure of a day activity and health services facility;

(18) licensure of a home and community support services agency;

(19) the nurse aide registry;

(20) the nurse aide training and competency evaluation program;

(21) the long-term care regulation and provider investigation employee misconduct registry; and

(22) the medication aide program.

(b) Before a contested case described in subsection (a) of this section is transferred to SOAH:

(1) the HHSC Appeals Division has exclusive jurisdiction over the case;

(2) Texas Administrative Code (TAC), Title 1, Chapter 357, Subchapter I (relating to Hearings Under the Administrative Procedure Act) and this chapter govern the case; and

(3) the parties may conduct discovery in accordance with 1 TAC Chapter 357, Subchapter I.

(c) SOAH conducts hearings in accordance with 1 TAC Chapter 155 (relating to Rules of Procedure) and this chapter.

(d) A SOAH administrative law judge issues a proposal for decision (PFD) in accordance with 1 TAC Chapter 155.

(e) If a party files PFD exceptions, or a reply to exceptions, the party must comply with 1 TAC Chapter 155.

§110.7. Contested Case Heard by HHSC.

(a) The Texas Health and Human Services Commission (HHSC) Appeals Division hears a contested case other than one described in §110.5(a) of this chapter (relating to Contested Case Heard by SOAH).

(b) The HHSC Appeals Division conducts a hearing in accordance with Texas Administrative Code (TAC), Title 1, Chapter 357, Subchapter I (relating to Hearings Under the Administrative Procedure Act) and this chapter.

(c) An HHSC administrative law judge (ALJ) schedules a hearing upon request for a hearing date by either party.

(d) An HHSC ALJ issues a final order in accordance with 1 TAC §357.498 (relating to Final Orders and Rehearings).

(e) If a party files a request for a rehearing, the party must comply with 1 TAC §357.498.

§110.9. Review of SOAH Proposal for Decision.

The Texas Health and Human Services Commission (HHSC) Executive Commissioner, or the Executive Commissioner's designee, reviews the proposal for decision (PFD), issued by a SOAH administrative law judge (ALJ). The HHSC Executive Commissioner or the Executive Commissioner's designee may submit exceptions to the PFD in accordance with 1 TAC §155.507.

§110.11. Issuance and Finality of SOAH Decision.

After reviewing a proposal for decision (PFD), the Texas Health and Human Services Commission (HHSC) Executive Commissioner or the Executive Commissioner's designee issues a final order in accordance with 1 TAC Chapter 357.

§110.13. Motion for Rehearing.

(a) A party may file a motion for rehearing in accordance with Texas Government Code 2001 §146(a).

(b) A party must file a reply to a motion for rehearing in accordance with Texas Government Code 2001 §146(b).

(c) The Texas Health and Human Services Commission (HHSC) Executive Commissioner or the Executive Commissioner's designee shall act on a motion for rehearing not later than the 55th day after the date the decision that is the subject of the motion is signed or the motion for rehearing is overruled by operation of law in accordance with Texas Government Code 2001 §146(c).

§110.15. Judicial Review.

(a) In accordance with Texas Government Code §2001.145, a decision that is final under this chapter is appealable; however, a timely motion for rehearing is a prerequisite to appeal a decision that is final in accordance with Texas Government Code §146.

(b) In accordance with Texas Government Code §2001.171, a person who has exhausted all administrative remedies at the Texas Health and Human Services Commission and who is aggrieved by a final decision in a contested case is entitled to judicial review under Texas Government Code, Chapter 2001.

(c) In accordance with Texas Government Code §2001.176(b)(3), filing a petition to initiate judicial review of a contested case does not affect the enforcement of a final decision for which the manner of review authorized by law is other than trial de novo.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on December 12, 2022.

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

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CHAPTER 260. DEAF BLIND WITH MULTIPLE DISABILITIES (DBMD) PROGRAM AND COMMUNITY FIRST CHOICE (CFC) SUBCHAPTER I. INDIVIDUALIZED SKILLS AND SOCIALIZATION

26 TAC §§260.501, 260.503, 260.505, 260.507, 260.509, 260.511, 260.513, 260.515, 260.517

The Texas Health and Human Services Commission (HHSC) adopts new §260.501, concerning Definitions; §260.503, concerning Description of Individualized Skills and Socialization; §260.505, concerning Provision of Individualized Skills and Socialization; §260.507, concerning Staffing Ratios; §260.509, concerning Discontinuation of Day Habilitation; §260.511, concerning Including Individualized Skills and Socialization on an IPC; §260.513, concerning Service Provider Qualifications and Training; §260.515, concerning Contracting to Provide Individualized Skills and Socialization; and §260.517, concerning Program Provider Reimbursement for Individualized Skills and Socialization, in new Chapter 260, Subchapter I, Individualized Skills and Socialization.

Sections 260.501, 260.503, 260.505, 260.513, 260.515, and 260.517 are adopted with changes to the proposed text as published in the August 12, 2022, issue of the *Texas Register* (47 TexReg 4803). These rules will be republished.

Sections 260.507, 260.509, and 260.511 are adopted without changes to the proposed text as published in the August 12, 2022, issue of the *Texas Register* (47 TexReg 4803). These rules will not be republished.

BACKGROUND AND JUSTIFICATION

The adopted rules are necessary to comply with Title 42, Code of Federal Regulations (42 CFR), §441.301(c)(4)(i) - (v), which require home and community based settings in programs authorized by §1915(c) of the Social Security Act to have certain qualities, including being integrated in and supporting full access of individuals to the greater community. The Centers for Medicare &Medicaid Services (CMS) is requiring that states be in compliance with these regulations by March 17, 2023.

The 2020-21 General Appropriations Act (GAA), House Bill 1, 86th Legislature, Regular Session, 2019 (Article II, Health and Human Services Commission, Rider 21) required HHSC to develop a plan to replace day habilitation in its Medicaid §1915(c) waiver programs for individuals with intellectual and developmental disabilities with more integrated services that maximize participation and integration of the individuals in the community.

In accordance with Rider 21, HHSC developed a plan to replace day habilitation provided in the Home and Community-Based Services (HCS), Texas Home Living (TxHmL), and Deaf Blind with Multiple Disabilities (DBMD) Programs with individualized skills and socialization. The plan included proposed ratios for service providers of individualized skills and socialization to individuals receiving individualized skills and socialization to help ensure that individuals receiving the service have adequate support to achieve their goals.

The 2022-2023 GAA, Senate Bill 1, 87th Legislature, Regular Session, 2021 (Article II, Health and Human Services Commission, Rider 23) authorized funding for the provision of individualized skills and socialization in the HCS, TxHmL, and DBMD Programs.

The adopted rules implement the plan required by Rider 21 to replace day habilitation with individualized skills and socialization in the DBMD Program and ensure that HHSC is in compliance with 42 CFR §441.301(c)(4)(i) - (v) by March 17, 2023.

The adopted rules describe the two types of individualized skills and socialization, on-site individualized skills and socialization and off-site individualized skills and socialization and require that both types be provided by an individualized skills and socialization provider.

The adopted rules include requirements for a program provider to make available both on-site and off-site individualized skills and socialization to individuals. The adopted rules include requirements for an individualized skills and socialization provider to meet staffing ratios.

The adopted rules also discontinue day habilitation effective March 1, 2023.

The rules implementing individualized skills and socialization in the HCS and TxHmL Programs are being adopted in Texas Administrative Code (TAC) Title 26, Chapter 263, Subchapter L and in 26 TAC Chapter 262, Subchapter J, and published elsewhere in this issue of the *Texas Register.*

The rules requiring a provider of individualized skills and socialization to be licensed in accordance with Texas Human Resources Code Chapter 103 are being adopted in 26 TAC Chapter 559.

COMMENTS

The 31-day comment period ended September 12th, 2022.

During this period, HHSC received comments regarding the proposed rules from 72 commenters, including Aging and Disability Services Local Authority in Lubbock, the ARC of the Capital Area, IDD Center in Beaumont, Citizens Development Center, doing business as U&I, Deaf-Blind Multihandicapped Association of Texas, Touch Base Center for the DeafBlind, Down Home Ranch, EveryChild, Inc., Gateway Community Partners, Genesis Behavior TX, Golden Rule Services, Texas Council of Com-

munity Centers, Community Health, LT Adventures, Mary Lee Foundation, Metrocrest Community Services, MHMR of Tarrant County, Providers Alliance for Community Services of Texas, Private Providers Association of Texas, Rock House, SONshine Center, the ARC of San Antonio, and 14 individual commenters. A summary of comments relating to the rules and HHSC's responses follows.

Comment: Multiple commenters expressed concerns that the rates adopted for individualized skills and socialization are not adequate.

Response: HHSC declines to make changes in response to the comments. The comments are outside the scope of this project because the rate methodology for individualized skills and socialization will be adopted in a separate rule project.

Comment: Multiple commenters requested that HHSC allow individualized skills and socialization to include activities in which an individual produces marketable goods and is paid below minimum wage for producing the goods in accordance with Section 14(c) of the Fair Labor Standards Act.

Response: HHSC declines to make these changes in response to the comments because the activities in question are not consistent with the home and community settings requirements in 42 CFR §441.301(c)(4)(i) - (v) and HHSC does not want these activities to hinder an individual's opportunity to obtain competitive employment in the community.

Comment: Multiple commenters expressed disagreement with the implementation of off-site individualized skills and socialization due to concerns about an individual's safety because there is a lack of a controlled environment while the individual is out in the community.

Response: HHSC declines to make changes in response to these comments. Individuals have a choice of whether they would like to participate in off-site individualized skills and socialization. Also, the adopted rules include staffing ratios for service providers of off-site individualized skills and socialization to individuals receiving the service to help ensure the health and safety of the individuals.

Comment: Multiple commenters requested that HHSC delay the implementation of individualized skills and socialization.

Response: HHSC declines to delay the implementation of individualized skills and socialization because the implementation of this service is necessary to ensure HHSC's compliance with 42 CFR §441.301(c)(4) before the deadline of March 17, 2023 established by CMS. HHSC will continue to hold trainings regarding the implementation of individualized skills and socialization.

Comment: Multiple commenters requested that HHSC remove the service limit.

Response: HHSC declines to make changes in response to this comment because the proposed rules do not include a service limit for individual skills and socialization.

Comment: Several commenters requested the ability for individualized skills and socialization providers to provide only off-site individualized skills and socialization.

Response: Changes were made in response to comments in the licensing rules being adopted in 26 TAC Chapter 559 to allow an individualized skills and socialization provider to provide only off-site individualized skills and socialization. HHSC did not make changes in this rule project in response to this comment.

Comment: One commenter requested additional training opportunities for local intellectual and developmental disability authorities (LIDDAs) and program providers on the new service of individualized skills and socialization.

Response: HHSC agrees that training opportunities for LIDDAs and program providers on individualized skills and socialization is important and has continued to provide trainings on the new service of individualized skills and socialization. HHSC will inform stakeholders about future training opportunities available for the service. HHSC did not make changes in response to this comment.

Comment: One commenter expressed that the premise for individualized skills and socialization is unfounded based on the federal Home and Community-Based Settings rules and that there is nothing in the federal requirements that requires day habilitations to close.

Response: HHSC agrees that the home and community-based settings requirements in 42 CFR, §441.301(c)(4)(i) - (v) do not require a location that provides day habilitation to close. HHSC determined, however, that day habilitation does not meet the requirements in 42 CFR, §441.301(c)(4)(i) - (v) and, therefore, is implementing individualized skills and socialization to comply with the federal regulation. Sites that currently provide day habilitation may choose to provide individualized skills and socialization in accordance with the new rules. HHSC did not make changes in response to this comment.

Comment: Multiple commenters requested additional clarity regarding when public and private intermediate care facilities for individuals with intellectual disabilities (ICF/IIDs) are allowed to provide individualized skills and socialization.

Response: In accordance with §260.505(b), on-site and off-site individualized skills and socialization must be provided by an individualized skills and socialization provider. Based on direction from CMS, HHSC revised proposed §260.503, Description of Individualized Skills and Socialization, by adding new subsection (e) to explain that individualized skills and socialization must not be provided in a setting that is presumed to have the qualities of an institution and to describe settings that have the qualities of an institution. HHSC added subsection (f) to proposed §260.503 to provide that an individualized skills and socialization provider may provide individualized skills and socialization in a setting presumed to have the qualities of an institution if CMS has determined through heightened scrutiny that the setting meets certain criteria. HHSC also revised proposed §260.51 to add definitions of "hospital," "Medicaid HCBS--Medicaid home and community-based services," and "nursing facility" because these terms are used in new subsections (e) and (f) added to proposed §260.503.

Comment: One commenter requested that HHSC "continue to provide supportive services for persons with disabilities and special needs."

Response: HHSC provides many services that benefit and support persons with disabilities. No changes were made in response to this comment.

Comment: One commenter requested that HHSC add in-home individualized skills and socialization as a service in the DBMD Program. Also, several commenters requested that the service planning team be allowed to determine if an individual would be allowed to receive in-home individualized skills and socialization.

Response: HHSC declines to make changes in response to these comments. In the DBMD Program, in-home day habilitation is not a service and, therefore, in-home individualized skills and socialization was not included as service in the proposed rules. Adding in-home individualized skills and socialization as a service in the DBMD Program would require additional analysis and funding.

Comment: One commenter requested that HHSC add a definition for "integration."

Response: HHSC declines to add a definition for "integration" in the proposed rules because the term "integration" is not used in the rules.

Comment: One commenter requested that HHSC add a definition for "community."

Response: HHSC declines to add a definition of "community" in the proposed rules because this term has its ordinary meaning.

Comment: One commenter requested that HHSC add a definition for "community setting."

Response: HHSC declines to make changes in response to this comment because §260.501 includes a definition of "community setting."

Comment: One commenter encouraged the use of Corrective Action Plan allowable by CMS to ensure that the service is feasible and adequately funded.

Response: HHSC declines to make changes in response to this comment because this comment is outside the scope of this project.

Comment: Two commenters requested that HHSC utilize resources provided by Texas School for the Blind and Visually Impaired.

Response: HHSC declines to make changes in response to this comment because the comment is outside the scope of this rule project.

Comment: Several commenters requested that individuals be allowed to volunteer in a person's residence, including private residences or settings in which an individual must not reside.

Response: HHSC agrees with this comment and made changes in proposed §260.503(i)(4)(B) and (C) to allow an off-site individualized skills and socialization activity to be provided in a setting in which an individual must not reside as set forth in the rules governing the DBMD Program, or in the residence of an individual or another person, if the activity is a volunteer activity performed by an individual.

Comment: Several commenters requested that HHSC remove the requirement in proposed §260.505(d) to document when an individual or the individual's legally authorized representative (LAR) decides that the individual will not participate in an individualized skills and socialization activity.

Response: HHSC disagrees with the commenter and believes that an individualized skills and socialization provider must document the individual's or LAR's decision for the individual not to participate in an activity the individual scheduled for on-site individualized skills and socialization or off-site individualized skills and socialization. This requirement helps ensure that if an individual does not receive individualized skills and socialization, it is because the individual or the individual's LAR declined to receive the service. However, because the licensing rules for individualized skills and socialization providers being adopted in 26 TAC Chapter 559, Subchapter H, include this documentation requirement, HHSC removed proposed §260.505(d) to avoid duplicative provisions in different rule chapters.

Comment: One commenter requested that HHSC create a network for Day Activity Centers to connect through monthly or quarterly meetings with the goal of sharing ideas.

Response: HHSC declines to make changes in response to this comment because the comment is outside the scope of this project.

Comment: One commenter requested that HHSC allow individualized skills and socialization to be provided through the consumer directed service (CDS) option.

Response: HHSC declines to make changes in response to this comment because allowing individualized skills and socialization to be provided through the CDS option in the DBMD Program would require additional analysis.

Comment: One commenter requested clarification on how interveners will be considered in the staffing ratios.

Response: In accordance with the DBMD Program Manual, a person cannot act as the intervener and provide another DBMD Program service at the same time. Therefore, an intervener cannot be counted as an individualized skills and socialization service provider in the staffing ratios. HHSC declines to make changes in response to this comment.

Comment: Several commenters expressed concerns that the off-site staffing ratios in the rules could cause discrimination and not support personal choice.

Response: HHSC declines to make changes in response to these comments. HHSC implemented staffing ratios to ensure the health and safety of individuals and that individuals have adequate support to achieve their goals.

Comment: Several commenters requested changes to the off-site staffing ratio (1:2) to increase the number of individuals in the ratio. Other commenters expressed concerns about having enough staff to meet the staffing ratios.

Response: HHSC declines to make changes in response to these comments. HHSC believes the 1:3 staffing ratio for on-site individualized skills and socialization and the 1:2 staffing ratio for off-site individualized skills and socialization are necessary to ensure the health and safety of individuals and that individuals have adequate support to achieve their goals.

Comment: One commenter recommended that the staffing ratio be 1:8 or higher for individuals with a level of need (LON) 1 or LON 5.

Response: HHSC declines to make changes in response to this comment. The proposed rules do not include staffing ratios based on LON because individuals in the DBMD Program are not assigned an LON.

Comment: One commenter requested the ability for provisional licensure for individualized skills and socialization providers.

Response: HHSC declines to make changes in response to this comment because it is outside the scope of this project. the proposed rules do not address the licensing of individualized skills and socialization providers.

Comment: One commenter expressed that HHSC did not make a good faith effort to determine the adverse economic effect on small businesses and microbusinesses in drafting these rules.

Response: HHSC determined that the rules could have an adverse economic effect on small businesses and micro-businesses due to the cost to comply. However, the new rules are necessary to comply with the federal regulations for home and community-based settings in 42 CFR §441.301(c)(4)(i) - (v). HHSC did not make any changes in response to this comment.

Comment: One commenter requested that education and transition goals for children in individualized skills and socialization be added to proposed §260.503(c), Description of Individualized Skills and Socialization, to ensure that their individual needs and preferences are considered and addressed.

Response: HHSC declines to make changes in response to this comment because the focus of individualized skills and socialization is an individual's employment goals or current or future volunteer goals, not education and transition goals.

Comment: Several commenters expressed concerns about finding low-cost activities for off-site individualized skills and socialization.

Response: HHSC did not make changes in response to this comment. Off-site individualized skills and socialization providers are able to provide free activities for individuals in the community such as volunteering or visiting a public library or public park.

Comment: Several commenters expressed concerns about the new service causing current day habilitations to close instead of continuing to provide individualized skills and socialization.

Response: HHSC did not make changes to the rules in response to this comment. HHSC agrees that the adopted rules do not require a location that provides day habilitation to close. HHSC determined that day habilitation does not meet the requirements in 42 CFR §441.301(c)(4)(i) - (v) and, therefore, is implementing individualized skills and socialization to comply with the federal regulation. Sites that currently provide day habilitation may choose to provide individualized skills and socialization in accordance with the new rules.

Comment: Two commenters expressed a concern that individualized skills and socialization adds a requirement for community integration not required of the public school system.

Response: HHSC did not make changes in response to this comment because 42 CFR §441.301(c)(4)(i) requires HCBS settings to be integrated in the community and support full access of individuals to the community.

HHSC revised the definition in proposed §260.501 of "individualized skills and socialization provider" to replace the reference to Texas Human Resources Code, Chapter 103 with a more specific reference to 26 TAC Chapter 559, Subchapter H, the licensing requirements for an individualized skills and socialization provider.

HHSC revised proposed §260.503(d)(4)(A) to remove "unless provided in an event open to the public." HHSC removed this wording because on-site individualized skills and socialization must be provided in a facility licensed in accordance with 26 TAC Chapter 559, Subchapter H.

Based on direction from CMS that a setting in which on-site individualized skills and socialization is provided in a provider-controlled setting, HHSC revised proposed §260.503 by adding new subsection (g) to add that the setting in which on-site individualized skills and socialization is provided must allow the individual to control the individual's schedule and activities, have access to the individual's food at any time, receive visitors at any time, and be physically accessible and free of hazards, in accordance with 42 CFR §441.301(c)(4)(vi)(C) - (E). HHSC also revised proposed §260.503 by adding new subsection (h) to add the requirements that must be met if an individual's service planning team determines that any of the requirements in new subsection (g)(1) must be modified, in accordance with 42 CFR §441.301(c)(4)(vi)(F).

HHSC add a new subsection (j) to proposed §260.503 to provide that an individualized skills and socialization provider or the program provider is not responsible for the cost, if any, of an individual to participate in an off-site activity that the individual chooses to participate in, such as purchasing movie tickets. This change was made to clarify that an individualized skills and socialization provider or the program provider is not required to pay for the cost of an individual to participate in an off-site activity of the individual's choice.

HHSC revised proposed §260.505(a) to require a program provider, instead of an individualized skills and socialization provider, to make both on-site and off-site individualized skills and socialization available to an individual. This change was made because the licensure process for individualized skills and socialization providers will allow an individualized skills and socialization provider to only provide off-site individualized skills and socialization.

HHSC removed the provision in proposed §260.505(c) that prohibits an individualized skills and socialization provider from requiring an individual to take a skills test or meet other requirements to receive off-site individualized skills and socialization. The prohibition in proposed §260.505(c) is included in the licensing rules for individualized skills and socialization providers being adopted in 26 TAC Chapter 559 and, therefore, the removal of §260.505(c) avoids duplicative provisions in different rule chapters.

HHSC removed the qualifications for a service provider of individualized skills and socialization in proposed §260.513(a) and (b) and instead referenced 26 TAC §559.227(a)(2) that includes these qualifications. HHSC removed the training requirements in proposed §260.513(c) for abuse, neglect, and exploitation and cardiopulmonary resuscitation, first aid, and choking prevention training and instead added a new subsection (d) to reference 26 TAC §559.227(k)(1)(B)(i), (ii), and (v) and 26 TAC §559.227(k)(2)(A)(i), (ii), and (iv) which includes these training requirements. Because HHSC removed "abuse, neglect, and exploitation training" in proposed §260.513(c), HHSC also revised §260.501 to remove the definitions of "abuse," "exploitation," "neglect," "physical abuse," "sexual abuse," and "verbal or emotional abuse," because the terms are no longer used in the subchapter. HHSC renumbered §260.501 accordingly.

HHSC revised the title of §260.513 to add "and Training" so that the section title more accurately reflects the contents of the section. HHSC also revised §260.513(c) to change "completes" to "must complete" to reflect that a service provider of individualized skills and socialization must complete the training requirements in subsection (c).

HHSC revised proposed §260.515(2)(C) by renumbering it as new paragraph (3) to require a program provider, instead of an individualized skills and socialization provider, to ensure that a

service provider of individualized skills and socialization meets the training requirements described in §260.513(c). This change was made because the training requirements in new paragraph (3) are not included in the licensing requirements in 26 TAC Chapter 559, Subchapter H. HHSC also made minor editorial changes in §260.515 to correct formatting.

HHSC revised proposed §260.517(c)(1) by adding "and Chapter 559, Subchapter H of this title" to allow HHSC to not pay a program provider for, or recoup any payments made to the program provider for individualized skills and socialization if on-site or off-site individualized skills and socialization is not provided in accordance with 26 TAC Chapter 559, Subchapter H. HHSC also revised §260.517(c)(8) to allow HHSC to not pay a program provider for, or recoup any payments made to the program provider for individualized skills and socialization if individualized skills and socialization is provided by a service provider who did not meet the qualifications to provide individualized skills and socialization described in §260.513 and §559.227. These changes were made so that HHSC may recoup or deny payment for noncompliance with 26 TAC Chapter 559, Subchapter H or if individualized skills and socialization is provided by a service provider who did not meet the required qualifications. HHSC also made minor editorial changes in this section for clarity.

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, and Texas Human Resources Code §32.021, which authorizes the Executive Commissioner of HHSC to adopt rules necessary for the proper and efficient operation of the Medicaid program.

§260.501. Definitions.

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

(1) Calendar day--Any day, including weekends and holidays.

(2) Case manager--A service provider of case management.

(3) CFC--Community First Choice. A state plan option governed by Code of Federal Regulations, Title 42, Chapter 441, Subpart K, regarding Home and Community-Based Attendant Services and Supports State Plan Option (Community First Choice).

(4) Community setting--A setting accessible to the general public within an individual's community.

(5) Day habilitation--A DBMD Program service.

(6) DBMD Program--The Deaf Blind with Multiple Disabilities Program.

(7) DFPS--Texas Department of Family and Protective Services.

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

(9) Hospital--A public or private institution licensed or exempt from licensure in accordance with Texas Health and Safety Code (THSC) Chapters 13, 241, 261, or 552.

(10) ID/RC Assessment--Intellectual Disability/Related Conditions Assessment. An HHSC form HHSC uses to determine the LOC for an individual.

(11) Individual--A person seeking to enroll or who is enrolled in the DBMD Program.

(12) Individualized skills and socialization--A DBMD Program service described in this subchapter. The two types of individualized skills and socialization are on-site individualized skills and socialization and off-site individualized skills and socialization.

(13) Individualized skills and socialization provider--A legal entity licensed in accordance with Chapter 559, Subchapter H of this title (relating to Individualized Skills and Socialization Provider Requirements).

(14) IPC--Individual Plan of Care. A written plan developed by an individual's service planning team and documented on the HHSC Individual Plan of Care form. An IPC:

(A) documents:

(i) the type and amount of each DBMD Program service and each CFC service, except for CFC support management, to be provided to the individual during an IPC year; and

(ii) if an individual will receive CFC support management; and

(B) is authorized by HHSC.

(15) IPC period--The effective period of an enrollment IPC and a renewal IPC as follows:

(A) for an enrollment IPC, the period of time from the effective date of the enrollment IPC, as described in the rules governing the DBMD Program, through the last calendar day of the 11th month after the month in which enrollment occurred; and

(B) for a renewal IPC, a 12-month period of time starting on the effective date of a renewal IPC as described in the rules governing the DBMD Program.

(16) IPP--Individual Program Plan. A written plan developed in accordance with the rules governing the DBMD Program and documented on an HHSC Individual Program Plan form.

(17) LAR--Legally authorized representative. A person authorized by law to act on behalf of an individual with regard to a matter described in this chapter, and may include a parent, guardian, or managing conservator of a minor, or the guardian of an adult.

(18) LOC--Level of care. A determination given to an individual as part of the eligibility determination process based on data submitted on the ID/RC Assessment.

(19) Medicaid HCBS--Medicaid home and community-based services. Medicaid services provided to an individual in an individual's home and community, rather than in a facility.

(20) Nursing facility--A facility licensed in accordance with THSC Chapter 242.

(21) Program provider--A person that has a contract with HHSC to provide DBMD Program services, excluding a financial management services agency.

(22) Service provider--A person who directly provides a DBMD Program service or a CFC service to an individual.

(23) TAC--Texas Administrative Code. A compilation of state agency rules published by the Texas Secretary of State in accordance with Texas Government Code, Chapter 2002, Subchapter C.

§260.503. Description of Individualized Skills and Socialization.

(a) The two types of individualized skills and socialization are on-site individualized skills and socialization and off-site individualized skills and socialization.

(b) A program provider must ensure that individualized skills and socialization is provided by an individualized skills and socialization provider. An individualized skills and socialization provider must be the program provider or a contractor of the program provider.

(c) An individualized skills and socialization provider must ensure that individualized skills and socialization:

(1) provides person-centered activities related to:

(A) acquiring, retaining, or improving self-help skills and adaptive skills necessary to live successfully in the community and participate in home and community life; and

(B) gaining or maintaining independence, socialization, community participation, current or future volunteer goals, or employment goals consistent with achieving the outcomes identified in an individual's IPP;

(2) supports the individual's pursuit and achievement of employment through school, vocational rehabilitation, the DBMD Program service of employment assistance, or the DBMD Program service of supported employment;

(3) provides personal assistance for an individual who cannot manage personal care needs during an individualized skills and socialization activity;

(4) as determined by an assessment conducted by a registered nurse, provides assistance with medications and the performance of tasks delegated by a registered nurse in accordance with state law and rules, unless a physician has delegated the task as a medical act under Texas Occupations Code, Chapter 157, as documented by the physician; and

(5) does not include activities in which an individual:

(A) produces marketable goods; and

(B) is paid below minimum wage for producing the goods in accordance with Section 14(c) of the Fair Labor Standards Act.

(d) An individualized skills and socialization provider must ensure that on-site individualized skills and socialization:

(1) is provided in a building or a portion of a building that is owned or leased by an individualized skills and socialization provider;

(2) includes transportation of an individual from one on-site individualized skills and socialization location to another on-site individualized skills and socialization location;

(3) promotes an individual's development of skills and behavior that support independence and personal choice; and

(4) is not provided in:

(A) a setting in which an individual must not reside, as set forth in the rules governing the DBMD Program; or

(B) the residence of an individual or another person.

(e) An individualized skills and socialization provider must ensure that individualized skills and socialization is not provided in a setting that is presumed to have the qualities of an institution. A setting is presumed to have the qualities of an institution if the setting:

(1) is located in a building in which a state supported living center or a certified intermediate care facility for individuals with an intellectual disability or related conditions (ICF/IID) operated by a local intellectual and developmental disability authority (LIDDA) is located but is distinct from the state supported living center or the certified ICF/IID operated by a LIDDA;

(2) is located in a building that is on the grounds of or immediately adjacent to a state supported living center or a certified ICF/IID operated by a LIDDA;

(3) is located in a building in which a licensed private ICF/IID, a hospital, a nursing facility, or other institution is located but is distinct from the ICF/IID, hospital, nursing facility, or other institution;

(4) is located in a building that is on the grounds of or immediately adjacent to a hospital, a nursing facility, or other institution except for a licensed private ICF/IID; or

(5) has the effect of isolating individuals from the broader community of persons not receiving Medicaid HCBS.

(f) An individualized skills and socialization provider may provide individualized skills and socialization to an individual in a setting that is presumed to have the qualities of an institution as described in subsection (e) of this section, if CMS determines through a heightened scrutiny review that the setting:

(1) does not have the qualities of an institution; and

(2) does have the qualities of home and community-based settings.

(g) The setting in which on-site individualized skills and socialization is provided must:

(1) allow an individual to:

(A) control the individual's schedule and activities related to on-site individualized skills and socialization;

(B) have access to the individual's food at any time; and

(C) have visitors of the individual's choosing at any time; and

(2) be physically accessible and free of hazards to an individual.

(h) If an individual's service planning team determines that any of the requirements in subsection (g)(1) of this section must be modified, the service planning team must revise the individual's IPP in accordance with the rules governing the DBMD Program to include the following:

(1) a description of the specific and individualized assessed need that justifies the modification;

(2) a description of any positive interventions and supports that have been tried but did not work;

(3) a description of any less intrusive methods of meeting the need that have been tried but did not work;

(4) a description of the condition that is directly proportionate to the specific assessed need;

(5) a description of how data will be routinely collected and reviewed to measure the ongoing effectiveness of the modification;

(6) the established time limits for periodic reviews to determine if the modification is still necessary or can be terminated;

(7) the individual's or LAR's signature on the IPP evidencing informed consent to the modification; and

(8) the program provider's assurance that the modification will cause the individual no harm.

(i) An individualized skills and socialization provider must ensure that off-site individualized skills and socialization:

(1) provides activities that:

(A) integrate an individual into the community; and

(B) promote the individual's development of skills and behavior that support independence and personal choice;

(2) is provided in a community setting chosen by the individual from among available community setting options;

(3) includes transportation of an individual from an on-site individualized skills and socialization location to an off-site individualized skills and socialization location and between off-site individualized skills and socialization locations; and

(4) is not provided in:

(A) a building in which on-site individualized skills and socialization is provided;

(B) a setting in which an individual must not reside, as set forth in the rules governing the DBMD Program, unless:

(i) the off-site individualized skills and socialization activity is a volunteer activity performed by an individual in such a setting; or

(ii) off-site individualized skills and socialization is provided in an event open to the public; or

(C) the residence of an individual or another person, unless the off-site individualized skills and socialization activity is a volunteer activity performed by an individual in the residence.

(j) An individualized skills and socialization provider or the program provider is not responsible for the cost, if any, of an individual to participate in an off-site activity.

§260.505. Provision of Individualized Skills and Socialization.

(a) A program provider must make both on-site individualized skills and socialization and off-site individualized skills and socialization available to an individual.

(b) An individualized skills and socialization provider must provide on-site individualized skills and socialization and off-site individualized skills and socialization in accordance with an individual's IPC and IPP.

§260.513. Service Provider Qualifications and Training.

(a) A service provider of individualized skills and socialization must meet the staff qualifications described in §559.227(a)(2) of this title (relating to Program Requirements).

(b) A service provider of individualized skills and socialization who provides transportation must meet the staff qualifications described in §559.227(a)(3) of this title.

(c) A service provider of individualized skills and socialization must complete the following training in accordance with rules governing the DBMD Program:

(1) general orientation training;

(2) DBMD Program Service Provider Training;

(3) training on needs of an individual to whom the service provider is providing individualized skills and socialization; and

(4) training on delegated tasks, if the service provider is performing delegated tasks for an individual receiving individualized skills and socialization.

(d) A service provider of individualized skills and socialization must meet:

(1) the initial training requirements described in §559.227(k)(1)(B)(i), (ii), and (v) of this title; and

(2) the ongoing training requirements described in §559.227(k)(2)(A)(i), (ii), and (iv) of this title.

§260.515. Contracting to Provide Individualized Skills and Socialization.

If a program provider contracts with an individualized skills and socialization provider to provide individualized skills and socialization to an individual, the program provider must:

(1) comply with 40 TAC §49.308 (relating to Subcontractors);

(2) ensure the individualized skills and socialization provider complies with:

(A) §260.503(c) - (e) of this subchapter (relating to Description of Individualized Skills and Socialization); and

(B) §260.505 of this subchapter (relating to Provision of Individualized Skills and Socialization); and

(3) ensure that a service provider of individualized skills and socialization meets the training requirements described in §260.513(c) of this subchapter (relating to Service Provider Qualifications and Training).

§260.517. Program Provider Reimbursement for Individualized Skills and Socialization.

(a) HHSC pays a program provider for on-site individualized skills and socialization and off-site individualized skills and socialization in accordance with the reimbursement rates.

(b) If an individual's DBMD Program services and CFC services are suspended or terminated, a program provider must not submit a claim for on-site individualized skills and socialization or off-site individualized skills and socialization provided during the period of the individual's suspension or after the termination, except the program provider may submit a claim for the first calendar day of the individual's suspension or termination.

(c) A program provider must not bill for and HHSC does not pay a program provider for on-site individualized skills and socialization or off-site individualized skills and socialization, or recoups any payments made to the program provider for on-site individualized skills and socialization or off-site individualized skills and socialization:

(1) if individualized skills and socialization is not provided in accordance with this subchapter and Chapter 559, Subchapter H of this title (relating to Individualized Skills and Socialization Provider Requirements);

(2) if the individual receiving individualized skills and socialization is, at the time individualized skills and socialization was provided, ineligible for the DBMD Program;

(3) if individualized skills and socialization is provided during a period of time for which there is not a signed and dated ID/RC Assessment for the individual;

(4) if individualized skills and socialization is provided during a period of time for which the individual did not have an LOC determination;

(5) if individualized skills and socialization is not provided in accordance with the individual's IPP;

(6) if the program provider did not comply with 40 TAC §49.305 (relating to Records);

(7) if the claim for the service did not meet the requirements in 40 TAC §49.311 (relating to Claims Payment);

(8) if individualized skills and socialization is provided by a service provider who did not meet the qualifications to provide individualized skills and socialization as described in §260.513 of this subchapter (relating to Service Provider Qualifications and Training) and §559.227 of this title (relating to Program Requirements);

(9) if the program provider did not comply with the DBMD Program Manual;

(10) if HHSC determines that individualized skills and socialization would have been paid for by a source other than the DBMD Program if the program provider had submitted to the other source a proper, complete, and timely request for payment for individualized skills and socialization;

(11) if individualized skills and socialization was not provided; or

(12) if individualized skills and socialization is provided during a period of time that the individual produced marketable goods and was paid below minimum wage for producing the goods in accordance with Section 14(c) of the Fair Labor Standards Act.

(d) HHSC does not pay a program provider for day habilitation or recoups any payments made to the program provider for day habilitation provided on or after March 1, 2023, even if an individual's IPC includes day habilitation on or after March 1, 2023.

(e) HHSC conducts contract and fiscal monitoring in accordance with rules governing the DBMD Program to determine whether a program provider is in compliance with this subchapter.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on December 12, 2022.

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Health and Human Services Commission
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Proposal publication date: August 12, 2022
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CHAPTER 262. TEXAS HOME LIVING (TxHmL) PROGRAM AND COMMUNITY FIRST CHOICE (CFC)

SUBCHAPTER J. INDIVIDUALIZED SKILLS AND SOCIALIZATION

26 TAC §§262.901, 262.903, 262.905, 262.907, 262.909, 262.911, 262.913, 262.915, 262.917, 262.919, 262.921, 262.923, 262.925, 262.927

The Texas Health and Human Services Commission (HHSC) adopts new §262.901, concerning Definitions; §262.903, concerning Types of Individualized Skills and Socialization; §262.905, concerning Description of On-Site and Off-Site Individualized Skills and Socialization; §262.907, concerning Description of and Criteria for an Individual to Receive In-Home Individualized Skills and Socialization; §262.909, concerning Exceptions to Certain Requirements During Declaration of Disaster; §262.911, concerning Provision of On-Site and Off-Site Individualized Skills and Socialization; §262.913, concerning Provision of In-Home Individualized Skills and Socialization; §262.915, concerning Service Limit for On-Site, Off-Site, and In-Home Individualized Skills and Socialization; §262.917, concerning Staffing Ratios for Off-Site Individualized Skills and Socialization; §262.919, concerning Discontinuation of Day Habilitation; §262.921, concerning Including On-Site, Off-Site, and In-Home Individualized Skills and Socialization on an IPC; §262.923, concerning Service Provider Qualifications and Training for In-Home Individualized Skills and Socialization; §262.925, concerning Program Provider Reimbursement for On-Site, Off-Site, and In-Home Individualized Skills and Socialization; and §262.927, concerning Enhanced Staffing Rate, in Texas Administrative Code (TAC), new Chapter 262, Subchapter J, Individualized Skills and Socialization.

Sections 262.901, 262.905, 262.911, 262.917, 262.923, 262.925, and 262.927 are adopted with changes to the proposed text as published in the August 12, 2022, issue of the *Texas Register* (47 TexReg 4809). These rules will be republished.

Sections 262.903, 262.907, 262.909, 262.913, 262.915, 262.919, and 262.921 are adopted without changes to the proposed text as published in the August 12, 2022, issue of the *Texas Register* (47 TexReg 4809). These rules will not be republished.

BACKGROUND AND JUSTIFICATION

The adopted rules are necessary to comply with Title 42, Code of Federal Regulations (CFR), §441.301(c)(4)(i) - (v), which require home and community based settings in programs authorized by §1915(c) of the Social Security Act to have certain qualities, including being integrated in and supporting full access of individuals to the greater community. The Centers for Medicare and Medicaid Services (CMS) is requiring that states be in compliance with these regulations by March 17, 2023.

The 2020-21 General Appropriations Act (GAA), House Bill 1, 86th Legislature, Regular Session, 2019 (Article II, Health and Human Services Commission, Rider 21) required HHSC to develop a plan to replace day habilitation in its Medicaid §1915(c) waiver programs for individuals with intellectual and developmental disabilities with more integrated services that maximize participation and integration of the individuals in the community.

In accordance with Rider 21, HHSC developed a plan to replace day habilitation provided in the Home and Community-Based Services (HCS), Texas Home Living (TxHmL), and Deaf Blind with Multiple Disabilities (DBMD) Programs with individualized skills and socialization. The plan included the use of staffing ratios while providing off-site individualized skills and socialization to individuals to ensure that the individuals receive more personalized attention and more easily meet their personal goals and to ensure the health and safety of the individuals.

The 2022-2023 GAA, Senate Bill 1, 87th Legislature, Regular Session, 2021 (Article II, Health and Human Services Commission, Rider 23) authorized funding for the provision of individu-

alized skills and socialization in the HCS, TxHmL, and DBMD Programs.

The adopted rules implement the plan required by Rider 21 to replace day habilitation with individualized skills and socialization in the TxHmL Program and will ensure HHSC's compliance with 42 CFR §441.301(c)(4)(i) - (v) by March 17, 2023.

The adopted rules describe the three types of individualized skills and socialization, on-site individualized skills and socialization, off-site individualized skills and socialization, and in-home individualized skills and socialization. The adopted rules require that on-site and off-site individualized skills and socialization be provided by an individualized skills and socialization provider.

The rules requiring a provider of individualized skills and socialization to be licensed in accordance with Texas Human Resources Code Chapter 103 are being adopted in 26 TAC Chapter 559 and published elsewhere in this issue of the *Texas Register.* The rules will require an individualized skills and socialization provider to be licensed as a day activity and health services facility with a special designation for individualized skills and socialization.

The adopted rules include requirements for a program provider to make available both on-site and off-site individualized skills and socialization to individuals. The adopted rules include requirements for an individualized skills and socialization provider to meet staffing ratios based on levels of need for off-site individualized skills and socialization.

The adopted rules also include requirements for the provision of in-home individualized skills and socialization including criteria that must be met for an individual to receive the service and that the service must be provided in the residence of the individual receiving the service.

To help providers to operate and provide services effectively during a disaster, the adopted rules provide that HHSC may allow program providers to use one or more of the exceptions specified in the rule while an executive order or proclamation declaring a state of disaster under Texas Government Code §418.014 is in effect.

The adopted rules discontinue day habilitation which includes in-home day habilitation effective March 1, 2023.

The rules implementing individualized skills and socialization in the HCS and DBMD Programs are being adopted in 26 TAC Chapter 263, Subchapter L and in 26 TAC Chapter 260, Subchapter I, and published elsewhere in the same issue of the *Texas Register.*

COMMENTS

The 31-day comment period ended September 12, 2022.

During this period, HHSC received comments regarding the proposed rules from 88 commenters, including the ARC of the Capital Area, the ARC of San Antonio, the Mary Lee Foundation, LTO Ventures, Community Healthcore, Genesis Behavior, Aging and Disability Services Local Authority, MHMR of Tarrant County, Advantage Care Services, Down Home Ranch, EveryChild, Inc., Golden Rule Services, IDD Center in Beaumont, Ability Connection, Citizens Development Center dba U&I, Texas Council of Community Centers, Inc. (Texas Council), the Private Providers Association of Texas (PPAT), Providers Alliance for Community Services of Texas (PACSTX), Mission Road Ministries, Lubbock Adult Day Center, 29 Acres, Tri-County Behavioral Healthcare, Metrocrest Community Services, Gateway Community Partners, Caregiver Long-term Care Services and Supports and 51 individuals.

A summary of comments relating to the rules and HHSC's responses follows.

Comment: Multiple commenters expressed concerns that the rates adopted for individualized skills and socialization are not adequate.

Response: HHSC declines to make changes in response to the comments. The comments are outside the scope of this project because the rate methodology for individualized skills and socialization will be adopted in a separate rule project.

Comment: Multiple commenters requested that HHSC allow individualized skills and socialization to include activities in which an individual produces marketable goods and is paid below minimum wage for producing the goods in accordance with Section 14(c) of the Fair Labor Standards Act.

Response: HHSC declines to make these changes in response to the comments because the activities in question are not consistent with the home and community settings requirements in 42 CFR §441.301(c)(4)(i) - (v) and HHSC does not want these activities to hinder an individual's opportunity to obtain competitive employment in the community.

Comment: Multiple commenters expressed disagreement with the implementation of off-site individualized skills and socialization due to concerns about an individual's safety because there is a lack of a controlled environment while the individual is out in the community.

Response: HHSC declines to make changes in response to these comments. Individuals have a choice of whether they participate in off-site individualized skills and socialization. Also, the adopted rules include staffing ratios for service providers of off-site individualized skills and socialization to individuals receiving the service to help ensure the health and safety of the individuals.

Comment: Multiple commenters requested that HHSC delay the implementation of individualized skills and socialization. One commenter requested that HHSC host a one day working session to address providers' concerns and delay the implementation of the service.

Response: HHSC declines to delay the implementation of individualized skills and socialization because the implementation of this service is necessary to ensure HHSC's compliance with 42 CFR §441.301(c)(4) before the deadline of March 17, 2023, established by CMS. HHSC will continue to hold trainings regarding the implementation of individualized skills and socialization. No changes are made to the rules in response to this comment.

Comment: Several commenters requested the ability for individualized skills and socialization providers to provide only off-site individualized skills and socialization.

Response: Changes were made in response to comments in the licensing rules being adopted in 26 TAC Chapter 559 to allow an individualized skills and socialization provider to provide only off-site individualized skills and socialization. HHSC did not make changes in this rule project in response to this comment.

Comment: One commenter requested additional training opportunities for local intellectual and developmental disability authorities (LIDDAs) and program providers on the new service of individualized skills and socialization.

Response: HHSC agrees that training opportunities for LIDDAs and program providers on individualized skills and socialization is important and has continued to provide trainings on the new service of individualized skills and socialization. HHSC will inform stakeholders about future training opportunities available for the service. HHSC did not make changes in response to this comment.

Comment: One commenter expressed that the premise for individualized skills and socialization is unfounded based on the federal Home and Community-Based Settings rules and that there is nothing in the federal requirements that requires day habilitations to close. Other commenters expressed concerns about individualized skills and socialization causing current day habilitations to close.

Response: HHSC agrees that the home and community-based settings requirements in 42 CFR §441.301(c)(4)(i) - (v) do not require a location that provides day habilitation to close. HHSC determined, however, that day habilitation does not meet the requirements in 42 CFR §441.301(c)(4)(i) - (v) and, therefore, is implementing individualized skills and socialization to comply with the federal regulation. Sites that currently provide day habilitation may choose to provide individualized skills and socialization in accordance with the new rules. HHSC did not make changes to the rules in response to this comment.

Comment: Several commenters requested increasing the daily, weekly, and monthly service limit for individualized skills and socialization.

Response: HHSC declines to make changes in response to this comment. Increasing the service limit for individualized skills and socialization would require additional analysis.

Comment: Several commenters requested changes in the staffing ratios for off-site individualized skills and socialization in order to provide for additional flexibility for program providers in light of current staffing shortages.

Response: HHSC revised proposed §262.917 to allow for a higher staffing ratio for individuals with a level of need (LON) 1 or LON 5. Specifically, HHSC revised this section to require that the staffing ratio for off-site individualized skills and socialization for an individual with a LON 1 or LON 5 be no higher than one service provider of off-site individualized skills and socialization to eight individuals and other persons receiving the service (1:8) instead of one service provider of off-site individualized skills and socialization to four individuals and other persons receiving the service (1:4).

Comment: One commenter requested additional language in proposed §262.905 and §262.907 for how HHSC will measure how individuals will meet their personal goals for individualized skills and socialization.

Response: HHSC declines to make changes in response to this comment because the individual's service planning team develops the person-directed plan for an individual in the TxHmL Program to accurately reflect and measure the individual's goals and desires.

Comment: Multiple commenters requested additional clarity regarding when public and private intermediate care facilities for individuals with intellectual disabilities (ICF/IIDs) are allowed to provide individualized skills and socialization.

Response: In accordance with §262.911(a), on-site and off-site individualized skills and socialization must be provided by an individualized skills and socialization provider. Based on direction from CMS, HHSC revised proposed §262.905, Description of On-Site and Off-Site Individualized Skills and Socialization, by adding new subsection (d) to explain that individualized skills and socialization must not be provided in a setting that is presumed to have the qualities of an institution and to describe settings that have the qualities of an institution. HHSC added subsection (e) to proposed §262.905 to provide that an individualized skills and socialization provider may provide individualized skills and socialization in a setting presumed to have the qualities of an institution if CMS has determined through heightened scrutiny that the setting meets certain criteria. HHSC also included definitions for the terms "hospital," "Medicaid HCBS," and "nursing facility" in proposed §262.901 for clarity because these terms were used in proposed §262.905(d) and (e).

Comment: One commenter requested future changes to the TxHmL Billing Requirements to clarify the difference between employment assistance and individualized skills and socialization.

Response: HHSC did not make changes in response to this comment but will take the comment under consideration when reviewing the TxHmL Billing Requirements.

Comment: One commenter requested that HHSC "continue to provide supportive services for persons with disabilities and special needs."

Response: HHSC provides many services that benefit and support persons with disabilities. No changes were made in response to this comment.

Comment: Several commenters requested that duplicative provisions that are included in the individualized skills and socialization licensure rules be removed from the rules published as adopted. One commenter specifically requested the removal of proposed §262.923.

Response: HHSC agrees with the requested changes and has deleted the on-site and off-site service provider requirements that are duplicative in proposed §262.911 and §262.923. HHSC also made changes in proposed §262.925 to replace the reference to proposed §262.923 with a reference to 26 TAC §559.227 following the removal of the duplicative provisions.

Comment: Several commenters requested revising the criteria in proposed §262.907(b) to allow the service planning team to determine whether an individual may receive in-home individualized skills and socialization.

Response: HHSC declines to make the requested change because revising the criteria in proposed §262.907(b) would require additional analysis.

Comment: Several commenters requested that HHSC allow for in-home individualized skills and socialization to be provided outside of the residence of the individual.

Response: HHSC declines to make changes in response to this comment because the primary characteristic of in-home individualized skills and socialization is that it must be provided in the individual's residence. On-site and off-site individualized skills and socialization are available for individuals to be provided outside of the individual's residence.

Comment: One commenter requested that HHSC align the definitions of "abuse," "neglect," and "exploitation" with the licensure requirements for individualized skills and socialization.

Response: HHSC removed the definitions of "abuse," "neglect," "exploitation," "physical abuse," "sexual abuse," and "verbal or emotional abuse" in §262.901 because these terms are not used in the rules.

Comment: One commenter encouraged the use of the Corrective Action Plan (CAP) allowable by CMS to ensure that the service is feasible and adequately funded.

Response: HHSC did not make changes to the rules in response to this comment because this comment is outside of the scope of this project.

Comment: One commenter requested that language be added to proposed §262.905(b)(1) - (2), Description of On-Site and Off-Site Individualized Skills and Socialization to add "education and transition" to the individual's goals.

Response: HHSC declines to make changes in response to this comment because the focus of individualized skills and socialization is an individual's employment goals or current or future volunteer goals, not education and transition goals.

Comment: One commenter requested that HHSC allow individualized skills and socialization to be provided through the consumer directed services (CDS) Option.

Response: HHSC did not make changes in response to this comment because individualized skills and socialization is available through the CDS Option in the TxHmL Program.

Comment: One commenter requested that individuals be given the choice to participate or not to participate in off-site individualized skills and socialization.

Response: HHSC did not make changes in response to this comment because the new rules do not require an individual to receive any type of individualized skills and socialization.

Comment: One commenter requested that volunteers be allowed to become service providers of individualized skills and socialization, provided that they meet the service provider qualifications in the rule.

Response: HHSC did not make changes in response to this comment because although a service provider must meet certain qualifications, proposed §262.923 does not prohibit a volunteer from being a service provider.

Comment: One commenter requested the ability for provisional licensure for individualized skills and socialization providers.

Response: HHSC did not make changes in response to this comment because it is outside the scope of this project. The proposed rules do not address the licensing of individualized skills and socialization providers.

Comment: One commenter requested expanding the criteria to receive in-home individualized skills and socialization to allow for a nurse, physician assistant, or nurse practitioner to be able to document the medical need for in-home individualized skills and socialization.

Response: HHSC declines to make changes in response to this comment because the changes would require additional analysis.

Comment: One commenter requested a 1:1 enhanced staffing rate be available for all individuals who are not a LON 9. Another commenter requested that individuals with an LON 8 be able to request an enhanced staffing rate. One commenter requested that a program provider be able to request a 1:4 ratio as an enhanced staffing rate for an individual.

Response: HHSC agrees with the request for a 1:1 enhanced staffing rate for all individuals who are not an LON 9. Therefore, HHSC made changes in proposed §262.927 and §262.917 to allow a program provider to request a level two enhanced staffing rate for off-site individualized skills and socialization so that the ratio of service providers for an individual with an LON 1, LON 5, LON 8, or LON 6 is no higher than one service provider to one individual (1:1). HHSC also made changes in proposed §262.927 and §262.917 so that a level one enhanced staffing rate provides for one service provider of off-site individualized skills and socialization to two individuals (1:2). HHSC also made changes to §262.925(b) to describe a level one and level two enhanced staffing rate. HHSC declines to make changes in response to the request for an enhanced staffing rate that would allow for a 1:4 staffing ratio because the changes would require additional analysis.

Comment: One commenter requested fewer service provider requirements for service providers of in-home individualized skills and socialization.

Response: HHSC did not make changes in response to this comment. The service provider requirements in proposed §262.923 help ensure that service providers are qualified to provide in-home individualized skills and socialization. HHSC is deleting the provisions related to on-site and off-site service provider qualifications in §262.923 because these provisions are in 26 TAC Chapter 559, Subchapter H.

Comment: One commenter requested a change in proposed §262.927(c)(2) to replace the "ICAP Scoring Booklet" with "scoring of a client needs assessment" in the event the ICAP is replaced with another assessment.

Response: HHSC declines to make changes in response to this comment because the ICAP is the current tool utilized by HHSC to determine an individual's needs and changing the assessment tool is outside of the scope of this project.

Comment: Several commenters requested flexibility in renewing individual plans of care (IPCs) when the IPC expires.

Response: HHSC declines to make changes in response to this comment. Federal regulation at 42 CFR §441.301(c)(3) requires an individual's person-centered service plan, which includes the IPC, to be reviewed and revised at least every 12 months, when the individual's circumstances or needs change significantly, or at the request of the individual.

Comment: Several commenters requested changes to proposed §262.917(c) to allow service providers to work with individuals outside of their assigned staffing ratios.

Response: HHSC declines to make changes in response to this comment because the required staffing ratio will not be met if a service provider provides services to individuals not in the assigned staffing ratio.

Comment: One commenter requested flexibility in proposed §262.925(d) to allow for the program provider to only verify licensure requirements and that the individualized skills and socialization provider has received an implementation plan.

Response: HHSC declines to make changes in response to this comment because, to ensure the integrity of the TxHmL Program, HHSC must not pay a program provider or must recoup

payments made to the program provider for any of the reasons described in §262.925(d).

Comment: One commenter requested clarification in the rules to add language that a family member and a service provider of host home/companion care would be allowed to provide in-home individualized skills and socialization.

Response: HHSC declines to make changes in response to this comment. HHSC will take this comment under consideration when reviewing the TxHmL Billing Requirements.

Comment: One commenter requested that HHSC clarify in the rules that the individualized skills and socialization provider is not responsible for the individual's costs for off-site individualized skills and socialization activities.

Response: HHSC added subsection (i) to proposed §262.905 to state that an individualized skills and socialization provider or the program provider is not responsible for the cost, if any, of an individual to participate in an off-site activity that the individual chooses to participate in, such as purchasing movie tickets.

Comment: One commenter requested adding a requirement in §262.921(b) that the in-home individualized skills and socialization provider will participate or develop the implementation plan.

Response: The process in proposed §262.921(b) for development of an implementation plan for individualized skills and socialization does not require that an individualized skills and socialization provider participate in developing the plan. This process is the same as the process for development of an implementation plan for other TxHmL Program services. To keep the process consistent for all TxHmL Program services, HHSC declines to make this change in response to this comment.

Comment: One commenter requested additional language in proposed §262.925(d)(2) to clarify that HHSC will only recoup or will not pay if there is not a signed and dated initial authorized IPC for the individual.

Response: HHSC declines to make changes in response to this comment. To ensure the integrity of the TxHmL Program, HHSC must not pay a program provider or must recoup payments made to the program provider for providing individualized skills and socialization to an individual during a period of time for which there is not an authorized initial, renewal, or revision IPC for the individual.

Comment: One commenter requested that HHSC clarify in proposed §263.2025(d)(1) that HHSC will not refuse to pay for a service if an individual has a temporary lapse in Medicaid eligibility.

Response: HHSC declines to make changes in response to this comment. The rules governing the TxHmL Program do not allow HHSC to pay a program provider for services provided to an individual who does not meet the eligibility criteria at the time the service was provided.

Comment: Several commenters requested that children be allowed to receive individualized skills and socialization.

Response: School-aged individuals are allowed to receive individualized skills and socialization if it is not being provided when the individual is regularly scheduled to attend school. In accordance with 40 TAC §9.190(e)(28), unless contraindications are documented with justification by the service planning team, a service coordinator must ensure that a school-age individual receives educational services in a six-hour-per-day program, five days per week, provided by the local school district. HHSC did not make changes in response to this comment.

Comment: Several commenters requested that individuals be allowed to volunteer in a person's residence, including private residences or settings in which an individual must not reside.

Response: HHSC agrees with this response and made changes in proposed §262.905(h)(4)(B) and §262.905(h)(4)(C) to allow for an off-site individualized skills and socialization activity to be provided in an individual's residence or in a setting in which an individual must not reside as set forth in the rules governing the TxHmL Program if the activity is a volunteer activity performed by an individual.

Comment: One commenter requested that HHSC allow for a range of hours on an individual's IPC instead of a specific amount of hours.

Response: HHSC declines to make changes in response to this comment. The content of an IPC is governed by 40 TAC §9.558(b) which requires that an individual's IPC be based on the person-directed plan (PDP) and specify the type and amount of each TxHmL Program service and CFC service to be provided to an individual. Therefore, this comment is outside the scope of this project.

Comment: One commenter requested that HHSC add additional guidance for what to do if an individual chooses off-site individualized skills and socialization but there is not a provider that offers off-site individualized skills and socialization in their community.

Response: HHSC did not make changes in response to this comment. Currently 40 TAC §9.578(d)(1) requires a program provider to provide TxHmL Program services in accordance with an individual's PDP, IPC, IP, and transportation plan.

Comment: Several commenters requested that HHSC remove the requirement in proposed §262.911(e) to document when an individual or the individual's legally authorized representative (LAR) decides that the individual will not participate in an on-site individualized skills and socialization activity.

Response: HHSC disagrees with the commenter and believes that an individualized skills and socialization provider must document the individual's or LAR's decision for the individual not to participate in an activity the individual scheduled for on-site individualized skills and socialization or off-site individualized skills and socialization. This requirement helps ensure that if an individual does not receive individualized skills and socialization, it is because the individual or the individual's LAR declined to receive the service. However, because the licensing rules for individualized skills and socialization providers being adopted in 26 TAC Chapter 559, Subchapter H, include this documentation requirement, HHSC removed the provisions in proposed §262.911(e) to avoid duplicative provisions in different rule chapters.

Comment: One commenter requested that HHSC create a definition for "Representative Payee" to differentiate from an LAR.

Response: HHSC declines to make changes in response to this comment because the definition of "LAR" makes clear that a representative payee is appointed by the Social Security Administration and is an example of an LAR.

Comment: Several commenters expressed concerns that the off-site staffing ratios in the rules could cause discrimination based on an individual's LON and not support personal choice.

The commenters also expressed concerns that individuals must be grouped based on LON.

Response: HHSC declines to make changes in response to this comment. HHSC implemented staffing ratios to ensure the health and safety of individuals participating in off-site individualized skills and socialization, so that individuals may meet their goals. The staffing ratios in proposed §262.917 for off-site individualized skills and socialization do not require that individuals be only with other individuals who have the same LON.

Comment: One commenter states that HHSC did not make a good faith effort to determine the adverse economic effect on small businesses and microbusinesses in drafting these rules.

Response: HHSC determined that the rules could have an adverse economic effect on small businesses and micro-businesses due to the cost to comply. However, the new rules are necessary to comply with the federal regulations for home and community-based settings in 42 CFR §441.301(c)(4)(i) - (v). HHSC did not make any changes in response to this comment.

Comment: One commenter expressed concerns that the service limit would keep individuals out in the community too long.

Response: HHSC did not make changes in response to this comment. The service limit in proposed §262.915(2) specifies the maximum amount of hours per day for on-site, off-site, and in-home individualized skills and socialization that an individual may receive. The service planning team determines, within the service limit, the amount of hours per day for on-site, off-site, or in-home individualized skills and socialization for each individual based on the individual's needs.

Comment: Several commenters expressed concerns about finding low cost activities for off-site individualized skills and socialization.

Response: HHSC did not make changes in response to this comment. Off-site individualized skills and socialization providers are able to provide free activities for individuals in the community such as volunteering and visiting a public library or public park.

HHSC revised the definition in proposed §262.901 of "individualized skills and socialization provider" to replace the reference to "Texas Human Resources Code, Chapter 103" with a more specific reference to "26 TAC Chapter 559, Subchapter H," the licensing requirements for an individualized skills and socialization provider, being adopted in this same issue of the *Texas Register.*

HHSC revised proposed §262.905(a) to state that individualized skills and socialization is a TxHmL Program service described in this section. The reference to Appendix C of the TxHmL Program waiver application approved by CMS was removed because §262.905 contains a complete description of individualized skills and socialization.

HHSC revised proposed §262.905(c)(4)(A) to remove "unless provided in an event open to the public." HHSC removed this wording because on-site individualized skills and socialization must be provided in a facility licensed in accordance with 26 TAC Chapter 559, Subchapter H.

HHSC revised proposed §262.911 to require that a program provider, instead of the individualized skills and socialization provider, make both on-site and off-site individualized skills and socialization available to an individual. This change was made because the licensure process for individualized skills and socialization providers will allow an individualized skills and socialization provider to only provide off-site individualized skills and socialization.

HHSC added a new paragraph (2) to proposed §262.917(a) to require a staffing ratio of no higher than one service provider of off-site individualized skills and socialization to two individuals with an LON 8 or an LON 6 and other persons receiving off-site individualized skills and socialization or a similar service (1:2) instead of one service provider of off-site individualized skills and socialization to four individuals and other persons receiving the service (1:4). HHSC also added a new paragraph (5) to proposed §262.917(a) to require a staffing ratio of no higher than one service provider of off-site individualized skills and socialization to one individual with an LON 9 and other persons receiving off-site individualized skills and socialization or a similar service (1:1) instead of one service provider of off-site individualized skills and socialization to four individuals and other persons receiving the service (1:4). HHSC made these changes because it was determined that like the HCS Program, the proposed individualized skills and socialization rates for the TxHmL Program support payment based on an LON 1, LON 5, LON 8, LON 6, and LON 9, and therefore the staffing ratios in TxHmL should be the same as those in the HCS Program.

HHSC revised proposed §262.917(b)(1) to change "the staffing ratio as required by subsection (a) of this section" to "the staffing ratio for the individual with highest level of need" because of the changes made to the staffing ratio requirements in §262.917(a).

HHSC changed proposed "§260.507" to "§260.507(a)" in proposed §262.917(b)(3) to use a more specific citation.

HHSC revised the title of proposed §262.923 to add "and Training" so that the section title more accurately reflects the contents of the section.

HHSC added paragraph (9) to proposed §262.925(d) to provide that HHSC does not pay a program provider for, or recoups any payments made to the program provider for individualized skills and socialization if on-site or off-site individualized skills and socialization is not provided in accordance with 26 TAC Chapter 559, Subchapter H of this title. This change was made so that HHSC may recoup or deny payment for noncompliance with 26 TAC Chapter 559, Subchapter H.

Based on direction from CMS that a setting in which on-site individualized skills and socialization is provided is a provider-controlled setting, HHSC revised proposed §262.905 by adding new subsection (f) to add that the setting in which on-site individualized skills and socialization is provided must allow the individual to control the individual's schedule and activities, have access to the individual's food at any time, receive visitors at any time, and be physically accessible and free of hazards, in accordance with 42 CFR §441.301(c)(4)(vi)(C) - (E). HHSC also revised proposed §262.905 by adding new subsection (g) to add the requirements that must be met if an individual's service planning team determines that any of the requirements in new subsection (f)(1) must be modified, in accordance with 42 CFR §441.301(c)(4)(vi)(F).

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, and Texas Human Resources Code §32.021, which authorizes the Exec-

utive Commissioner of HHSC to adopt rules necessary for the proper and efficient operation of the Medicaid program.

§262.901. Definitions.

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

(1) Applicant--A Texas resident seeking services in the Texas Home Living Program (TxHmL).

(2) Calendar day--Any day, including weekends and holidays.

(3) CDS employer--Consumer directed services employer. This term has the same meaning as the term "employer" set forth in 40 TAC §41.103 (relating to Definitions).

(4) CDS option--Consumer directed services option. This term has the meaning set forth in 40 TAC §41.103.

(5) CFC--Community First Choice. A state plan option governed by Code of Federal Regulations, Title 42, Chapter 441, Subpart K, regarding Home and Community-Based Attendant Services and Supports State Plan Option (Community First Choice).

(6) CFC PAS/HAB--CFC personal assistance services/habilitation.

(7) CMS--Centers for Medicare & Medicaid Services. The federal agency within the United States Department of Health and Human Services that administers the Medicare and Medicaid programs.

(8) Community setting--A setting accessible to the general public within an individual's community.

(9) Day habilitation--A TxHmL Program service that provides assistance with acquiring, retaining, or improving self-help, socialization, and adaptive skills provided in a location other than the residence of an individual.

(10) DFPS--The Department of Family and Protective Services.

(11) FMSA--Financial management services agency. This term has the meaning set forth in 40 TAC §41.103.

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

(13) Hospital--A public or private institution licensed or exempt from licensure in accordance with Texas Health and Safety Code (THSC) Chapters 13, 241, 261, or 552.

(14) ICAP--Inventory for Client and Agency Planning.

(15) ID/RC Assessment--Intellectual Disability/Related Conditions Assessment. A form used by HHSC for level of care determination and level of need assignment.

(16) Implementation plan--A written document developed by a program provider for an individual that, for each TxHmL Program service and CFC service on the individual's individual plan of care (IPC) to be provided by the program provider except for community support and CFC support management, includes:

(A) a list of outcomes identified in the person-directed plan that will be addressed using TxHmL Program services and CFC services;

(B) specific objectives to address the outcomes required by subparagraph (A) of this paragraph that are:

(i) observable, measurable, and outcome-oriented; and

(ii) derived from assessments of the individual's strengths, personal goals, and needs;

(C) a target date for completion of each objective;

(D) the number of units of TxHmL Program services and CFC services needed to complete each objective;

(E) the frequency and duration of TxHmL Program services and CFC services needed to complete each objective; and

(F) the signature and date of the individual, legally authorized representative, and the program provider.

(17) Individual--A person enrolled in the TxHmL Program.

(18) Individualized skills and socialization provider--A legal entity licensed in accordance with Chapter 559, Subchapter H of this title (relating to Individualized Skills and Socialization Provider Requirements).

(19) Initial IPC--The first IPC for an individual developed before the individual's enrollment into the TxHmL Program.

(20) IPC--Individual plan of care. A written plan that:

(A) states:

(i) the type and amount of each TxHmL Program service and each CFC service, except for CFC support management, to be provided to an individual during an IPC year;

(ii) the services and supports to be provided to the individual through resources other than TxHmL Program services or CFC services, including natural supports, medical services, and educational services; and

(iii) if an individual will receive CFC support management; and

(B) is authorized by HHSC.

(21) IPC year--The effective period of an initial IPC and renewal IPC as described in this paragraph.

(A) Except as provided in subparagraph (B) of this paragraph, the IPC year for an initial and renewal IPC is a 365-calendar day period starting on the begin date of the initial or renewal IPC.

(B) If the begin date of an initial or renewal IPC is March 1 or later in a year before a leap year or January 1 - February 28 of a leap year, the IPC year for the initial or renewal IPC is a 366-calendar day period starting on the begin date of the initial or renewal IPC.

(C) A revised IPC does not change the begin or end date of an IPC year.

(22) LAR--Legally authorized representative. A person authorized by law to act on behalf of a person with regard to a matter described in this subchapter, including a parent, guardian, or managing conservator of a minor; a guardian of an adult; an agent appointed under a power of attorney; or a representative payee appointed by the Social Security Administration. An LAR, such as an agent appointed under a power of attorney or representative payee appointed by the Social Security Administration, may have limited authority to act on behalf of a person.

(23) LOC--Level of care. A determination given to an applicant or individual as part of the eligibility determination process based on data submitted on the ID/RC Assessment.

(24) LON--Level of need. An assignment given by HHSC to an applicant or individual that is derived from the ICAP service level score and from selected items on the ID/RC Assessment.

(25) Medicaid HCBS--Medicaid home and community-based services. Medicaid services provided to an individual in an individual's home and community, rather than in a facility.

(26) Nursing facility--A facility licensed in accordance with THSC Chapter 242.

(27) PDP--Person-directed plan. A plan developed using an HHSC form that describes the supports and services necessary to achieve the desired outcomes identified by the applicant or individual and LAR and to ensure the applicant's or individual's health and safety.

(28) Program provider--A person, as defined in 40 TAC §49.102 (relating to Definitions), that has a contract with HHSC to provide TxHmL Program services, excluding a financial management services agency.

(29) Renewal IPC--An IPC required to be developed for an individual at least 30 but not more than 90 calendar days before the expiration of the individual's IPC in accordance with rules governing the TxHmL Program.

(30) Revised IPC--An initial IPC or renewal IPC that is revised during the IPC year in accordance with rules governing the TxHmL Program to add a new TxHmL Program service or CFC service or change the amount of an existing service.

(31) Service coordinator--An employee of a local intellectual and developmental disability authority who provides service coordination to an individual.

(32) Service provider--A person who directly provides a TxHmL Program service or CFC service to an individual.

(33) TAC--Texas Administrative Code. A compilation of state agency rules published by the Texas Secretary of State in accordance with Texas Government Code, Chapter 2002, Subchapter C.

(34) TxHmL Program--The Texas Home Living Program.

§262.905. Description of On-Site and Off-Site Individualized Skills and Socialization.

(a) Individualized skills and socialization is a TxHmL Program service described in this section.

(b) On-site and off-site individualized skills and socialization:

(1) provide person-centered activities related to:

(A) acquiring, retaining, or improving self-help skills and adaptive skills necessary to live successfully in the community and participate in home and community life; and

(B) gaining or maintaining independence, socialization, community participation, current or future volunteer goals, or employment goals consistent with achieving the outcomes identified in an individual's PDP;

(2) support the individual's pursuit and achievement of employment through school, vocational rehabilitation, the TxHmL Program service of employment assistance, or the TxHmL Program service of supported employment;

(3) provide personal assistance for an individual who cannot manage personal care needs during an individualized skills and socialization activity;

(4) as determined by an assessment conducted by a registered nurse, provide assistance with medications and the performance of tasks delegated by a registered nurse in accordance with state law and rules, unless a physician has delegated the task as a medical act under Texas Occupations Code Chapter 157, as documented by the physician; and

(5) do not include activities in which an individual:

(A) produces marketable goods; and

(B) is paid below minimum wage for producing the goods in accordance with Section 14(c) of the Fair Labor Standards Act.

(c) On-site individualized skills and socialization:

(1) is provided in a building or a portion of a building that is owned or leased by an individualized skills and socialization provider;

(2) includes transportation of an individual from one on-site individualized skills and socialization location to another on-site individualized skills and socialization location;

(3) promotes an individual's development of skills and behavior that support independence and personal choice; and

(4) is not provided in:

(A) a setting in which an individual must not reside, as set forth in the rules governing the TxHmL Program; or

(B) the residence of an individual or another person.

(d) An individualized skills and socialization provider must ensure that individualized skills and socialization is not provided in a setting that is presumed to have the qualities of an institution. A setting is presumed to have the qualities of an institution if the setting:

(1) is located in a building in which a state supported living center or a certified intermediate care facility for individuals with an intellectual disability or related conditions (ICF/IID) operated by a local intellectual and developmental disability authority (LIDDA) is located but is distinct from the state supported living center or the certified ICF/IID operated by a LIDDA;

(2) is located in a building that is on the grounds of or immediately adjacent to a state supported living center or a certified ICF/IID operated by a LIDDA;

(3) is located in a building in which a licensed private ICF/IID, a hospital, a nursing facility, or other institution is located but is distinct from the ICF/IID, hospital, nursing facility, or other institution;

(4) is located in a building that is on the grounds of or immediately adjacent to a hospital, a nursing facility, or other institution except for a licensed private ICF/IID; or

(5) has the effect of isolating individuals from the broader community of persons not receiving Medicaid HCBS.

(e) An individualized skills and socialization provider may provide individualized skills and socialization to an individual in a setting that is presumed to have the qualities of an institution as described in subsection (d) of this section, if CMS determines through a heightened scrutiny review that the setting:

(1) does not have the qualities of an institution; and

(2) does have the qualities of home and community-based settings.

(f) The setting in which on-site individualized skills and socialization is provided must:

(1) allow an individual to:

(A) control the individual's schedule and activities related to on-site individualized skills and socialization;

(B) have access to the individual's food at any time; and

(C) have visitors of the individual's choosing at any time; and

(2) be physically accessible and free of hazards to an individual.

(g) If an individualized skills and socialization provider becomes aware that a modification to a requirement described in subsection (f)(1) of this section is needed based on a specific assessed need of an individual, the individualized skills and socialization provider must inform the individual's program provider of the needed modification.

(1) The program provider must:

(A) notify the service coordinator of the needed modification; and

(B) provide the service coordinator the information described in paragraph (2)(A) of this subsection as requested by the service coordinator.

(2) A service coordinator must, if notified by the program provider of a needed modification, convene a service planning team meeting to update the individual's PDP to include the following:

(A) a description of the specific and individualized assessed need that justifies the modification;

(B) a description of the positive interventions and supports that were tried but did not work;

(C) a description of the less intrusive methods of meeting the need that were tried but did not work;

(D) a description of the condition that is directly proportionate to the specific assessed need;

(E) a description of how data will be routinely collected and reviewed to measure the ongoing effectiveness of the modification;

(F) the established time limits for periodic reviews to determine if the modification is still necessary or can be terminated;

(G) the individual's or LAR's signature evidencing informed consent to the modification; and

(H) the program provider's assurance that the modification will cause no harm to the individual.

(3) After the service planning team updates the PDP as required by paragraph (2) of this subsection, the individualized skills and socialization provider may implement the modifications.

(h) Off-site individualized skills and socialization:

(1) provides activities that:

(A) integrate an individual into the community; and

(B) promote the individual's development of skills and behavior that support independence and personal choice;

(2) is provided in a community setting chosen by the individual from among available community setting options;

(3) includes transportation of an individual from an on-site individualized skills and socialization location to an off-site individualized skills and socialization location and between off-site individualized skills and socialization locations; and

(4) is not provided in:

(A) a building in which on-site individualized skills and socialization is provided;

(B) a setting in which an individual must not reside, as set forth in the rules governing the TxHmL Program, unless:

(i) the off-site individualized skills and socialization activity is a volunteer activity performed by an individual in such a setting; or

(ii) off-site individualized skills and socialization is provided in an event open to the public; or

(C) the residence of an individual or another person, unless the off-site individualized skills and socialization activity is a volunteer activity performed by an individual in the residence.

(i) An individualized skills and socialization provider or the program provider is not responsible for the cost, if any, of an individual to participate in an off-site activity.

§262.911. Provision of On-Site and Off-Site Individualized Skills and Socialization.

(a) On-site and off-site individualized skills and socialization must be provided by an individualized skills and socialization provider. An individualized skills and socialization provider must be the program provider or a contractor of the program provider.

(b) A program provider must make both on-site individualized skills and socialization and off-site individualized skills and socialization available to an individual.

(c) An individualized skills and socialization provider must provide on-site individualized skills and socialization and off-site individualized skills and socialization in accordance with an individual's PDP, IPC, and implementation plan.

§262.917. Staffing Ratios for Off-Site Individualized Skills and Socialization.

(a) The ratio of service providers of off-site individualized skills and socialization to persons receiving services off-site must be:

(1) no higher than one service provider of off-site individualized skills and socialization to eight individuals with an LON 1 or an LON 5 without an enhanced staffing rate and other persons receiving off-site individualized skills and socialization or a similar service (1:8);

(2) no higher than one service provider of off-site individualized skills and socialization to two individuals with an LON 8 or an LON 6 and other persons receiving off-site individualized skills and socialization or a similar service (1:2);

(3) no higher than one service provider of off-site individualized skills and socialization to two individuals with an LON 1 or an LON 5 with the level one enhanced staffing rate and other persons receiving off-site individualized skills and socialization or a similar service (1:2);

(4) no higher than one service provider of off-site individualized skills and socialization to one individual with an LON 1, LON 5, LON 8, or LON 6 with the level two enhanced staffing rate and other persons receiving off-site individualized skills and socialization or a similar service (1:1); and

(5) no higher than one service provider of off-site individualized skills and socialization to one individual with an LON 9 and other persons receiving off-site individualized skills and socialization or a similar service (1:1).

(b) A ratio described in subsection (a) of this section may include individuals with different LONs and other persons receiving off-

site individualized skills and socialization or a similar service. If the ratio includes individuals with different LONs or other persons receiving off-site individualized skills and socialization or a similar service, the ratio must be one of the following, whichever is the lowest staffing ratio:

(1) the staffing ratio for the individual with highest level of need;

(2) the staffing ratio required by §263.2017(a) of this title (relating to Staffing Ratios for Off-Site Individualized Skills and Socialization), if a person in the HCS Program is one of the persons represented in the ratio; or

(3) the staffing ratio required by §260.507(a) of this title (relating to Staffing Ratios), if a person in the DBMD Program is one of the persons represented in the ratio.

(c) A service provider of off-site individualized skills and socialization assigned to the individuals represented in the staffing ratio required by subsection (a) of this section must provide services only to the individuals and other persons represented in the ratio.

§262.923. Service Provider Qualifications and Training for In-Home Individualized Skills and Socialization.

(a) A service provider of in-home individualized skills and socialization must be at least 18 years of age and:

(1) have a high school diploma or a certificate recognized by a state as the equivalent of a high school diploma; or

(2) have documentation of a proficiency evaluation of experience and competence to perform the job tasks that includes:

(A) a written competency-based assessment of the ability to document service delivery and observations of the individuals to be served; and

(B) at least three written personal references from persons not related by blood that indicate the ability to provide a safe, healthy environment for the individuals being served.

(b) A service provider of in-home individualized skills and socialization must complete training as required by the rules governing the TxHmL Program.

§262.925. Program Provider Reimbursement for On-Site, Off-Site, and In-Home Individualized Skills and Socialization.

(a) Except as provided in subsection (b) of this section, HHSC pays for on-site, off-site, and in-home individualized skills and socialization provided to an individual at the reimbursement rates for on-site, off-site and in-home individualized skills and socialization regardless of the individual's LON.

(b) If approved in accordance with §262.927 of this subchapter (relating to Enhanced Staffing Rate) HHSC pays:

(1) a level one enhanced staffing rate for off-site individualized skills and socialization for an individual with an LON 1 or LON 5; and

(2) a level two enhanced staffing rate for off-site individualized skills and socialization for an individual with an LON 1, LON 5, LON 8, or LON 6.

(c) If an individual's TxHmL Program services and CFC services are suspended or terminated, a program provider must not submit a claim for on-site, off-site, or in-home individualized skills and socialization provided during the period of the individual's suspension or after the termination, except that the program provider may submit a claim for the first day of the individual's suspension or termination.

(d) HHSC does not pay a program provider for on-site, off-site, or in-home individualized skills and socialization, or recoups any payments made to the program provider for on-site, off-site, or in-home individualized skills and socialization if:

(1) the individual receiving on-site, off-site, or in-home individualized skills and socialization was, at the time on-site, off-site, or in-home individualized skills and socialization was provided, ineligible for the TxHmL Program;

(2) on-site, off-site, or in-home individualized skills and socialization is provided to an individual during a period of time for which there is not a signed, dated, and authorized IPC for the individual;

(3) on-site, off-site, or in-home individualized skills and socialization is provided during a period of time for which there is not a signed and dated ID/RC Assessment for the individual;

(4) on-site, off-site, or in-home individualized skills and socialization is provided during a period of time for which the individual did not have an LOC determination;

(5) on-site, off-site, or in-home individualized skills and socialization is not provided in accordance with a signed, dated, and authorized IPC that includes on-site, off-site, or in-home individualized skills and socialization;

(6) on-site, off-site, or in-home individualized skills and socialization is not provided in accordance with the individual's PDP or implementation plan;

(7) on-site, off-site, or in-home individualized skills and socialization is provided before the individual's enrollment date into the TxHmL Program;

(8) on-site, off-site, or in-home individualized skills and socialization is not provided in accordance with this subchapter;

(9) on-site or off-site individualized skills and socialization is not provided in accordance with Chapter 559, Subchapter H of this title (relating to Individualized Skills and Socialization Provider Requirements);

(10) on-site, off-site, or in-home individualized skills and socialization is not provided in accordance with the TxHmL Program Billing Requirements;

(11) on-site, off-site, or in-home individualized skills and socialization is not documented in accordance with the TxHmL Program Billing Requirements;

(12) the program provider did not comply with 40 TAC §49.305 (relating to Records);

(13) the claim for on-site, off-site, or in-home individualized skills and socialization did not meet the requirements in 40 TAC §49.311 (relating to Claims Payment) or the TxHmL Program Billing Requirements;

(14) HHSC determines that on-site, off-site, or in-home individualized skills and socialization would have been paid for by a source other than the TxHmL Program if the program provider had submitted to the other source a proper, complete, and timely request for payment for on-site, off-site, or in-home individualized skills and socialization;

(15) on-site or off-site individualized skills and socialization is provided by a service provider who did not meet the qualifications to provide on-site or off-site individualized skills and socialization as described in §559.227(a) of this title (relating to Program Requirements) and the TxHmL Program Billing Requirements;

(16) in-home individualized skills and socialization is provided by a service provider who did not meet the qualifications to provide in-home individualized skills and socialization as described in §262.923 of this subchapter (relating to Service Provider Qualifications and Training for In-Home Individualized Skills and Socialization) and the TxHmL Program Billing Requirements;

(17) on-site, off-site, or in-home individualized skills and socialization was not provided;

(18) on-site or off-site individualized skills and socialization is provided during a period of time that the individual produced marketable goods and was paid below minimum wage for producing the goods in accordance with Section 14(c) of the Fair Labor Standards Act;

(19) in-home individualized skills and socialization is not provided in the residence of the individual as required by §262.913(a) of this subchapter (relating to Provision of In-Home Individualized Skills and Socialization); or

(20) in-home individualized skills and socialization is provided to an individual without the documentation required by §262.913(c) of this subchapter.

(e) HHSC does not pay a program provider for day habilitation, or recoups any payments made to the program provider for day habilitation, if day habilitation is provided on or after March 1, 2023, even if an individual's IPC includes day habilitation on or after March 1, 2023.

(f) HHSC conducts provider fiscal compliance reviews, also known as billing and payment reviews, in accordance with rules governing the TxHmL Program and the TxHmL Program Billing Requirements to determine whether a program provider is in compliance with this subchapter.

§262.927. Enhanced Staffing Rate.

(a) A program provider may request a level one enhanced staffing rate for off-site individualized skills and socialization described in §262.925(b) of this subchapter (relating to Program Provider Reimbursement for On-Site, Off-Site, and In-Home Individualized Skills and Socialization) for an individual with a LON 1 or LON 5 who receives off-site individualized skills and socialization from the program provider.

(b) A program provider may request a level two enhanced staffing rate for off-site individualized skills and socialization described in §262.925(b) of this subchapter for an individual with a LON 1, LON 5, LON 8, or LON 6 who receives off-site individualized skills and socialization from the program provider.

(c) A service coordinator must request a level one enhanced staffing rate for an individual with a LON 1 or LON 5 or request a level two enhanced staffing rate for an individual with a LON 1, LON 5, LON 8, or LON 6 for off-site individualized skills and socialization described in §262.925(b) of this subchapter for an individual who receives off-site individualized skills and socialization through the CDS option if the CDS employer asks the service coordinator to request the enhanced staffing rate.

(d) A program provider or service coordinator makes the request described in subsections (a) - (c) of this section by submitting the following documentation to HHSC:

(1) a completed HHSC Enhanced Staffing Rate Request Form;

(2) the most recent ICAP scoring booklet;

(3) the most recent ID/RC Assessment;

(4) the most recent PDP;

(5) the most recent implementation plan for individualized skills and socialization; and

(6) other documentation that supports the individual's request for an enhanced staffing rate, which may include:

(A) the behavior support plan;

(B) a physician's order;

(C) an assessment completed by a service provider of a professional therapy;

(D) the nursing assessment; and

(E) the CFC PAS/HAB assessment.

(e) HHSC approves a request made in accordance with subsections (a) - (d) of this section if the documentation submitted to HHSC demonstrates that to participate in off-site individualized skills and socialization, the individual requires more service provider support than the individual typically receives. The requirement for additional support may be because of the individual's mobility, medical, or behavioral needs.

(f) HHSC may review an approved enhanced staffing rate at any time to determine if it is appropriate. If HHSC reviews an enhanced staffing rate, a program provider or service coordinator must submit documentation supporting the enhanced staffing rate to HHSC in accordance with HHSC's request.

(g) HHSC notifies a program provider or service coordinator that an enhanced staffing rate is approved or denied through the HHSC data system.

(h) A service coordinator must notify the CDS employer and FMSA of HHSC's approval or denial described in subsection (g) of this section.

(i) A program provider may request an administrative hearing in accordance with 1 TAC §357.484 (relating to Request for a Hearing) if HHSC:

(1) denies a request made in accordance with subsection (a) or (b) of this section; or

(2) denies an enhanced staffing rate based on a review described in subsection (f) of this section.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on December 12, 2022.

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Karen Ray
Chief Counsel
Health and Human Services Commission
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Proposal publication date: August 12, 2022
For further information, please call: (512) 438-4639

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CHAPTER 263. HOME AND COMMUNITY-BASED SERVICES (HCS) PROGRAM AND COMMUNITY FIRST CHOICE (CFC)

SUBCHAPTER L. INDIVIDUALIZED SKILLS AND SOCIALIZATION

26 TAC §§263.2001, 263.2003, 263.2005, 263.2007, 263.2009, 263.2011, 263.2013, 263.2015, 263.2017, 263.2019, 263.2021, 263.2023, 263.2025, 263.2027

The Texas Health and Human Services Commission (HHSC) adopts new §263.2001, concerning Definitions; §263.2003, concerning Types of Individualized Skills and Socialization; §263.2005, concerning Description of On-Site and Off-Site Individualized Skills and Socialization; §263.2007, concerning Description of and Criteria for an Individual to Receive In-Home Individualized Skills and Socialization; §263.2009, concerning Exceptions to Certain Requirements During Declaration of Disaster; §263.2011, concerning Provision of On-Site and Off-Site Individualized Skills and Socialization; §263.2013, concerning Provision of In-Home Individualized Skills and Socialization; §263.2015, concerning Service Limit for On-Site, Off-Site, and In-Home Individualized Skills and Socialization; §263.2017, concerning Staffing Ratios for Off-Site Individualized Skills and Socialization; §263.2019, concerning Discontinuation of Day Habilitation; §263.2021, concerning Including On-Site, Off-Site, and In-Home Individualized Skills and Socialization on an IPC; §263.2023, concerning Service Provider Qualifications and Training for In-Home Individualized Skills and Socialization; §263.2025, concerning Program Provider Reimbursement for On-Site, Off-Site, and In-Home Individualized Skills and Socialization; and §263.2027, concerning Enhanced Staffing Rate, in Texas Administrative Code (TAC), new Chapter 263, Subchapter L, Individualized Skills and Socialization.

Sections 263.2001, 263.2005, 263.2011, 263.2017, 263.2023, 263.2025, and 263.2027 are adopted with changes to the proposed text as published in the August 12, 2022, issue of the *Texas Register* (47 TexReg 4818). These rules will be republished.

Sections 263.2003, 263.2007, 263.2009, 263.2013, 263.2015, 263.2019, and 263.2021 are adopted without changes to the proposed text as published in the August 12, 2022, issue of the *Texas Register* (47 TexReg 4818). These rules will not be republished.

BACKGROUND AND JUSTIFICATION

The adopted rules are necessary to comply with Title 42, Code of Federal Regulations (CFR), §441.301(c)(4)(i) - (v), which require home and community based settings in programs authorized by §1915(c) of the Social Security Act to have certain qualities, including being integrated in and supporting full access of individuals to the greater community. The Centers for Medicare and Medicaid Services (CMS) is requiring that states be in compliance with these regulations by March 17, 2023.

The 2020-21 General Appropriations Act (GAA), House Bill 1, 86th Legislature, Regular Session, 2019 (Article II, Health and Human Services Commission, Rider 21) required HHSC to develop a plan to replace day habilitation in its Medicaid §1915(c) waiver programs for individuals with intellectual and developmental disabilities with more integrated services that maximize participation and integration of the individuals in the community.

In accordance with Rider 21, HHSC developed a plan to replace day habilitation provided in the Home and Community-Based Services (HCS), Texas Home Living (TxHmL), and Deaf Blind with Multiple Disabilities (DBMD) Programs with individualized skills and socialization. The plan included the use of staffing ratios while providing off-site individualized skills and socialization to individuals to ensure that the individuals receive more personalized attention and more easily meet their personal goals and to ensure the health and safety of the individuals.

The 2022-2023 GAA, Senate Bill 1, 87th Legislature, Regular Session, 2021 (Article II, Health and Human Services Commission, Rider 23) authorized funding for the provision of individualized skills and socialization in the HCS, TxHmL, and DBMD Programs.

The adopted rules implement the plan required by Rider 21 to replace day habilitation with individualized skills and socialization in the HCS Program and will ensure HHSC's compliance with 42 CFR §441.301(c)(4)(i) - (v) by March 17, 2023.

The adopted rules describe the three types of individualized skills and socialization - on-site individualized skills and socialization, off-site individualized skills and socialization, and in-home individualized skills and socialization. The adopted rules require that on-site and off-site individualized skills and socialization be provided by an individualized skills and socialization provider.

The rules requiring a provider of individualized skills and socialization to be licensed in accordance with Texas Human Resources Code Chapter 103, are being adopted in 26 TAC Chapter 559, Subchapter H and published elsewhere in this issue of the *Texas Register.* The rules in Chapter 559, Subchapter H will require an individualized skills and socialization provider to be licensed as a day activity and health services facility with a special designation for individualized skills and socialization.

The adopted rules include requirements for a program provider to make available both on-site and off-site individualized skills and socialization to individuals. The adopted rules include requirements for an individualized skills and socialization provider to meet staffing ratios based on levels of need for off-site individualized skills and socialization.

The adopted rules also include requirements for the provision of in-home individualized skills and socialization including criteria that must be met for an individual to receive the service and that the service must be provided in the residence of the individual receiving the service.

The adopted rules discontinue day habilitation which includes in-home day habilitation effective March 1, 2023.

To help providers to operate and provide services effectively during a disaster, the adopted rules provide that HHSC may allow program providers to use one or more of the exceptions specified in the rule while an executive order or proclamation declaring a state of disaster under Texas Government Code §418.014 is in effect.

The rules implementing individualized skills and socialization in the TxHmL and DBMD Programs are being adopted in 26 TAC Chapter 262 Subchapter J and in 26 TAC Chapter 260, Subchapter I and published elsewhere in the same issue of the *Texas Register.*

COMMENTS

The 31-day comment period ended September 12, 2022.

During the 31-day comment period, HHSC received comments regarding the proposed rules from 88 commenters, including the ARC of the Capital Area, the ARC of San Antonio, the Mary Lee Foundation, LTO Ventures, Community Healthcore, Genesis

Behavior, Aging and Disability Services Local Authority, MHMR of Tarrant County, Advantage Care Services, Down Home Ranch, EveryChild, Inc., Golden Rule Services, IDD Center in Beaumont, Ability Connection, Citizens Development Center, dba U&I, Texas Council of Community Centers, Inc. (Texas Council), the Private Providers Association of Texas (PPAT), Providers Alliance for Community Services of Texas (PACSTX), Mission Road Ministries, Lubbock Adult Day Center, 29 Acres, Tri-County Behavioral Healthcare, Metrocrest Community Services, Gateway Community Partners, Caregiver Long-term Care Services and Supports, and 51 individuals.

A summary of comments relating to the rules and HHSC's responses follows.

Comment: Multiple commenters expressed concerns that the rates adopted for individualized skills and socialization are not adequate.

Response: HHSC declines to make changes in response to the comments. The comments are outside the scope of this project because the rate methodology for individualized skills and socialization will be adopted in a separate rule project.

Comment: Multiple commenters requested that HHSC allow individualized skills and socialization to include activities in which an individual produces marketable goods and is paid below minimum wage for producing the goods in accordance with Section 14(c) of the Fair Labor Standards Act.

Response: HHSC declines to make these changes in response to the comments because the activities in question are not consistent with the home and community settings requirements in 42 CFR §441.301(c)(4)(i) - (v) and HHSC does not want these activities to hinder an individual's opportunity to obtain competitive employment in the community.

Comment: Multiple commenters expressed disagreement with the implementation of off-site individualized skills and socialization due to concerns about an individual's safety because there is a lack of a controlled environment while the individual is out in the community.

Response: HHSC declines to make changes in response to these comments. Individuals have a choice of whether they participate in off-site individualized skills and socialization. Also, the adopted rules include staffing ratios for service providers of off-site individualized skills and socialization to individuals receiving the service to help ensure the health and safety of the individuals.

Comment: Multiple commenters requested that HHSC delay the implementation of individualized skills and socialization. One commenter requested that HHSC host a one day working session to address providers' concerns and delay the implementation of the service.

Response: HHSC declines to delay the implementation of individualized skills and socialization because the implementation of this service is necessary to ensure HHSC's compliance with 42 CFR §441.301(c)(4) before the deadline of March 17, 2023, established by CMS. HHSC will continue to hold trainings regarding the implementation of individualized skills and socialization. No changes were made to the rules in response to this comment.

Comment: Several commenters requested the ability for individualized skills and socialization providers to provide only off-site individualized skills and socialization.

Response: Changes were made in response to comments in the licensing rules being adopted in 26 TAC Chapter 559 to allow an individualized skills and socialization provider to provide only off-site individualized skills and socialization. HHSC did not make changes in this rule project in response to this comment.

Comment: One commenter requested additional training opportunities for local intellectual and developmental disability authorities (LIDDAs) and program providers on the new service of individualized skills and socialization.

Response: HHSC agrees that training opportunities for LIDDAs and program providers on individualized skills and socialization is important and has continued to provide trainings on the new service of individualized skills and socialization. HHSC will inform stakeholders about future training opportunities available for the service. HHSC did not make changes in response to this comment.

Comment: One commenter expressed that the premise for individualized skills and socialization is unfounded based on the federal Home and Community-Based Settings rules and that there is nothing in the federal requirements that requires day habilitations to close. Other commenters expressed concerns about individualized skills and socialization causing current day habilitations to close.

Response: HHSC agrees that the home and community-based settings requirements in 42 CFR §441.301(c)(4)(i) - (v) do not require a location that provides day habilitation to close. HHSC determined, however, that day habilitation does not meet the requirements in 42 CFR §441.301(c)(4)(i) - (v) and, therefore, is implementing individualized skills and socialization to comply the federal regulation. Sites that currently provide day habilitation may choose to provide individualized skills and socialization in accordance with the new rules. HHSC did not make changes to the rules in response to this comment.

Comment: Several commenters requested increasing the daily, weekly, and monthly service limit for individualized skills and socialization.

Response: HHSC declines to make changes in response to this comment. Increasing the service limit for individualized skills and socialization would require additional analysis.

Comment: Several commenters requested changes in the staffing ratios for off-site individualized skills and socialization in order to provide for additional flexibility for program providers in light of current staffing shortages.

Response: HHSC revised proposed §263.2017 to allow for a higher staffing ratio for individuals with a level of need (LON) 1 or LON 5. Specifically, HHSC revised this section to require that the staffing ratio for off-site individualized skills and socialization for an individual with a LON 1 or LON 5 be no higher than one service provider of off-site individualized skills and socialization to eight individuals and other persons receiving the service (1:8) instead of a one service provider of off-site individualized skills and socialization to six individuals and other persons receiving the service (1:6).

Comment: One commenter requested additional language in proposed §263.2005 and §263.2007 for how HHSC will measure how individuals will meet their personal goals for individualized skills and socialization.

Response: HHSC declines to make changes in response to this comment because the individual's service planning team devel-

ops the person-directed plan for an individual in the HCS Program to accurately reflect and measure the individual's goals and desires.

Comment: Multiple commenters requested additional clarity regarding when public and private intermediate care facilities for individuals with intellectual disabilities (ICF/IIDs) are allowed to provide individualized skills and socialization.

Response: In accordance with §263.2011(a), on-site and off-site individualized skills and socialization must be provided by an individualized skills and socialization provider. Based on direction from CMS, HHSC revised proposed §263.2005, Description of On-Site and Off-Site Individualized Skills and Socialization, by adding new subsection (d) to explain that individualized skills and socialization must not be provided in a setting that is presumed to have the qualities of an institution and to describe settings that have the qualities of an institution. HHSC added subsection (e) to proposed §263.2005 to provide that an individualized skills and socialization provider may provide individualized skills and socialization in a setting presumed to have the qualities of an institution if CMS has determined through heightened scrutiny that the setting meets certain criteria. HHSC also included definitions for the terms "hospital," "Medicaid HCBS," and "nursing facility" in proposed §263.2001 for clarity because these terms were used in proposed §263.2005(d) and (e).

Comment: One commenter requested future changes to the HCS Billing Requirements and HCS Handbook to clarify the difference between employment assistance and individualized skills and socialization.

Response: HHSC did not make changes in response to this comment but will take the comment under consideration when reviewing the HCS Billing Requirements.

Comment: One commenter requested that HHSC "continue to provide supportive services for persons with disabilities and special needs."

Response: HHSC provides many services that benefit and support persons with disabilities. No changes were made in response to this comment.

Comment: Several commenters requested that duplicative provisions that are included in the individualized skills and socialization licensure rules be removed from the rules published as adopted. One commenter specifically requested the removal of proposed §263.2023.

Response: HHSC agrees with the requested changes and deleted proposed §263.2011(d) and (e) and §263.2023(b) and revised proposed §263.2023(a) and (c) to delete references to on-site and off-site individualized skills and socialization because these provisions are addressed in 26 TAC Chapter 559, Subchapter H the licensure rules for individualized skills and socialization providers. HHSC also made a corresponding change in proposed §263.2025(d)(15) to correct the reference to 26 TAC §263.2023.

Comment: Several commenters requested revising the criteria in proposed §263.2007(b) to allow the service planning team to determine whether an individual may receive in-home individualized skills and socialization.

Response: HHSC declines to make the requested change because revising the criteria in proposed §263.2007(b) would require additional analysis.

Comment: Several commenters requested that HHSC allow for in-home individualized skills and socialization to be provided outside of the residence of the individual.

Response: HHSC declines to make changes in response to this comment because the primary characteristic of in-home individualized skills and socialization is that it must be provided in the individual's residence. On-site and off-site individualized skills and socialization are available for individuals to be provided outside of the individual's residence.

Comment: One commenter requested that HHSC align the definitions of "abuse," "neglect," and "exploitation" with the licensure requirements for individualized skills and socialization.

Response: HHSC removed the definitions of "abuse," "neglect," "exploitation," "physical abuse," "sexual abuse," and "verbal or emotional abuse" in the adopted rules because these terms are not used in the rules.

Comment: One commenter encouraged the use of the Corrective Action Plan (CAP) allowable by CMS to ensure that the service is feasible and adequately funded.

Response: HHSC did not make changes to the rules in response to this comment because this comment is outside of the scope of this project.

Comment: One commenter requested that language be added to proposed §263.2005(b)(1)-(2), Description of On-Site and Off-Site Individualized Skills and Socialization to add "education and transition" to the individual's goals.

Response: HHSC declines to make changes in response to this comment because the focus of individualized skills and socialization is an individual's employment goals or current or future volunteer goals, not education and transition goals.

Comment: One commenter requested that HHSC allow individualized skills and socialization to be provided through the consumer directed services (CDS) Option.

Response: HHSC declines to make changes in response to this comment because allowing individualized skills and socialization to be provided through the CDS option would require additional analysis.

Comment: One commenter requested that individuals be given the choice to participate or not to participate in off-site individualized skills and socialization.

Response: HHSC did not make changes in response to this comment because the new rules do not require an individual to receive any type of individualized skills and socialization.

Comment: One commenter requested that volunteers be allowed to become service providers of individualized skills and socialization, provided that they meet the service provider qualifications in the rule.

Response: HHSC did not make changes in response to this comment because although a service provider must meet certain qualifications, proposed §263.2023 does not prohibit a volunteer from being a service provider.

Comment: One commenter requested the ability for provisional licensure for individualized skills and socialization providers.

Response: HHSC did not make changes in response to this comment because it is outside the scope of this project. The proposed rules do not address the licensing of individualized skills and socialization providers.

Comment: One commenter requested expanding the criteria to receive in-home individualized skills and socialization to allow for a nurse, physician assistant, or nurse practitioner to be able to document the medical need for in-home individualized skills and socialization.

Response: HHSC declines to make changes in response to this comment because the changes would require additional analysis.

Comment: One commenter requested a 1:1 enhanced staffing rate be available for all individuals who are not an LON 9. Another commenter requested that individuals with an LON 8 be able to request an enhanced staffing rate. One commenter requested that a program provider be able to request a 1:4 ratio as an enhanced staffing rate for an individual.

Response: HHSC agrees with the request for a 1:1 enhanced staffing rate for all individuals who are not an LON 9. Therefore, HHSC made changes in proposed §263.2027 and §263.2017 to allow a program provider to request a level two enhanced staffing rate for off-site individualized skills and socialization so that the ratio of service providers for an individual with an LON 1, LON 5, LON 8, or LON 6 is no higher than one service provider to one individual (1:1). HHSC also made changes in proposed §263.2027 and §263.2017 so that a level one enhanced staffing rate provides for one service provider of off-site individualized skills and socialization to two individuals (1:2). HHSC also made changes to §263.2025(b) to provide that HHSC pays for a level two enhanced staffing rate for off-site individualized skills and socialization for an individual with an LON 1, LON 5, LON 8, or LON 6 and to distinguish between a level one and a level two enhanced staffing rate. HHSC declines to make changes in response to the request for an enhanced staffing rate that would allow for a 1:4 staffing ratio because the changes would require additional analysis.

Comment: One commenter requested fewer service provider requirements for service providers of in-home individualized skills and socialization.

Response: HHSC did not make changes in response to this comment. The service provider requirements in proposed §263.2023 help ensure that service providers are qualified to provide in-home individualized skills and socialization. HHSC is deleting the provisions related to on-site and off-site service provider qualifications in §263.2023 because these provisions are in 26 TAC Chapter 559, Subchapter H.

Comment: One commenter requested a change in proposed §263.2027(a)(2) to replace the "ICAP Scoring Booklet" with "scoring of a client needs assessment" in the event the ICAP is replaced with another assessment.

Response: HHSC declines to make changes in response to this comment, because the ICAP is the current tool utilized by HHSC to determine an individual's needs and changing the assessment tool is outside of the scope of this project.

Comment: Several commenters requested flexibility in renewing individual plans of care (IPCs) when the IPC expires.

Response: HHSC declines to make changes in response to this comment. Federal regulation at 42 CFR §441.301(c)(3) requires an individual's person-centered service plan, which includes the IPC, to be reviewed and revised at least every 12 months, when the individual's circumstances or needs change significantly, or at the request of the individual.

Comment: Several commenters requested changes to proposed §263.2017(c) to allow service providers to work with individuals outside of their assigned staffing ratios.

Response: HHSC declines to make changes in response to this comment because the required staffing ratio will not be met if a service provider provides services to individuals not in the assigned staffing ratio.

Comment: One commenter requested flexibility in proposed §263.2025(d) to allow for the program provider to only verify licensure requirements and that the individualized skills and socialization provider has received an implementation plan.

Response: HHSC declines to make changes in response to this comment because, to ensure the integrity of the HCS Program, HHSC must not pay a program provider or must recoup payments made to the program provider for any of the reasons described in §263.2025(d).

Comment: One commenter requested clarification in the rules to add language that a family member and a service provider of host home/companion care would be allowed to provide in-home individualized skills and socialization.

Response: HHSC declines to make changes in response to this comment. HHSC will take this comment under consideration when reviewing the HCS Billing Requirements.

Comment: One commenter requested that HHSC clarify in the rules that the individualized skills and socialization provider is not responsible for the individual's costs for off-site individualized skills and socialization activities.

Response: HHSC added subsection (i) to proposed §263.2005 to state that an individualized skills and socialization provider or the program provider is not responsible for the cost, if any, of an individual to participate in an off-site activity that the individual chooses to participate in, such as purchasing movie tickets.

Comment: One commenter requested adding a requirement in proposed §263.2021(b) that the in-home individualized skills and socialization provider will participate in developing the implementation plan.

Response: The process in proposed §263.2021(b) for development of an implementation plan for individualized skills and socialization does not require that an individualized skills and socialization provider participate in developing the plan. This process is the same as that for development of an implementation plan for other HCS Program services. To keep the process consistent for all HCS Program services, HHSC declines to make changes in response to this comment.

Comment: One commenter requested additional language in proposed §263.2025(d)(2) to clarify that HHSC will only recoup or will not pay if there is not a signed and dated initial authorized IPC for the individual.

Response: HHSC declines to make changes in response to this comment. To ensure the integrity of the HCS Program, HHSC must not pay a program provider or must recoup payments made to the program provider for providing individualized skills and socialization to an individual during a period of time for which there is not an authorized initial, renewal, or revision IPC for the individual.

Comment: One commenter requested that HHSC clarify in proposed §263.2025(d)(1) that HHSC will not refuse to pay for a

service if an individual has a temporary lapse in Medicaid eligibility.

Response: HHSC declines to make changes in response to this comment. The rules governing the HCS Program do not allow HHSC to pay a program provider for services provided to an individual who does not meet the eligibility criteria at the time the service was provided.

Comment: Several commenters requested that children be allowed to receive individualized skills and socialization.

Response: School-aged individuals are allowed to receive individualized skills and socialization if it is not being provided when the individual is regularly scheduled to attend school. In accordance with 40 TAC §9.190(e)(28), unless contraindications are documented with justification by the service planning team, a service coordinator must ensure that a school-age individual receives educational services in a six-hour-per-day program, five days per week, provided by the local school district. HHSC did not make changes in response to this comment.

Comment: Several commenters requested that individuals be allowed to volunteer in a person's residence, including private residences or settings in which an individual must not reside.

Response: HHSC agrees with this request and made changes in proposed §263.2005(h)(4)(B) and §263.2005(h)(4)(C) to allow for an off-site individualized skills and socialization activity to be provided in an individual's residence or in a setting in which an individual must not reside, as set forth in the rules governing the HCS Program, if the activity is a volunteer activity performed by an individual.

Comment: One commenter requested that HHSC allow for a range of hours on an individual's IPC instead of a specific amount of hours.

Response: HHSC declines to make changes in response to this comment. The content of an IPC is governed by 40 TAC §9.159(c) which requires that an individual's IPC be based on the person-directed plan (PDP) and specify the type and amount of each HCS Program service and CFC service to be provided to an individual. Therefore, this comment is outside the scope of this project.

Comment: One commenter requested that HHSC add additional guidance for what to do if an individual chooses off-site individualized skills and socialization but there is not a provider that offers off-site individualized skills and socialization in their community.

Response: HHSC did not make changes in response to this comment. Currently, 40 TAC §9.174(a)(3) requires an HCS Program provider to provide or obtain as needed and without delay all HCS Program services and CFC services.

Comment: Several commenters requested that HHSC remove the requirement in proposed §263.2011(e) to document when an individual or the individual's legally authorized representative (LAR) decides that the individual will not participate in an on-site individualized skills and socialization activity.

Response: HHSC disagrees with the commenter and believes that an individualized skills and socialization provider must document the individual's or LAR's decision for the individual not to participate in an activity the individual scheduled for on-site individualized skills and socialization or off-site individualized skills and socialization. This requirement helps ensure that if an individual does not receive individualized skills and socialization, it is because the individual or the individual's LAR declined to receive the service. However, because the licensing rules for individualized skills and socialization providers being adopted in 26 TAC Chapter 559, Subchapter H, include this documentation requirement, HHSC removed the provisions in proposed §263.2011(e) to avoid duplicative provisions in different rule chapters.

Comment: One commenter requested that HHSC create a definition of "Representative Payee" to differentiate from an LAR.

Response: HHSC declines to make changes in response to this comment because the definition of "LAR" makes clear that a representative payee is appointed by the Social Security Administration and is an example of an LAR.

Comment: Several commenters expressed concerns that the off-site staffing ratios in the rules could cause discrimination based on an individual's LON and not support personal choice. The commenters also expressed concerns that individuals must be grouped based on LON.

Response: HHSC declines to make changes in response to this comment. HHSC implemented staffing ratios to ensure the health and safety of individuals participating in off-site individualized skills and socialization so that individuals may meet their goals. The staffing ratios in proposed §263.2017 for off-site individualized skills and socialization do not require that individuals be only with other individuals who have the same LON.

Comment: One commenter states that HHSC did not make a good faith effort to determine the adverse economic effect on small businesses and microbusinesses in drafting these rules.

Response: HHSC determined that the rules could have an adverse economic effect on small businesses and micro-businesses due to the cost to comply. However, the new rules are necessary to comply with the federal regulations for home and community-based settings in 42 CFR §441.301(c)(4)(i) - (v). HHSC did not make any changes in response to this comment.

Comment: One commenter expressed concerns that the service limit would keep individuals out in the community too long.

Response: HHSC did not make changes in response to this comment. The service limit in proposed §263.2015(2) specifies the maximum amount of hours per day for on-site, off-site, and in-home individualized skills and socialization that an individual may receive. The service planning team determines, within the service limit, the amount of hours per day for on-site, off-site, or in-home individualized skills and socialization for each individual based on the individual's needs.

Comment: Several commenters expressed concerns about finding low cost activities for off-site individualized skills and socialization.

Response: HHSC did not make changes in response to this comment. Off-site individualized skills and socialization providers are able to provide free activities for individuals in the community such as volunteering and visiting a public library or public park.

HHSC revised the definition in proposed §263.2001 of "individualized skills and socialization provider" to replace the reference to "Texas Human Resources Code, Chapter 103" with a more specific reference to "26 TAC Chapter 559, Subchapter H," the licensing requirements for an individualized skills and socialization provider, being adopted in this same issue of the *Texas Register.*

HHSC revised proposed §263.2005(a) to state that individualized skills and socialization is a HCS Program service described in this section. The reference to Appendix C of the HCS Program waiver application approved by CMS was removed because §263.2005 contains a complete description of individualized skills and socialization.

HHSC revised proposed §263.2005(c)(4)(A) to remove "unless provided in an event open to the public." HHSC removed this wording because on-site individualized skills and socialization must be provided in a facility licensed in accordance with 26 TAC Chapter 559, Subchapter H.

HHSC revised proposed §263.2011 to require that a program provider, instead of the individualized skills and socialization provider, make both on-site and off-site individualized skills and socialization available to an individual. This change was made because the licensure process for individualized skills and socialization providers will allow an individualized skills and socialization provider to only provide off-site individualized skills and socialization.

HHSC revised the title of proposed §263.2023 to add "and Training" so that the section title more accurately reflects the contents of the section.

HHSC added paragraph (9) to proposed §263.2025(d) to provide that HHSC does not pay a program provider for, or recoups any payments made to the program provider for individualized skills and socialization if on-site or off-site individualized skills and socialization is not provided in accordance with 26 TAC Chapter 559, Subchapter H. This change was made so that HHSC may recoup or deny payment for noncompliance with 26 TAC Chapter 559, Subchapter H.

Based on direction from CMS that a setting in which on-site individualized skills and socialization is provided is a provider-controlled setting, HHSC revised proposed §263.2005 by adding new subsection (f) to add that the setting in which on-site individualized skills and socialization is provided must allow the individual to control the individual's schedule and activities, have access to the individual's food at any time, receive visitors at any time, and be physically accessible and free of hazards, in accordance with 42 CFR §441.301(c)(4)(vi)(C) - (E). HHSC also revised proposed §263.2005 by adding new subsection (g) to add the requirements that must be met if an individual's service planning team determines that any of the requirements in new subsection (f)(1) must be modified, in accordance with 42 CFR §441.301(c)(4)(vi)(F).

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, and Texas Human Resources Code §32.021, which authorizes the Executive Commissioner of HHSC to adopt rules necessary for the proper and efficient operation of the Medicaid program.

§263.2001. Definitions.

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

(1) Applicant--A Texas resident seeking services in the Home and Community-based Services (HCS) Program.

(2) Calendar day--Any day, including weekends and holidays.

(3) CFC--Community First Choice. A state plan option governed by Code of Federal Regulations, Title 42, Chapter 441, Subpart K, regarding Home and Community-Based Attendant Services and Supports State Plan Option (Community First Choice).

(4) CFC PAS/HAB--CFC personal assistance services/habilitation.

(5) CMS--Centers for Medicare & Medicaid Services. The federal agency within the United States Department of Health and Human Services that administers the Medicare and Medicaid programs.

(6) Community setting--A setting accessible to the general public within an individual's community.

(7) Day habilitation--An HCS Program service that provides assistance with acquiring, retaining, or improving self-help, socialization, and adaptive skills provided in a location other than the residence of an individual.

(8) DFPS--The Department of Family and Protective Services.

(9) HCS Program--The Home and Community-based Services Program.

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

(11) Hospital--A public or private institution licensed or exempt from licensure in accordance with Texas Health and Safety Code (THSC) Chapters 13, 241, 261, or 552.

(12) ICAP--Inventory for Client and Agency Planning.

(13) ID/RC Assessment--Intellectual Disability/Related Conditions Assessment. A form used by HHSC for level of care determination and level of need assignment.

(14) Implementation plan--A written document developed by a program provider for an individual that, for each HCS Program service and CFC service on the individual's individual plan of care (IPC) to be provided by the program provider, except for supported home living and CFC support management, includes:

(A) a list of outcomes identified in the person-directed plan that will be addressed using HCS Program services and CFC services;

(B) specific objectives to address the outcomes required by subparagraph (A) of this paragraph that are:

(i) observable, measurable, and outcome-oriented; and

(ii) derived from assessments of the individual's strengths, personal goals, and needs;

(C) a target date for completion of each objective;

(D) the number of units of HCS Program services and CFC services needed to complete each objective;

(E) the frequency and duration of HCS Program services and CFC services needed to complete each objective; and

(F) the signature and date of the individual, legally authorized representative, and the program provider.

(15) Individual--A person enrolled in the HCS Program.

(16) Individualized skills and socialization provider--A legal entity licensed in accordance with Chapter 559, Subchapter H of this title (relating to Individualized Skills and Socialization Provider Requirements).

(17) Initial IPC--The first IPC for an individual developed before the individual's enrollment into the HCS Program.

(18) IPC--Individual plan of care. A written plan that:

(A) states:

(i) the type and amount of each HCS Program service and each CFC service, except for CFC support management, to be provided to the individual during an IPC year;

(ii) the services and supports to be provided to the individual through resources other than HCS Program services or CFC services, including natural supports, medical services, and educational services; and

(iii) if an individual will receive CFC support management; and

(B) is authorized by HHSC.

(19) IPC year--The effective period of an initial IPC and renewal IPC as described in this paragraph.

(A) Except as provided in subparagraph (B) of this paragraph, the IPC year for an initial and renewal IPC is a 365-calendar day period starting on the begin date of the initial or renewal IPC.

(B) If the begin date of an initial or renewal IPC is March 1 or later in a year before a leap year or January 1 - February 28 of a leap year, the IPC year for the initial or renewal IPC is a 366-calendar day period starting on the begin date of the initial or renewal IPC.

(C) A revised IPC does not change the begin or end date of an IPC year.

(20) LAR--Legally authorized representative. A person authorized by law to act on behalf of another person with regard to a matter described in this chapter, including a parent, guardian, or managing conservator of a minor; a guardian of an adult; an agent appointed under a power of attorney; or a representative payee appointed by the Social Security Administration. An LAR, such as an agent appointed under a power of attorney or representative payee appointed by the Social Security Administration, may have limited authority to act on behalf of a person.

(21) LOC--Level of care. A determination given to an applicant or individual as part of the eligibility determination process based on data submitted on the ID/RC Assessment.

(22) LON--Level of need. An assignment given by HHSC to an individual upon which reimbursement for certain services is based.

(23) Medicaid HCBS--Medicaid home and community-based services. Medicaid services provided to an individual in an individual's home and community, rather than in a facility.

(24) Nursing facility--A facility licensed in accordance with THSC Chapter 242.

(25) PDP--Person-directed plan. A plan developed using an HHSC form that describes the supports and services necessary to achieve the desired outcomes identified by the applicant or individual and LAR and to ensure the applicant's or individual's health and safety.

(26) Program provider--A person, as defined in 40 TAC §49.102 (relating to Definitions), that has a contract with HHSC to provide HCS Program services, excluding a financial management services agency.

(27) Renewal IPC--An IPC developed for an individual in accordance with the rules governing the HCS Program.

(28) Revised IPC--An initial IPC or a renewal IPC that is revised during an IPC year in accordance with the rules governing the HCS Program to add a new HCS Program service or CFC service or change the amount of an existing service.

(29) Service coordinator--An employee of a local intellectual and developmental disability authority who provides service coordination to an individual.

(30) Service provider--A person who directly provides an HCS Program service or CFC service to an individual.

(31) TAC--Texas Administrative Code. A compilation of state agency rules published by the Texas Secretary of State in accordance with Texas Government Code, Chapter 2002, Subchapter C.

§263.2005. Description of On-Site and Off-Site Individualized Skills and Socialization.

(a) Individualized skills and socialization is an HCS Program service described in this section.

(b) On-site and off-site individualized skills and socialization:

(1) provide person-centered activities related to:

(A) acquiring, retaining, or improving self-help skills and adaptive skills necessary to live successfully in the community and participate in home and community life; and

(B) gaining or maintaining independence, socialization, community participation, current or future volunteer goals, or employment goals consistent with achieving the outcomes identified in an individual's PDP;

(2) supports the individual's pursuit and achievement of employment through school, vocational rehabilitation, the HCS Program service of employment assistance, or the HCS Program service of supported employment;

(3) provides personal assistance for an individual who cannot manage personal care needs during an individualized skills and socialization activity;

(4) as determined by an assessment conducted by a registered nurse, provides assistance with medications and the performance of tasks delegated by a registered nurse in accordance with state law and rules, unless a physician has delegated the task as a medical act under Texas Occupations Code Chapter 157, as documented by the physician; and

(5) does not include activities in which an individual:

(A) produces marketable goods; and

(B) is paid below minimum wage for producing the goods in accordance with Section 14(c) of the Fair Labor Standards Act.

(c) On-site individualized skills and socialization:

(1) is provided in a building or a portion of a building that is owned or leased by an individualized skills and socialization provider;

(2) includes transportation of an individual from one on-site individualized skills and socialization location to another on-site individualized skills and socialization location;

(3) promotes an individual's development of skills and behavior that support independence and personal choice; and

(4) is not provided in:

(A) a setting in which an individual must not reside, as set forth in the rules governing the HCS Program; or

(B) the residence of an individual or another person.

(d) An individualized skills and socialization provider must ensure that individualized skills and socialization is not provided in a setting that is presumed to have the qualities of an institution. A setting is presumed to have the qualities of an institution if the setting:

(1) is located in a building in which a state supported living center or a certified intermediate care facility for individuals with an intellectual disability or related conditions (ICF/IID) operated by a local intellectual and developmental disability authority (LIDDA) is located but is distinct from the state supported living center or the certified ICF/IID operated by a LIDDA;

(2) is located in a building that is on the grounds of or immediately adjacent to a state supported living center or a certified ICF/IID operated by a LIDDA;

(3) is located in a building in which a licensed private ICF/IID, a hospital, a nursing facility, or other institution is located but is distinct from the ICF/IID, hospital, nursing facility, or other institution;

(4) is located in a building that is on the grounds of or immediately adjacent to a hospital, a nursing facility, or other institution except for a licensed private ICF/IID; or

(5) has the effect of isolating individuals from the broader community of persons not receiving Medicaid HCBS.

(e) An individualized skills and socialization provider may provide individualized skills and socialization to an individual in a setting that is presumed to have the qualities of an institution as described in subsection (d) of this section, if CMS determines through a heightened scrutiny review that the setting:

(1) does not have the qualities of an institution; and

(2) does have the qualities of home and community-based settings.

(f) The setting in which on-site individualized skills and socialization is provided must:

(1) allow an individual to:

(A) control the individual's schedule and activities related to on-site individualized skills and socialization;

(B) have access to the individual's food at any time; and

(C) have visitors of the individual's choosing at any time; and

(2) be physically accessible and free of hazards to an individual.

(g) If an individualized skills and socialization provider becomes aware that a modification to a requirement described in subsection (f)(1) of this section is needed based on a specific assessed need of an individual, the individualized skills and socialization provider must inform the individual's program provider of the needed modification.

(1) The program provider must:

(A) notify the service coordinator of the needed modification; and

(B) provide the service coordinator the information described in paragraph (2)(A) of this subsection as requested by the service coordinator.

(2) A service coordinator must, if notified by the program provider of a needed modification, convene a service planning team meeting to update the individual's PDP to include the following:

(A) a description of the specific and individualized assessed need that justifies the modification;

(B) a description of the positive interventions and supports that were tried but did not work;

(C) a description of the less intrusive methods of meeting the need that were tried but did not work;

(D) a description of the condition that is directly proportionate to the specific assessed need;

(E) a description of how data will be routinely collected and reviewed to measure the ongoing effectiveness of the modification;

(F) the established time limits for periodic reviews to determine if the modification is still necessary or can be terminated;

(G) the individual's or LAR's signature evidencing informed consent to the modification; and

(H) the program provider's assurance that the modification will cause no harm to the individual.

(3) After the service planning team updates the PDP as required by paragraph (2) of this subsection, the individualized skills and socialization provider may implement the modifications.

(h) Off-site individualized skills and socialization:

(1) provides activities that:

(A) integrate an individual into the community; and

(B) promote the individual's development of skills and behavior that support independence and personal choice;

(2) is provided in a community setting chosen by the individual from among available community setting options;

(3) includes transportation of an individual from an on-site individualized skills and socialization location to an off-site individualized skills and socialization location and between off-site individualized skills and socialization locations; and

(4) is not provided in:

(A) a building in which on-site individualized skills and socialization is provided;

(B) a setting in which an individual must not reside, as set forth in the rules governing the HCS Program, unless:

(i) the off-site individualized skills and socialization activity is a volunteer activity performed by an individual in such a setting; or

(ii) off-site individualized skills and socialization is provided in an event open to the public; or

(C) the residence of an individual or another person, unless the off-site individualized skills and socialization activity is a volunteer activity performed by an individual in the residence.

(i) An individualized skills and socialization provider or the program provider is not responsible for the cost, if any, of an individual to participate in an off-site activity.

§263.2011. Provision of On-Site and Off-Site Individualized Skills and Socialization.

(a) On-site and off-site individualized skills and socialization must be provided by an individualized skills and socialization provider.

An individualized skills and socialization provider must be the program provider or a contractor of the program provider.

(b) A program provider must make both on-site individualized skills and socialization and off-site individualized skills and socialization available to an individual.

(c) An individualized skills and socialization provider must provide on-site individualized skills and socialization and off-site individualized skills and socialization in accordance with an individual's PDP, IPC, and implementation plan.

§263.2017. Staffing Ratios for Off-Site Individualized Skills and Socialization.

(a) The ratio of service providers of off-site individualized skills and socialization to persons receiving services off-site must be:

(1) no higher than one service provider of off-site individualized skills and socialization to eight individuals with an LON 1 or an LON 5 without an enhanced staffing rate and other persons receiving off-site individualized skills and socialization or a similar service (1:8);

(2) no higher than one service provider of off-site individualized skills and socialization to two individuals with an LON 8 or an LON 6 and other persons receiving off-site individualized skills and socialization or a similar service (1:2);

(3) no higher than one service provider of individualized skills and socialization to two individuals with an LON 1 or an LON 5 with the level one enhanced staffing rate and other persons receiving off-site individualized skills and socialization or a similar service (1:2);

(4) no higher than one service provider of off-site individualized skills and socialization to one individual with an LON 1, LON 5, LON 8, or LON 6 with the level two enhanced staffing rate and other persons receiving off-site individualized skills and socialization or a similar service (1:1); and

(5) no higher than one service provider of off-site individualized skills and socialization to one individual with an LON 9 and other persons receiving off-site individualized skills and socialization or a similar service (1:1).

(b) A ratio described in subsection (a) of this section may include individuals with different LONs and other persons receiving off-site individualized skills and socialization or a similar service. If the ratio includes individuals with different LONs or other persons receiving off-site individualized skills and socialization or a similar service, the ratio must be one of the following, whichever is the lowest staffing ratio:

(1) the staffing ratio for the individual with highest level of need;

(2) the staffing ratio required by §262.917(a) of this title (relating to Staffing Ratios for Off-Site Individualized Skills and Socialization), if a person in the TxHmL Program is one of the persons represented in the ratio; or

(3) the staffing ratio required by §260.507(a) of this title (relating to Staffing Ratios), if a person in the DBMD Program is one of the persons represented in the ratio.

(c) A service provider of off-site individualized skills and socialization assigned to the individuals represented in a ratio in subsection (a) of this section must provide services only to the individuals and other persons represented in the ratio.

§263.2023. Service Provider Qualifications and Training for In-Home Individualized Skills and Socialization.

(a) A service provider of in-home individualized skills and socialization must be at least 18 years of age and:

(1) have a high school diploma or a certificate recognized by a state as the equivalent of a high school diploma; or

(2) have documentation of a proficiency evaluation of experience and competence to perform the job tasks that includes:

(A) a written competency-based assessment of the ability to document service delivery and observations of the individuals to be served; and

(B) at least three written personal references from persons not related by blood that indicate the ability to provide a safe, healthy environment for the individuals being served.

(b) A service provider of in-home individualized skills and socialization must complete training as required by the rules governing the HCS Program.

§263.2025. Program Provider Reimbursement for On-Site, Off-Site, and In-Home Individualized Skills and Socialization.

(a) Except as provided in subsection (b) of this section, HHSC pays for on-site, off-site, and in-home individualized skills and socialization provided to an individual in accordance with an individual's LON and the reimbursement rates for on-site, off-site, and in-home individualized skills and socialization.

(b) If approved in accordance with §263.2027 of this subchapter (relating to Enhanced Staffing Rate) HHSC pays:

(1) a level one enhanced staffing rate for off-site individualized skills and socialization for an individual with a LON 1 or LON 5; and

(2) a level two enhanced staffing rate for off-site individualized skills and socialization for an individual with an LON 1, LON 5, LON 8, or LON 6.

(c) If an individual's HCS Program services and CFC services are suspended or terminated, a program provider must not submit a claim for on-site, off-site, or in-home individualized skills and socialization provided during the period of the individual's suspension or after the termination, except that the program provider may submit a claim for the first day of the individual's suspension or termination.

(d) HHSC does not pay a program provider for on-site, off-site, or in-home individualized skills and socialization, or recoups any payments made to the program provider for on-site, off-site, or in-home individualized skills and socialization, if:

(1) the individual receiving on-site, off-site, or in-home individualized skills and socialization was, at the time on-site, off-site, or in-home individualized skills and socialization was provided, ineligible for the HCS Program;

(2) on-site, off-site, or in-home individualized skills and socialization is provided to an individual during a period of time for which there is not a signed, dated, and authorized IPC for the individual;

(3) on-site, off-site, or in-home individualized skills and socialization is provided during a period of time for which there is not a signed and dated ID/RC Assessment for the individual;

(4) on-site, off-site, or in-home individualized skills and socialization is provided during a period of time for which the individual did not have an LOC determination;

(5) on-site, off-site, or in-home individualized skills and socialization is not provided in accordance with a signed, dated, and

authorized IPC that includes on-site, off-site, or in-home individualized skills and socialization;

(6) on-site, off-site, or in-home individualized skills and socialization is not provided in accordance with the individual's PDP or implementation plan;

(7) on-site, off-site, or in-home individualized skills and socialization is provided before the individual's enrollment date into the HCS Program;

(8) on-site, off-site, or in-home individualized skills and socialization is not provided in accordance with this subchapter; (9) on-site or off-site individualized skills and socialization is not provided in accordance with Chapter 559, Subchapter H of this title (relating to Individualized Skills and Socialization Provider Requirements);

(10) on-site, off-site, or in-home individualized skills and socialization is not provided in accordance with the HCS Program Billing Requirements;

(11) on-site, off-site, or in-home individualized skills and socialization is not documented in accordance with the HCS Program Billing Requirements;

(12) the program provider did not comply with 40 TAC §49.305 (relating to Records);

(13) the claim for on-site, off-site, or in-home individualized skills and socialization did not meet the requirements in 40 TAC §49.311 (relating to Claims Payment) or the HCS Program Billing Requirements;

(14) HHSC determines that on-site, off-site, or in-home individualized skills and socialization would have been paid for by a source other than the HCS Program if the program provider had submitted to the other source a proper, complete, and timely request for payment for on-site, off-site, or in-home individualized skills and socialization;

(15) on-site or off-site individualized skills and socialization is provided by a service provider who did not meet the qualifications to provide on-site or off-site individualized skills and socialization in accordance with §559.227(a) of this title (relating to Program Requirements) and the HCS Program Billing Requirements;

(16) in-home individualized skills and socialization is provided by a service provider who did not meet the qualifications to provide in-home individualized skills and socialization as described in §263.2023 of this subchapter (relating to Service Provider Qualifications and Training for In-Home Individualized Skills and Socialization) and the HCS Program Billing Requirements;

(17) on-site, off-site, or in-home individualized skills and socialization was paid at an incorrect LON because the information entered in the HHSC data system from a completed ID/RC Assessment is not identical to the information on the completed ID/RC Assessment;

(18) on-site, off-site, or in-home individualized skills and socialization was not provided;

(19) on-site or off-site individualized skills and socialization is provided during a period of time that the individual produced marketable goods and was paid below minimum wage for producing the goods in accordance with Section 14(c) of the Fair Labor Standards Act;

(20) in-home individualized skills and socialization is not provided in the residence of the individual as required by §263.2013(a) of this subchapter (relating to Provision of In-Home Individualized Skills and Socialization); or

(21) in-home individualized skills and socialization is provided to an individual without the documentation required by §263.2013(c) of this subchapter.

(e) HHSC does not pay a program provider for day habilitation, or recoups any payments made to the program provider for day habilitation, if day habilitation is provided on or after March 1, 2023, even if an individual's IPC includes day habilitation on or after March 1, 2023.

(f) HHSC conducts provider fiscal compliance reviews, also known as billing and payment reviews, in accordance with rules governing the HCS Program and the HCS Program Billing Requirements to determine whether a program provider is in compliance with this subchapter.

§263.2027. Enhanced Staffing Rate.

(a) A program provider may request a level one enhanced staffing rate for off-site individualized skills and socialization described in §263.2025(b) of this subchapter (relating to Program Provider Reimbursement for Individualized Skills and Socialization) for an individual with a LON 1 or LON 5 by submitting the following documentation to HHSC:

(1) a completed HHSC Enhanced Staffing Rate Request Form;

(2) the most recent ICAP scoring booklet;

(3) the most recent ID/RC Assessment;

(4) the most recent PDP;

(5) the most recent implementation plan for individualized skills and socialization; and

(6) other documentation that supports the individual's request for an enhanced staffing rate, which may include:

(A) the behavior support plan;

(B) a physician's order;

(C) an assessment completed by a service provider of a professional therapy;

(D) the nursing assessment; and

(E) the CFC PAS/HAB assessment.

(b) A program provider may request a level two enhanced staffing rate for off-site individualized skills and socialization described in §263.2025(b) of this subchapter for an individual with a LON 1, LON 5, LON 8, or LON 6 by submitting the documentation described in subsection (a) of this section.

(c) HHSC approves a request made in accordance with subsection (a) or (b) of this section if the documentation submitted to HHSC demonstrates that to participate in off-site individualized skills and socialization, the individual requires more service provider support than the individual would receive with the individual's assigned LON. The requirement for additional support may be because of the individual's mobility, medical, or behavioral needs.

(d) HHSC may review an approved enhanced staffing rate at any time to determine if it is appropriate. If HHSC reviews an enhanced staffing rate, a program provider must submit documentation supporting the enhanced staffing rate to HHSC in accordance with HHSC's request.

(e) HHSC notifies a program provider that an enhanced staffing rate is approved or denied through the HHSC data system.

(f) A program provider may request an administrative hearing in accordance with 1 TAC §357.484 (relating to Request for a Hearing) if HHSC:

(1) denies a request made in accordance with subsection (a) or (b) of this section; or

(2) denies an enhanced staffing rate based on a review described in subsection (d) of this section.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on December 12, 2022.

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Karen Ray
Chief Counsel
Department of State Health Services
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Proposal publication date: August 12, 2022
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CHAPTER 559. DAY ACTIVITY AND HEALTH SERVICES REQUIREMENTS

The Executive Commissioner of the Texas Health and Human Services Commission (HHSC) adopts new §§559.201, 559.203, 559.205, 559.207, 559.209, 559.211, 559.213, 559.215, 559.217, 559.219, 559.221, 559.223, 559.225, 559.227, 559.229, 559.231, 559.233, 559.235, 559.237, 559.239, 559.241, 559.243, 559.245, 559.247, 559.249, and 559.251.

New §§559.201, 559.207, 559.215, 559.217, 559.221, 559.235, 559.239, 559.247, and 559.249 are adopted without changes to the proposed text as published in the August 12, 2022, issue of the *Texas Register* (47 TexReg 4827). These rules will not be republished.

New §§559.203, 559.205, 559.209, 559.211, 559.213, 559.219, 559.223, 559.225, 559.227, 559.229, 559.231, 559.233, 559.237, 559.241, 559.243, 559.245, and 559.251 are adopted with changes to the proposed text as published in the August 12, 2022, issue of the *Texas Register* (47 TexReg 4827). These rules will be republished.

BACKGROUND AND JUSTIFICATION

The purpose of the new rules is to implement a new subcategory of day activity and health services (DAHS) licensure for individualized skills and socialization providers. This ensures individualized skills and socialization providers' compliance with appropriate oversight and regulations without the cost and operational complexity involved in creating a new licensure type.

The new rules are necessary to comply with the 2020-2021 General Appropriations Act, 86th Legislature, Regular Session, 2019 (Article II, Health and Human Services Commission, Rider 21), which requires HHSC to establish the individualized skills and socialization provider as a new provider type to replace traditional day habilitation providers. These new rules license these new providers under the current DAHS statute (Chapter 103, Texas Human Resources Code) and establish a new subchapter of rules specific to these providers within existing DAHS rules.

COMMENTS

The 31-day comment period ended September 12, 2022. During this period, HHSC received 173 comments regarding the proposed rules from 18 commentors, including individuals and organizations such as the Alliance of and for Visually Impaired Texans, Touch Base Center for the Deaf and Blind, Twin Visions Corporation, Caregiver, Sonshine Center, Every Child, Inc., Gateway Community Partners, High Point Village, Texas Council, and combined comments from Private Provider's Association of Texas and Provider's Alliance for Community Services of Texas. A summary of comments relating to the Individualized Skills and Socialization Rules and HHSC's responses follows.

Comment: Several commenters made similar remarks about §559.203. Commenters requested more specificity in the definitions for capacity, evacuation, and reportable event.

Response: HHSC declines to make changes as capacity is not determined by HHSC, evacuation may differ depending on the nature of the emergency, and reportable events are outlined in §559.241.

Comment: A commentor requested that HHSC add provisions for off-site only application to the licensure rule §559.205.

Response: HHSC agreed to add off-site only requirements to the licensing rule language to accommodate providers who do not have an on-site component.

Comment: Several commentors requested training requirements as outlined in §559.205(d) regarding frequency of required training for individualized skills and socialization licensing applicants.

Response: HHSC declined to make changes as the required training is to be completed once, before the initial license.

Comment: A commentor requested HHSC change the requirement for the program provider to report a name change each time the provider does so, as outlined in §559.205(e)(6).

Response: HHSC declines to make the change as the business name of the program provider is registered with the secretary of state and must be reported every time the program provider changes its assumed ("doing business as") name.

Comment: Several commentors requested that §559.207 provide more specificity regarding how providers calculate capacity and how they change capacity for an individualized skills and socialization provider.

Response: HHSC declines to make changes as capacity is not determined by HHSC; it is determined by local ordinances and building codes. The provider must submit an application for change in capacity to HHSC if it wants to serve more people than it listed in its original application. HHSC can provide guidance regarding capacity independently of this rule project.

Comment: Several commentors requested that §559.209 and §559.219 be amended to eliminate staggered licenses. Commentors suggested that staggered licenses are cumbersome for individualized skills and socialization providers to track and renew.

Response: HHSC declines to eliminate staggered licenses. Staggered licenses will offset the initial influx of license applications to HHSC and allow for a more efficient process. HHSC has revised language in §559.205 and §559.209 to clarify that initial licenses will only be staggered through the end of HHSC fiscal year 2023. HHSC also corrected a citation in §559.219.

Comment: A commentor requested that HHSC eliminate §559.211 because the change of ownership process appeared tedious.

Response: HHSC declines to make the change since two persons cannot each hold a license at the same location. This process prevents the outgoing owner from having to close the location and interrupt business.

Comment: Several commentors requested that HHSC change the timeframe in §559.217 from 10 days to 30 days.

Response: HHSC declines making the change as the 10-day timeframe is consistent with other licensing program requirements.

Comment: A commentor requested that §559.221 include provisions for relocation in the event of an emergency.

Response: HHSC declines to make the change. Rule language includes an emergency response section in §559.229 that includes evacuation and relocation to another facility.

Comment: A commentor requested that HHSC change §559.223 to allow more time to notify HHSC in the event of a facility closure.

Response: HHSC agreed to change language to within at least five days to give providers additional time to notify HHSC in the event of a voluntary closure.

Comment: Several commentors requested HHSC remove the requirements in §559.225 related to provision of client rights to individuals who receive individualized skills and socialization services.

Response: HHSC declines to make the change as the provision of client rights is a statutory requirement in Texas Human Resources Code Chapter 103.

Comment: A commentor requested that HHSC provide clarification in §559.225 related to incident reports.

Response: HHSC agrees with this comment and added clarifying language that the provider must create policies and procedures regarding maintaining incident reports.

Comment: A commentor requested that HHSC add a provision in §559.225 to allow the provider to post information on a website in addition to in the facility itself.

Response: HHSC agreed to add website to the list of places where providers must display information about the business.

Comment: Several commentors requested that the director position as identified in §559.227 be changed to site manager or that the director be allowed to oversee multiple locations.

Response: HHSC agreed to the suggestion and changed director to administrator.

Comment: Several commentors requested that HHSC remove the provision from §559.227 that allows an individualized skills and socialization provider to deny an individual admission to the facility if it cannot meet the individual's needs.

Response: HHSC declines to make changes. Individualized skills and socialization providers are different from Home and Community-based Services (HCS) program providers, and the requirements are different. HCS program providers have choices as to how they meet the needs of the individual and ensure the individual's service plan is executed. Other options may be better suited for the individual.

Comment: Several commentors requested that HHSC remove or revise the provision from §559.227 that requires staffing ratios in accordance with Medicaid policy rules. One commentor requested that HHSC amend the language for clarity.

Response: HHSC declines making changes as Medicaid policy sets the staffing ratios by program. HHSC did make one minor revision for clarity.

Comment: Several commentors requested revision and clarification in §559.227 regarding medication administration, delegation, and training requirements.

Response: HHSC agrees to make the revision and allow for medication administration, delegation, and training requirements to align with Medicaid policy.

Comment: Several commentors requested clarification of intent and provision under §559.227 related to first aid supplies and off-site individualized skills and socialization providers.

Response: HHSC agrees with the recommendation and added language regarding access to first aid supplies for on and off-site providers; however, HHSC declines to make changes regarding what constitutes "immediately" as each situation is different.

Comment: Several commentors requested that HHSC provide additional requirements in §559.229 around evaluation tools and assessments.

Response: HHSC declines to make changes as this rule is about written competency-based assessments for staff members and not individuals receiving services.

Comment: Several commentors requested that HHSC modify requirements in §559.229(c)(2). Commentors requested moving from specific to general requirements.

Response: HHSC declines to make changes as "services" and "assistance" are two different things. For example, the needed services could be transportation and the assistance needed could be a vehicle with wheelchair access capabilities.

Comment: Several commentors requested revision to language in §559.229(d), regarding the eight core functions of emergency management, to include emergency alerts and delivery of emergency alerts. Commentors requested that HHSC removed the requirement to monitor local news and weather reports.

Response: HHSC agrees with the recommendation but will retain the monitoring requirement in rule language. HHCS believes that a provider should monitor local news and weather reports during an emergency to ensure the health and safety of the individuals.

Comment: Several commentors requested that HHSC strike provisions from §559.229(d)(5)(C), and (D). Commentors said that the comprehensive services provider would be responsible for finding another individualized skills and socialization provider to serve the impacted individuals or provide services in an emergency.

Response: HHSC agreed to some modification of rule language when the rule did not impact the health and safety of the individual. HHSC also agreed to amend rule language to clarify when the facility had to post evacuation routes and allows the provider to create and implement evacuation plans that meet the needs of the individual.

Comment: Several commentors requested that HHSC strike §559.229(d)(6) from rule. Commentors said that the compre-

hensive services provider would be responsible for providing transportation for the individual in an emergency.

Response: HHSC declines to completely remove the paragraph but amended the rule to state that the individualized skills and socialization provider must create a plan for transportation in an emergency, which could include comprehensive program providers or family.

Comment: A commentor requested that HHSC strike §559.229(d)(7)(A) from the rule providing that the comprehensive services provider would be responsible for providing for the health and medical needs of the individual in an emergency. Another requested that the language be simplified.

Response: HHSC declines to remove the subparagraph completely but amended the rule to state that the individualized skills and socialization provider must create a plan that ensures the health and medical needs of an individual in an emergency, which could include comprehensive program providers or family. The individualized skills and socialization provider remains responsible for the health and medical needs of the individual while the individual is in their care.

Comment: A commentor requested that HHSC strike §559.229(d)(8) from the rule providing that an individualized skills and socialization provider would likely call on the comprehensive service provider and family members to evacuate individuals, and comprehensive services providers would be responsible for finding another individualized skills and socialization provider to serve the impacted individuals.

Response: HHSC declines to make the change as ensuring that resources are available during an emergency protects the health and safety of the individual.

Comment: A commentor suggested adding "at the time of the fire drill" to §559.229 (f)(2)(A) for clarity.

Response: HHSC agreed to the addition.

Comment: A commentor suggested HHSC revise §559.229(f)(2)(D) for clarity, specifically what the monthly fire prevention inspection entails and what training is required for the staff member who documents the inspection results. Another commentor suggested removing the provision altogether.

Response: HHSC agreed to remove the provision from rule.

Comment: A commentor requested removing the requirement from §559.231 to provide a list to HHSC that must include the waiver program or funding source used by the individual to receive services from the individualized skills and socialization provider.

Response: HHSC declines to make change as a comprehensive list of individualized skills and socialization recipients will inform the HHSC survey sample.

Comment: Several commentors requested that HHSC remove from §559.241 the requirement to report abuse, neglect, and exploitation to Complaint and Incident Intake (CII) and then follow up with a Provider Investigation report form 3613-A. Commentors requested that the reporting process mirror that of the HCS waiver program.

Response: HHSC declines to make change as this is a licensed facility and allegations of abuse, neglect, and exploitation fall to HHSC Long-Term Care Regulation (LTCR) survey operations and reports of such are triaged through CII.

Comment: Several commentors recommended changing certain reportable incidents by adding to §559.241(b)(3) "resulting from sexual activity between individuals resulting from coercion, physical force, or taking advantage of the disability of an individual" and strike paragraph (b)(6) in reportable incidents to CII.

Response: HHSC agreed to amend the language to resemble DAHS reporting requirements more closely. HHSC removed critical incident language and simplified reporting requirements.

Comment: Several commentors expressed concern regarding the implementation timeline for issuing licenses to new providers. Commentors indicated that given the HHSC deadline of March 2023, HHSC may have difficulty issuing all necessary licenses in a timely manner.

Response: HHSC added the authority to issue a temporary license at its discretion. This will allow HHSC to issue a temporary license to providers in advance of a standard license and provide a more efficient means to process licensure applications.

HHSC made changes to rule language independent of the formal comment process and as a result of internal and external stakeholder feedback. Revisions include:

- changing the word "inspection" to "survey" throughout for clarity and consistency;

- adding requirements regarding fire safety practices, including extinguishers;

- adding requirements for building occupancy and building accessibility;

- adding requirements for off-site only individualized skills and socialization service providers;

- adding community engagement plan attestation requirements to the licensing application;

- adding information about prohibited settings as set forth in the Medicaid HCS program rules;

- adding "in-person" to the definition section;

- adding additional background check information to the service provider section;

- adding additional individual rights information as set forth in the Medicaid Home and Community Based settings requirements; and

- adding a requirement to sign up for the HHSC emergency broadcast system.

HHSC LTCR received several comments that fall outside the scope of this project. Comments recommended that HHSC:

- allow wage work rather than individualized skills and socialization only;

- continue day habilitation as-is, as licensure of individualized skills and socialization services is overly burdensome and unnecessary;

- sufficiently fund the program;

- reconsider the staffing ratios; and

- provide adequate reimbursement rates to cover operational costs.

HHSC did not make the recommended changes as HHSC LTCR rules do not determine:

- whether day habilitation may continue for the state of Texas;

- whether individualized skills and socialization allows individuals to participate in piece work;

- staff to individual ratios;

- funding; or

- reimbursement rates.

These comments were forwarded to HHSC Medicaid Long-term Services and Supports for consideration.

SUBCHAPTER H. INDIVIDUALIZED SKILLS AND SOCIALIZATION PROVIDER REQUIREMENTS

DIVISION 1. INTRODUCTION

26 TAC §559.201, §559.203

STATUTORY AUTHORITY

The new sections 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 §531.021, which 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 Government Code §531.033, which provides the Executive Commissioner of HHSC with broad rule-making authority; Texas Human Resources Code §32.021, which provides that HHSC shall adopt necessary rules for the proper and efficient operation of the Medicaid program; and Texas Human Resources Code §103.004 and §103.005, which respectively provide that the Executive Commissioner of HHSC shall adopt rules for implementing Chapter 103 and adopt rules for licensing and setting standards for facilities licensed under Chapter 103.

§559.203. Definitions.

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

(1) Change of ownership--An event that results in a change to the federal taxpayer identification number of the license holder of a facility. The substitution of a personal representative for a deceased license holder is not a change of ownership.

(2) Community setting--A setting accessible to the general public within an individual's community.

(3) Day Activity and Health Services (DAHS) directory--A public list generated and maintained by the HHSC, listing all DAHS providers, including individualized skills and socialization providers.

(4) Deaf Blind with Multiple Disabilities (DBMD) program--A waiver program operated by HHSC, as authorized by the Centers for Medicare & Medicaid Services (CMS) in accordance with §1915(c) of the Social Security Act.

(5) Home and Community-based Services (HCS) program--A waiver program operated by HHSC as authorized by CMS in accordance with §1915(c) of the Social Security Act.

(6) Implementation plan--In the HCS and TxHmL programs, a written document developed by a program provider outlining outcomes and objectives for each program service on the individual's IPC to be provided by the program provider.

(7) Individual--A person who applies for or is receiving services from an individualized skills and socialization provider.

(8) Individual plan of care (IPC)--A written plan authorized by HHSC that states the type and amount of each DBMD, TxHmL, or HCS program service to be provided to the individual during an IPC year.

(9) Individual program plan (IPP)--In the DBMD program, a written plan documented on an HHSC form and completed by an individual's case manager that describes the goals and outcomes for each DBMD program service and Community First Choice (CFC) service, other than CFC support management, included on the individual's IPC.

(10) Individualized skills and socialization--A DBMD, TxHmL, or HCS program service described in §260.503 of this title (relating to Description of Individualized Skills and Socialization), §262.905 of this title (relating to Description of On-Site and Off-Site Individualized Skills and Socialization), or §263.2005 of this title (relating to Description of On-Site and Off-Site Individualized Skills and Socialization). The two types of individualized skills and socialization are on-site individualized skills and socialization and off-site individualized skills and socialization.

(11) Individualized skills and socialization provider--A provider licensed as a DAHS provider by HHSC to provide individualized skills and socialization services. A provider of individualized skills and socialization services is considered an individualized skills and socialization provider once licensed.

(12) In person or in-person--Within the physical presence of another person who is awake. In person or in-person does not include using videoconferencing or a telephone.

(13) Legally authorized representative (LAR)--A person authorized by law to act on behalf of another person with regard to a matter described in this subchapter, including a parent, guardian, or managing conservator of a minor; a guardian of an adult; an agent appointed under a power of attorney; or a representative payee appointed by the Social Security Administration. An LAR, such as an agent appointed under a power of attorney or representative payee appointed by the Social Security Administration, may have limited authority to act on behalf of a person.

(14) License holder--A person who holds a license as an individualized skills and socialization provider.

(15) Off-site individualized skills and socialization only--An individualized skills and socialization service provider who only delivers off-site individualized skills and socialization services and does not deliver on-site individualized skills and socialization services.

(16) On-site individualized skills and socialization location--The building or a portion of a building that is owned or leased by an individualized skills and socialization provider where on-site individualized skills and socialization is provided.

(17) Online licensure portal--The Texas Unified Licensure Information Portal (TULIP) system. TULIP is the online system for submitting long-term care licensure applications.

(18) Person-directed plan (PDP)--In the HCS and the TxHmL programs, a written plan, based on person-directed planning and developed with an applicant or individual using the HHSC person-directed plan form and discovery tool found on the HHSC website, that describes the supports and services necessary to achieve the desired outcomes identified by the applicant, individual, or LAR and ensures the applicant's or individual's health and safety.

(19) Program provider--A person, as defined in Texas Administrative Code, Title 40, §49.102 (relating to Definitions), who has a contract with HHSC to provide DBMD, TxHmL, or HCS program services, excluding a financial management services agency.

(20) Service provider--A person, who may be an employee, contractor, or volunteer of an individualized skills and socialization provider, who directly provides individualized skills and socialization services to an individual.

(21) Texas Home Living (TxHmL) program--A waiver program operated by HHSC and approved by CMS in accordance with §1915(c) of the Social Security Act.

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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DIVISION 2. LICENSING

26 TAC §§559.205, 559.207, 559.209, 559.211, 559.213, 559.215, 559.217, 559.219, 559.221, 559.223

STATUTORY AUTHORITY

The new sections 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 §531.021, which 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 Government Code §531.033, which provides the Executive Commissioner of HHSC with broad rule-making authority; Texas Human Resources Code §32.021, which provides that HHSC shall adopt necessary rules for the proper and efficient operation of the Medicaid program; and Texas Human Resources Code §103.004 and §103.005, which respectively provide that the Executive Commissioner of HHSC shall adopt rules for implementing Chapter 103 and adopt rules for licensing and setting standards for facilities licensed under Chapter 103.

§559.205. Criteria for Licensing.

(a) An entity may not establish or provide individualized skills and socialization services in Texas without a license issued by the Texas Health and Human Services Commission (HHSC) in accordance with Texas Human Resources Code, Chapter 103, and this subchapter.

(b) An individualized skills and socialization provider must be listed on HHSC's Day Activity and Health Services (DAHS) directory as an individualized skills and socialization provider in order to provide individualized skills and socialization services.

(c) An applicant for a license must submit a complete application form, follow the application instructions, electronically upload required documentation, and submit the required license fee to HHSC through the online licensure portal.

(d) An applicant for a license must complete the HHSC required training to become an individualized skills and socialization provider and provide documentation that required training is complete through the application in the online licensure portal.

(e) An applicant for a license must submit to HHSC as part of the application the:

(1) name of the business entity to be licensed;

(2) tax identification number;

(3) name of the chief executive officer (CEO) or equivalent person;

(4) ownership information;

(5) address of the on-site individualized skills and socialization location or, for providers of off-site individualized skills and socialization services only, the designated place of business where records are kept;

(6) name of program providers using this entity for individualized skills and socialization services, if any;

(7) maximum number of individuals who can receive individualized skills and socialization at or from this location, which will become the licensed capacity when approved;

(8) effective date the entity will be available to provide individualized skills and socialization services;

(9) attestation that the applicant has created and implemented a community engagement plan, including:

(A) a description of how the organization will meet the requirement to make off-site individualized skills and socialization available to individuals;

(B) a description of how the organization will work with contracted program providers to obtain information from the individuals' person-directed plans (PDP) and use that information to inform on-site and off-site activities that are aligned with an individual's PDP; and

(C) a description of how staff will respond to an emergency or other unexpected circumstance that may occur during the provision of on-site and off-site individualized skills and socialization to ensure the health and safety of all individuals; and

(10) any other information required by the online application instructions.

(f) HHSC may deny an application that remains incomplete after 120 days.

(g) Before issuing a license, HHSC considers the background and qualifications of:

(1) the applicant or license holder;

(2) a person with a disclosable interest;

(3) an affiliate of the applicant or license holder;

(4) an administrator;

(5) a manager; and

(6) any other person disclosed on the submitted application as defined by the application instructions.

(h) If the applicant is located within, on the grounds of, or physically adjacent to a prohibited setting as set forth in the rules governing the HCS Program and the applicant has not been approved through heightened scrutiny process, HHSC will refer the application for enforcement.

(i) An applicant for a license must affirmatively demonstrate that the applicant meets the requirements for operation based on an on-site survey. However, through the end of HHSC fiscal year 2023, at its sole discretion, HHSC may issue a temporary initial license effective for 180 days which may be extended until such time as an applicant demonstrates that it meets the requirements for operation based on this on-site survey.

(j) HHSC issues a license if it finds that the applicant or license holder, all persons described in subsection (h) of this section, and the provider meet all applicable requirements of this subchapter, and the on-site individualized skills and socialization location, if applicable, meets all requirements of this subchapter.

(k) HHSC will implement a system under which licenses issued under this subchapter expire on staggered dates. Through the end of HHSC fiscal year 2023, applicants may receive:

(1) a one-year license;

(2) a two-year license;

(3) a three-year license.

(l) An individualized skills and socialization provider must not provide services to more individuals than the number of individuals specified on its license.

(m) An individualized skills and socialization provider must prominently and conspicuously post its license for display in a public area of the on-site individualized skills and socialization location that is readily accessible to individuals, employees, and visitors. For an off-site only individualized skills and socialization provider, the license must be displayed in a conspicuous place in the designated place of business.

(n) If any information submitted through the application process changes following licensure, the license holder must submit an application through the online licensure portal to make the changes.

§559.209. Renewal Procedures and Qualifications.

(a) A license issued under this chapter:

(1) must be renewed before the license expiration date; and

(2) is not automatically renewed.

(b) All renewal licenses issued under this subchapter are valid for three years.

(c) The submission of a license fee alone does not constitute an application for renewal.

(d) To renew a license, a license holder must submit an application for renewal to HHSC through the online licensure portal no later than the 45th day before the expiration date of the current license. HHSC considers that an application for renewal has met the submission deadline if the license holder:

(1) submits a complete application to HHSC, and HHSC receives that complete application no later than the 45th day before the expiration date of the current license;

(2) submits an incomplete application to HHSC with a letter explaining the circumstances that prevented the inclusion of the missing information, and HHSC receives the incomplete application and letter no later than the 45th day before the expiration date of the current license; or

(3) submits a complete application or an incomplete application with a letter explaining the circumstances that prevented the inclusion of the missing information to HHSC, HHSC receives the application during the 45-day period ending on the date the current license expires, and the license holder pays a late fee in accordance with §559.219(c) of this subchapter (relating to License Fees) in addition to the license renewal fee.

(e) For purposes of Texas Government Code §2001.054, HHSC considers that a person has submitted a timely and sufficient application for the renewal of a license if the license holder's application has met the submission deadlines in subsection (e) of this section, including submission of the required fee. Failure to submit a timely and sufficient application will result in the expiration of the license on the expiration date listed on the license.

(f) An application for renewal submitted after the expiration date of the license will not be accepted and an application for an initial license complying with the requirements in §559.205 of this subchapter must be submitted (relating to Criteria for Licensing).

(g) The application for renewal must contain the same information required for an original application and the license fee as described in §559.219 of this subchapter.

(h) The renewal of a license may be denied for the same reasons an original application for a license may be denied as described in §559.215 of this subchapter (relating to Criteria for Denying a License or Renewal of a License).

§559.211. Change of Ownership and Notice of Changes.

(a) For the purposes of this section, a temporary change of ownership license is a temporary license issued to an applicant who proposes to become the license holder of a current individualized skills and socialization provider that exists on the date the application is submitted.

(b) A license holder may not transfer its license. The applicant (new license holder) must obtain a temporary change of ownership license followed by an initial three-year license in accordance with this section. When the Texas Health and Human Services Commission (HHSC) approves the change of ownership by issuing a temporary change of ownership license to the new license holder, the current license holder's license becomes invalid as of the effective date of the change of ownership indicated in the change of ownership application. Between the effective date of the change of ownership and the issuance of the temporary change of ownership license, the existing license holder remains responsible under its license; however, the applicant may operate as the individualized skills and socialization provider on behalf of the current license holder during such time period.

(c) The applicant must submit to HHSC through the online licensure portal:

(1) a complete change of ownership application for a license in accordance with HHSC instructions and §559.205 of this subchapter (relating to Criteria for Licensing) or an incomplete application with a letter explaining the circumstances that prevented the inclusion of the missing information;

(2) the application fee, in accordance with §559.219 of this subchapter (relating to License Fees); and

(3) a signed and notarized Change of Ownership Transfer Affidavit HHSC Form 1092 from the applicant and the individualized skills and socialization provider's current license holder of intent to transfer the individualized skills and socialization provider opera-

tion from the current license holder to the applicant, beginning on the change of ownership effective date specified on the change of ownership application.

(d) To avoid an individualized skills and socialization provider operating without a license, an applicant must submit all items required by subsection (c) of this section at least 30 days before the anticipated date of a change of ownership, unless the 30-day notice requirement is waived in accordance with subsection (e) of this section.

(e) HHSC may waive the 30-day notice required in subsection (d) of this section if HHSC determines that the applicant presents evidence showing that circumstances prevented the submission of the items in subsection (c) of this section at least 30 days before the anticipated change of ownership and that not waiving the 30-day requirement would create a threat to the health and safety of an individual.

(f) Upon HHSC approval of the items specified in subsection (c) of this section, HHSC issues a temporary change of ownership license to the applicant if HHSC finds that the applicant, all controlling persons, and all persons disclosed in the application satisfy all applicable requirements in §559.205 of this subchapter and §559.215 of this subchapter (relating to Criteria for Denying a License or Renewal of a License).

(1) The issuance of a temporary change of ownership license constitutes HHSC's official written notice to the individualized skills and socialization provider of the approval of the application for a change of ownership.

(2) The effective date of the temporary change of ownership license is the date requested in the application and cannot precede the date the application is received by HHSC through the online licensure portal.

(g) A temporary change of ownership license expires on the earlier of:

(1) 90 days after its effective date or the last day of any extension HHSC provides in accordance with subsection (h) of this section; or

(2) the date HHSC issues a three-year license in accordance with subsection (k) of this section.

(h) HHSC, in its sole discretion, may extend a temporary change of ownership license for a term of 90 days at a time based upon extenuating circumstances.

(i) HHSC conducts an on-site survey to verify compliance with the licensure requirements after issuing a temporary change of ownership license. HHSC may conduct a desk review instead of an on-site survey after issuing a temporary change of ownership if:

(1) less than 50 percent of the direct or indirect ownership interest of the former license holder changed, when compared to the new license holder; or

(2) every person with a disclosable interest in the new license holder had a disclosable interest in the former license holder.

(j) If the applicant, all controlling persons, and all persons disclosed in the application satisfy all applicable requirements of §559.205 and §559.215 of this subchapter for a license, and the individualized skills and socialization provider passes the change of ownership survey as described in subsection (i) of this section, HHSC issues a three-year license. The effective date of the three-year license is the same date as the effective date of the change of ownership and cannot precede the date the application was received by HHSC through the online licensure portal.

(k) If a license holder adds an owner with a disclosable interest, but the license holder does not undergo a change of ownership, the license holder must notify HHSC of the addition no later than 30 days after the addition of the owner through the submission of an application in the online licensure portal.

(l) If a license holder changes its name but does not undergo a change of ownership, the license holder must notify HHSC and submit documentation evidencing a legal name change by submitting an application through the online licensure portal. On receipt of the notice and documentation, HHSC reissues the current license in the license holder's new name.

§559.213. Time Periods for Processing Licensing Applications.

(a) The Texas Health and Human Services Commission (HHSC) will process only applications received within 60 days before the requested date of the issuance of the license.

(b) An application is complete when all requirements for licensing have been met, including compliance with standards and payment of the licensing fee. If a survey for compliance is required, the application is not complete until the survey has occurred, reports have been reviewed, and the applicant complies with the standards.

(c) HHSC will notify applicants within 30 days after receipt of the application if any of the following applications are incomplete:

(1) initial application;

(2) change of ownership;

(3) renewal; and

(4) increase in capacity.

(d) Except as provided in the following sentence, a license will be issued or denied within 30 days after the receipt of a complete application or within 30 days before the expiration date of the license. However, HHSC may delay an action on an application for renewal of a license for up to six months if the individualized skills and socialization provider is subject to a proposed or pending licensure termination action on or within 30 days before the expiration date of the license. The issuance of the license constitutes HHSC's official written notice to the individualized skills and socialization provider of the acceptance and filing of the application.

(e) In the event the application is not processed in the time periods stated in this section, the applicant has a right to request of HHSC full reimbursement of all filing fees paid in that particular application process. If HHSC does not agree that the established periods have been violated or finds that good cause existed for exceeding the established periods, the request will be denied.

(f) Good cause for HHSC exceeding the period established is considered to exist if:

(1) the number of applications to be processed exceeds by 15 percent or more the number processed in the same calendar quarter of the preceding year;

(2) another public or private entity used in the application process caused the delay; or

(3) other conditions existed giving good cause for exceeding the established periods.

(g) If the request for full reimbursement is denied, the applicant may appeal to HHSC for resolution of the dispute. The applicant must send a statement to HHSC describing the request for reimbursement and the reasons for it. HHSC makes a decision concerning the appeal and notifies the applicant of the decision.

§559.219. License Fees.

(a) The license fee is $75 for a three-year license. The license fee for a license issued in accordance with §559.205(k) of this subchapter (relating to Criteria for Licensing) is:

(1) $25 for a one-year license;

(2) $50 for a two-year license; and

(3) $75 for a three-year license.

(b) The fee must be paid with each initial application, change of ownership application, and application for renewal of the license. A license holder or applicant must pay fees as defined in the online licensure portal.

(c) An applicant for license renewal that submits an application during the 45-day period ending on the date the current license expires must pay a late fee of $25 in addition to the license fee described in subsection (a) of this section.

§559.223. Voluntary Closure.

An individualized skills and socialization provider must notify the Texas Health and Human Services Commission in writing at least five days before the permanent closure of operation. The individualized skills and socialization provider must include in the written notice the date of permanent closure, reason for closing, location of individual records (active and inactive), and name and address of the individual record custodian.

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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DIVISION 3. PROVIDER REQUIREMENTS

26 TAC §§559.225, 559.227, 559.229

STATUTORY AUTHORITY

The new sections 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 §531.021, which 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 Government Code §531.033, which provides the Executive Commissioner of HHSC with broad rule-making authority; Texas Human Resources Code §32.021, which provides that HHSC shall adopt necessary rules for the proper and efficient operation of the Medicaid program; and Texas Human Resources Code §103.004 and §103.005, which respectively provide that the Executive Commissioner of HHSC shall adopt rules for implementing Chapter 103 and adopt rules for licensing and setting standards for facilities licensed under Chapter 103.

§559.225. General Requirements.

(a) An individualized skills and socialization provider must:

(1) comply with the provisions of Texas Health and Safety Code (HSC), Chapter 250 (relating to Nurse Aide Registry and Criminal History Checks of Employees and Applicants for Employment in Certain Facilities Serving the Elderly, Persons with Disabilities, or Persons with Terminal Illnesses);

(2) before offering employment to any person, search the following registries to determine if the person is eligible for employment:

(A) the employee misconduct registry (EMR) established under HSC §253.007;

(B) the Texas Health and Human Services Commission (HHSC) nurse aide registry (NAR) and medication aide registry (MAR);

(C) the List of Excluded Individuals and Entities (USLEIE) maintained by the United States Department of Health and Human Services; and

(D) the List of Excluded Individuals and Entities (LEIE) maintained by HHSC Office of Inspector General;

(3) not employ a person who is listed on the:

(A) HHSC employee misconduct registry as unemployable; or

(B) HHSC nurse or medication aide registries as revoked or suspended; and

(4) provide information about the EMR to an employee in accordance with 26 TAC §561.3 (relating to Employment and Registry Information).

(b) In addition to the initial search of the EMR, LEIE, NAR, MAR, and USLEIE, an individualized skills and socialization provider must:

(1) conduct a search of the NAR, MAR, and EMR to determine if the employee is designated in those registries as unemployable at least every 12 months; and

(2) keep a copy of the results of the initial and annual searches of the NAR,MAR, and EMR in the employee's personnel file and make it available to HHSC upon request;

(3) comply with all relevant federal and state standards; and

(4) comply with all applicable provisions of the Texas Human Resource Code (HRC), Chapter 102 (relating to Rights of the Elderly).

(c) An individualized skills and socialization provider must:

(1) provide an individual who is 55 years of age or older with a written list of the individual's rights, as outlined under HRC §102.004; and

(2) create policies and procedures that protect and promote the rights of the individual, including the individual's right to:

(A) control his or her schedule and activities related to on-site individualized skills and socialization;

(B) access his or her food at any time;

(C) receive visitors without prior notice to the individualized skills and socialization provider unless such rights are con-

traindicated by the individual's rights or the rights of other individuals; and

(D) physically access the building.

(d) An individualized skills and socialization provider must:

(1) report abuse, neglect, exploitation, and critical incidents in accordance with §559.241 of this subchapter (relating to Reporting Abuse, Neglect, Exploitation, or Critical Incidents);

(2) create policies and procedures for creating and maintaining incident reports;

(3) ensure the confidentiality of individual records and other information related to individuals; and

(4) inform the individual orally and in writing of the individual's rights, responsibilities, and grievance procedures in a language the individual understands.

(e) An individualized skills and socialization provider must prominently and conspicuously post for display in a public area of the on-site individualized skills and socialization, or designated place of business for off-site only individualized skills and socialization, that is readily available to individuals, employees, and visitors:

(1) the license issued under this chapter;

(2) a sign prescribed by HHSC that describes complaint procedures and specifies how complaints may be filed with HHSC;

(3) a notice in the form prescribed by HHSC stating that survey and related reports are available at the on-site individualized skills and socialization location for public survey and providing HHSC's toll-free telephone number that may be used to obtain information concerning the individualized skills and socialization provider;

(4) a copy of the most recent survey report relating to the individualized skills and socialization provider;

(5) a brochure, letter, or website that outlines the individualized skills and socialization provider's hours of operation, holidays, and a description of activities offered; and

(6) emergency telephone numbers, including the abuse hotline telephone number.

§559.227. Program Requirements.

(a) Staff qualifications.

(1) An individualized skills and socialization provider must:

(A) employ an administrator;

(B) ensure the administrator meets the requirements outlined in paragraph (2) of this subsection; and

(C) have a policy regarding the delegation of responsibility in the administrator's absence.

(2) A service provider of individualized skills and socialization must be at least 18 years of age and:

(A) have a high school diploma or a certificate recognized by a state as the equivalent of a high school diploma; or

(B) have documentation of a proficiency evaluation of experience and competence to perform the job tasks that includes:

(i) a written competency-based assessment of the ability to document service delivery and observations of the individuals receiving services; and

(ii) at least three written personal references from persons not related by blood that indicate the ability to provide a safe, healthy environment for the individuals receiving services.

(3) A service provider of individualized skills and socialization who provides transportation must:

(A) have a valid driver's license; and

(B) transport individuals in a vehicle insured in accordance with state law.

(b) Staffing. An individualized skills and socialization provider must ensure that:

(1) an individual whose needs cannot be met by the individualized skills and socialization provider is not admitted or retained;

(2) the ratio of service providers to individuals is maintained in accordance with §260.507 of this title (relating to Staffing Ratios), §262.917 of this title (relating to Staffing Ratios for Off-Site Individualized Skills and Socialization), and §263.2017 of this title (relating to Staffing Ratios for Off-Site Individualized Skills and Socialization), during the provision of off-site individualized skills and socialization, including during transportation; and

(3) sufficient staff are on duty at all times during the provision of on-site individualized skills and socialization to ensure:

(A) the health and safety of the individuals;

(B) supervision is provided in accordance with the needs of an individual; and

(C) individualized skills and socialization are provided in accordance with an individual's individual plan of care (IPC), individual program plan (IPP), person-directed plan (PDP), and implementation plan, as applicable.

(c) Staff responsibilities.

(1) The administrator:

(A) manages the individualized skills and socialization services and the on-site individualized skills and socialization location;

(B) ensures staff are trained;

(C) supervises staff; and

(D) maintains all records.

(2) A service provider:

(A) delivers individualized skills and socialization services;

(B) assists with recreational activities; and

(C) provides protective supervision through observation and monitoring.

(d) An individualized skills and socialization provider must make both on-site and off-site individualized skills and socialization available to an individual, unless the individualized skills and socialization provider provides off-site individualized skills and socialization only.

(e) An individualized skills and socialization provider must ensure that on-site individualized skills and socialization:

(1) is provided in a building or a portion of a building that is owned or leased by an individualized skills and socialization provider; and

(2) is not provided in a prohibited setting for an individual, as set forth in the rules governing the HCS Program.

(f) An individualized skills and socialization provider must ensure that off-site individualized skills and socialization:

(1) are provided in a community setting chosen by the individual from among available community setting options;

(2) includes transportation necessary for the individual's participation in off-site individualized skills and socialization; and

(3) is not provided in:

(A) a building in which on-site individualized skills and socialization are provided;

(B) a prohibited setting for an individual, as set forth in the rules governing the HCS Program, unless:

(i) provided in an event open to the public; or

(ii) the activity is a volunteer activity performed by an individual in such a setting; or

(C) the residence of an individual or another person, unless the activity is a volunteer activity performed by an individual in the residence.

(g) An individualized skills and socialization provider must provide individualized skills and socialization:

(1) in the Deaf Blind with Multiple Disabilities (DBMD) program, in accordance with an individual's individual plan of care (IPC) and individual program plan (IPP); and

(2) in the Texas Home Living (TxHmL) program and Home and Community-based Services (HCS) program, in accordance with an individual's person-directed plan (PDP), IPC, and implementation plan.

(h) An individualized skills and socialization provider must not require an individual to take a skills test or meet other requirements to receive off-site individualized skills and socialization.

(i) If an individual does not want to participate in an activity the individual scheduled for on-site individualized skills and socialization or off-site individualized skills and socialization, or the legally authorized representative (LAR) does not want the individual to participate in such activity, the individualized skills and socialization provider must document the decision not to participate in the individual's record.

(j) An individualized skills and socialization provider must provide on-site and off-site individualized skills and socialization in-person.

(k) Training.

(1) Initial training.

(A) An individualized skills and socialization provider must:

(i) provide service providers with training on fire, disaster, and their responsibilities under the emergency response plan developed in accordance with §559.229 of this subchapter (relating to Environment and Emergency Response Plan) within three workdays after the start of employment and document the training in the individualized skills and socialization provider's records; and

(ii) provide service providers a minimum of eight hours of training during the first three months after the start of employment and document the training in the records of the individualized skills and socialization provider.

(B) The training provided in accordance with subparagraph (A)(ii) of this paragraph must include:

(i) any nationally or locally recognized adult CPR course or certification;

(ii) first aid;

(iii) infection control;

(iv) overview of the population served by the individualized skills and socialization provider; and

(v) identification and reporting of abuse, neglect, or exploitation.

(2) Ongoing training.

(A) An individualized skills and socialization provider must:

(i) ensure that service providers maintain current certification in CPR;

(ii) train on responsibilities under the emergency response plan developed in accordance with §559.229;

(iii) train on infection control policies and procedures developed in accordance with subsection (n) of this section; and

(iv) train on the identification and reporting of abuse, neglect, or exploitation.

(l) Medications.

(1) Administration.

(A) If an individual cannot or chooses not to self-administer his or her medications, an individualized skills and socialization provider must provide assistance with such medications and the performance of related tasks if:

(i) a registered nurse has assessed the assistance and related tasks and delegated such to the individualized skills and socialization provider in accordance with state law and rules; or

(ii) a physician has delegated the assistance and related tasks as a medical act to the individualized skills and socialization provider under Texas Occupations Code Chapter 157, as documented by the physician.(B) An individualized skills and socialization provider must record an individual's medications, including over-the-counter medications, on the individual's medication profile record. The recorded information must be obtained from the prescription label and must include the medication name, strength, dosage, doses received, directions for use, route of administration, prescription number, pharmacy name, and the date each medication was issued by the pharmacy.

(2) General.

(A) An individualized skills and socialization provider must immediately report to an individual's program provider any unusual reactions to a medication or treatment.

(B) When an individualized skills and socialization provider supervises or administers medications, the individualized skills and socialization provider must document in writing if an individual does not receive or take the medication and treatment as prescribed. The documentation must include the date and time the dose should have been taken, and the name and strength of medication missed.

(3) Storage.

(A) An individualized skills and socialization provider must provide a locked area for all medications, which may include:

(i) a central storage area; or

(ii) a medication cart.

(B) An individualized skills and socialization provider must store an individual's medication separately from other individuals' medications within the storage area.

(C) An individualized skills and socialization provider must store medication requiring refrigeration in a locked refrigerator that is used only for medication storage or in a separate, permanently attached, locked medication storage box in a refrigerator.

(D) An individualized skills and socialization provider must store poisonous substances and medications labeled for "external use only" separately within the locked area.

(E) An individualized skills and socialization provider must store drugs covered by Schedule II of the Controlled Substances Act of 1970 in a locked, permanently attached cabinet, box, or drawer that is separate from the locked storage area for other medications.

(m) Accident, injury, or acute illness.

(1) An individualized skills and socialization provider must stock and maintain in a single location in the on-site individualized skills and socialization location first aid supplies to treat burns, cuts, and poisoning.

(2) An individualized skills and socialization provider delivering off-site individualized skills and socialization must ensure first aid supplies to treat burns, cuts, and poisoning are immediately available at all times during service provision.

(3) In the event of accident or injury to an individual requiring emergency care, or in the event of death of an individual, an individualized skills and socialization provider must:

(A) arrange for emergency care or transfer to an appropriate place for treatment, including:

(i) a physician's office;

(ii) a clinic; or

(iii) a hospital;

(B) immediately notify an individual's program provider with which the individualized skills and socialization provider contracts to provide services to the individual; and

(C) describe and document the accident, injury, or illness on a separate report containing a statement of final disposition and maintain the report on file.

(n) An individualized skills and socialization provider must create and enforce written policies and procedures for infection control, including spread of disease to ensure staff compliance with state law, the Occupational Safety and Health Administration, and the Centers for Disease Control and Prevention.

§559.229. Environment and Emergency Response Plan.

(a) Definitions. In this section:

(1) "emergency situation" means an impending or actual situation that:

(A) interferes with normal activities of an individualized skills and socialization provider or the individuals receiving services from the individualized skills and socialization provider;

(B) may:

(i) cause injury or death to an individual or staff member of the individualized skills and socialization provider; or

(ii) cause damage to property of the individualized skills and socialization provider;

(C) requires the individualized skills and socialization provider to respond immediately to mitigate or avoid the injury, death, damage, or interference; and

(D) does not include a situation that arises from the medical condition of an individual such as cardiac arrest, obstructed airway, cerebrovascular accident; and

(2) "plan" refers to an individualized skills and socialization provider's emergency response plan.

(b) Administration. An individualized skills and socialization provider must:

(1) develop and implement a written plan as described in subsection (c) of this section;

(2) maintain a written copy of the plan that is accessible to all staff at all times;

(3) evaluate and revise the plan as necessary:

(A) within 30 days after an emergency situation;

(B) at least annually; and

(4) revise the plan within 30 days after information included in the plan changes.

(c) Emergency response plan. An individualized skills and socialization provider's plan must:

(1) include a risk assessment of all potential internal and external emergency situations relevant to the individualized skills and socialization provider's operations and geographical area, such as a fire, failure of heating and cooling systems, a power outage, an explosion, a hurricane, a tornado, a flood, extreme snow and ice for the area, a wildfire, terrorism, or a hazardous materials accident;

(2) include a description of the services and assistance needed by the individuals in an emergency situation;

(3) include a section for each core function of emergency management, as described in subsection (d) of this section, that is based on an individualized skills and socialization provider's decision to either shelter-in-place or evacuate during an emergency; and

(4) for the on-site individualized skills and socialization location, include a fire safety plan that complies with subsection (e) of this section.

(d) Plan requirements regarding eight core functions of emergency management.

(1) Direction and control. An individualized skills and socialization provider's plan must contain a section for direction and control that:

(A) designates by name or title the emergency preparedness coordinator (EPC) who is the staff person with the authority to manage the individualized skills and socialization provider's response to an emergency situation in accordance with the plan;

(B) designates by name or title the alternate EPC who is the staff person with the authority to act as the EPC if the EPC is unable to serve in that capacity;

(C) documents the name and contact information for the local emergency management coordinator (EMC) for the area where the individualized skills and socialization provider is located, as identified by the office of the local mayor or county judge; and

(D) documents coordination with the local EMC as required by the local EMC's guidelines relating to emergency situations.

(2) Warnings, emergency alerts, or notifications. An individualized skills and socialization provider's plan must contain a section for warnings, emergency alerts, or notifications that:

(A) describes how the EPC will be notified of an emergency situation;

(B) identifies how the EPC will receive notification of relevant local news and weather reports; and

(C) ensures monitoring of local news and weather reports.

(3) Communication. An individualized skills and socialization provider's plan must contain a section for communication that:

(A) identifies the individualized skills and socialization provider's primary mode of communication and alternate mode of communication to be used in the event of power failure or the loss of the individualized skills and socialization provider's primary mode of communication in an emergency situation;

(B) includes procedures for maintaining a current list of telephone numbers for individuals, their program providers, and other relevant emergency contacts as appropriate;

(C) includes procedures for maintaining a current list of telephone numbers for the individualized skills and socialization provider's staff that also identifies the EPC;

(D) identifies the location of the lists described in subparagraphs (B) and (C) of this paragraph where individualized skills and socialization provider staff can obtain the list quickly;

(E) includes procedures to notify:

(i) staff about an emergency situation;

(ii) a receiving facility, if applicable, about an impending or actual evacuation of individuals; and

(iii) individuals, LARs, and other persons about an emergency situation;

(F) describes how the individualized skills and socialization provider will provide, during an emergency situation, general information to the public, such as the change in location and hours, or that the individualized skills and socialization provider is closed due to the emergency situation;

(G) includes procedures for the individualized skills and socialization provider to maintain communication with:

(i) staff during an emergency situation;

(ii) a receiving facility, if applicable; and

(iii) staff or other responsible parties who will transport individuals to a secure location during an evacuation in a vehicle;

(H) includes procedures for reporting to the Texas Health and Human Services Commission (HHSC) an emergency situation that caused the death or serious injury of an individual while receiving individualized skills and socialization services as follows:

(i) by telephone, at 1-800-458-9858, within 24 hours after the death or serious injury; and

(ii) within five working days after making a report described by clause (i) of this subparagraph, the individualized skills and socialization provider must ensure an investigation of the incident is conducted and send a written investigation report on Form 3613-A, Provider Investigation Report, or a form containing, at a minimum, the information required by Form 3613-A, to HHSC's Complaint and Incident Intake.

(4) Sheltering-in-place. An individualized skills and socialization provider that provides on-site services must include in the plan a section that includes procedures to shelter individuals in place during an emergency situation.

(5) Evacuation. An individualized skills and socialization provider that provides on-site services must include in the plan a section for evacuation that:

(A) requires posting building evacuation routes prominently throughout the on-site individualized skills and socialization location;

(B) includes procedures for evacuating individuals to a pre-arranged location in an emergency situation, if applicable;

(C) includes procedures for:

(i) ensuring staff accompany evacuating individuals, as appropriate;

(ii) ensuring that all persons present in the building have been evacuated;

(iii) accounting for individuals and staff after they have been evacuated;

(iv) accounting for individuals who are absent from the individualized skills and socialization provider at the time of the evacuation;

(v) contacting the local EMC, if required by the local EMC guidelines, to find out if it is safe to return to the geographical area; and

(vi) determining if it is safe to re-enter and occupy the building after an evacuation;

(D) includes procedures for notifying the local EMC regarding an evacuation of the building, if required by the local EMC guidelines;

(E) includes procedures for notifying HHSC by telephone, at 1-800-458-9858, within 24 hours after an evacuation that individuals have been evacuated;

(F) includes procedures for notifying the HHSC Regulatory Services regional office for the area in which the individualized skills and socialization provider is located, by telephone, as soon as safely possible after a decision to evacuate is made; and

(G) includes procedures for notifying the HHSC regional office for the area in which the individualized skills and socialization provider is located, by telephone, that individuals have returned to the building after an evacuation, within 48 hours after their return.

(6) Transportation. An individualized skills and socialization provider must include in the plan a section with procedures for transportation.

(7) Health and Medical Needs. An individualized skills and socialization provider's plan must contain a section ensuring that the health and medical needs of individuals are met during an emergency.

(8) Resource Management. An individualized skills and socialization provider's plan must contain a section for resource man-

agement that ensures individuals have appropriate access to resources during an emergency.

(e) Training. An individualized skills and socialization provider must:

(1) train all staff when hired on fire, disaster, and their responsibilities under the plan in accordance with §559.227(k) of this subchapter (relating to Program Requirements); and

(2) retrain staff at least annually on fire, disaster, and the staff member's responsibilities under the plan and when the staff member's responsibilities under the plan change.

(f) An individualized skills and socialization provider offering on-site services must:

(1) conduct unannounced drills with staff for fire, severe weather, and other emergency situations identified by the individualized skills and socialization provider as likely to occur, based on the results of the risk assessment required by subsection (c)(1) of this section; and

(2) establish procedures to:

(A) perform a fire drill at least once every 90 days with all occupants of the building at the time of the fire drill at expected and unexpected times and under varying conditions;

(B) relocate, during the fire drill, all occupants of the building to a predetermined location where participants must remain until a recall or dismissal signal is given; and

(C) complete the HHSC Fire Drill Report Form for each required fire drill.

(g) An individualized skills and socialization services provider or designee must enroll in an emergency communication system in accordance with instructions from HHSC.

(h) An individualized skills and socialization services provider or designee must respond to requests for information received through the emergency communication system in the format established by HHSC.

(i) An individualized skills and socialization services provider must ensure that each facility has:

(1) exterior doors that are unobstructed and accessible to all individuals;

(2) two means of escape from the facility;

(3) fire extinguishers that are:

(A) accessible and unobstructed to the service provider;

(B) on each level of the facility;

(C) serviced or replaced after each use; and

(D) if unused, serviced according to the manufacturer's instructions, or as required by the state or local fire marshal.

(j) The facility must conform to all applicable state laws and local ordinances pertaining to occupancy. When these laws, codes, and ordinances are more stringent than the standards in this section, the more stringent requirements govern. If state laws or local codes or ordinances conflict with the requirements of these standards, the provider must submit an application to alter the licensed capacity so that these conflicts may be legally resolved.

(k) The facility must meet the provisions and requirements concerning accessibility for individuals with disabilities in the following laws and regulations: the Americans with Disabilities Act (ADA) of 1990 (Title 42, United States Code, Chapter 126); Title 28, Code of Federal Regulations, Part 35; Texas Government Code, Chapter 469, Elimination of Architectural Barriers; and 16 TAC Chapter 68, Elimination of Architectural Barriers. Plans for new construction, substantial renovations, modifications, and alterations must be submitted to the Texas Department of Licensing and Regulation (Attn: Elimination of Architectural Barriers Program) for accessibility approval under Texas Government Code, Chapter 469. At least 50 percent of the client restrooms must be in accordance with ADA. Exception: facilities licensed for 45 or fewer persons may provide one unisex restroom in accordance with accessibility requirements.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

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Karen Ray
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Health and Human Services Commission
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DIVISION 4. SURVEYS, INVESTIGATIONS, AND ENFORCEMENT

26 TAC §§559.231, 559.233, 559.235, 559.237, 559.239, 559.241, 559.243, 559.245, 559.247, 559.249, 559.251

STATUTORY AUTHORITY

The new sections 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 §531.021, which 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 Government Code §531.033, which provides the Executive Commissioner of HHSC with broad rule-making authority; Texas Human Resources Code §32.021, which provides that HHSC shall adopt necessary rules for the proper and efficient operation of the Medicaid program; and Texas Human Resources Code §103.004 and §103.005, which respectively provide that the Executive Commissioner of HHSC shall adopt rules for implementing Chapter 103 and adopt rules for licensing and setting standards for facilities licensed under Chapter 103.

§559.231. Surveys and Visits.

(a) The Texas Health and Human Services Commission (HHSC) may enter the premises of an individualized skills and socialization provider at reasonable times and perform a survey necessary to issue a license or renew a license. HHSC survey personnel will perform surveys, follow-up visits, complaint investigations, investigations of abuse or neglect, and other contact visits as required for carrying out the responsibilities of licensing.

(b) Generally, all surveys, complaint investigations, and other visits, whether routine or non-routine, made for the purpose of determining the appropriateness of care of individuals and day-to-day op-

erations of an individualized skills and socialization provider will be unannounced. Any exceptions must be justified.

(c) HHSC may conduct any survey or investigation as a desk review, if appropriate, and at the discretion of HHSC, except for the on-site components of:

(1) an initial survey; and

(2) a complaint investigation.

(d) Any person may request a survey of an individualized skills and socialization provider by notifying HHSC Complaint and Incident Intake at 1-800-458-9858 of an alleged violation of a licensing requirement. HHSC performs an on-site survey as soon as feasible but no later than 30 days after receiving the complaint, unless after a preliminary investigation the complaint is found to be frivolous. HHSC will respond to the complainant in writing if the complainant provides a mailing address.

(e) HHSC receives and investigates anonymous complaints.

(f) The individualized skills and socialization provider must provide all its books, records, and other documents maintained by or on behalf of an individualized skills and socialization provider to HHSC upon request.

(1) HHSC is authorized to photocopy documents, photograph individuals, and use any other available recording devices to preserve all relevant evidence of conditions found during a survey, or investigation that HHSC reasonably believes threatens the health and safety of an individual.

(2) Examples of records and documents that may be requested and photocopied or otherwise reproduced are individual program plans, person-directed plans, and medication records.

(3) Upon request, an individualized skills and socialization provider must provide HHSC with a list of all individuals served by the individualized skills and socialization provider. The list must include the waiver program or funding source used by the individual to receive services from the individualized skills and socialization provider.

(4) The individualized skills and socialization provider may charge HHSC at a rate not to exceed the rate HHSC charges for copies. The procedure of copying is the responsibility of the administrator or designee. If copying requires that the records be removed from the individualized skills and socialization provider, a representative of the individualized skills and socialization provider is expected to accompany the records and assure their order and preservation.

(5) HHSC protects the copies for privacy and confidentiality in accordance with recognized standards of medical records practice, applicable state laws, and HHSC policy.

(g) The source of the complaint is not revealed.

(h) HHSC inspects an individualized skills and socialization provider at least once every two years after the initial survey.

§559.233. Determinations and Actions Pursuant to Surveys.

(a) The Texas Health and Human Services Commission (HHSC) determines if an individualized skills and socialization provider is in compliance with the licensing rules.

(b) Violations of regulations are listed on forms designed for the purpose of the survey.

(c) At the conclusion of a survey, the violations are discussed in an exit conference with the individualized skills and socialization provider's management. A written list of the violations is left with the individualized skills and socialization provider at the time of the exit conference.

(d) If, after the initial exit conference, additional violations are cited, the violations are communicated to the individualized skills and socialization provider within 10 working days after the initial exit conference.

(e) HHSC provides a clear and concise summary in nontechnical language of each licensure survey and complaint investigation, if applicable. The summary outlines significant violations noted at the time of the survey, but does not include names of individuals, staff, or any other information that would identify individuals or other prohibited information under general rules of public disclosure. The summary is provided to the individualized skills and socialization provider at the time the report of contact or similar document is provided.

(f) Upon receipt of the final statement of violations, the individualized skills and socialization provider has 10 working days to submit an acceptable plan of correction to the HHSC Regulatory Services regional director. An acceptable plan of correction must address:

(1) how the individualized skills and socialization provider will accomplish the corrective action for those individuals affected by each violation;

(2) how the individualized skills and socialization provider will identify other individuals with the potential to be affected by the same violation;

(3) how the individualized skills and socialization provider will put the corrective measure into practice or make systemic changes to ensure that the violation does not recur;

(4) how the individualized skills and socialization provider will monitor the corrective action to ensure that the violation is corrected and will not recur; and

(5) the date the corrective action will be completed.

(g) If the individualized skills and socialization provider and the inspector cannot resolve a dispute regarding a violation of regulations, the individualized skills and socialization provider is entitled to an informal dispute resolution (IDR) at the regional level for all violations. For a violation that resulted in an adverse action, the individualized skills and socialization provider is entitled to an IDR at either the regional or state office level.

(1) A written request and all supporting documentation must be submitted to the Regional Director, HHSC Long-term Care Regulation, for a regional IDR; or to Regulatory Services, Texas Health and Human Services Commission, P.O. Box 149030, E-351, Austin, Texas 78714-9030, for a state office IDR, no later than the 10th day after receipt of the official statement of violations.

(2) HHSC completes the IDR process no later than the 30th day after receipt of a request from an individualized skills and socialization provider.

(3) Violations deemed invalid in an IDR will be so noted in HHSC's records.

§559.237. Procedures for Inspection of Public Records.

(a) Procedures for inspection of public records will be in accordance with the Texas Government Code, Chapter 552, and as further described in this section.

(b) The Texas Health and Human Services Commission (HHSC) Regulatory Services Division is responsible for the maintenance and release of records on licensed facilities, and other related records.

(c) The application for inspection of public records is subject to the following criteria.

(1) The application must be made to HHSC Long-term Care Regulation, Regulatory Services Division, Mail Code E-349, P.O. Box 149030, Austin, Texas 78714-9030;

(2) The requester must identify themselves.

(3) The requester must give reasonable prior notice of the time for inspection or copying of records.

(4) The requester must specify the records requested.

(5) On written applications, if HHSC is unable to ascertain the records being requested, HHSC may return the written application to the requester for clarification.

(6) HHSC will provide the requested records as soon as possible; however, if the records are in active use, or in storage, or time is needed for proper de-identification or preparation of the records for inspection, HHSC will so advise the requester and set an hour and date within a reasonable time when the records will be available.

(d) Original records may be inspected or copied, but in no instance will original records be removed from HHSC offices.

(e) Records maintained by HHSC Regulatory Services Division are open to the public, with the following exceptions.

(1) Incomplete reports, audits, evaluations, and investigations made of, for, or by HHSC are confidential.

(2) All reports, records, and working papers used or developed by HHSC in and investigation of reports of abuse and neglect are confidential and may be released to the public as provided in §559.95 of this chapter (relating to confidentiality).

(3) All names and related personal, medical, or other identifying information about an individual are confidential.

(4) Information about any identifiable person that is defamatory or an invasion of privacy is confidential.

(5) Information identifying complainants or informants is confidential.

(6) Itineraries of surveys are confidential.

(7) Other information that is excepted from release by Texas Government Code, Chapter 552, is not available to the public.

(8) To implement this subsection, HHSC may not alter or de-identify original records. Instead, HHSC will make available for public review or release only a properly de-identified copy of the original record.

(f) HHSC will charge for copies of records upon request.

(1) If the requester simply wants to inspect records, the requester will specify the records to be inspected. HHSC will make no charge for this service, unless HHSC determines a charge is appropriate based on the nature of the request.

(2) If the requester wants copies of a record, the requester will specify in writing the records to be copied on an appropriate HHSC form, and HHSC will complete the form by specifying the cost of the records, which the requester must pay in advance. Checks and other instruments of payment must be made payable to the Texas Health and Human Services Commission.

(3) Any expenses for standard-size copies incurred in the reproduction, preparation, or retrieval of records must be borne by the requester on a cost basis in accordance with costs established by the Office of the Attorney General or HHSC for office machine copies.

(4) For documents that are mailed, HHSC will charge for the postage at the time it charges for the production. All applicable sales taxes will be added to the cost of copying records.

(5) When a request involves more than one long-term care facility, each facility will be considered a separate request.

§559.241. Reporting Abuse, Neglect, Exploitation, or Incidents to HHSC.

(a) Any individualized skills and socialization provider staff who has reasonable cause to believe that an individual is in a state of abuse, neglect, or exploitation must report the abuse, neglect, or exploitation to the Texas Health and Human Services (HHSC) Complaint and Incident Intake Section within one hour after suspecting or learning of the alleged abuse, neglect, or exploitation.

(b) In addition to the reporting requirements described in subsection (a) of this section, an individualized skills and socialization provider must report the death of an individual when the death occurs while the individual is receiving services from an individualized skills and socialization provider to the HHSC Complaint and Incident Intake Section within one hour after learning of the individual's death.

(c) The following information must be reported to HHSC when making a report described in subsections (a) or (b) of this section:

(1) name, age, and address of the individual;

(2) name and address of the person responsible for the care of the individual, if available;

(3) nature and extent of the individual's condition;

(4) basis of the reporter's knowledge; and

(5) any other relevant information.

(d) Within five working days after making a report described in subsections (a) or (b) of this section, the individualized skills and socialization provider must ensure an investigation of the incident is conducted and send a written investigation report on Form 3613-A, Provider Investigation Report, or a form containing, at a minimum, the information required by Form 3613-A, to HHSC's Complaint and Incident Intake.

§559.243. HHSC Complaint Investigation.

(a) A complaint is any allegation received by the Texas Health and Human Services Commission (HHSC) regarding abuse, neglect, or exploitation of an individual or a violation of state standards.

(b) HHSC must give the individualized skills and socialization provider notification of the complaint received and a summary of the complaint, without identifying the source of the complaint.

(c) HHSC investigates complaints of abuse, neglect, or exploitation when the alleged victim is an individual receiving services from an individualized skills and socialization provider and:

(1) the act occurs at the on-site individualized skills and socialization location;

(2) the act occurs during the provision of off-site individualized skills and socialization;

(3) the individualized skills and socialization provider is responsible for the supervision of the individual at the time the act occurs; or

(4) the alleged perpetrator is affiliated with the individualized skills and socialization provider.

(d) Complaints of abuse, neglect, or exploitation not meeting the criteria in subsection (a) of this section must be referred to the Texas Department of Family and Protective Services.

(e) Complaint investigations must include a visit to the individualized skills and socialization provider and consultation with persons thought to have knowledge of the circumstances. If the individualized skills and socialization provider fails to admit HHSC staff for a complaint investigation, HHSC will seek a probate or county court order for admission. Investigators may request of the court that a peace officer accompany them.

(f) In cases concluded to be physical abuse, the written report of the investigation by HHSC must be submitted to the appropriate law enforcement agency.

(g) In cases concluded to be abuse, neglect, or exploitation of an individual with a guardian, the written report of the investigation by HHSC must be submitted to the probate or county court that oversees the guardianship.

§559.245. Confidentiality.

All reports, records, communications, and working papers used or developed by the Texas Health and Human Services Commission (HHSC) in an investigation are confidential and may be released only as provided in this section.

(1) The final written investigation report on cases may be furnished to the district attorney and appropriate law enforcement agencies if the investigation reveals abuse that is a criminal offense. HHSC may provide to another state agency or governmental entity information that is necessary for HHSC, state agency, or entity to properly execute its duties and responsibilities to provide services to a person with a disability or the elderly.

(2) The final written investigation report may be released to the public upon request provided the report is de-identified to remove all names and other personally identifiable data, including any information from witnesses and other person furnished to HHSC as part of the investigation.

(3) The reporter and the individualized skills and socialization provider will be notified of the results of HHSC's investigation of a reported case of abuse, neglect, or exploitation, whether HHSC concluded that abuse, neglect, or exploitation occurred or did not occur.

(4) Upon written request of the person who is the subject of the report of abuse, neglect, or exploitation or his or her legal representative, HHSC releases to the person or his or her legal representative otherwise confidential information relating to the final report. The request must specify the information desired and be signed and dated by the person or his or her legal representative. The legal representative of a deceased person may make a written request for this information. The legal representative of a deceased person must also specify the reason the information is requested. Any legal representative must include with the request sufficient documentation to establish his or her authority. HHSC edits the information before release to protect the confidentiality of information related to the reporter's identity and to protect any other person whose safety or welfare may be endangered by disclosure.

§559.251. Emergency Suspension and Closing Order.

(a) The Texas Health and Human Services Commission (HHSC) will suspend an individualized skills and socialization provider's license or order an immediate closing of part of the facility if:

(1) HHSC finds that the individualized skills and socialization provider is operating in violation of the licensure rules; and

(2) the violation creates an immediate threat to the health and safety of an individual.

(b) The order suspending a license or closing a part of a facility under this section is immediately effective on the date the license holder receives a hand-delivered written notice or on a later date specified in the order.

(c) The order suspending a license or ordering an immediate closing of a part of the facility is valid for ten days after the effective date of the order.

(d) A licensee whose facility is closed under this section is entitled to request a formal administrative hearing under the Health and Human Services Commission's formal hearing procedures in 1 TAC Chapter 357, Subchapter I (relating to Hearings Under the Administrative Procedure Act), but a request for an administrative hearing does not suspend the effectiveness of the order.

(e) An individualized skills and socialization provider will be removed from HHSC's Day Activity and Health Services (DAHS) directory during an effective emergency suspension.

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 567. CERTIFICATE OF PUBLIC ADVANTAGE

The Texas Health and Human Services Commission (HHSC) adopts amendments to §567.2, concerning Definitions; §567.6, concerning Scope; §567.21, concerning Changes That Could Affect the Certificate of Public Advantage; §567.22, concerning Application; §567.25, concerning Fees; §567.26, concerning Conditions for Issuing a Certificate of Public Advantage; §567.41, concerning Rate Reviews for Hospitals Operating Under a Certificate of Public Advantage; §567.52, concerning Annual Review; §567.53, concerning Investigation; Consequences; and §567.54, concerning Corrective Action Plan; the repeals of §567.31, concerning Terms; §567.32, concerning Annual Report; and §567.33, concerning Voluntary Termination; and new §567.31, concerning Terms; §567.32, concerning Changes that May Affect the Certificate of Public Advantage; §567.33, concerning Annual Public Hearing; §567.34, concerning Annual Report; §567.35, concerning Voluntary Termination; and §567.36, concerning Supervision Fees.

The repeals of §§567.31 - 567.33; amendments to §§567.21, 567.25, 567.41, 567.52, and 567.54; and new §§567.32, 567.34, and 567.35 are adopted without changes to the proposed text as published in the July 8, 2022, issue of the *Texas Register* (47 TexReg 3909). These rules will not be republished.

The amendments to §§567.2, 567.6, 567.22, 567.26, and 567.53 and new §§567.31, 567.33, and 567.36 are adopted with changes to the proposed text as published in the July 8, 2022, issue of the *Texas Register* (47 TexReg 3909). These rules will be republished.

BACKGROUND AND JUSTIFICATION

The amendments, repeals, and new sections update the rules regarding a Certificate of Public Advantage (COPA). The rules provide additional clarity to internal and external stakeholders, update supervision fees and reporting requirements, and ensure consistency between these rules and Texas Health and Safety Code (HSC) Chapter 314A, as added by House Bill 3301, 86th Legislature, Regular Session, 2019.

COMMENTS

The 31-day comment period ended August 8, 2022. During this period, HHSC received comments regarding the proposed rules from six commenters, Hendrick Health, Shannon Health, Texas Association of Health Plans (TAHP), Texas Association of Voluntary Hospitals (TAVH), Texas Hospital Association (THA), and Texas Organization of Rural and Community Hospitals (TORCH). A summary of comments relating to the rules and HHSC's responses follows.

Comment: Hendrick Health and Shannon Health stated HHSC may only adopt rules within HHSC's statutory authority, and rules adopted under HSC §314A.101 should support the statutory purpose of ensuring a COPA benefits the public and should remain within the statute's scope and not impose any additional burdens, restrictions, or conditions.

Response: HHSC acknowledges this comment.

Comment: Several commenters stated the proposed rules add to existing administrative and regulatory burdens for COPA holders, impacts hospital operations, and creates additional costs to comply. Commenters also stated the proposed rules undermine the COPA statute's purpose and any rules adopted to implement HSC Chapter 314 should support the statutory purpose and benefit the public. Commenters suggested revising the proposed rules to reduce regulatory and administrative burdens and streamline reporting requirements.

Response: HHSC declines to revise the rules beyond the changes to the proposed text as detailed in this preamble because the rules and rule updates are necessary to implement HSC Chapter 314A.

Comment: Several commenters stated the new "ancillary service" definition at §567.2(1) exceeds HHSC's statutory authority and too broadly defines the term because the definition may encompass services unrelated to inpatient or outpatient hospital care. Commenters suggested revising the "ancillary service" definition to limit the definition to more accurately capture the major services hospitals provide and services referenced in the COPA statute and provided alternate language for HHSC's consideration.

Response: HHSC removes the "ancillary service" definition in §567.2(1) in response to this comment. A definition for ancillary service is unnecessary for Chapter 567 because HHSC removed the term from §567.53, regarding investigations and consequences, which was the only instance of this term in the chapter. HSC §314A.151 provides HHSC the authority to investigate the hospital's activities to ensure public benefit.

Comment: Several commenters stated the definition of "COPA" under §567.2(2), renumbered to §567.2(1) for the adopted rule, limits the COPA to the initial merger parties, which keeps them from reorganizing legal entities if necessary. Commenters suggested revising the proposed language to mirror the current definition at §567.2(1).

Response: HHSC declines to revise the definition for "COPA", because the amended definition's intent is to clarify a COPA is limited to the parties for which HHSC issued the COPA.

Comment: Several commenters objected to HHSC adding the new "terms or conditions" definition at §567.2(5), renumbered to §567.2(4) in the adopted rule, because the definition is too broad and does not provide a specific benefit to the public. Commenters suggested revising §567.2 by removing this new definition.

Response: HHSC declines to revise the "terms or conditions" definition, because the definition clarifies language used in HSC Chapter 314A, which uses both "terms" and "conditions" interchangeably. HHSC has authority under HSC §314A.005 to adopt rules for the administration and implementation of HSC Chapter 314A, which includes clarifying undefined statutory terms.

Comment: Several commenters recommended removing the new language at §567.6(a) - (b) because the language limits a COPA's scope to the parties that apply for a COPA, which commenters stated provides no public benefit, and removes the requirement that a COPA may not be altered. Commenters expressed concern this would limit a hospital's ability to rely on their current COPA status when reorganizing or acquiring additional hospitals or collaborating with or engaging in transactions with other hospitals to benefit the public. Commenters stated if another party sought to purchase a hospital party to a COPA, the hospital would have to apply for a new COPA, which commenters stated is costly and burdensome to the hospitals.

Response: HHSC declines to revise §567.6(a) - (b) because this amendment clarifies a COPA is limited to the parties for which HHSC approved the COPA.

Comment: Several commenters stated §567.6(c) unfairly allows HHSC to amend terms or conditions after a COPA's approval and does not require HHSC to provide hospitals operating under a COPA notice and the opportunity to comment and raise concerns before any changes take effect. Commenters stated the new language exceeds HHSC's statutory authority to ensure the COPA benefits the public. Commenters stated HHSC should follow the rulemaking process when changing any terms and conditions in accordance with Texas Government Code Chapter 2001, including providing a specified timeline and sufficient notice of changes. Commenters suggested revising the rule to mirror the current language in §567.6.

Response: HHSC relocates §567.6(c) to §567.31(c) and clarifies HHSC must provide to a hospital operating under a COPA notice not less than 30 days before a change to the terms or conditions takes effect.

Comment: Several commenters stated §567.21, which requires COPA applicants to notify HHSC about certain events no later than five business days after the event, does not account for situations where notifying HHSC within five business days would be unreasonable and not feasible and imposes an impracticable and overly burdensome requirement on applicants. Commenters further stated the proposed change does not benefit the

public. Commenters suggested revising the rule to replace the proposed five business day notification deadline with the current "as soon as practicable" rule language in §567.21.

Response: HHSC declines to revise §567.21 because HHSC bases the decision on whether to issue a COPA on the most current application information and must issue a decision within the 120-day statutory deadline. HHSC has authority under HSC §314A.005 to adopt rules for the administration and implementation of HSC Chapter 314A.

Comment: Several commenters suggested revising §567.21(1) to mirror the paragraph's current provisions because the proposed amendment removing "termination of the merger agreement" from this paragraph provides no specific additional benefit to the public.

Response: HHSC declines to revise §567.21(1) because terminating a merger agreement is not an applicable change that may affect the COPA application under §567.21.

Comment: Several commenters suggested revising §567.21(3) to mirror the paragraph's current language using the "CMS" acronym instead of the agency's full name, the "Centers for Medicare and Medicaid Services," because this change adds no public benefit.

Response: HHSC declines to revise §567.21(3) because defining the acronym "CMS" adds clarity for the public and is consistent with current HHSC rulemaking guidelines regarding acronym definitions and use.

Comment: Several commenters expressed concern with removing the list of required application items from current §567.22(b) because the proposed language lacks sufficient guidance for applicants and may result in HHSC receiving applications with insufficient and unnecessary information. Commenters suggested revising the subsection to mirror the current language in §567.22(b), including the required application items.

Response: HHSC revises §567.22(b) to include the required COPA application information to provide additional clarity and increase transparency regarding application requirements.

Comment: TAHP suggested revising §567.22(c)(2), renumbered to §567.22(d)(2) in the adopted rule, to require hospitals to post the redacted versions of their COPA applications to their websites to increase transparency with the public.

Response: HHSC declines to revise the renumbered §567.22(d)(2), because HHSC posts the hospital's redacted COPA applications on HHSC's website.

Comment: Several commenters stated §567.22(c), renumbered to §567.22(d) in the adopted rule, would impose new redaction standards for hospitals submitting a COPA application and could result in applying new redaction standards on hospitals operating under a COPA. Commenters suggested revising the language to instead read, "The redacted version may not redact any information that is currently publicly available."

Response: HHSC declines to revise the renumbered §567.22(d), because the amended rule language only applies to future applicants. HHSC notes the revised language does not require a current COPA holder to change their application documents.

Comment: Several commenters stated §567.22(g), renumbered to §567.22(h) in the adopted rule, which states the deadline for granting or denying the COPA application does not begin until HHSC deems the application complete, is overbroad, provides no benefit to the public, and conflicts with HSC §314A.054(b). The subsection allows HHSC to dictate when the review of the application starts and could lead to significant inefficiencies and delays. Commenters suggested the renumbered §567.22(h) to clarify HHSC must grant or deny the application within 120 days after the application filing date. Commenters alternatively suggested revising §567.22(h) to require HHSC to notify an applicant that HHSC deemed their application incomplete within 10 days from the application filing date, otherwise, the application is automatically deemed complete.

Response: HHSC revises the renumbered to §567.22(h), by changing the word "complete" to "filed" to align with §567.22(e), renumbered to §567.22(f) in the adopted rule.

Comment: THA objected to relocating terms or conditions of compliance language from current §567.31 to proposed §567.26(b) because THA stated doing so provides no public benefit. THA suggested revising the rules to relocate the language in §567.26(b) back to §567.31 to mirror current rule.

Response: HHSC revises §567.26(b) as suggested by relocating the terms or conditions of compliance language at §567.26(b) to §567.31(a).

Comment: Several commenters stated §567.31, which requires a hospital operating under a COPA to comply with all terms or conditions, is overly strict, suggests failure to comply with all terms or conditions constitutes automatic noncompliance, and does not provide an avenue for corrective action. Commenters suggested revising the rule to mirror the current language in §567.31, which states HHSC may include terms or conditions if necessary.

Response: HHSC revises §567.31 by relocating language from proposed §567.26(b) to §567.31(a), which is substantially similar to current §567.31 and states HHSC may include terms or conditions in connection with issuing a COPA, if necessary. HHSC declines to remove language requiring hospitals operating under a COPA to comply with all required terms or conditions and notes HSC §314A.056(c) permits HHSC to set terms or conditions.

Comment: Several commenters stated §567.32, which adds a new section requiring a hospital operating under a COPA to notify HHSC of certain changes that may affect the COPA no later than five business days after the qualifying event, does not account for situations where notifying HHSC within five business days is not feasible and imposes an impracticable and overly burdensome requirement with no corresponding benefit to the public. Commenters suggested revising the rule to mirror the current language in §567.21, which requires COPA applicants to notify HHSC about changes that may affect the COPA.

Response: HHSC declines to revise §567.32 because a hospital operating under a COPA must provide HHSC with current information relevant to the COPA. HHSC has statutory authority to supervise merged hospitals operating under a COPA, ensure continued public benefit, and set time frames for COPA compliance documentation.

Comment: TAHP suggested revising §567.33 to require HHSC and hospitals operating under a COPA to post recordings of their public hearings, information provided to HHSC as a result of the hearing, and any other nonconfidential portions of annual or interim reports on HHSC's and the hospitals' websites to increase transparency with the public.

Response: HHSC declines to revise §567.33 because the HHSC posts the public versions of quarterly and annual reports on HHSC's website. HHSC may determine, based on internal policy, to post public hearing recordings and related nonconfidential information on HHSC's website at a future date.

Comment: Several commenters stated §567.33, which creates a new section requiring a hospital operating under a COPA to conduct an annual public hearing to obtain input regarding the COPA, contains an ambiguous term "accept" in §567.33(c), which could suggest a hospital must comply with or incorporate all oral and written public comments, regardless of their feasibility, relevance, or benefit to the public. THA further stated the public benefit does not outweigh the burden associated with the hospital holding a public hearing. Commenters recommended removing §567.33 from the chapter.

Response: HHSC revises §567.33(c) by clarifying a hospital shall "receive" oral and written public comments during the public hearing.

Comment: Several commenters suggested §567.33(d), which requires a hospital to record the public hearing, and §567.33(e), which requires a hospital operating under a COPA to submit information about the hearing in the annual report to HHSC, may discourage public discussion if participants know their comments will be recorded or disseminated. Commenters recommended HHSC remove the new rules associated with the public hearing.

Response: HHSC declines to revise §567.33(d) - (e) because the public hearing recording is proof of a hospital's compliance with §567.33(a).

Comment: Several commenters acknowledged HHSC relocated language regarding annual reporting requirements from current §567.32 to proposed §567.34(a), modified the deadline to submit the annual report to HHSC from the COPA anniversary date to 90 days after the COPA anniversary date, and stated the proposed rule adds additional requirements for the annual report. THA stated the proposed rule modifications do not provide a benefit to the public. Commenters suggested revising the subsection to mirror the language in current §567.32.

Response: HHSC declines to revise §567.34(a) because this subsection is necessary to administer the chapter's purpose.

Comment: Several commenters stated §567.34(b), which states as a condition of the COPA, HHSC may require more frequent reporting, but not more often than quarterly, and does not provide adequate notice of at least 30 business days to the hospital regarding additional reports beyond the annual and quarterly reports. THA stated the modification provides no benefit to the public. Commenters suggested revising §567.34(b) to prohibit HHSC from requiring more than quarterly reports as a condition of the COPA and require HHSC to provide at least 30 business days' notice to the hospitals operating under a COPA before issuing a request for a report.

Response: HHSC declines to revise §567.34(b) because this subsection is necessary to administer the chapter's purpose. HHSC notes under §567.34(b), HHSC may not require reporting more often than quarterly as a condition of the COPA.

Comment: Several commenters stated HHSC relocating language regarding voluntary termination from current §567.33 to proposed §567.35 provides no clarification regarding the effect of voluntary termination or HHSC's ability to impose terms or conditions relating to termination. Commenters suggested revising §567.35 by relocating the voluntary termination language back to §567.33.

Response: HHSC declines to revise §567.35 because HHSC did not make substantive changes to the language in current §567.33 beyond including a statutory citation to provide additional clarity. HHSC further notes the updates to this section are necessary to accommodate new sections added to Subchapter C and to reorganize and renumber the sections in the subchapter accordingly.

Comment: Several commenters acknowledged HHSC relocating the language at current §567.25(c) to proposed §567.36 and stated the proposed revisions to the current rule language adds provisions relating to increasing supervision fees and would allow HHSC to assess an annual supervision fee for each hospital operating under a COPA. Commenters further stated the proposed language requires hospitals operating under a COPA to pay the first supervision fee no later than 30 calendar days after the date HHSC issues the COPA and to pay each subsequent supervision fee no later than the anniversary of when HHSC issued the COPA. Commenters suggested HHSC revise §567.36 to mirror the current language in §567.25 and either remove the phrase "each hospital" from the rule or clarify "each hospital" means the merged entity and the individual hospitals operating under a COPA are not required to pay separate supervision fees.

Response: HHSC revises §567.36(1) by clarifying the annual supervision fee is $100,000 for each hospital operating under the COPA.

Comment: TAHP commented under HSC §314A.102, when hospitals merge and one hospital adopt the higher rates of the other hospital, this is considered a rate change, which requires a rate change review. TAHP suggested revising §567.41 by clarifying updating charges or chargemasters trigger a required rate review.

Response: HHSC declines to revise §567.41 in response to this comment. HHSC understands the legislative intent of the rate review requirements apply only to rate changes that would alter existing hospital rates. HHSC does not consider a newly merged hospital billing under the existing rates of a hospital with which it merged to a rate change requiring prior review and approval.

Comment: Several commenters stated §567.41, regarding the rate review process, is overly burdensome and the language at §567.41(c)(1) requiring a hospital operating under a COPA to submit an application for a rate review may prevent the hospital from being able to timely request a rate increase review. Commenters noted the amended rule creates a new step in the process, which requires a hospital to request an application from HHSC and imposes an additional review layer before HHSC deems the application complete. Commenters stated the additional step and layer of HHSC review hampers a hospital's ability to assess an appropriate rate increase, negotiate with third party payors, and notify HHSC within a reasonable time frame. Commenters also stated it is unclear what the application would require and that it may be difficult for a hospital to compile and provide the necessary information within an unknown deadline. Commenters specified §567.41(c)(3) - (4), which requires a market analysis of current rates and a capital expenditures requirement, goes beyond HHSC's statutory authority. Commenters also stated hospitals must be able to adjust to inflation and other market conditions. Commenters recommended HHSC delay changes to the rate review process and retain the

requirements under current §567.41(6)(B) until more data on patient patterns and costs are available.

Response: HHSC declines to revise §567.41 because the rules are necessary for HHSC to complete the required rate review. HHSC included §567.41(c)(1) - (4) in §567.41 to standardize the process and inform hospitals of all components the rate review application.

Comment: Several commenters stated §567.41(d), which requires a hospital operating under a COPA to provide HHSC with any additional information HHSC requests within 10 business days, imposes an inflexible deadline, is overly burdensome, and has no corresponding and specific benefit to the public. Commenters stated additional information requests are not tied to a standard that ensures a rate change benefits the public and does not inappropriately exceed competitive rates.

Response: HHSC declines to revise §567.41(d) in response to these comments. HSC §314A.102 outlines the rate review process timeline, which requires HHSC to notify the hospital of HHSC's decision to approve, deny, or modify the proposed rate change no later than 30 days before the hospital implements the proposed rate change. Requiring hospitals to respond within 10 business days allows HHSC to provide a timely response and avoid denying the proposal due to insufficient time to review the information.

Comment: TAHP requested revising §567.41(h) to require hospitals to publicly publish or provide impacted insurers with the rate review application and HHSC's approval or denial of the hospital's rate increases within five days because the third-party payors must confirm HHSC's approval for rate increases before the hospital implements them.

Response: HHSC declines to revise §567.41(h) because the hospital is responsible for corresponding with their third-party payors regarding approved or denied rate changes.

Comment: Several commenters acknowledged §567.52 updates a reference to the annual report section. Commenters stated the reference provides no benefit to the public and recommended HHSC not adopt this change.

Response: HHSC declines to revise §567.52 as the reference update is necessary to ensure clarity, ensure the rule correctly cites §567.34 as a reference, and adhere to HHSC rulemaking guidelines.

Comment: Several commenters stated §567.53(b)(1) - (2), which allows HHSC to enter, inspect, review, or investigate any hospital operating under a COPA and access, inspect, and copy all hospital documents, is overly broad and burdensome. Commenters stated HHSC should not have complete access a hospital or its ancillary services. Commenters suggested revising the rule to mirror current §567.53.

Response: HHSC revises §567.53(b)(1) by removing "or any ancillary service area" from the paragraph. HHSC notes the rules must allow HHSC to enter a hospital to inspect its premises and records in order to investigate the hospital's activities and ensure continued public benefit in accordance with HSC §314A.151.

In response to staff comments, HHSC relocated §567.6(c) to §567.31(c) because this subsection is more appropriately organized under the terms section.

SUBCHAPTER A. GENERAL PROVISIONS

26 TAC §567.2, §567.6

STATUTORY AUTHORITY

The amendments 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 HSC Chapter 314A, which requires HHSC, as the agency designated by the Governor under HSC §314A.004, to adopt rules for the administration and implementation of Chapter 314A.

§567.2. Definitions.

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

(1) Certificate of Public Advantage (COPA)--The written approval by the Texas Health and Human Services Commission (HHSC) that governs a cooperative agreement between hospitals that are party to a merger.

(2) Hospital--A nonpublic general hospital that is licensed under Texas Health and Safety Code Chapter 241 and is not maintained or operated by a political subdivision of this state.

(3) Merger Agreement--An agreement among two or more hospitals for the consolidation by merger, or other acquisition or transfer of assets, by which ownership or control over substantially all the stock, assets, or activities of one or more previously licensed and operating hospitals is placed under the control of another licensed hospital, or hospitals, or another entity that controls the hospitals.

(4) Terms or conditions--Any actions or measures that HHSC may require as a condition for issuing a COPA or allowing continued operation under a COPA.

§567.6. Scope.

(a) A Certificate of Public Advantage (COPA) is issued for a merger agreement between the parties identified in a COPA application.

(b) A COPA is limited to the parties that apply for a COPA.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on December 12, 2022.

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Karen Ray
Chief Counsel
Health and Human Services Commission
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For further information, please call: (512) 834-4591

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SUBCHAPTER B. APPLICATION AND ISSUANCE

26 TAC §§567.21, 567.22, 567.25, 567.26

STATUTORY AUTHORITY

The amendments 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 HSC Chapter 314A, which requires HHSC, as the agency designated

by the Governor under HSC §314A.004, to adopt rules for the administration and implementation of Chapter 314A.

§567.22. Application.

(a) The acquiring party in a proposed merger agreement (the applicant) may apply to the Texas Health and Human Services Commission (HHSC) for a Certificate of Public Advantage (COPA) governing the merger agreement.

(b) The acquiring party must submit an application as specified by HHSC and the following information:

(1) the entities party to the proposed merger agreement, including names, addresses, contact information, and licensure and accreditation information;

(2) the specifics of the proposed transaction, including a letter of intent from each party, and alternatives to the merger agreement;

(3) post-transaction governance structure of the merged entity;

(4) post-transaction competition in the market area;

(5) financial strength of the merged entity;

(6) impact of the proposed merger agreement on employees;

(7) the geographic service areas and services offered by each party to the proposed merger agreement, including designations made by the state or other organizations;

(8) quality initiatives for each party to the proposed merger agreement;

(9) physicians, primary care services, and other healthcare services available to the public in the market area;

(10) community health needs;

(11) the condition of the physical plant and equipment of each party to the proposed merger agreement;

(12) financial assistance policies and the amount of uncompensated care provided by each party to the proposed merger agreement;

(13) current hospital rates and third-party reimbursement agreements;

(14) savings from the proposed merger agreement;

(15) benefits of the proposed merger agreement to the public;

(16) public comments regarding the proposed merger agreement; and

(17) any additional information HHSC deems necessary based on the circumstances specific to the application.

(c) An application is not complete until it contains all supplementary information, including any additional information HHSC deems necessary based on the circumstances specific to the application, and the application fee.

(d) If an applicant believes the application contains proprietary information that is required to remain confidential, the applicant may submit two applications:

(1) one application with complete information for HHSC's use with proprietary information clearly identified but not redacted; and

(2) one application, labeled as redacted and available for public release, with proprietary information redacted, subject to the following:

(A) The redacted version shall include at the minimum enough unredacted information, as determined by HHSC, to indicate continued public benefit.

(B) The redacted version may not redact any information that is publicly available, including:

(i) financial statements and other compliance documents required in the issue of tax-exempt bonds, if applicable;

(ii) Medicare Cost Reports;

(iii) Community Health Needs Assessments;

(iv) charity care and other patient financial policies;

(v) charge and payment data, including the chargemaster, list of shoppable services, and machine-readable payor specific data;

(vi) quality ratings, including Centers for Medicare and Medicaid Services Star Ratings, Hospital Consumer Assessment of Healthcare Providers and Systems (HCAHPS) ratings, and Leapfrog ratings; and

(vii) information included in the Texas Department of State Health Services' Annual Survey of Hospitals.

(e) An applicant shall submit a complete unredacted copy of the application and any related materials to the Attorney General at the same time it submits the application to HHSC.

(f) An application shall not be deemed filed until HHSC determines the application is complete.

(g) HHSC may request additional information necessary to make the application complete and to meet the requirements of Texas Health and Safety Code Chapter 314A and this chapter.

(h) The deadline for granting or denying the application under Texas Health and Safety Code §314A.054 does not begin until HHSC deems the application filed.

§567.26. Conditions for Issuing a Certificate of Public Advantage.

The Texas Health and Human Services Commission (HHSC) will issue a Certificate of Public Advantage (COPA) if:

(1) it determines under the totality of the circumstances that:

(A) the proposed merger would likely benefit the public by maintaining or improving the quality, efficiency, and accessibility of health care services offered to the public; and

(B) the likely benefits resulting from the proposed merger agreement outweigh any disadvantages attributable to a reduction in competition that may result from the proposed merger; and

(2) the application:

(A) provides specific evidence showing that the proposed merger would likely benefit the public;

(B) explains in detail how the likely benefits resulting from the proposed merger agreement outweigh any disadvantages attributable to a reduction in competition; and

(C) sufficiently addresses the following factors:

(i) the quality and price of hospital and health care services provided to citizens of this state;

(ii) the preservation of sufficient hospitals within a geographic area to ensure public access to acute care;

(iii) the cost efficiency of services, resources, and equipment provided or used by the hospitals that are a party to the merger agreement;

(iv) the ability of health care payors to negotiate payment and service arrangements with hospitals proposed to be merged under the agreement;

(v) the extent of any reduction in competition among physicians, allied health professionals, other health care providers, or other persons providing goods or services to, or in competition with, hospitals; and

(vi) any other factor the applicant deems relevant to HHSC's determination under Texas Health and Safety Code §314A.056.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on December 12, 2022.

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Karen Ray
Chief Counsel
Health and Human Services Commission
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For further information, please call: (512) 834-4591

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SUBCHAPTER C. OPERATIONAL REQUIREMENTS

26 TAC §§567.31 - 567.33

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 HSC Chapter 314A, which requires HHSC, as the agency designated by the Governor under HSC §314A.004, to adopt rules for the administration and implementation of Chapter 314A.

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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26 TAC §§567.31 - 567.36

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, and HSC Chapter 314A, which requires HHSC, as the agency designated by the Governor under HSC §314A.004, to adopt rules for the administration and implementation of Chapter 314A.

§567.31. Terms.

(a) The Texas Health and Human Services Commission (HHSC) may include terms or conditions of compliance in connection with issuing a Certificate of Public Advantage (COPA), if necessary, to ensure that the proposed merger likely benefits the public as specified in this chapter.

(b) A hospital operating under a COPA shall comply with all terms or conditions required in the issuance of a COPA.

(c) Any terms or conditions for a COPA are separate from the COPA itself. HHSC retains the authority to amend the terms or conditions. HHSC shall notify the hospital of any change in the terms or conditions not less than 30 days before the change takes effect.

§567.33. Annual Public Hearing.

(a) A hospital operating under a Certificate of Public Advantage (COPA) shall conduct a live, annual public hearing that is held face-to-face either in-person or using synchronous audiovisual interaction between the meeting attendees to obtain input from the public regarding the hospital's COPA.

(1) The public hearing must occur no sooner than one month before and no later than the anniversary of the date the Texas Health and Human Services Commission issued the COPA.

(2) If the hospital operating under the COPA holds the hearing in-person, the hearing shall take place within the geographic service area of the hospital operating under the COPA. The location shall be open to the public.

(b) At least 14 calendar days before the public hearing, the hospital operating under the COPA shall publicly advertise the hearing's details, including its date, time, location, and method of participation, by:

(1) posting a notice on the website of each hospital operating under the COPA or on a different webpage available through a hyperlink that is located prominently on the website's home page;

(2) posting the information on each social media account maintained by each hospital operating under the COPA; and

(3) notifying local news media, including print, internet, and broadcast outlets.

(c) During the hearing, the hospital operating under the COPA shall receive oral and written comments from the public regarding the COPA.

(d) The hospital operating under the COPA shall make an audio and video recording of the hearing and maintain the recording for one year from the hearing date.

(e) The hospital operating under the COPA shall provide information about the hearing in the annual report required by §567.34 of this subchapter (relating to Annual Report), including:

(1) an unedited copy of the hearing recording required by subsection (d) of this section in a format accessible by HHSC;

(2) a summary of all oral and written comments received at the public hearing;

(3) a copy of any written comments received;

(4) any responses or actions planned in response to comments received;

(5) the number of persons who attended the hearing;

(6) the date and time of the hearing;

(7) the duration of the hearing; and

(8) the names and titles of all individuals representing the hospital at the hearing.

§567.36. Supervision Fees.

In accordance with Texas Health and Safety Code §314A.105, the Texas Health and Human Services Commission (HHSC) may assess an annual supervision fee in an amount that is at least $75,000 but not more than $200,000 for each hospital operating under a Certificate of Public Advantage (COPA).

(1) The amount of the annual supervision fee is $100,000 for each hospital operating under the COPA. However, HHSC may decrease this amount to the statutory minimum or increase this amount to the statutory maximum by the amount needed to cover the reasonable costs incurred in supervising hospitals and in implementing and administering Texas Health and Safety Code Chapter 314A and this chapter.

(2) The amount of any increase of the annual supervision fee may not exceed 25% of the previous annual supervision fee.

(3) HHSC shall publish on its website and directly notify each hospital operating under the COPA of the amount of the supervision fee annually and at least 90 days before any increase takes effect.

(4) Each hospital operating under a COPA shall pay the first supervision fee no later than 30 calendar days after the date HHSC issues the COPA.

(5) Each hospital operating under a COPA shall pay each subsequent supervision fee no later than the anniversary of the date HHSC issued the COPA.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on December 12, 2022.

TRD-202204933
Karen Ray
Chief Counsel
Health and Human Services Commission
Effective date: January 1, 2023
Proposal publication date: July 8, 2022
For further information, please call: (512) 834-4591

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SUBCHAPTER D. RATE REVIEW

26 TAC §567.41

STATUTORY AUTHORITY

The amendment is 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 HSC Chapter 314A, which requires HHSC, as the agency designated by the Governor under HSC §314A.004, to adopt rules for the administration and implementation of Chapter 314A.

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) 834-4591

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SUBCHAPTER E. ENFORCEMENT

26 TAC §§567.52 - 567.54

STATUTORY AUTHORITY

The amendments 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 HSC Chapter 314A, which requires HHSC, as the agency designated by the Governor under HSC §314A.004, to adopt rules for the administration and implementation of Chapter 314A.

§567.53. Investigation; Consequences.

(a) To ensure that the activities of a hospital resulting from a merger agreement continue to benefit the public, the Texas Health and Human Services Commission (HHSC) may:

(1) investigate the hospital's activities; and

(2) require the hospital to perform a certain action or refrain from a certain action or revoke the hospital's certificate of public advantage, if HHSC determines that:

(A) the hospital is not complying with Texas Health and Safety Code Chapter 314A, this chapter, or a term or condition of compliance with the Certificate of Public Advantage (COPA) governing the hospital's immunized activities;

(B) HHSC's approval and issuance of the COPA was obtained as a result of material misrepresentation;

(C) the hospital has failed to pay any fee required under this chapter; or

(D) the benefits resulting from the approved merger no longer outweigh the disadvantages attributable to the reduction in competition resulting from the approved merger.

(b) HHSC may make any entrance, inspection, review, or investigation it considers necessary to ensure the activities of a hospital operating under a COPA continue to benefit the public.

(1) An HHSC representative may enter the premises of a hospital operating under the COPA at any reasonable time for purposes of this chapter.

(2) HHSC may access, inspect, and copy all books, records, or other documents maintained by or on behalf of a hospital operating under the COPA as necessary for the purposes of this chapter.

(3) A hospital operating under the COPA shall cooperate with any entrance, inspection, review, or investigation by HHSC for the purposes of this chapter.

(4) HHSC shall maintain the confidentiality of hospital records as applicable under federal and state law.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on December 12, 2022.

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Karen Ray
Chief Counsel
Health and Human Services Commission
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Proposal publication date: July 8, 2022
For further information, please call: (512) 834-4591

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CHAPTER 985. HUMAN IMMUNODEFICIENCY VIRUS PREVENTION AND TREATMENT IN STATE SUPPORTED LIVING CENTERS

26 TAC §§985.1 - 985.6

The Texas Health and Human Services Commission (HHSC) adopts in Texas Administrative Code (TAC), Title 26, new Chapter 985, Human Immunodeficiency Virus Prevention and Treatment in State Supported Living Centers, comprising §985.1, concerning Purpose; §985.2, concerning Application; §985.3, concerning Definitions; §985.4, concerning Education; §985.5, concerning Counseling; and §985.6, concerning Limitation of an Individual's Activity.

Sections 985.1 - 985.6 are adopted without changes to the proposed text as published in the September 16, 2022, issue of the *Texas Register* (47 TexReg 5745). These rules will not be republished.

BACKGROUND AND JUSTIFICATION

This adoption transfers HHSC rules regarding Human Immunodeficiency Virus (HIV) prevention, testing, and treatment from 40 TAC Chapter 8, Subchapter L to 26 TAC Chapter 985. The new rules simplify and consolidate requirements for the state supported living centers regarding the prevention, testing, and treatment of human immunodeficiency virus for individuals served, and workplace guidelines for contractors providing services to individuals served by the SSLCs. The repeal of 40 TAC Chapter 8, Subchapter L is adopted simultaneously elsewhere in this issue of the *Texas Register.*

COMMENTS

The 31-day comment period ended October 17, 2022.

During this period, HHSC did not receive any comments regarding the proposed rules.

STATUTORY AUTHORITY

The new sections 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 §531.008(c)(5), which requires the Executive Commissioner to establish a facilities division for the purpose of administering state facilities, including state hospitals and state supported living centers; Texas Health and Safety Code §85.113, which requires an entity that contracts with HHSC to operate a program involving direct client contact to adopt and implement human immunodeficiency virus (HIV) and acquired immune deficiency syndrome (AIDS) workplace guidelines similar to the guidelines adopted by the agency; Texas Health and Safety Code §85.114, which requires certain state agencies, including HHSC, to make HIV education available for residential facilities under the agency's jurisdiction; and Texas Health and Safety Code §531.001(h), which provides that the Executive Commissioner is responsible for the planning, policy development, and resource development and allocation for and oversight of mental health and intellectual disability services in this state.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on December 12, 2022.

TRD-202204973
Karen Ray
Chief Counsel
Health and Human Services Commission
Effective date: January 1, 2023
Proposal publication date: September 16, 2022
For further information, please call: (512) 438-3049

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TITLE 31. NATURAL RESOURCES AND CONSERVATION

PART 2. TEXAS PARKS AND WILDLIFE DEPARTMENT

CHAPTER 65. WILDLIFE

SUBCHAPTER F PERMITS FOR AERIAL MANAGEMENT OF WILDLIFE AND EXOTIC SPECIES

31 TAC §65.151, §65.152

The Texas Parks and Wildlife Commission in a duly noticed meeting on November 3, 2022 adopted amendments to 31 TAC §65.151, concerning Definitions, and §65.152, concerning General Rules, without changes to the proposed text as published in the September 16, 2022, issue of the *Texas Register* (47 TexReg 5748). The rules will not be republished.

The amendments clarify that it is lawful to use unmanned aerial vehicles (UAVs, or "drones") at night to locate feral hogs for purposes of lethal control.

Under federal law (16 U.S.C. §742j-1, commonly referred to as the Airborne Hunting Act, or AHA) it is unlawful to shoot or attempt to shoot or intentionally harass any bird, fish, or other animal from aircraft (including drones) except for certain specified reasons, including protection of wildlife, livestock, and human health except as may be provided by state law pursuant to federal authority. Parks and Wildlife Code, Chapter 43, Subchapter G, is the statutory authority for regulating airborne wildlife management in Texas; under Parks and Wildlife Code §43.109, the Parks and Wildlife Commission is authorized to promulgate regulations governing the management of wildlife by the use of aircraft.

The recent advent and increasing popularity of drones have resulted in a number of inquiries to the department regarding their use at night, particularly with respect to the lethal control of feral hogs. Feral hogs are an extremely destructive nuisance species, causing great damage to agricultural crops and wildlife habitats across the state, and the department vigorously encourages the public to control feral hog populations in order to protect native wildlife and their habitats. Current rules prohibit the take of wildlife or exotic animals (which includes members of the swine family, such as feral hogs) from aircraft at night (defined as the hours between one half-hour after sunset and one-half hour before sunrise). The department wishes to clarify that although wildlife and exotic animals may not be *taken* by means of drones at any time, it is lawful to use drones solely for purposes of locating feral hogs, including at night. The rules also clarify that any person who operates a drone pursuant to an aerial wildlife permit must possess the permit while doing so, and that any person who participates in the capture, take, shooting, or attempted capture, take, or shooting of feral hogs as a result of the use of a drone to locate feral hogs for purposes of eventual take or capture is a gunner for the purposes of the subchapter, and all reporting and recordkeeping requirements of the subchapter apply to such persons.

The department received 32 comments opposing adoption of the rules as proposed. Of those comments, 20 articulated a reason or rationale for opposing adoption. Those comments, accompanied by the department's response to each, follow.

One commenter opposed adoption and stated that unscrupulous persons will use UAVs at night to chase deer to locations and properties where hunters await to hunt them in daylight. The department neither agrees nor disagrees with the comment and responds that the rules regulate the use of drones by persons under a department-issued permit, which mandates notification, reporting, and recordkeeping requirements that allow the department to monitor permittee behavior. The department can revoke such permits if they are abused. In any case, such conduct is unlawful irrespective of the rules in question and department enforcement personnel will respond accordingly when unlawful conducted is detected. The department also responds that persons with information concerning illegal take of wildlife resources should contact the department's Operation Game Thief program. No changes were made as a result of the comment.

Three commenters opposed adoption and stated that people will abuse the privilege of flying drones at night. The department disagrees with the comment to the extent that the rule as adopted does not affect anyone's right to lawfully fly a drone at night, it authorizes the use of drones to locate feral hogs at night under a department-issued permit, which can be revoked upon conviction for unlawful conduct. No changes were made as a result of the comment.

One commenter opposed adoption and stated that the rule is actually intended to "produce revenue for the state via the sale of drone permits." The department disagrees with the comment and responds that there is no state drone permit or permit fee. No changes were made as a result of the comment.

Two commenters opposed adoption and stated that people don't want drones flying over their houses and properties at night. The department neither agrees nor disagrees with the comments and responds that the department's regulatory authority with respect to drones is limited to their use under a department-issued permit to manage wildlife and exotic animals and the commission has no authority to regulate any other aspect of drone use by any other persons. No changes were made as a result of the comments.

One commenter opposed adoption and stated that the rules cater to wealthy landowners. The department disagrees with the comment and responds that the rules as adopted clarify what constitutes lawful use of drones under a department-issued permit to manage wildlife and exotic animals. No changes were made as a result of the comment.

One commenter opposed adoption and stated that people should be allowed to hunt hogs by means of drones. The department disagrees with the comment and responds that by statute (Parks and Wildlife Code, §62.002) it is unlawful to use any device to remotely control the aiming and discharge of archery equipment or a firearm to hunt an animal or bird. The commission does not possess the authority to modify or eliminate that law. No changes were made as a result of the comment.

One commenter opposed adoption and stated that drones should not be lawful for hunting anything. The department agrees with the comment and responds that it is unlawful to take any bird or animal directly by use of a drone. No changes were made as a result of the comment.

One commenter opposed adoption and stated that the rules will make it easier for poachers. The department disagrees with the comment and responds that unlike the overwhelming majority of people (who are law-abiding), a poacher is a person who has made the conscious decision to violate the law, which is why the department employs law enforcement personnel. The department is confident in its ability to detect, prosecute, and obtain convictions of violators and notes that persons with information regarding conservation law violations may report that information to the department's Operation Game Thief Program. No changes were made as a result of the comment.

One commenter opposed adoption and stated that the rules will create an enforcement nightmare. The department disagrees with the comment and responds that the rules affect persons who operate drones under a department-issued permit that can be revoked for misuse and that it is confident in its ability to detect, prosecute, and obtain convictions for violations if they occur. No changes were made as a result of the comment.

One commenter opposed adoption and stated that the rules will allow the harassment of avian species under the guise of locating feral hogs. The department disagrees with the comment and responds that harassment of avian life is a violation of federal and state law. No changes were made as a result of the comment.

Once commenter opposed adoption and stated that the rule will allow deer to be killed "without detection or evidence." The de-

partment disagrees with the comment and responds that the rules as adopted apply only to the use of drones under a department-issued permit, which also imposes mandatory reporting and notification requirements and can be revoked for misuse. The department also responds that it is unlawful to take deer by use of a drone. No changes were made as a result of the comment.

One commenter opposed adoption and stated that it should be against the law to fly a drone over property not owned by the drone operator. The department neither agrees nor disagrees with the comment and responds that under federal law, drones are aircraft and may be operated anywhere at any time in compliance with applicable federal law, which the commission does not possess authority to modify or eliminate. No changes were made as a result of the comment.

One commenter opposed adoption and stated that hunting pressure does not affect hog populations and the use of drones will only create conflicts between humans. The department disagrees with the comment and responds that the rules as adopted allow the use of drones under a department-issued permit to locate feral hogs and are not as such an endorsement or recognition of the efficacy or effectiveness of such usage on hog populations. The department also responds that any social conflicts arising from drone use to locate hogs at night are speculative and the department does not possess the authority to regulate the legal use of drones at night for purposes other than management of wildlife and exotic animals. No changes were made as a result of the comment.

One commenter opposed adoption and stated that the rules will allow drones to be used to locate game species, which violates fair chase laws. The department disagrees with the comment and responds that the rules as adopted allow the use of drones under a department-issued permit to locate feral hogs at night; any other use with respect to game, non-game, or exotic animals is unlawful. The department also responds that "fair chase" is not explicitly codified in Texas conservation law, although it is historically and traditionally understood to be an implicit assumption in the regulation of hunting. No changes were made as a result of the comment.

One commenter opposed adoption and stated that the department should make it easier to hunt feral hogs at night by use of drones. The department disagrees with the comment and responds that by statute (Parks and Wildlife Code, §62.002) it is unlawful to use any device to remotely control the aiming and discharge of archery equipment or a firearm to hunt an animal or bird. No changes were made as a result of the comment.

One commenter opposed adoption and stated that the rules will be abused and will lead to poaching. The department disagrees with the comment and responds that the rules apply to persons permitted by the department to use aircraft to manage wildlife and such permits may be revoked if it is proven that a permittee has violated the law. No changes were made as a result of the comment.

One commenter opposed adoption and stated that the rule will enable poaching, theft, and rustling. The department disagrees with the comment and responds that rule applies to persons permitted by the department to use aircraft to manage wildlife and such permits may be revoked if it is proven that a permittee has violated the law. No changes were made as a result of the comment.

One commenter opposed adoption and stated that the rule will allow unscrupulous persons to locate and monitor trophy animals for eventual harvest. The department disagrees with the comment and responds that rule applies to persons permitted by the department to use aircraft to manage wildlife and such permits may be revoked if it is proven that a permittee has violated the law. No changes were made as a result of the comment.

The department received 33 comments supporting adoption of the rules as proposed.

The amendments are adopted under Parks and Wildlife Code, §43.109, which provides the commission with authority to make regulations governing the management of wildlife or exotic animals by the use of aircraft under this subchapter, including forms and procedures for permit applications; procedures for the management of wildlife or exotic animals by the use of aircraft; limitations on the time and the place for which a permit is valid; establishment of prohibited acts; rules to require, limit, or prohibit any activity as necessary to implement Parks and Wildlife Code, Chapter 43, Subchapter G.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on December 9, 2022.

TRD-202204893
James Murphy
General Counsel
Texas Parks and Wildlife Department
Effective date: January 1, 2023
Proposal publication date: September 16, 2022
For further information, please call: (512) 389-4775

PART 21. TEXAS LOW-LEVEL RADIOACTIVE WASTE DISPOSAL COMPACT COMMISSION

CHAPTER 675. OPERATIONAL RULES
SUBCHAPTER B. EXPORTATION AND IMPORTATION OF WASTE

31 TAC §675.20, §675.21

The Texas Low-Level Radioactive Waste Disposal Compact Commission (TLLRWDCC or Commission) adopts amendments to 31 Texas Administrative Code §§675.20, concerning Definitions, and 675.21, concerning Exportation of Waste to a Non-Party State for Disposal. The amendments are adopted without changes to the proposed text as published in the October 14, 2022 issue of the Texas Register (47 TexReg 6814) and will not be republished.

Amendments to section 675.20 define the terms "contingent event" and "exigent event," while amendments to section 675.21 adjust timelines for the Commission to consider and approve exportation of low-level radioactive waste when required by contingent and exigent circumstances, after an opportunity for public comment.

The adopted rules improve the process with respect to the presence of low-level radioactive waste in Texas, if it became impossible to dispose of low-level radioactive waste at the Compact Waste Facility located in Andrews County, Texas, the only such facility in the two Compact states. The adopted rules re-define "contingent event" and "exigent event," and allow for the safe and prompt disposal of low-level radioactive waste outside of the state of Texas were the Compact Waste Facility temporarily or permanently closed or unable to receive the waste.

The Commission adopts the rules to implement and fulfill its responsibilities under 42 United States Code §2021d which authorize the Commission to "Upon petition, allow an individual generator, a group of generators, or the host state of the compact to export low-level radioactive waste to a low-level radioactive waste disposal facility located outside the party states. The commission may approve the petition only by a majority vote of its members. The permission to export low-level radioactive waste shall be effective for that period of time and for the specified amount of low-level radioactive waste, and subject to any other term or condition, as is determined by the commission." The statute also authorizes the Commission to "[m]onitor the exportation outside of the party states of material which otherwise meets the criteria of low-level radioactive waste, where the sole purpose of the exportation is to manage or process the material for recycling or waste reduction and return it to the party states for disposal in the compact facility."

The rules also implement and comply with Texas Health and Safety Code §403.006 ("the Texas Low-Level Radioactive Waste Disposal Compact" or "the Compact") §3.04(7), which requires the Commission to prepare, adopt, and implement contingency plans for the disposal and management of low-level radioactive waste in the event that the compact facility should be closed; and Compact §§3.05(7) and (8), which require the Commission to implement the authority provided by 42 United States Code §2021d cited above, to allow the exportation of low-level radioactive waste to an appropriate facility located outside the party states and to allow the Commission to monitor such exportation.

The Commission received no comments to the proposed rule.

The rules are statutorily authorized by §3.05(4) of the Compact, as set out at Tex. Health & Safety Code §403.006, which authorizes the Commission to adopt, by a majority vote, bylaws and rules necessary to carry out the terms of the Compact. The adopted rules implement §§3.04(7) and 3.05(7) and (8) of the Compact as set out at Tex. Health & Safety Code §403.006.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on December 6, 2022.

TRD-202204846
Stephen Raines
Executive Director
Texas Low-Level Radioactive Waste Disposal Compact Commission
Effective date: December 26, 2022
Proposal publication date: October 14, 2022
For further information, please call: (512) 350-6241

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TITLE 34. PUBLIC FINANCE

PART 4. EMPLOYEES RETIREMENT SYSTEM OF TEXAS

CHAPTER 75. HAZARDOUS PROFESSION DEATH BENEFITS

34 TAC §75.2

The Employees Retirement System of Texas (ERS) adopts amendments to 34 Texas Administrative Code Chapter 75, concerning Hazardous Profession Death Benefits, by amending §75.2 (Additional Benefit Claims) with changes to the proposed text as published in the July 8, 2022, issue of the *Texas Register* (47 TexReg 3952). The amendments were approved by the ERS Board of Trustees at its December 6, 2022 meeting. This section will be republished.

Section 75.2 is amended in order to allow the surviving spouses of certain public servants who die in the line of duty after September 1, 2022, to receive a cash balance annuity that would be calculated as provided by Tex. Gov't Code §820.053, which became effective on September 1, 2022.

No comments were received regarding the proposed amendments.

The amendments are adopted under Tex. Gov't Code §815.102, which provides authorization for the ERS Board of Trustees to adopt rules necessary for the administration of the funds of the retirement system and regarding the transaction of any other business of the Board.

§75.2. Additional Benefit Claims.

(a) In addition to the documents required under §75.1 of this chapter, the following documents shall be submitted in an application for benefits under Tex. Gov't Code Chapter 615, Subchapter F, unless the executive director or the executive director's designee waives their submission:

(1) a sworn statement from the person making the claim that:

(A) the decedent, on the date of death, was not receiving and was not eligible to receive an annuity under an employee retirement plan;

(B) the surviving spouse, if any, has not remarried;

(C) the surviving spouse, if any, is not retired and is not eligible to retire under an employee retirement plan; and

(D) the surviving spouse, if any, is not receiving and is not eligible to receive social security benefits; and

(2) an itemized statement of funeral expenses incurred, if the application includes a claim for payment of funeral expenses.

(b) If the decedent died before September 1, 2022, then except as provided by subsection (e) of this section, an annuity payable to a surviving spouse who is eligible for benefits under Tex. Gov't Code Chapter 615, Subchapter F, shall be computed as provided by Tex. Gov't Code §814.105 as if the decedent, on the date of death:

(1) was employed by the Texas Department of Public Safety at the lowest salary provided by the General Appropriations Act for a peace officer position, if the decedent held a peace officer position on the date of death, or by the Texas Department of Criminal Justice at the lowest salary provided by the General Appropriations Act for a custodial personnel position, if the decedent held a custodial personnel position on the date of death;

(2) had accrued 10 years of service credit in the applicable position; and

(3) was eligible to retire without regard to any age requirement.

(c) If the decedent died on or after September 1, 2022, then except as provided by subsection (e) of this section, a surviving spouse who is eligible for benefits under Tex. Gov't Code Chapter 615, Subchapter F, is entitled to receive the greater of an annuity computed as provided by subsection (b) of this section or an annuity computed as provided by Tex. Gov't Code §820.053 as if the decedent, on the date of death:

(1) was employed by the Texas Department of Public Safety at the lowest salary provided by the General Appropriations Act for a peace officer position, if the decedent held a peace officer position on the date of death, or by the Texas Department of Criminal Justice at the lowest salary provided by the General Appropriations Act for a custodial personnel position, if the decedent held a custodial personnel position on the date of death;

(2) had accrued 10 years of service credit in the applicable position;

(3) was eligible to retire without regard to any age requirement; and

(4) was not eligible for the additional benefit provided by Tex. Gov't Code §820.053(a)(2)(B).

(d) For purposes of subsection (c) of this section, the system shall:

(1) include gain sharing interest in the computation of an annuity under Tex. Gov't Code §820.053;

(2) determine which annuity computation would result in the greater annuity at the time the annuity is first paid; and

(3) allow the surviving spouse to reject the system's determination and elect to receive the lesser annuity by providing written notice of the election, which shall be irrevocable, to the system before any payment is made.

(e) In lieu of an amount computed under subsection (b) or (c) of this section, an annuity shall be paid in the amount the decedent would have been eligible to receive under the decedent's employee retirement plan if the decedent had been eligible to retire at the age and with the service attained on the last day of the month of the decedent's death if:

(1) the person making the claim requests payment of the amount computed under this subsection before any payment computed under subsection (b) or (c) of this section is made;

(2) an authorized representative of the employee retirement plan in which the decedent was a participant certifies the amount computed under this subsection; and

(3) the amount computed under this subsection is greater than the amounts computed under subsections (b) and (c) of this section.

(f) The reduction factors applied to a death benefit plan administered by the system shall be applied in the same manner to an annuity computed under subsection (b) or (c) of this section.

(g) As a condition of receipt of an annuity under Tex. Gov't Code Chapter 615, Subchapter F, an eligible surviving spouse shall agree to annually certify the spouse's eligibility under subsection (a)(1)(B) - (D) of this section and to notify the system of any change in circumstances affecting the spouse's continued eligibility. Failure to comply with this requirement or to provide the agreed certification is a basis for suspension of annuity payments until compliance occurs.

(h) The amount reimbursed for funeral expenses under Tex. Gov't Code Chapter 615, Subchapter F, shall not exceed the lesser of $6,000 or the amount of funeral expenses actually incurred.

(i) The executive director or the executive director's designee may require additional information or affidavits as necessary to establish the validity of any claim 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.

Filed with the Office of the Secretary of State on December 9, 2022.

TRD-202204885
Cynthia C. Hamilton
General Counsel
Employees Retirement System of Texas
Effective date: December 29, 2022
Proposal publication date: July 8, 2022
For further information, please call: (877) 275-4377

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TITLE 40. SOCIAL SERVICES AND ASSISTANCE

PART 1. DEPARTMENT OF AGING AND DISABILITY SERVICES

CHAPTER 8. CLIENT CARE--INTELLECTUAL DISABILITY SERVICES

SUBCHAPTER L. HUMAN IMMUNODEFICIENCY VIRUS (HIV) PREVENTION, TESTING, AND TREATMENT

40 TAC §§8.281 - 8.297

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 Title 40, Part 1, Chapter 8, Subchapter L, Human Immunodeficiency Virus (HIV) Prevention, Testing, and Treatment, which comprises §8.281, concerning Purpose; §8.282, concerning Application; §8.283, concerning Definitions; §8.284, concerning Policy Overview; §8.285, concerning Education; §8.286, concerning Screening for HIV Antibody; §8.287, concerning Counseling; §8.288,

concerning Confidentiality of Test Results; §8.289, concerning Documentation of Test Results; §8.290, concerning Required Reporting of Test Results; §8.291, concerning Management of Exposure to Blood/Body Substances; §8.292, concerning Limitation of Client Activity; §8.293, concerning Personnel Issues; §8.294, concerning Responsibility and Resources; §8.295, concerning Exhibits; §8.296, concerning References; and §8.297, concerning Distribution.

The repeals of §§8.281 - 8.297 are adopted without changes to the proposed text as published in the September 16, 2022, issue of the *Texas Register* (47 TexReg 5767). These rules will not be republished.

BACKGROUND AND JUSTIFICATION

The repeals remove HHSC rules from Texas Administrative Code (TAC) Title 40, Chapter 8, Subchapter L. The repeals delete rules as no longer necessary because content of the rules have been added to new rules in 26 TAC Chapter 985, Human Immunodeficiency Virus Prevention and Treatment in State Supported Living Centers. The new rules are adopted elsewhere in this issue of the *Texas Register.*

COMMENTS

The 31-day comment period ended October 17, 2022.

During this period, HHSC did not receive any comments regarding the proposed rules.

STATUTORY AUTHORITY

The repeals are authorized by Texas Government Code §531.0055, which provides that the Executive Commissioner of HHSC shall adopt rules for the operation and provision of services by the health and human services agencies; §531.008(c)(5), which requires the Executive Commissioner to establish a facilities division for the purpose of administering state facilities, including state hospitals and state supported living centers; and Texas Health and Safety Code §531.001(h), which provides that the Executive Commissioner is responsible for the planning, policy development, and resource development and allocation for and oversight of mental health and intellectual disability services in this state.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on December 12, 2022.

TRD-202204972
Karen Ray
Chief Counsel
Department of Aging and Disability Services
Effective date: January 1, 2023
Proposal publication date: September 16, 2022
For further information, please call: (512) 438-3049

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CHAPTER 91. HEARINGS UNDER THE ADMINISTRATIVE PROCEDURE ACT

40 TAC §§91.1 - 91.8

As required by Texas Government Code §531.0202(b), the Texas Department of Aging and Disability Services (DADS) was abolished effective September 1, 2017, after all 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 40 TAC, Part 1, Chapter 91, Hearings Under the Administrative Procedure Act, comprised of §§91.1 - 91.8.

The repeal of §§91.1 - 91.8 is adopted without changes to the proposed text as published in the August 26, 2022, issue of the *Texas Register* (47 TexReg 5080). These rules will not be republished.

BACKGROUND AND JUSTIFICATION

The repeal of 40 TAC, Chapter 91 deletes the rules as no longer needed, because the content of the rules has been added to proposed new 26 TAC, Chapter 110.

COMMENTS

The 31-day comment period ended September 26, 2022. During this period, HHSC did not receive any comments regarding the proposed rules.

STATUTORY AUTHORITY

The repeals are authorized by Texas Government Code §531.0055, which provides that the Executive Commissioner of HHSC shall adopt rules for the operation and provision of services by the health and human services agencies; Texas Government Code §531.021, which 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 Government Code §531.033, which provides the Executive Commissioner of HHSC with broad rule-making authority; and Texas Human Resources Code §32.021, which provides that HHSC shall adopt necessary rules for the proper and efficient operation of the Medicaid program.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on December 12, 2022.

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Karen Ray
Chief Counsel
Department of Aging and Disability Services
Effective date: January 1, 2023
Proposal publication date: August 26, 2022
For further information, please call: (512) 438-3161

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PART 20. TEXAS WORKFORCE COMMISSION

CHAPTER 850. VOCATIONAL REHABILITATION SERVICES ADMINISTRATIVE RULES AND PROCEDURES

The Texas Workforce Commission (TWC) adopts amendments to the following sections of Chapter 850, relating to Vocational Rehabilitation Services Administrative Rules and Procedures:

Subchapter A. Vocational Rehabilitation General Rules, §§850.3 - 850.5 and §850.11

Subchapter C. Councils, Board, and Committees, §§850.33 - 850.35

Subchapter E. Vocational Rehabilitation Services Appeals and Hearing Procedures, §§850.60 - 850.62, 850.69, 850.82, and 850.84

TWC adopts the following new section to Chapter 850, relating to Vocational Rehabilitation Services Administrative Rules and Procedures:

Subchapter A. Vocational Rehabilitation General Rules, §850.7

TWC adopts the repeal of the following section of Chapter 850, relating to Vocational Rehabilitation Services Administrative Rules and Procedures:

Subchapter C. Councils, Board, and Committees, §850.32

The amendments to §§850.3 - 850.5, 850.11, 850.33 - 850.35, 850.60 - 850.62, 850.69, and 850.82; new §850.7; and the repeal of §850.32 are adopted *without changes,* to the proposal as published in the September 2, 2022, issue of the *Texas Register* (47 TexReg 5307), and, therefore, the adopted rule text will not be published. The amendment to §850.84 is adopted *with changes* to the proposed text and the adopted rule text will be published.

PART I. PURPOSE, BACKGROUND, AND AUTHORITY

Senate Bill (SB) 208, 84th Texas Legislature, Regular Session (2015), added Texas Labor Code, §351.002, which transferred the administration of vocational rehabilitation (VR) services from the Texas Department of Assistive and Rehabilitative Services (DARS) to TWC effective September 1, 2016. The administrative rules relating to the VR Services Program were transferred from DARS to TWC and codified under 40 TAC Chapter 850. On May 13, 2019, TWC amended Chapter 850 to align the chapter with TWC's operation of the VR Services Program.

The amendments to Chapter 850 are adopted to address stakeholder comments, clarify existing rules, and improve program service delivery, consistency, and efficiency.

Texas Government Code, §2001.039 requires that every four years each state agency review and consider for readoption, revision, or repeal each rule adopted by that agency. TWC reviewed the rules in Chapter 850 and determined that the rules are needed, reflect current legal and policy considerations, and reflect current TWC procedures. The reasons for initially adopting the rules continue to exist and any changes to the rules are described in Part II of this preamble.

PART II. EXPLANATION OF INDIVIDUAL PROVISIONS

(Note: Minor editorial changes are made that do not change the meaning of the rules and, therefore, are not discussed in the Explanation of Individual Provisions.)

SUBCHAPTER A. VOCATIONAL REHABILITATION GENERAL RULES

TWC adopts the following amendments to Subchapter A:

§850.3. Definitions

Section 850.3 is amended to add the definition for "Agency" and to revise the term from "counselor" to "vocational rehabilitation counselor" for clarification. Throughout Chapter 850, the term "counselor" has been updated to "vocational rehabilitation counselor" or "VR counselor."

§850.4. Opportunities for Citizen Participation

Section 850.4 is amended to clarify information regarding open meetings and add a reference to 40 TAC Chapter 800, Subchapter G, relating to Petition for Adoption of Rules.

§850.5. Complaints

Section 850.5 is amended to expand the methods for filing complaints.

§850.7. Monitoring and Oversight of Vocational Rehabilitation Counselor Performance and Decision Making.

New §850.7 is added to establish an administrative rule for the monitoring and oversight of VR counselor performance and decision making in accordance with Texas Labor Code, §352.104, Training and Supervision of Counselors.

§850.11. Qualified Vocational Rehabilitation Counselor

Section 850.11 is amended to include Vocational Rehabilitation Division acronym "VRD" in the references to "management" and in place of "division" for clarity.

Section 850.11(f) is amended to clarify that reimbursement is allowed for one GRE exam.

SUBCHAPTER C. COUNCILS, BOARD, AND COMMITTEES

TWC adopts the following amendments to Subchapter C:

§850.32. Definitions

Section 850.32 is repealed because the section is no longer needed. The definition for "Agency" and acronym "RCT" are defined elsewhere in Chapter 850.

SUBCHAPTER E. VOCATIONAL REHABILITATION SERVICES APPEALS AND HEARING PROCEDURES

TWC adopts the following amendments to Subchapter E:

§850.60. Scope

Section 850.60 is amended to remove references to the Business Enterprises of Texas (BET) program because the program is addressed in 40 TAC Chapter 854; remove Comprehensive Rehabilitative Services (CRS) from the scope of services because CRS falls under Texas Health and Human Services Commission oversight; and add a reference to the Client Assistance Program (CAP).

§850.61. Definitions

Section 850.61 is amended to remove the definitions of "counselor" and "State Plan" because the terms are defined in §850.3.

§850.62. Filing a Request for Review

Section 850.62 is amended to state that the request for a review shall be filed within 180 calendar days from the date of the determination and that the CAP can assist and advocate for customers during an appeal and informal dispute resolution.

§850.69. Reasonable Accommodations

Section 850.69 is amended to clarify that TWC shall bear the costs related to providing reasonable accommodations for hearings or proceedings conducted.

§850.82. Documentary Evidence and Official Notice

Section 850.82 is amended to remove the reference to 34 Code of Federal Regulations (CFR) Part 395 as BET appeals are addressed in 40 TAC Chapter 854.

§850.84. Impartial Hearing Officer Decision

Section 850.84(b) is not amended as proposed. At adoption, §850.84(b) is removed to avoid confusion with federal criteria relating to a timely hearing decision. Subsequent subsections are relettered accordingly.

Relettered §850.84(c) is amended to remove the references to Texas Labor Code, Chapter 355 and 34 CFR Part 395 as BET appeals are addressed in 40 TAC Chapter 854.

PART III. PUBLIC COMMENTS

The public comment period closed on October 3, 2022. TWC received comments from Disability Rights Texas (DRTx) and one individual.

General Comment

COMMENT: An individual commented in support of the proposed rule amendments.

RESPONSE: The Commission appreciates the support.

§850.84. Impartial Hearing Officer Decision

COMMENT: DRTx recommended that §850.84(b) be revised to align with the federal criteria for a timely hearing decision.

RESPONSE: At adoption, the Commission removed §850.84(b) to avoid confusion with the federal criteria for a timely hearing decision.

SUBCHAPTER A. VOCATIONAL REHABILITATION GENERAL RULES

40 TAC §§850.3 - 850.5, 850.7, 850.11

STATUTORY AUTHORITY

The rules are adopted under Texas Labor Code, Chapter 352 and Texas Human Resources Code, Chapter 111, which provide TWC with the authority to adopt, amend, or repeal such rules as it deems necessary for the effective administration of vocational rehabilitation services.

The adopted rules affect Texas Human Resources Code, Chapter 111 and Texas Labor Code, Chapter 352.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on December 6, 2022.

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Les Trobman
General Counsel
Texas Workforce Commission
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Proposal publication date: September 2, 2022
For further information, please call: (512) 850-8356

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SUBCHAPTER C. COUNCILS, BOARD, AND COMMITTEES

40 TAC §850.32

The repeal is adopted under Texas Labor Code, Chapter 352 and Texas Human Resources Code, Chapter 111, which provide TWC with the authority to adopt, amend, or repeal such rules as it deems necessary for the effective administration of vocational rehabilitation services.

The adopted repeal affects Texas Human Resources Code, Chapter 111 and Texas Labor Code, Chapter 352.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

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40 TAC §§850.33 - 850.35

The rules are adopted under Texas Labor Code, Chapter 352 and Texas Human Resources Code, Chapter 111, which provide TWC with the authority to adopt, amend, or repeal such rules as it deems necessary for the effective administration of vocational rehabilitation services.

The adopted rules affect Texas Human Resources Code, Chapter 111 and Texas Labor Code, Chapter 352.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

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Texas Workforce Commission
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SUBCHAPTER E. VOCATIONAL REHABILITATION SERVICES APPEALS AND HEARING PROCEDURES

40 TAC §§850.60 - 850.62, 850.69, 850.82, 850.84

The rules are adopted under Texas Labor Code, Chapter 352 and Texas Human Resources Code, Chapter 111, which provide TWC with the authority to adopt, amend, or repeal such rules as it deems necessary for the effective administration of vocational rehabilitation services.

The adopted rules affect Texas Human Resources Code, Chapter 111 and Texas Labor Code, Chapter 352.

§850.84. Impartial Hearing Officer Decision.

(a) Within 30 days of the hearing completion date, the IHO shall issue a decision that is based on the evidence and consistent with the provisions of the approved State Plan; the Act, as amended; federal vocational rehabilitation regulations, state regulations, and policies that are consistent with federal requirements, and shall provide to the appellant or, if appropriate, the appellant's authorized representative, and the Agency's authorized representative or the Agency's Office of General Counsel, as appropriate, a full written report of the findings of fact, conclusions of law, and any other grounds for the decision.

(b) The decision shall address each issue considered by the IHO.

(c) The IHO may prescribe such remedies as are appropriate within the scope of, and permitted by, as applicable, Texas Labor Code, Chapter 352; the Act, as amended; the regulations of the Rehabilitation Services Administration of the United States Department of Education, 34 Code of Federal Regulations Parts 361 and 365; and the Agency's policies and rules.

(1) The IHO shall not award restitutionary, compensatory, or monetary relief, including monetary damages, to any party.

(2) The IHO shall not prescribe an action affecting the employment of an Agency employee.

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 856. VOCATIONAL REHABILITATION SERVICES

The Texas Workforce Commission (TWC) adopts amendments to the following sections of Chapter 856, relating to Vocational Rehabilitation Services:

Subchapter A. Program and Purpose, §856.1 and §856.3

Subchapter B. Eligibility, §§856.20, 856.40, 856.41, 856.45, 856.50, 856.52, 856.53, and 856.56

Subchapter C. Rates for Medical Services, §856.57

Subchapter D. Customer Participation, §856.59

Subchapter E. Comparable Benefits, §856.71

Subchapter G. Criss Cole Rehabilitation Center, §856.84

The amendments to §§856.1, 856.3, 856.20, 856.40, 856.41, 856.45, 856.50, 856.56, 856.59, 856.71, and 856.84 are adopted *without changes* to the proposed text as published in the September 2, 2022, issue of the *Texas Register* (47 TexReg 5314), and, therefore, the adopted rule text will not be published. The amendments to §§856.52, 856.53, and 856.57 are adopted *with changes* to the proposed text as published and the adopted rule text will be published.

PART I. PURPOSE, BACKGROUND, AND AUTHORITY

On October 17, 2017, TWC adopted rules under 40 TAC Chapter 856 to align with the integration of TWC, Vocational Rehabilitation (VR) Services, and Blind Services. Further amendments to Chapter 856 were adopted on July 31, 2018, to incorporate the Criss Cole Rehabilitation Center.

The amendments to Chapter 856 are adopted to address stakeholder comments, clarify existing rules, improve consistency with federal regulations, and increase efficiency of program operations.

Texas Government Code, §2001.039 requires that every four years each state agency review and consider for readoption, revision, or repeal each rule adopted by that agency. TWC conducted a rule review of Chapter 856 and determined that the rules are needed, reflect current legal and policy considerations, and reflect current TWC procedures. The reasons for initially adopting the rules continue to exist and any changes to the rules are described in Part II of this preamble.

PART II. EXPLANATION OF INDIVIDUAL PROVISIONS

(Note: Minor editorial changes are made that do not change the meaning of the rules and, therefore, are not discussed in the Explanation of Individual Provisions.)

SUBCHAPTER A. PROGRAM AND PURPOSE

TWC adopts the following amendments to Subchapter A:

§856.1. Purpose

Section 856.1 is amended to add additional language to better align with Workforce Innovation and Opportunity Act.

§856.3. Definitions

Section 856.3 is amended to add definitions for "academic training" and "vocational rehabilitation counselor."

SUBCHAPTER B. ELIGIBILITY AND PROVISION OF SERVICES

TWC adopts the following amendments to Subchapter B:

The subchapter title is amended from "Eligibility" to "Eligibility and Provision of Services" to better describe the subchapter's content.

§856.20. Eligibility

Section 856.20 is amended to include additional language to better align with 34 Code of Federal Regulations (CFR) §361.42.

§856.40. Provision of Goods and Services

Section 856.40 is amended to change the section name from "Provision of Services" to "Provision of Goods and Services" to better describe the section's content.

Section 856.40 is amended to include additional language to better align with 34 CFR §361.45.

§856.41. Comprehensive Assessment

Section 856.41 is amended to clarify the criteria used for comprehensive assessments and to clarify that certain types of assessments are not mandatory but are completed as appropriate to identify VR needs and determine the services necessary to meet the customer's employment goal.

§856.45. Vocational and Other Training Services

Section 856.45 is amended to clarify that training at a vocational or technical school is not required to occur in Texas, to clarify exceptions for Supplemental Security Income (SSI) or Social Security Disability Insurance (SSDI) recipients, and to remove current §856.45(c)(9) as this was added in the "academic training" definition, as well as §856.45(e), which precludes the Vocational Rehabilitation Division (VRD) from paying tuition and fees to a business, technical, or vocational school above the published fees.

§856.50. Post-Employment Services

Section 856.50 is amended to better align with 34 CFR §361.5(c)(41).

§856.52. Individualized Plan for Employment

Section 856.52 is amended to increase efficiency in customer notifications.

At adoption, §856.52(m) is added to include that VRD provides services in the most integrated setting that is appropriate for the services involved and is consistent with the informed choice of the eligible individual. The subsequent subsections are relettered accordingly.

§856.53. Customers Determined to Have Achieved Employment Outcome

Section 856.53(b) is not removed as proposed. At adoption, §856.53(b) is retained and amended to clarify that the customer is informed by VRD of the availability of post-employment services.

§856.56. Assistive Technology Devices

Section 856.56 is amended to remove the reference to cost.

SUBCHAPTER C. RATES FOR MEDICAL SERVICES

TWC adopts the following amendments to Subchapter C:

The subchapter title is amended from "Provision of Vocational Rehabilitation Services" to "Rates for Medical Services" to better describe the subchapter's content.

§856.57. Alternative Purchasing Methods - Rates for Medical Services

Section 856.57 is amended to increase efficiency in the process of establishing rates for medical services by adding that TWC's executive director or deputy executive director may establish the rates annually based on the standards adopted by TWC's three-member Commission (Commission). Section 856.57 is also amended to include the process for providing the notice of the proposed schedule of rates for public comment.

At adoption, §856.57(5) is amended to allow exceptions to established Maximum Affordable Payment Schedule (MAPS) rates on a case-by-case basis by VR counselor and exceptions contrary to the Agency's medical director's or optometric consultant's recommendation require approval by the VRD deputy director or VRD director.

SUBCHAPTER D. CUSTOMER PARTICIPATION

TWC adopts the following amendments to Subchapter D:

§856.59. Purpose of Customer Participation

Section 856.59 is amended to clarify that customers may need to participate in the cost of services based on their financial need unless the customer is a recipient of Social Security benefits, either SSI or SSDI.

SUBCHAPTER E. COMPARABLE BENEFITS

TWC adopts the following amendments to Subchapter E:

§856.71. Availability of Comparable Services and Benefits

Section 856.71 is amended to include additional language to better align with 34 CFR §361.53(a)(1).

SUBCHAPTER G. CRISS COLE REHABILITATION CENTER

TWC adopts the following amendments to Subchapter G:

§856.84. Initial Eligibility

Section 856.84 is amended to remove the requirement that a customer is a Texas resident.

PART III. PUBLIC COMMENTS

The public comment period closed on October 3, 2022. TWC received comments from Disability Rights Texas (DRTx) and one individual.

General Comment

COMMENT: An individual commented in support of the proposed rule amendments.

RESPONSE: The Commission appreciates the support.

§856.45. Vocational and Other Training Services

COMMENT: DRTx recommended that all customers who are below the basic living requirement be exempt from all training tuition costs and additional fees.

RESPONSE: TWC is in compliance with the applicable federal regulations on financial needs tests. TWC's policy allows for exceptions for customers not receiving SSI or SSDI, who are below the basic living requirement, and who have a financial hardship or other extenuating circumstances.

No changes were made in response to the comment.

§856.52. Individualized Plan for Employment

COMMENT: DRTx recommended adding the requirements of 34 CFR §361.46(a)(3) and (4) and (b)(4) - (7) for an IPE to §856.52.

RESPONSE: The Commission agrees with including the requirement in 34 CFR §361.46(a)(3) and, at adoption, added §856.52(m) to include that VRD provides services in the most integrated setting that is appropriate for the services involved and is consistent with the informed choice of the eligible individual.

The requirements in 34 CFR §361.46(a)(4) and (b)(4) - (7) are not included because current §856.52(g) indicates that data used to prepare the IPE must include the information necessary to satisfy federal requirements.

§856.53. Customers Determined to Have Achieved Employment Outcome

COMMENT: DRTx recommended amending proposed §856.53 to state the customer should be informed of post-employment services prior to closing the VR case.

RESPONSE: At adoption the Commission retained §856.53(b) and amended the subsection to clarify that the customer is informed by VRD of available post-employment services.

§856.57. Alternative Purchasing Methods - Rates for Medical Services

COMMENT: DRTx recommended changing the authority to make exceptions to MAPS rates to the VRD director or designated VRD staff, because a medical director or optometric consultant does not have the authority to grant such exceptions.

RESPONSE: At adoption, the Commission amended §856.57(5) to allow exceptions to established MAPS rates on a case-by-case basis by a VR counselor and exceptions contrary to TWC's medical director's or optometric consultant's recommendation require approval by the VRD deputy director or VRD director.

§856.59. Purpose of Customer Participation

COMMENT: DRTx recommended that all customers who are below the basic living requirement be exempt from all cost of VR services.

RESPONSE: TWC is in compliance with the applicable federal regulations on financial needs tests. TWC's policy allows for exceptions for customers not receiving SSI or SSDI, who are below the basic living requirement, and who have a financial hardship or other extenuating circumstances.

No changes were made in response to the comment.

SUBCHAPTER A. PROGRAM AND PURPOSE

40 TAC §856.1, §856.3

STATUTORY AUTHORITY

The rules are adopted under Texas Labor Code, Chapter 352 and Texas Human Resources Code, Chapter 111, which provide TWC with the authority to adopt, amend, or repeal such rules as it deems necessary for the effective administration of vocational rehabilitation services.

The adopted rules affect Texas Human Resources Code, Chapter 111, and Texas Labor Code, Chapter 352.

§856.1. Purpose.

The Vocational Rehabilitation Services Program is a joint state- and federal-funded program administered by the Agency's Vocational Rehabilitation Division (VRD) to assess, plan, develop, and provide vocational rehabilitation services for eligible individuals with disabilities, consistent with their unique strengths, resources, priorities, concerns, abilities, capabilities, interests, and informed choice so that these individuals can prepare for and engage in competitive integrated employment and achieve economic self-sufficiency. The Vocational Rehabilitation Services Program seeks to empower individuals with disabilities to maximize employment, economic self-sufficiency, independence, and inclusion in and integration into society. In accordance with the Rehabilitation Act of 1973, as amended, VRD is the single designated state unit for the Vocational Rehabilitation Services Program.

§856.3. Definitions.

In addition to the definitions contained in Texas Labor Code, §352.001 and 34 Code of Federal Regulations §361.5, the following words and terms, when used in this chapter, shall have the following meanings.

(1) Academic training--A postsecondary program of organized instruction or study that may lead to an academic, professional, or vocational degree, certificate, or other recognized educational credential. Academic training does not include continuing education required for maintaining certification in a field in which the customer is already gainfully employed.

(2) Applicant--An individual who applies to the Vocational Rehabilitation Division for vocational rehabilitation services.

(3) Blind--An individual having not more than 20/200 visual acuity in the better eye with correcting lenses or visual acuity greater than 20/200 but with a limitation in the field of vision such that the widest diameter of the visual field subtends an angle no greater than 20 degrees.

(4) Customer--An individual with a disability who has applied for or is receiving vocational rehabilitation services.

(5) Visually Impaired--A visual acuity of not more than 20/70 in the better eye with correcting lenses, or visual acuity greater than 20/70 but with a limitation in the field of vision such that the widest diameter of the visual field subtends an angle no greater than 30 degrees.

(6) Vocational rehabilitation counselor--An Agency employee who is trained to provide vocational guidance and counseling and meets the minimum qualifications designated in a functional job description.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on December 6, 2022.

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Les Trobman
General Counsel
Texas Workforce Commission
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Proposal publication date: September 2, 2022
For further information, please call: (512) 850-8356

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SUBCHAPTER B. ELIGIBILITY AND PROVISION OF SERVICES

40 TAC §§856.20, 856.40, 856.41, 856.45, 856.50, 856.52, 856.53, 856.56

The rules are adopted under Texas Labor Code, Chapter 352 and Texas Human Resources Code, Chapter 111, which provide TWC with the authority to adopt, amend, or repeal such rules as it deems necessary for the effective administration of vocational rehabilitation services.

The adopted rules affect Texas Human Resources Code, Chapter 111, and Texas Labor Code, Chapter 352.

§856.52. Individualized Plan for Employment.

(a) The Vocational Rehabilitation Division (VRD) initiates and continuously develops an individualized plan for employment (IPE) for each individual eligible for vocational rehabilitation (VR) services and for each individual being provided such services in trial work. All IPEs must be written using the form prescribed by VRD for this purpose.

(b) VRD advises the customer or, the customer's parent, guardian, or other representative, as appropriate, of the customer's options and all VRD procedures and requirements affecting the development and review of an IPE, including the availability of special modes of communication.

(c) The VR counselor and customer or, as appropriate, the customer's parent, guardian, or other representative, uses information obtained during the assessment to help the customer make informed choices about VR needs, employment outcome, intermediate rehabilitation objectives, and the nature and scope of VR services and the service providers to be included in the IPE.

(d) The VR counselor must provide the customer or, as appropriate, the customer's representative, with a copy of the IPE and its amendments, in the mode of communication specified by the customer or representative.

(e) All substantive revisions necessary to reflect changes in the customer's employment outcome, specific VR services, service providers, and the methods used to procure services must be incorporated into the customer's IPE.

(f) The customer may develop all or part of the IPE with assistance from the VR counselor, a qualified vocational rehabilitation counselor not employed by VRD, or another resource outside VRD. VRD does not pay for non-VRD assistance with IPE development. The IPE is not final until approved by the VR counselor. A copy of the plan and any amendments are provided to the customer or the customer's parent, guardian, or other representative, as appropriate.

(g) The data used to prepare the IPE must include the information necessary to satisfy federal requirements and to adequately document the customer's plan of services. Regardless of the approach selected by the customer to develop the IPE, the IPE must, at a minimum, contain the following mandatory components:

(1) a description of the customer's specific employment outcome;

(2) a description of the specific VR services that are needed to achieve the employment outcome, including, as appropriate, the provision of assistive technology devices and assistive technology services; personal assistance services, including training in the management of those services; and timelines for initiating the services and for achieving the employment outcome;

(3) a description of the entity chosen by the customer or, as appropriate, the customer's representative, that will provide the VR services, and the methods used to procure the services;

(4) a description of criteria to evaluate progress toward achievement of the employment outcome;

(5) the terms and conditions of the IPE, including, as appropriate, information describing:

(A) VRD responsibilities; and

(B) customer responsibilities, including:

(i) the customer's responsibilities related to his or her employment outcome;

(ii) if applicable, the customer's participation in paying for the costs of the plan;

(iii) the customer's responsibility to apply for and secure comparable benefits; and

(iv) the responsibilities of other entities resulting from arrangements made under comparable services or benefits;

(6) for a customer with the most significant disabilities for whom an employment outcome in a supported employment setting has been determined to be appropriate, information identifying:

(A) the extended services that the customer needs; and

(B) the source of extended services or, if the source of the extended services cannot be identified at the time that the IPE is developed, a description of the basis for a reasonable expectation that a source will become available; and

(7) as determined to be necessary, a statement of projected need for post-employment services.

(h) In developing an IPE for a student with a disability who is receiving special education services, VRD must consider the student's individualized education program.

(i) The VR counselor must advise the customer of the customer's rights and the means by which the customer may express and seek remedy for dissatisfaction with the plan, including the opportunity for an administrative review of VRD action and a fair hearing in accordance with the Administrative Procedure Act, Texas Government Code, Chapter 2001, and the rules in Chapter 850 of this title (relating to Vocational Rehabilitation Services Administrative Rules and Procedures).

(j) The VR counselor reviews the IPE as often as necessary, but on at least an annual basis, at which time the customer or the customer's parent, guardian, or other representative, as appropriate, is afforded an opportunity to review the plan and, if necessary, jointly redevelop its terms.

(k) The IPE is a joint commitment that must be signed by both the VR counselor and the customer.

(l) VRD may provide only goods and services that are reasonable and necessary to achieve the employment outcome identified in the customer's IPE.

(m) VRD provides services in the most integrated setting that is appropriate for the services involved and is consistent with the informed choice of the eligible individual.

(n) Before suspending, reducing, or terminating any planned service in the IPE, VRD shall provide notification of intent to the customer.

(o) VRD must suspend, reduce, or terminate the customer's planned services no sooner than 10 working days after notice has been provided to the customer.

§856.53. Customers Determined to Have Achieved Employment Outcome.

(a) The Vocational Rehabilitation Division (VRD) determines a customer to have achieved an employment outcome when the following requirements are met:

(1) the provision of services under the customer's individualized plan for employment (IPE) has contributed to the achievement of the employment outcome;

(2) the customer has achieved the employment outcome that is described in the customer's IPE and that is consistent with the

customer's strengths, resources, priorities, concerns, abilities, capabilities, interests, and informed choice;

(3) the employment outcome is in an integrated setting;

(4) the customer has maintained the employment outcome for at least 90 days; and

(5) the customer and the vocational rehabilitation counselor consider the employment outcome to be satisfactory and agree that the customer is performing well on the job.

(b) After a customer has been determined to have achieved an employment outcome, VRD informs the customer of the availability of post-employment services as required to maintain, regain, or advance in employment.

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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Les Trobman
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SUBCHAPTER C. RATES FOR MEDICAL SERVICES

40 TAC §856.57

The rule is adopted under Texas Labor Code, Chapter 352 and Texas Human Resources Code, Chapter 111, which provide TWC with the authority to adopt, amend, or repeal such rules as it deems necessary for the effective administration of vocational rehabilitation services.

The adopted rule affects Texas Human Resources Code, Chapter 111, and Texas Labor Code, Chapter 352.

§856.57. Alternative Purchasing Methods - Rates for Medical Services.

Under Texas Labor Code, §352.054, this section sets forth the standards governing the determination of rates paid for medical services provided by the Agency. The rates determined under these standards are reevaluated annually:

(1) Rates shall be established based on Medicare and Medicaid schedules for current procedural terminology. Where Medicare and Medicaid schedules are not applicable, rates that represent best value shall be established based on factors that include reasonable and customary industry standards for each specific service.

(2) Rates shall be established at a level adequate to ensure that enough qualified providers are available to provide assessment and treatment within a geographic distribution that reflects customer or claimant distribution.

(3) Notification of the proposed schedule of rates shall be published in the *Texas Register* to allow interested persons to present comments to the Agency before the rates are established.

(4) After the reevaluation process is completed in accordance with the requirements in paragraphs (1) and (2) of this section, the Agency's executive director or deputy executive director may establish the rates for medical services.

(5) Exceptions to established rates may be made on a case-by-case basis by the Vocational Rehabilitation counselor after consultation with the Agency's medical director or optometric consultant. Exceptions contrary to the Agency's medical director's or optometric consultant's recommendation require approval by the Vocational Rehabilitation Division (VRD) deputy director or VRD director.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

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SUBCHAPTER D. CUSTOMER PARTICIPATION

40 TAC §856.59

The rule is adopted under Texas Labor Code, Chapter 352 and Texas Human Resources Code, Chapter 111, which provide TWC with the authority to adopt, amend, or repeal such rules as it deems necessary for the effective administration of vocational rehabilitation services.

The adopted rule affects Texas Human Resources Code, Chapter 111, and Texas Labor Code, Chapter 352.

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SUBCHAPTER E. COMPARABLE BENEFITS

40 TAC §856.71

The rule is adopted under Texas Labor Code, Chapter 352 and Texas Human Resources Code, Chapter 111, which provide TWC with the authority to adopt, amend, or repeal such rules as

it deems necessary for the effective administration of vocational rehabilitation services.

The adopted rule affects Texas Human Resources Code, Chapter 111, and Texas Labor Code, Chapter 352.

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SUBCHAPTER G. CRISS COLE REHABILITATION CENTER

40 TAC §856.84

The rule is adopted under Texas Labor Code, Chapter 352 and Texas Human Resources Code, Chapter 111, which provide TWC with the authority to adopt, amend, or repeal such rules as it deems necessary for the effective administration of vocational rehabilitation services.

The adopted rule affects Texas Human Resources Code, Chapter 111, and Texas Labor Code, Chapter 352.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

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TITLE 43. TRANSPORTATION

PART 10. TEXAS DEPARTMENT OF MOTOR VEHICLES

CHAPTER 215. MOTOR VEHICLE DISTRIBUTION

SUBCHAPTER E. GENERAL DISTINGUISHING NUMBERS

43 TAC §215.133, §215.140

INTRODUCTION. The Texas Department of Motor Vehicles (department) adopts amendments to 43 TAC §215.133, General Distinguishing Number, and §215.140, Established and Permanent Place of Business, concerning licensing requirements for applicants for and holders of a dealer general distinguishing number (GDN) under Transportation Code Chapter 503. The department adopts §215.133 and §215.140 with changes to the proposed text as published in the October 28, 2022, issue of the *Texas Register* (47 TexReg 7256) and are being republished.

In response to comments, the department adopts changes to amended §215.133 and §215.140. These changes include amendments to add "if applicable" in §215.133(c)(1)(B) to clarify that GDN applicants and license holders do not have to include a website in the application if no website exists. The word "solely" is substituted for the word "only" in §215.140(1) and (2) to clarify that a retail or a wholesale dealer may be open by appointment if the dealer is also open during posted hours that comply with the existing minimum business hour requirements. In §215.140(11)(B)(iv) and (vii) the requirement for a material object or barrier that cannot be readily removed is clarified to state that a material object or barrier must be in place on all sides except for the space necessary to allow for entry and exit of vehicle inventory. Additionally, in §215.140(11)(C) the requirement to disclose the address of a storage lot was deleted from this proposal to allow time for more stakeholder input and the system programming time required to allow for the efficient submission, storage, and reporting of this information.

REASONED JUSTIFICATION. The amendments to §215.133 and §215.140 are necessary to prevent and deter fraud in the application process, to implement recently adopted fingerprint requirements, to prevent consumer abuse and improve public safety, to clarify existing licensing requirements, to conform the rules with legislative changes, and to update rule language consistent with the department's electronic application processing requirements. Nonsubstantive changes to standardize and modernize rule language are also being implemented to improve the readability of these rules.

Amended §215.133

Nonsubstantive changes are necessary to modernize the language for improved readability in §215.133(b), (c), and (k) by deleting the words or phrases "the provisions of," "herein," "of this section," "Office of the," and "thereon" and substituting words or phrases with the same meaning if required. Current §215.133(k) is renumbered as §215.133(j).

In §215.133(b), an amendment is made to add a statutory reference to Transportation Code §503.024 and to delete duplicative statutory text in the rule language. These amendments are necessary to conform the rule with the current statute and avoid future statutory conflicts.

Amendments in §215.133(c) specify the requirements for new, renewal, and amendment dealer GDN applications including the requirement to attach documents, pay required fees, and submit applications electronically on a prescribed form in the department's designated licensing system. Fees, including the authority to prorate fees, are prescribed by statute in Transportation Code §§503.007, 503.008, and 503.011, and in Occupations Code §2301.264. These amendments are necessary to implement current dealer application requirements and clarify that a dealer renewing or amending a GDN must review current GDN information, update information that has changed, and provide related supporting information or documents for any change or

new requirement. These amendments are also necessary to clarify how information must be submitted in the department's electronic application system. These amendments are necessary to implement the department's responsibilities under Transportation Code §§ 503.029, 503.032, and 503.034 and Occupations Code §2301.257 and §2301.303.

Amendments in §215.133 (c)(1) subparagraphs (D), (E), (G) and (H) and in §215.133 (c)(2)(D) require an applicant or license holder to provide information and an identity document for an employee or other representative listed in the application. Occupations Code §2301.257 authorizes the department to prescribe the application form and require any information necessary to determine the applicant's qualifications to adequately serve the public. Occupations Code §2301.651(b) gives the board authority to deny an application for an act or omission by an officer, director, partner, trustee, or other person acting in a representative capacity that would be cause for denying a license. This information is necessary as without this information the department could not carry out its statutory responsibility under Occupations Code Chapter 2301 or Transportation Code Chapter 503 to investigate whether a representative committed a disqualifying act or omission that would prevent the applicant from being licensed as a GDN dealer.

In §215.133(c), the department is adopting three new requirements to deter fraud in the application process and prevent fraud and public abuse if a dealer GDN is issued. The first amendment is to require the applicant to list a manager or other bona fide employee in the application if the applicant is owned by an out-of-state owner or an owner who will not be present during business hours at the established and permanent place of business in Texas. This amendment is necessary so the department can identify and appropriately investigate the background and criminal history record of the authorized business representative who will be physically present at the business location in Texas. The second amendment requires the applicant to designate an owner or representative listed in the application as the applicant's temporary tag database account administrator and provide the individual's business email address. This amendment is necessary to implement dealer responsibilities under §215.150 regarding a dealer's authorization to issue a temporary tag, as well as dealer responsibilities under Transportation Code §503.0631(a) and (e) to help ensure the buyer's temporary tag database is secure. The third amendment requires applicants to provide information related to insolvency-including outstanding or unpaid judgments and liens-so the department can evaluate financial trustworthiness and stability as required under §215.89 concerning fitness for licensure.

In §215.133(c)(1)(B) the phrase "(if applicable)" is added to denote that an applicant must only disclose a business website if one exists.

Additionally, in §215.133(c), an amendment allows the department to require any other information or documents necessary to fulfill its statutory duties to review and investigate application information under Occupations Code §2301.256; Transportation Code §§503.029, 503.034, and 503.038; and §215.89. Lastly, an amendment deleting a reference to a concealed handgun license is required because that form of identification no longer exists.

New §215.133(d) is required to implement the September 1, 2022, fingerprint requirement for new applicants and existing dealers holding a GDN under §503.029(a)(6). The fingerprint requirement affects the following GDN holders and applicants: franchised motor vehicle dealers, independent motor vehicle dealers, wholesale motor vehicle dealers, motorcycle dealers, house trailer dealers, trailer or semitrailer dealers, and independent mobility motor vehicle dealers. This fingerprint requirement is necessary to reduce identity fraud in the application process and obtain more comprehensive criminal history record for applicants and GDN holders.

Current §215.133(d) is renumbered as (e) and amendments substituting the term "applicant" for the word "person" and are necessary to clarify that the applicant is responsible for including in the application any assumed names to be used by the applicant. An applicant may be an individual or one of several types of business structures or legal entities, and the amended language was necessary to ensure that all applicant types are included.

Additionally, the department added assumed name requirements to mirror the requirements in Occupations Code §2302.106 that apply to salvage vehicle dealers. This amendment makes the assumed name requirements consistent for an independent motor vehicle dealer GDN holder acting as a salvage vehicle dealer or rebuilder. Additionally, this amendment provides increased protection for Texas citizens by applying this assumed name requirement to all GDN dealer categories. Under §2302.106, a license may not be issued in a fictitious name that may be confused with or is similar to that of a governmental entity or is otherwise deceptive or misleading to the public. This requirement is necessary to prevent consumer fraud and abuse.

The text in current §215.133(d) and (e) is deleted because this requirement is incorporated into amended §215.133(e).

In §215.133(f) the words "or authorized" and "only" are added to reinforce the existing statutory requirement in Transportation Code §503.001(17) and §503.036(c) that wholesale motor vehicle dealers may sell or exchange vehicles only with other licensed or authorized dealers. This change is necessary to clarify that wholesale motor vehicle dealers may not sell vehicles to retail purchasers, and to inform and protect retail buyers. The language in §215.133(f) stating that wholesale dealers may only buy vehicles from other dealers is deleted as this limitation is not consistent with Transportation Code §503.001(17) and §503.036(c).

An amendment to §215.133(g) is necessary to correct the statutory reference to the independent mobility motor vehicle dealer definition in Occupations Code §2301.002.

An amendment to §215.133(h) clarifies that the department may require a site visit to the established and permanent place of business in Texas as part of the application evaluation process for a new, renewal, or new location application. Another amendment also allows the department to require a notarized affidavit signed by the applicant confirming that all premises requirements are met and will be maintained during the license period. These amendments are necessary to discharge the department's responsibility to evaluate applications and investigate compliance under Occupations Code §2301.256 and Transportation Code §§503.029, 503.034, and 503.038.

The current §215.133(h) is deleted because the circumstances under which an application can be denied are in §215.141 concerning sanctions, and do not need to be duplicated in this section.

The current §215.133(i) is deleted as proof of property ownership or proof of a written lease for the term of the license is included in amendments to §215.133(c).

The current §215.133(j) is renumbered as §215.133(i), and the word "vehicle" was added for consistency.

The current §215.133(k) is renumbered as §215.133(j) and is amended to add a provision implementing House Bill 139, 87th Legislature Regular Session (2021), which amended Occupations Code §55.004 to allow agencies to adopt rules ensuring that a military service member, military veteran, or military spouse receives appropriate credit for training, education, and professional experience in a licensed profession. Additionally, the phrase "dealer education and" was added to describe the training referenced in this subsection to be consistent with the statutory term in Transportation Code §503.0296.

Amended §215.140

For clarity, the title of §215.140 is amended to add the phrase "Premises Requirements" at the end of the title, because this phrase is commonly recognized and used by GDN holders and the department to describe the requirements of this section.

Amendments to §215.140(1) and §215.140(2) clarify that a retail or wholesale motor vehicle dealer's office may not be open solely by appointment. Other amendments add an owner and a voicemail service as acceptable persons or methods of answering the telephone, and clarify that a caller must be able to speak to a natural person or leave a message during the weekday hours of 8:00 a.m. to 5:00 p.m. These amendments are necessary to deter fraud and prevent consumer abuse and provide more flexibility to dealers.

Section 215.140(2) is amended to clarify that a bona fide employee may represent a wholesale motor vehicle dealer at the dealer's office location during the wholesale motor vehicle dealer's posted business hours consistent with the statutory language in Transportation Code §503.032(c)(2).

Section 215.140(3) and (4) clarify department criteria for determining whether an exterior business sign is conspicuous, permanent, and permanently mounted for retail dealers and wholesale motor vehicle dealers. The amendments also clarify that retail dealers and wholesale motor vehicle dealers are responsible for ensuring that their business sign complies with municipal ordinances and that the lease signage requirements are consistent with the signage requirements in §215.140. Additionally, amendments clarify that retail and wholesale motor vehicle dealers may use a temporary sign or banner if the dealer provides proof that a sign meeting the department's requirements has been ordered and provides a written statement that the sign will be promptly and permanently mounted upon delivery. These amendments are necessary clarifications that will allow GDN retail dealer applicants and license holders to comply with Transportation Code §503.032.

Amended §215.140(4) includes new exterior and interior business sign requirements for wholesale motor vehicle dealers. This sign requirement is necessary to eliminate confusion about whether wholesale motor vehicle dealers may exchange or sell vehicles to retail purchasers and informs and protects retail buyers from making unlawful purchases. The effective date for the sign requirement is September 1, 2023, to provide additional time for affected GDN holders to comply. Amendments also clarify department criteria for determining whether a wholesale motor vehicle dealer's interior business sign is considered conspicuous, permanent, and permanently mounted. These amendments are necessary and important clarifications that will allow wholesale dealer applicants and license holders to more easily comply with statutory requirements to have an established and permanent place of business as required by Transportation Code §503.032.

Amendments in §§215.140(4)(B)(i), 215.140(13)(A), and 215.140(13)(D) change the term "landlord" to "property owner" for clarity, consistency, and modernization of the rule language.

In amendments to §215.140(5), the word "requirements" is substituted for "structure" in the first sentence because the phrase "office requirements" more accurately describes the content of this paragraph. In §215.140(5)(A), the definition of a building is expanded to require that a building must have a permanent roof in addition to connecting exterior walls on all sides. Additional clarifying examples were added to §215.140(5)(B) to describe typical documents that demonstrate compliance with municipal ordinances and clarify that the dealer has a continuing responsibility to maintain compliance when a space is remodeled or changes use. These amendments are necessary and important clarifications that will allow GDN dealer applicants and license holders to more easily comply with statutory requirements to have an established and permanent place of business as required by Transportation Code §503.032.

In §215.140(5)(C) the department is reinstating requirements that a dealer's office may not be located in any room or building that is not open to the public. New §215.140(5)(D) reinstates a requirement that the dealer's office may not be located in a restaurant, gas station, or convenience store, unless the office has a separate entrance door that does not require a dealer's customer to pass through the other unrelated business. These amendments are necessary to deter temporary tag fraud and criminal activity as law enforcement has identified these types of locations as common locations used to commit fraud and serious crimes by bad actor license holders. New §215.140(5)(E) states that a dealer's office may not be virtual or be provided by a subscription for office space or office services and are required because these types of office arrangements do not establish a permanent location as required by Transportation Code §503.032. The amendments to §215.140(5)(C), (D), and (E) are necessary to prevent fraud and consumer abuse, to protect public health and safety, and to implement the requirements of Transportation Code §503.032.

Current §215.140(5)(D) is renumbered as §215.140(5)(F) and clarifies that the dealer's office must be located in Texas and deletes a reference to the mailing of a license which is no longer department practice, as license holders may print a license at any time from the department's licensing system with no fee required. Amended language also corrects punctuation.

Current §215.140(5)(E) is renumbered as §215.140(5)(G). New §215.140(5)(H) reinstates the requirement that a dealer's office have at least 100 square feet of interior floor space exclusive of hallways, closets, or restrooms and have a minimum seven-foot-high ceiling. New §215.140(5)(H) also adds a new requirement that a dealer's office space accommodate required office equipment and allow a dealer's representative and at least one customer to safely access the office and privately conduct business while seated. Transportation Code §503.032(a)(2)(A) says a location is considered to be an established and permanent place of business if the applicant maintains on the location a permanent furnished office that is equipped as required by the department for the sale of vehicles. A customer and the dealer's representative need to be able to enter the office to privately conduct business, including the possible discussion of financing. These amendments are necessary minimum requirements

to prevent fraud and consumer abuse and to protect public health and safety.

Amendments to §215.140(5), (7), (8), and (9) substitute the word "building" or "office building" for "structure" or "business structure" and are required for consistency and clarity.

In §215.140(8) the words "motor vehicle" are inserted for consistency in denoting a wholesale motor vehicle dealer.

In §215.140(10) the department adds a requirement that a dealer's office must have permanent interior walls on all sides and be separate from any public area used by another business when the dealer's business is housed with another business. These amendments are necessary to prevent fraud and consumer abuse and to protect public health and safety. A customer and the dealer's representative need to be able to enter the office to privately conduct business, including the possible discussion of financing. An office is also necessary to safeguard temporary tags and related computer hardware.

The department amends the title of §215.140(11) to include the phrase "storage lot", as this subparagraph includes the requirements for both a display area and a storage lot. Other amendments in §215.140(11) clarify that the display area must be located at the retail dealer's physical business address or contiguous to that address, and that the display area may not be in a storage lot. Other amendments clarify that the display area may not be used for customer parking, employee parking, or general storage, and reinstate a requirement that if the dealer's business location includes gasoline pumps or includes another business that sells gasoline, the dealer's display area may not be part of the parking area for gasoline customers and may not interfere with access to or egress from the gasoline pumps, fuel tanks, or fire prevention equipment. A reference to a charging station is added to this requirement in recognition of recent changes in motor vehicle technology. Reinstating the requirement that a dealer's display area not interfere with access to gasoline pumps, fuel tanks, or fire prevention equipment and adding a reference to a charging station is necessary to protect public health as approximately 4,000 fires per year occur in or on gas station properties. These fires cause serious injuries including death and property damage of more than thirty million dollars per year on average. Many of the amendments to §215.140(11)(B) are necessary to protect prospective customers from danger as they approach and leave the display area and as they focus on a display vehicle. Other changes clarify requirements for a shared display area located inside a building and are required so the standards for outdoor and indoor display areas are consistent and comply with the statutory requirement for each dealer to establish a display area, an important part of establishing a permanent place of business. These changes include a clarification in the existing requirement for a material object or barrier that cannot be readily removed to be used to separate each dealer's display area. The clarification states that a material object or barrier must be in place on all sides except for the space necessary to allow for entry and exit of vehicle inventory. In §215.140(11)(B), current provisions (v) and (vi) are renumbered (vi) and (vii) to accommodate a new provision. New §215.140(11)(C) includes the existing requirements for a storage lot and clarifies that a storage lot must be fenced or in an access-controlled location to be considered not accessible to the public by the department. This amendment is required to clarify and help dealers comply with the current rule. The amendments in §215.140(11) are also necessary to prevent fraud and consumer abuse and to protect public health and safety. The requirement to disclose the physical location of a storage lot has been deleted from this proposal to allow time the department to get additional input from law enforcement and industry stakeholders, and in recognition of the system programming time required to implement an efficient data submission, storage, and reporting solution.

Amendments to §215.140(12) are required to conform the language to be consistent with current §215.133(j) which is renumbered as §215.133(i). This amendment further is required to implement House Bill 1667, 86th Legislature, Regular Session (2019), which added Occupations Code §2302.009 and amended §2302.101 to provide that a person holding an independent motor vehicle GDN is exempt from the requirement that the person also hold a salvage vehicle dealer license to act as a salvage vehicle dealer or rebuilder. The amendment retains the requirement that a salvage motor vehicle offered for sale be conspicuously marked to inform a potential buyer that the vehicle is a salvage motor vehicle to protect the public.

Amendments to §215.140(13) clarify that the dealer is responsible for verifying that the physical address on the application is the correct physical address for the property if only a legal description is provided in the lease. Additionally, a new provision is added relating to subleases in which the property owner is not the dealer's lessor. In this circumstance, the dealer must also obtain a signed and notarized statement from the property owner which includes the property owner's full name, email address, mailing address, and phone number, and a statement from the property owner confirming that the dealer is authorized by the property owner to sublease the location and may operate a vehicle sales business from the business location. These amendments are necessary to prevent fraud in the application process, to prevent consumer abuse, and to protect public health and safety. This provision also protects GDN dealer applicants. The department has received applications from GDN dealers with a signed sublease who are unable to establish a permanent location and qualify for a GDN because the property owner hasn't authorized a sublease or a vehicle dealer to operate on the property. Transportation Code §503.029(a)(3) requires an applicant for a GDN to submit an application that demonstrates the applicant meets the requirements under Transportation Code §503.032, which requires the applicant to demonstrate that the location for which the applicant requests the GDN is an established and permanent place of business.

Amendments to §215.140(14) implement House Bill 3533, 87th Legislature, Regular Session (2021), which amended Transportation Code §503.033 to require certain dealers to post a bond notice at the business location. An amendment sets out the information that must be included in the bond notice and is required to implement Transportation Code §503.033.

Amended language also includes substituting the term "GDN" for "license" or "general distinguishing number" for consistency in §215.133 and §215.140. The term "GDN" is defined in §215.2 as a General Distinguishing Number.

In amending these rules, the department prioritized the public benefits associated with reducing fraud and related crime and improving public health and safety, while carefully considering potential costs to GDN dealers consistent with board and department responsibilities in Occupations Code Chapter 2301, Subchapter D.

SUMMARY OF COMMENTS.

The department received three written comments. Two commenters, the Texas Automobile Dealers Association and an individual commenter, either supported the rule amendments as proposed or requested one or more changes in the rule amendments. One commenter, the Texas Independent Automobile Dealers Association, requested the rules be withdrawn or alternatively requested changes to the rules.

Comment:

A commenter stated that requesting an on-site manager or dealer's information seems appropriate considering the rampant dealer consolidations and number of publicly owned dealers in Texas.

Agency Response:

The department appreciates the commenter's support for this rule amendment.

Comment:

A commenter stated that it is inappropriate to inquire about insolvency and suggested instead that the department require a bond based on a dealership's number of years in business and annual sales volume of new and used vehicles.

Agency Response.

The department considered this suggestion and believes requiring a bond of every dealer would be a more burdensome solution for dealers, as insolvency affects a small percentage of dealer applicants and license holders. When insolvency does occur, however, substantial harm to the public may result. Requiring applicants to disclose outstanding liens and judgments provides the department with information that will allow the department to review the financial obligations of applicants and license holders as part of the licensing process consistent with the department's obligation under §215.89(b)(5).

Comment:

A commenter stated that amendments for additional information should be listed in their potential entirety and provided in advance to dealers, and that broad language is inappropriate and unnecessary.

Agency Response.

The department disagrees with this comment as the information required of new applicants is provided in the rule and a license amendment is only necessary when the information contained in the new or most recent application changes. Further, the information that the department may request is expressly limited to the information that is required to evaluate the application under current law and rules.

Comment:

A commenter stated that the department should visit every potential dealer site prior to approving a new application, and that a site visit is not necessary for an existing dealer who is expanding to a new location.

Agency Response.

The department agrees that a site visit is a very important part of the licensing process and is a powerful way to reduce fraud. In Fiscal Year 2022, the department completed 604 site visits to GDN dealer applicants more than doubling the number of site visits from the prior fiscal year. The results of these site visits informed these rule amendments. The adopted rule language will allow the department to increase the number of site visits as staff and department funding permits.

Comment:

A commenter agreed with the rule amendments to the dealer office minimum requirements including office access.

Agency Response.

The department appreciates the support.

Comment:

A commenter requested that the department allow more than one contact's name, email address, and telephone number on an application to allow for changes in staff.

Agency Response.

The department agrees that the ability to add more than one license contact would be helpful for many license holders. The department will request a system enhancement to allow this capability in the future and will notify license holders when this capability becomes available.

Comment:

Two commenters suggest that the proposed rule be amended to not require information in the GDN application that is now obtained through the fingerprint requirement.

Agency Response.

The department must continue to ask for individual identity and criminal history information to complete other requirements of the background check process and to verify the applicant's veracity and corresponding eligibility for a dealer GDN under Transportation Code §503.034 and §503.038 and Occupations Code §2301.651. The department requires an applicant or license holder to provide criminal history information only and does not generally require court documents which the department recognizes can be burdensome.

Comment:

Two commenters requested clarification on the storage lot requirements. The first commenter requested clarification regarding when a storage lot is established and when it is temporary as additional storage may be needed for only a short period of time and thus no license amendment is necessary. The second commenter stated that proposed rule requirements to include storage lots on a dealer license needs additional stakeholder input as a storage lot is undefined and recommends striking §215.140(11)(C) in its entirety until there is more clarity.

Agency Response.

The proposed rule requiring disclosure of the physical address of a storage lot not located at the licensed location is being deleted from this proposal to allow additional input from all stakeholders and to allow time for the system programming necessary to collect, store, and report storage lot location information.

Comment:

A commenter stated that while a vehicle inventory owner has a desire to safeguard vehicles when stored at an offsite lot, a fenced area may not always be available if the lot is temporary storage or if the lot owner refuses to fence the area.

Agency Response.

The department agrees that safeguarding inventory is important for GDN dealers given the prevalence of vehicle and catalytical converter theft. The existing rule allowed a storage lot only if the lot has no public access. The proposed rule clarifies that a fenced storage lot complies with this rule requirement. While a fence is a common and cost-effective method of limiting public access, it is a clarifying example and not the sole way a GDN dealer may prevent public access under the rule.

Comment:

A commenter requested that the department withdraw the rules because the rules are too burdensome and delay licensing.

Agency Response.

The department does not agree with this comment. The pre-licensing changes that have already been implemented are successfully identifying fraudulent applications. Implementing these rules also provide additional necessary protections and important public welfare and safety benefits as described in the preamble. In September 2021, the Motor Vehicle Division (MVD) approved 841 non-franchise GDN new dealer applications in an average of 16 days per application. Most changes in requirements were implemented in September 2021 and affected applications submitted after that date. In December 2021, the average processing time for 885 non-franchise GDN new dealer applications was 20 days. So, the impact of the initial process changes was not more than 4 days for new non-franchise GDN dealer applications. In September 2022, the average processing time for the same group of applications was 29 days. From September 2021 to September 2022 the average processing time for renewal applications increased from 5 to 8 days. These increases of 9 days and 3 days in average processing time were largely due to multiple licensing staff vacancies. The department anticipates that these staff vacancies and the new fingerprint requirement will extend processing times beyond 29 days for new and renewal applications for the remainder of 2022. However, four new licensing staff members will start in December and begin training on the processing of GDN dealer applications. These new staff members will significantly reduce processing times in 2023.

These average processing time frames while extended continue to be reasonable and reflect the department's commitment to customer service, reducing fraud, and licensing only applicants that meet all statutory and rule requirements. The department believes this tradeoff is warranted and best serves the public interest.

Comment:

A commenter stated that the proposed rules should recognize that micro-businesses do not always have a website, and recommended adding "(if applicable)" after the words "website address" in §215.133(c)(1)(B).

Agency Response.

The department agrees that adding "if applicable" could be a helpful clarification for applicants that do not have a website and has implemented this recommendation in the adopted rule.

Comment:

A commenter stated that the proposed rule fails to account for dealers with multiple websites and is unclear if a dealer must provide its main website only or all websites. The commenter recommends adding the word "primary" immediately before the word "website".

Agency Response.

The department declines to make this change as any website on which a license holder advertises vehicles must comply with department advertising rules and should be disclosed to the department.

Comment:

A commenter stated that the proposed rule should not require a social security number as a condition to be a licensed dealer. Foreign business owners may obtain an Employer Identification Number or an Individual Taxpayer Identification Number without obtaining a social security number. The commenter recommends adding the words "(if applicable)" after the words "social security number" to §215.133(c)(1)(D) and (E).

Agency Response.

The department declines to make this change as a non-U.S. citizen owner is required to provide an Employer Identification Number as specified in §215.133(c)(1)(F) and has amended text to include resident and non-resident aliens in that subparagraph.

Comment:

A commenter noted that proposed rule related to a bona fide employee states a GDN applicant must provide "the name, social security number, date of birth, and identity document information for at least one manager"¦". Dealers looking to expand into Texas have already found this rule burdensome because TxDMV is asking for proof of residency. Therefore, the commenter is requesting that a bona fide employee not be required to produce proof of residency and that a dealer is only required to meet this requirement as written.

Agency Response.

The department declines to make this change as the department can handle temporary manager assignments under this rule. For example, a new applicant can submit written confirmation that a manager has temporarily been assigned to a Texas location and provide an affidavit confirming that the applicant will have a bona fide employee onsite once the manager's temporary assignment is complete. A new GDN dealer is required to have a permanent and established place of business to be eligible for a dealer GDN under Transportation Code §503.032. This statutory requirement includes having an owner or bona fide employee at the location during "reasonable and lawful" business hours.

Comment:

A commenter states that the proposed rule should limit inquiries about adverse credit history to only relevant credit history based on the statute of limitations on debt actions and the initial 10-year period in which a lien is collectible. The commenter recommends amending §215.133(c)(1)(M) to read as follows "any outstanding or unpaid debts for the past four years, and liens or judgments in past 10 years, unless the debt was discharged under 11 U.S.C. §§101 et seq. or pending resolution under a cased filed under the Bankruptcy Act".

Agency Response.

The department declines to make this change as these limitations may not apply to an individual applicant, for example, in Texas a judgment may be renewed or revived after 10 years, and other states may have differing requirements.

Comment:

A commenter states that the Certificate of Responsibility is already incorporated into the application questions and recommends deleting §215.133(c)(1)(N) in its entirety.

Agency Response.

The department declines to delete the Certificate of Responsibility form as this form documents the applicant's commitment to continue to follow department statutes and rules throughout the GDN dealer license period. This form is only required if the electronic attestation fails because the form of identification entered by the applicant cannot be verified.

Comment:

A commenter states that the proposed rule should only require one form of identification and fingerprinting to verify the identity of a dealer and recommends amending §215.133(c)(2)(D) by striking the words "at least".

Agency Response.

The department declines to make this change as occasionally a natural person is required to provide more than one identity document when the first document provided is not adequate to confirm the person's identity.

Comment:

A commenter states that the proposed rule should not require dealers to provide both premises photos and a notarized affidavit and recommends striking either "premises photos and" or "and a notarized affidavit" from §215.133(c)(2)(G).

Agency Response.

The department declines to make this change as the premises photos and the notarized affidavit serve two different purposes. The photos are used to verify that the applicant has met the premises requirements for having an established and permanent place of business. The notarized affidavit confirms the applicant's understanding of the premises requirements - including the applicant's obligation to maintain an established and permanent place of business during the license period. The statements in the notarized affidavit have been incorporated into the new and amendment GDN applications to make it easier for new applicants going forward.

Comment:

A commenter states that the proposed rules are ambiguous as to whether dealers can be open by appointment only and recommended modifying the proposed language of §215.140(2) to add, "Hours open by appointment only do not count towards meeting this requirement."

Agency Response.

The department appreciates this comment and substitutes the word "solely" for the word "only" in the adopted rule to clarify that a dealer may not be open solely by appointment.

Comment:

A commenter states that permanent interior walls on all sides should not be required when a dealer's office is located in a public area used by another business and that a cubicle is sufficient. The commenter recommends striking §215.140(10)(C) in its entirety.

Agency Response.

The department declines to make this change. A cubicle does not provide the privacy and security necessary for customer's personal and financial data or to secure temporary tag equipment and supplies when a dealer is located in a public area shared by another business.

Comment:

A commenter states that the display area barrier requirements should be updated, and recommends amending §215.140(11)(B)(iv) to read as, "the dealer's inventory must be separated from the business's display or parking area by a barrier on all sides that do not have a curb except for a side to enter and exit the inventory."

Agency Response.

The department agrees that space for a dealer to enter and exit inventory on one side of the dealer's display area is a helpful clarification and has added wording in §215.140(11)(B)(iv) and (vii) to add this clarification. The department added the clarification: "A material object or barrier must be in place on all sides except for the space necessary to allow for entry and exit of vehicle inventory." A material object could include a curb or building wall for example.

Comment:

A commenter states that the proposed rule on the inside display area barrier requirements should allow barriers that are easily removed as safety concern differences do not require a permanent barrier for indoor display areas. The commenter suggest that a rope line is appropriate to distinguish to the public those cars offered by a dealer from vehicles offered by another dealer. The commenter recommends striking the words "by a material object or barrier that cannot be readily removed" and replacing it with "by a barrier."

Agency Response.

The department declines to make this change as the rule requirement to have a material object or barrier that cannot readily be removed is based on each dealer's statutory requirement to have display space for at least five vehicles as part of an established and permanent place of business. Allowing barriers that can be readily removed would not be consistent with the statutory requirement and invites confusion and potential for consumer fraud in spaces shared by multiple dealers.

Comment:

A commenter states that the proposed language in §215.140(13)(A), and §215.140(13)(D) should be amended to avoid confusion based on §215.140(13)(E) and recommends amending §215.140(13)(A) to read as follows "the name of the lessor of the premises and the name of the dealer as the tenant or lessee of the premises;" and amending §215.140(13)(D) to read as "the signature of the lessor and the signature of the dealer as the tenant or lessee."

Agency Response.

The department disagrees with this comment. The primary purpose of requiring the property owner to be a party to the lease or to provide a notarized affidavit is to ensure the lease has not been fraudulently executed without the property owner's knowledge or consent and that the applicant intends to operate a bona fide vehicle business at that location. Establishing a permanent place of business for the term of the license is a statutory requirement.

Comment:

A commenter recommends eliminating a new provision relating to subleases in which the property owner is not the dealer's lessor and is therefore required to obtain authorization from the property owner. The commenter stated that this requirement has been implemented and should not have been without notice and a comment period, and further states that he knows of dealers for whom TxDMV made exceptions such as a Fortune 1000 dealer group that took over the lease of a failed dealership. The commenter recommends amending §215.140(13)(E) to state (E) if the lease agreement is a sublease in which the property owner is not the lessor, the dealer must obtain: (i) a signed notarized statement from the property owner including the following information: . . . or (ii) a copy of the lessor's lease showing the landlord may reassign their lease or sublease."

Agency Response.

The department has been given statutory authority to review applications and investigate applications for evidence of misrepresentation or fraud, and the circumstances described by the commenter demonstrate that the department is actively doing so. The department declines to make any changes to the text of this rule as the current rule language is necessary to prevent fraud and protects the applicant if the property owner is unwilling or unable to allow a vehicle business at the location.

STATUTORY AUTHORITY The department adopts amendments to §215.133 and §215.140 under the following provisions of Occupations Code Chapters 2301 and 2302, and Transportation Code Chapters 503 and 1002.

--Occupations Code §2301.155 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 §2302.051 authorizes the board to adopt rules as necessary to administer Occupations Code Chapter 2302.

--Transportation Code §503.002 authorizes the board to adopt rules that are necessary to administer Transportation Code Chapter 503.

--Transportation Code §503.0631 authorizes the department to adopt rules and prescribe procedures as necessary to implement §503.0631 regarding the buyer's temporary tag database.

--Transportation Code §1002.001 authorizes the board to adopt rules that are necessary and appropriate to implement the powers and the duties of the department.

CROSS REFERENCE TO STATUTE. Occupations Code §§55.004, 2301.001, 2301.002, 2301.151, 2301.152, 2301.153, 2301.255, 2301.256, 2301.264, 2302.009, 2302.101, 2302.106; and Transportation Code §§503.001, 503.006, 503.007, 503.008, 503.011, 503.024, 503.027, 503.029, 503.0296, 503.032, 503.033, 503.034, 503.036, and 503.038.

§215.133. General Distinguishing Number.

(a) No person may engage in business as a dealer unless that person has a currently valid GDN assigned by the department for each location from which the person engages in business. A dealer must also hold a GDN for a consignment location, unless the consignment location is a wholesale motor vehicle auction.

(b) Subsection (a) of this section does not apply to a person exempt from the requirement to obtain a GDN under Transportation Code §503.024.

(c) A GDN dealer application shall be on a form prescribed by the department and properly completed by the applicant. A GDN dealer application shall include all required information, required supporting documents, and required fees and shall be submitted to the department electronically in a system designated by the department for licensing. A GDN dealer renewing or amending its GDN must verify current license information, provide related information and documents for any new requirements or changes to the GDN, and pay required fees. An applicant for a new dealer GDN must provide the following:

(1) Required information:

(A) type of GDN requested;

(B) business information, including the name, physical and mailing addresses, telephone number, Secretary of State file number (if applicable), and website address (if applicable);

(C) application contact name, email address, and telephone number;

(D) the name, social security number, date of birth, identity document information, and ownership percentage for each owner, partner, member, or principal if the applicant is not a publicly traded company;

(E) the name, social security number, date of birth, and identity document information for each officer, director, manager, trustee, or other representative authorized to act on behalf of the applicant if the applicant is owned in full or in part by a legal entity;

(F) the name, employer identification number, ownership percentage, and non-profit or publicly-traded status for each legal entity that owns the applicant in full or in part;

(G) the name, social security number, date of birth, and identity document information of at least one manager or other bona fide employee who will be present at the established and permanent place of business if the owner is out of state or will not be present during business hours at the established and permanent place of business in Texas;

(H) the name and business email address of the temporary tag database account administrator designated by the applicant who must be an owner or representative listed in the application;

(I) criminal history record information under the laws of Texas, another state in the United States, the United States, and any foreign jurisdiction for each person listed in the application, including offense description, date, and location;

(J) military service status;

(K) licensing history required to evaluate fitness for licensure under §215.89 of this title (relating to Fitness);

(L) information about the business location and business premises, including whether the applicant will operate as a salvage vehicle dealer at the location;

(M) history of insolvency, including outstanding or unpaid debts, judgments, or liens, unless the debt was discharged under 11 U.S.C. §§101 *et seq.* (Bankruptcy Act) or is pending resolution under a case filed under the Bankruptcy Act;

(N) signed Certificate of Responsibility, which is a form provided by the department; and

(O) any other information required by the department to evaluate the application under current law and board rules.

(2) A legible and accurate electronic image of each applicable required document:

(A) proof of a surety bond if required under §215.137 of this title (relating to Surety Bond);

(B) the certificate of filing, certificate of incorporation, or certificate of registration on file with the Secretary of State, if applicable;

(C) each assumed name certificate on file with the Secretary of State or county clerk;

(D) at least one of the following identity documents for each natural person listed in the application:

(i) current driver license;

(ii) current Texas Identification Card issued by the Texas Department of Public Safety under Transportation Code, Chapter 521, Subchapter E;

(iii) current license to carry a handgun issued by the Texas Department of Public Safety under Government Code, Chapter 411, Subchapter H;

(iv) current passport; or

(v) current United States armed forces identification.

(E) a certificate of occupancy, certificate of compliance, or other official documentation confirming the business location complies with municipal ordinances, including zoning, occupancy, or other requirements for a vehicle business;

(F) documents proving business premises ownership, or lease or sublease agreement for the license period;

(G) premises photos and a notarized affidavit certifying that all premises requirements in §215.140 of this title (relating to Established and Permanent Place of Business Premises Requirements) are met and will be maintained during the license period;

(H) evidence of franchise if applying for a franchised motor vehicle dealer GDN;

(I) proof of completion of the dealer education and training required under Transportation Code §503.0296, if applicable; and

(J) any other documents required by the department to evaluate the application under current law and board rules.

(3) Required fees:

(A) the fee for the GDN for each type of license requested as prescribed by law; and

(B) the fee for each metal dealer plate requested by the applicant as prescribed by law.

(d) An applicant for a GDN must also comply with fingerprint requirements in §211.6 of this title (relating to Fingerprint Requirements for General Distinguishing Numbers), if applicable.

(e) An applicant for a dealer GDN operating under a name other than the applicant shall use the name under which the applicant is authorized to do business, as filed with the Secretary of State or county clerk, and the assumed name of such legal entity shall be recorded by the applicant on the application using the letters "DBA." The applicant may not use an assumed name that may be confused with or is similar to that of a governmental entity or that is otherwise deceptive or misleading to the public.

(f) A wholesale motor vehicle dealer GDN holder may sell or exchange vehicles with licensed or authorized dealers only. A wholesale motor vehicle dealer GDN holder may not sell or exchange vehicles at retail.

(g) An independent mobility motor vehicle dealer shall retain and produce for inspection all records relating to the license requirements under Occupations Code, §2301.002(17-b) and all information and records required under Transportation Code §503.0295.

(h) In evaluating a new or renewal dealer GDN application or an application for a new GDN location, the department may require a site visit to determine if the business location meets the requirements in §215.140. The department will require the applicant or GDN holder to provide a notarized affidavit confirming that all premises requirements are met and will be maintained during the license period.

(i) A person holding an independent motor vehicle GDN does not have to hold a salvage vehicle dealer license to:

(1) act as a salvage vehicle dealer or rebuilder; or

(2) store or display a motor vehicle as an agent or escrow agent of an insurance company.

(j) To be eligible for an independent motor vehicle GDN, a person must complete dealer education and training specified by the department, except as provided in this subsection:

(1) once a person has completed the required dealer education and training, the person will not have to retake the dealer education and training for subsequent GDN renewals, but may be required to provide proof of dealer education and training completion as part of the GDN renewal process;

(2) a person holding an independent motor vehicle GDN for at least 10 years as of September 1, 2019, is exempt from the dealer education and training requirement; and.

(3) a military service member, military spouse, or military veteran will receive appropriate credit for prior training, education, and professional experience and may be exempted from the dealer education and training requirement.

§215.140. Established and Permanent Place of Business Premises Requirements.

A dealer must meet the following requirements at each licensed location and maintain the requirements during the term of the license. If multiple dealers are licensed at a location, each dealer must maintain the following requirements during the entire term of the license.

(1) Business hours for retail dealers.

(A) A retail dealer's office shall be open at least four days per week for at least four consecutive hours per day and may not be open solely by appointment.

(B) The retail dealer's business hours for each day of the week must be posted at the main entrance of the retail dealer's office that is accessible to the public. The owner or a bona fide employee of the retail dealer shall be at the retail dealer's licensed location during the posted business hours for the purposes of buying, selling, exchanging, or leasing vehicles. If the owner or a bona fide employee is not available to conduct business during the retail dealer's posted business hours due to special circumstances or emergencies, a separate sign must be posted indicating the date and time the retail dealer will resume operations. Regardless of the retail dealer's business hours, the retail dealer's telephone must be answered from 8:00 a.m. to 5:00 p.m. weekdays by

a bona fide employee, owner, answering service, voicemail service, or answering machine. A caller must be able to speak to a natural person or leave a message during these hours.

(2) Business hours for wholesale motor vehicle dealers. A dealer that holds only a wholesale motor vehicle dealer's GDN must post its business hours at the main entrance of the wholesale motor vehicle dealer's office. A wholesale motor vehicle dealer or bona fide employee shall be at the wholesale motor vehicle dealer's licensed location at least two weekdays per week for at least two consecutive hours per day. A wholesale motor vehicle dealer may not be open solely by appointment. Regardless of the wholesale motor vehicle dealer's business hours, the wholesale motor vehicle dealer's telephone must be answered from 8:00 a.m. to 5:00 p.m. weekdays by a bona fide employee, owner, answering service, voicemail service, or answering machine. A caller must be able to speak to a natural person or leave a message during these hours.

(3) Business sign requirements for retail dealers.

(A) A retail dealer must display a conspicuous, permanent sign with letters at least six inches in height showing the retail dealer's business name or assumed name substantially similar to the name reflected on the retail dealer's GDN under which the retail dealer conducts business. A business sign is considered conspicuous if it is easily visible to the public within 100 feet of the main entrance of the business office. A business sign is considered permanent only if it is made of durable, weather-resistant material.

(B) The sign must be permanently mounted at the physical address listed on the application for the retail dealer's GDN. A business sign is considered permanently mounted if bolted to an exterior building wall or bolted or welded to a dedicated sign pole or sign support permanently installed in the ground.

(C) A retail dealer may use a temporary sign or banner if that retail dealer can show proof that a sign that meets the requirements of this paragraph has been ordered and provides a written statement that the sign will be promptly and permanently mounted upon delivery.

(D) A retail dealer is responsible for ensuring that the business sign complies with municipal ordinances, and that any lease signage requirements are consistent with the signage requirements in this paragraph.

(4) Business sign requirements for wholesale motor vehicle dealers.

(A) Exterior Sign

(i) A wholesale motor vehicle dealer must display a conspicuous, permanent sign with letters at least six inches in height showing the wholesale motor vehicle dealer's business name or assumed name substantially similar to the name reflected on the wholesale motor vehicle dealer's GDN under which the wholesale motor vehicle dealer conducts business. Effective September 1, 2023, the sign must also include the statement that "Purchasers must be Licensed Dealers" in letters at least three inches in height. A business sign is considered conspicuous if it is easily visible to the public within 100 feet of the main entrance of the business office. A business sign is considered permanent only if it is made of durable, weather-resistant material.

(ii) The sign must be permanently mounted on the business property at the physical address listed on the application. A business sign is considered permanently mounted if bolted to an exterior building wall or bolted or welded to a dedicated sign pole or sign support permanently installed in the ground. A wholesale motor vehicle dealer may use a temporary exterior sign or banner if the wholesale motor vehicle dealer can show proof that a sign that meets the requirements of this paragraph has been ordered and provides a written statement that the sign will be promptly and permanently mounted upon delivery.

(B) Interior Sign

(i) If the wholesale motor vehicle dealer's office is located in an office building with one or more other businesses and an outside sign is not permitted by the property owner, a conspicuous permanent business sign permanently mounted on or beside the main door to the wholesale motor vehicle dealer's office with letters at least two inches in height is acceptable. Effective September 1, 2023, the sign must also include the statement that "Purchasers must be Licensed Dealers" in letters at least one inch in height.

(ii) An interior business sign is considered conspicuous if it is easily visible to the public within 10 feet of the main entrance of the wholesale motor vehicle dealer's office. An interior sign is considered permanent if made from durable material and has lettering that cannot be changed. An interior sign is considered permanently mounted if bolted or otherwise permanently affixed to the main door or nearby wall. A wholesale motor vehicle dealer may use a temporary interior sign or banner if the wholesale motor vehicle dealer can show proof that a sign that meets the requirements of this paragraph has been ordered and provides a written statement that the sign will be promptly and permanently mounted upon delivery.

(C) A wholesale motor vehicle dealer is responsible for ensuring that the business sign complies with municipal ordinances and that any lease signage requirements are consistent with the signage requirements in this paragraph.

(5) Office requirements for a retail dealer and a wholesale motor vehicle dealer.

(A) A dealer's office must be located in a building with a permanent roof and connecting exterior walls on all sides.

(B) A dealer's office must comply with all applicable municipal ordinances, including municipal zoning ordinances. The dealer is responsible for obtaining a certificate of occupancy, certificate of compliance, or other required document issued by a municipal government to show compliance, including a new certificate or document when the building is altered or remodeled, or when the building use changes.

(C) A dealer's office may not be located in a residence, apartment, hotel, motel, rooming house, or any room or building not open to the public.

(D) A dealer's office may not be located in a restaurant, gas station, or convenience store, unless the office has a separate entrance door that does not require a dealer's customer to pass through the other business.

(E) A dealer's office may not be virtual or provided by a subscription for office space or office services. Access to an office space or office services is not considered an established and permanent location.

(F) The physical address of the dealer's office must be in Texas and recognized by the U.S. Postal Service or capable of receiving U.S. mail. The department will not mail a metal dealer's license plate to an out-of-state address.

(G) A portable-type office building may qualify as an office only if the building meets the requirements of this section and is not a readily moveable trailer or other vehicle.

(H) The dealer's office space must:

(i) include at least 100 square feet of interior floor space, exclusive of hallways, closets, or restrooms;

(ii) have a minimum seven-foot-high ceiling;

(iii) accommodate required office equipment; and

(iv) allow a dealer and customer to safely access the office and conduct business in private while seated.

(6) Required office equipment for a retail dealer and a wholesale motor vehicle dealer. At a minimum, a dealer's office must be equipped with:

(A) a desk;

(B) two chairs;

(C) internet access; and

(D) a working telephone number listed in the business name or assumed name under which the dealer conducts business.

(7) Number of retail dealers in one building. Not more than four retail dealers may be located in the same building. Each retail dealer located in the same building must meet the requirements of this section.

(8) Number of wholesale motor vehicle dealers in one office building. Not more than eight wholesale motor vehicle dealers may be located in the same office building. Each wholesale motor vehicle dealer located in the same office building must meet the requirements of this section.

(9) Office sharing prohibition for retail dealers and wholesale motor vehicle dealers. Unless otherwise authorized by the Transportation Code, a retail dealer and a wholesale motor vehicle dealer licensed after September 1, 1999, may not be located in the same building.

(10) Dealer housed with other business.

(A) If a person conducts business as a dealer in conjunction with another business owned by the same person and under the same name as the other business, the same telephone number may be used for both businesses. If the name of the dealer differs from the name of the other business, a separate telephone listing and a separate sign for each business are required.

(B) A person may conduct business as a dealer in conjunction with another business not owned by that person only if the dealer owns the property on which business is conducted or has a separate lease agreement from the owner of that property that meets the requirements of this section. The same telephone number may not be used by both businesses. The dealer must have separate business signs, telephone listings, and office equipment required under this section.

(C) A dealer's office must have permanent interior walls on all sides and be separate from any public area used by another business.

(11) Display area and storage lot requirements.

(A) A wholesale motor vehicle dealer is not required to have display space at the wholesale motor vehicle dealer's business premises.

(B) A retail dealer must have an area designated as display space for the retail dealer's inventory. A retail dealer's designated display area must comply with the following requirements.

(i) The display area must be located at the retail dealer's physical business address or contiguous to the retail dealer's physical address. The display area may not be in a storage lot.

(ii) The display area must be of sufficient size to display at least five vehicles of the type for which the GDN is issued. Those spaces must be reserved exclusively for the retail dealer's inventory and may not be used for customer parking, employee parking, general storage, or shared or intermingled with another business or a public parking area, a driveway to the office, or another dealer's display area.

(iii) The display area may not be on a public easement, right-of-way, or driveway unless the governing body having jurisdiction of the easement, right-of-way, or driveway expressly consents in writing to use as a display area. If the easement, right-of-way, or driveway is a part of the state highway system, use as a display area may only be authorized by a lease agreement.

(iv) If a retail dealer shares a display or parking area with another business, including another dealer, the dealer's vehicle inventory must be separated from the other business's display or parking area by a material object or barrier that cannot be readily removed. A material object or barrier must be in place on all sides except for the space necessary to allow for entry and exit of vehicle inventory.

(v) If a dealer's business location includes gasoline pumps or a charging station or includes another business that sells gasoline or has a charging station, the dealer's display area may not be part of the parking area for fuel or charging station customers and may not interfere with access to or from the gasoline pumps, fuel tanks, charging station, or fire prevention equipment.

(vi) The display area must be adequately illuminated if the retail dealer is open at night so that a vehicle for sale can be properly inspected by a potential buyer.

(vii) The display area may be located inside a building; however, if multiple dealers are displaying vehicles inside a building, each dealer's display area must be separated by a material object or barrier that cannot be readily removed. A material object or barrier must be in place on all sides except for the space necessary to allow for entry and exit of vehicle inventory.

(C) A GDN dealer may maintain a storage lot only if the storage lot is not accessible to the public and no sales activity occurs at the storage lot. A sign stating the dealer's name, contact information, and the fact the property is a storage lot is permissible. A storage lot must be fenced or in an access-controlled location to be considered not accessible to the public.

(12) Dealers authorized to sell salvage motor vehicles. If an independent motor vehicle dealer offers a salvage motor vehicle for sale on the dealer's premises, the vehicle must be clearly and conspicuously marked with a sign informing a potential buyer that the vehicle is a salvage motor vehicle. This requirement does not apply to a licensed salvage pool operator.

(13) Lease requirements. If the premises from which a dealer conducts business, including any display area, is not owned by the dealer, the dealer must maintain a lease that is continuous during the period of time for which the dealer's license will be issued. The lease agreement must be on a properly executed form containing at a minimum:

(A) the name of the property owner as the lessor of the premises and the name of the dealer as the tenant or lessee of the premises;

(B) the period of time for which the lease is valid;

(C) the street address or legal description of the property, provided that if only a legal description of the property is included, a dealer must attach a statement verifying that the property description

in the lease agreement is the physical street address identified on the application as the physical address for the established and permanent place of business;

(D) the signature of the property owner as the lessor and the signature of the dealer as the tenant or lessee; and

(E) if the lease agreement is a sublease in which the property owner is not the lessor, the dealer must also obtain a signed and notarized statement from the property owner including the following information:

(i) property owner's full name, email address, mailing address, and phone number; and

(ii) property owner's statement confirming that the dealer is authorized to sublease the location and may operate a vehicle sales business from the location.

(14) Dealer must display GDN and bond notice. A dealer must display the dealer's GDN issued by the department at all times in a manner that makes the GDN easily readable by the public and in a conspicuous place at each place of business for which the dealer's GDN is issued. If the dealer's GDN applies to more than one location, a copy of the GDN and bond notice must be displayed in each supplemental location. A dealer required to obtain a surety bond must post a bond notice adjacent to and in the same manner as the dealer's GDN is displayed. The notice must include the bond company name, bond identification number, and procedure by which a claimant can recover under the bond. The notice must also include the department's website address and notify a consumer that a dealer's surety bond information may be obtained by submitting a request to the department.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on December 8, 2022.

TRD-202204873
Elizabeth Brown Fore
General Counsel
Texas Department of Motor Vehicles
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For further information, please call: (512) 465-4160

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CHAPTER 217. VEHICLE TITLES AND REGISTRATION

INTRODUCTION. The Texas Department of Motor Vehicles (department) adopts amendments to 43 TAC §§217.54, 217.55, and 217.184, concerning the registration of vehicles as part of certain county fleets. The department adopts §§217.54, 217.55, and 217.184 without changes to the proposed text as published in the August 26, 2022, issue of the *Texas Register* (47 TexReg 5091). The rules will not be republished.

REASONED JUSTIFICATION. The amendments to §§217.54, 217.55, and 217.184 are necessary to implement new Transportation Code §502.0025 and amended §502.453, which authorize registration of an exempt county fleet for an extended period, under Senate Bill 1064 (SB 1064), 87th Legislature, Regular Session (2021).

Transportation Code §502.0025 defines an "exempt county fleet" as a group of two or more nonapportioned motor vehicles, semitrailers, or trailers that is owned by and used exclusively in the service of a county with a population of 3.3 million or more. Currently only Harris County is eligible to register vehicles under an exempt county fleet as defined by §502.0025. Amendments to §§217.54, 217.55, and 217.184 incorporate the new statutory definition of exempt county fleets into existing commercial fleet and exempt registration rules to implement extended registration requirements in SB 1064.

SB 1064 directs the department to establish rules regarding the suspension of the county fleet's registration if the owner fails to comply with Transportation Code §502.0025 or rules adopted under that section and to enforce inspection requirements. Amendments to §217.55(e) establish the penalty associated with failing to maintain compliance with Transportation Code §502.0025.

Nonsubstantive amendments also remove obsolete terms and conform the rules to current practices.

Section 217.54(e), (f), and (i)(6)(B). The amendments to §217.54(e), (f), and (i)(6)(B) replace the term "insignia" with "metal fleet license plate" and "registration receipt" to conform with current department operations. Fleet license plates and registration receipts are issued to commercial fleet registrants rather than registration insignia, under Transportation Code §502.0023.

Section 217.54(e)(2) - (3). The amendments remove §217.54(e)(2) - (3) as those requirements apply only to insignia, making them unnecessary when insignia are not used. The amendments also renumber existing §217.54(e)(4) - (5) accordingly.

Section 217.54(f)(2), (f)(3), and (i)(6)(B). The amendments to §217.54(f)(2), (f)(3), and (i)(6)(B) add the option of providing the department with acceptable proof that the metal fleet license plates have been destroyed when the registered vehicle has been removed from the fleet or when the registration has been canceled.

Section 217.55(a)(2)(A)(iii) and (a)(C). The amendment to §217.55(a)(2)(A)(iii) changes the manner in which an application for exempt registration provides the required statement "that the vehicle is owned or under the control of and will be operated by the exempt agency." The amendment requires the statement to be a certification instead of an affidavit. A similar amendment was made to §217.55(a)(C) to require a statement to be a certification, rather than an affidavit. These amendments conform the rule to the department's current practices.

Section 217.55(a)(3)(D). The amendment to §217.55(a)(3)(D) removes the reference to an exempt plate being marked with a replacement year because license plates no longer have an assigned replacement interval. Also, the remaining language in §217.55(a)(3)(D) was moved to §217.55(a)(2)(F) because the applicants for these vehicles will receive a standard exempt license plate for the vehicle if the application is approved.

Section 217.55(e). New §217.55(e) implements the extended registration allowed under Transportation Code §502.0025, including the following: (1) requirements regarding the suspension of an exempt county fleet's registration for failure to comply with the law or adopted rules; and (2) the method to enforce the inspection requirements under Transportation Code Chapter

548 for motor vehicles, semitrailers, and trailers registered under §217.55(e).

Section 217.55(e). New §217.55(e) allows an exempt county fleet to be registered for annual increments of up to eight years and requires that a registered vehicle be titled, unless exempt by statute from titling.

Section 217.55(e)(1) - (4). New §217.55(e)(1) - (4) establish application requirements and requirements related to registration receipts and exempt fleet license plates.

Section 217.55(e)(5). New §217.55(e)(5) establishes requirements related to adding or removing a vehicle from an exempt county fleet.

Section 217.55(e)(6). New §217.55(e)(6) establishes procedures for paying the state's portion of the vehicle inspection fee.

Section 217.55(e)(7). New §217.55(e)(7) allows for the cancellation of a registration for noncompliance with the exempt fleet statutes and rules or with inspection requirements under Transportation Code Chapter 548. New §517.55(e)(7) also prohibits a vehicle with canceled registration from operating on a public highway.

Section 217.55(e)(8) - (9). New §217.55(e)(8) - (9) establish procedures for reinstating a canceled registration and for requesting a replacement license plate.

Section 217.184(3). The amendment to §217.184(3) specifies that exempt county fleets are excluded from the processing and handling fee requirements under §217.183. The amendment is necessary to implement SB 1064's amendments to Transportation Code §502.453.

SUMMARY OF COMMENTS.

The department received one written comment on the proposal from the Lubbock County Tax Assessor-Collector.

Comment:

A commenter asked how a tax assessor-collector can replace a plate, in relation to amended §217.54(e)(1) and amended §217.55(c)(1). The commenter implied that the two paragraphs are related.

Response:

The paragraphs that the commenter expresses concern with appear in two separate sections of rules and are not related to each other. Section 217.54 relates to the extended commercial fleet program. Amended §217.54(e)(1) replaced the term "insignia" with "metal fleet license plate" and "registration receipt" to conform with current department operations. Fleet license plates and registration receipts are issued to commercial fleet registrants rather than registration insignia, under Transportation Code §502.0023. Section 217.55 relates to exempt vehicles. Amended §217.55(c)(1) contains nonsubstantive amendments to conform the rules to current practices. The amendments do not add a new requirement. No change has been made in response to this comment.

SUBCHAPTER B. MOTOR VEHICLE REGISTRATION

43 TAC §217.54, §217.55

STATUTORY AUTHORITY. The department adopts amendments to §§217.54, 217.55, and 217.184 under Transportation Code §§502.0021, 502.0023, 502.0025, and 1002.001.

-- Transportation Code §502.0021 authorizes the department to adopt rules to administer Transportation Code Chapter 502.

-- Transportation Code §502.0023 requires the department to adopt rules to implement extended registration of commercial fleet vehicles.

-- Transportation Code §502.0025 requires the department to adopt rules to implement extended registration of certain county fleet vehicles.

-- 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 §§502.0023, 502.0025, 502.1911, and 502.453.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on December 8, 2022.

TRD-202204871
Elizabeth Brown Fore
General Counsel
Texas Department of Motor Vehicles
Effective date: December 28, 2022
Proposal publication date: August 26, 2022
For further information, please call: (512) 465-4160

SUBCHAPTER I. FEES

43 TAC §217.184

STATUTORY AUTHORITY. The department adopts amendments to §§217.54, 217.55, and 217.184 under Transportation Code §§502.0021, 502.0023, 502.0025, and 1002.001.

-- Transportation Code §502.0021 authorizes the department to adopt rules to administer Transportation Code Chapter 502.

-- Transportation Code §502.0023 requires the department to adopt rules to implement extended registration of commercial fleet vehicles.

-- Transportation Code §502.0025 requires the department to adopt rules to implement extended registration of certain county fleet vehicles.

-- 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 §§502.0023, 502.0025, 502.1911, and 502.453.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on December 8, 2022.

TRD-202204872

Elizabeth Brown Fore
General Counsel
Texas Department of Motor Vehicles
Effective date: December 28, 2022
Proposal publication date: August 26, 2022
For further information, please call: (512) 465-4160

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Review Of Agency Rules

This section contains notices of state agency rule review as directed by the Texas Government Code, §2001.039. Included here are proposed rule review notices, which invite public comment to specified rules under review; and adopted rule review notices, which summarize public comment received as part of the review. The complete text of an agency's rule being reviewed is available in the *Texas Administrative Code* on the Texas Secretary of State's website.

For questions about the content and subject matter of rules, please contact the state agency that is reviewing the rules. Questions about the website and printed copies of these notices may be directed to the *Texas Register* office.

Proposed Rule Reviews

Texas Commission on Jail Standards

Title 37, Part 9

In accordance with Texas Government Code §2001.039, the Texas Commission on Jail Standards proposes the review of Chapter 251, concerning General; Chapter 255, concerning Rulemaking Procedures, and Chapter 269, Subchapter D, concerning Juvenile Justice Reports. The Commission will determine whether these rules need repeal or amendment. Comments on the review may be submitted to any of the following: TCJS Rule Review, attention: William Turner, P.O. Box 12985, Austin, Texas 78711-12985; Fax (512) 463-3185; e-mail: will.turner@tcjs.state.tx.us. The Commission must receive comments postmarked no later than 30 days from the date this notice is published in the *Texas Register*.

TRD-202204880
Brandon Wood
Executive Director
Texas Commission on Jail Standards
Filed: December 8, 2022

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Texas Commission on Fire Protection

Title 37, Part 13

The Texas Commission on Fire Protection (commission) files this notice of intention to review and consider for re-adoption, revision, or repeal, Texas Administrative Code, Title 37, Part 13, Chapter 401, concerning Administrative Practice and Procedure. Chapter 401 consists of §401.1, Purpose and Scope, §401.3, Definitions, §401.5, Delegation and Authority, §401.7 Construction, §401.9, Records of Official Action, §401.11, Conduct of Commission and Advisory Meetings, §401.13, Computation of Time, §401.15, Agreements to be in Writing, §401.17, Requirements, §401.19, Petition for Adoption of Rules, §401.21, Examination Challenge, §401.23, Examination Waiver Request, §401.31, Disciplinary Proceedings in Contested Cases, §401.41, Preliminary Staff Conference, §401.51, Opportunity for Hearing, §401.53, Contested Case Hearing, §401.57, Filing of Exceptions and Replies to Proposal for Decision, §401.59, Orders, §401.61, Record, §401.63, Final Decision and Orders, §401.67, Motions for Rehearing, §401.105, Administrative Penalties, §401.111, Application for Reinstatement of License or Certificate, §401.113, Evaluation for Reinstatement, §401.115, Procedure upon Request for Reinstatement, §401.117, Commission Action Possible upon Request, §401.119, Failure to Appear for Reinstatement, § 401.121, Purpose of Establishing Time Periods, §401.123, Notice of Deficiency, §401.125, Processing Periods, §401.127, Appeal, §401.129, Charges for Public Records, §401.131, Historically Underutilized Business.

This review will be conducted pursuant to Texas Government Code §2001.039. The commission will accept comments for 30 days following publication of this notice in the *Texas Register* as to whether the reason for the rule continues to exist.

The Texas Commission on Fire Protection, which administers these rules, believes the reason for the rules contained in this chapter continue to exist. Any questions or written comments pertaining to this notice of intention to review should be directed to Mike Wisko, Agency Chief, Texas Commission on Fire Protection, P.O. Box 2286, Austin, Texas, 78768-2286 or by email to Amanda.khan@tcfp.texas.gov. Any proposed changes to the rules as a result of the review will be published in the *Texas Register* in compliance with Texas Government Code, Chapter 2001, and will be open for the required public comment period prior to final adoption or repeal by the commission.

TRD-202204894
Mike Wisko
Agency Chief
Texas Commission on Fire Protection
Filed: December 9, 2022

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The Texas Commission on Fire Protection (commission) files this notice of intention to review and consider for re-adoption, revision, or repeal, Texas Administrative Code, Title 37, Part 13, Chapter 421, concerning Standards for Certification. Chapter 421 consists of §421.1, Procedures for Meetings, §421.3, Minimum Standards Set By the Commission, §421.5, Definitions, §421.9, Designation of Fire Protection Duties, §421.11, Requirement to be Certified Within One Year, §421.13, Individual Certificate Holders, §421.15, Extension of Training Period, §421.17, Requirement to Maintain Certification.

This review will be conducted pursuant to Texas Government Code §2001.039. The commission will accept comments for 30 days following publication of this notice in the *Texas Register* as to whether the reason for the rule continues to exist.

The Texas Commission on Fire Protection, which administers these rules, believes the reason for the rules contained in this chapter continue to exist. Any questions or written comments pertaining to this notice of intention to review should be directed to Mike Wisko, Agency Chief, Texas Commission on Fire Protection, P.O. Box 2286, Austin, Texas, 78768-2286 or by email to amanda.khan@tcfp.texas.gov. Any proposed changes to the rules as a result of the review will be published in the *Texas Register* in compliance with Texas Government Code, Chapter 2001, and will be open for the required public comment period prior to final adoption or repeal by the commission.

TRD-202204895
Mike Wisko
Agency Chief
Texas Commission on Fire Protection
Filed: December 9, 2022

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The Texas Commission on Fire Protection (commission) files this notice of intention to review and consider for re-adoption, revision, or repeal, Texas Administrative Code, Title 37, Part 13, Chapter 425, concerning Fire Service Instructors. Chapter 425 consists of §425.1, Minimum Standards for Fire Service Instructor Certification, §425.3, Minimum Standards for Fire Service Instructor I Certification, §425.5, Minimum Standards for Fire Service Instructor II Certification, §425.7, Minimum Standards for Fire Service Instructor III Certification, §425.9, Minimum Standards for Master Fire Service Instructor III Certification, §425.11, International Fire Service Accreditation Congress (IFSAC) Seal.

This review will be conducted pursuant to Texas Government Code §2001.039. The commission will accept comments for 30 days following publication of this notice in the *Texas Register* as to whether the reason for the rule continues to exist.

The Texas Commission on Fire Protection, which administers these rules, believes the reason for the rules contained in this chapter continue to exist. Any questions or written comments pertaining to this notice of intention to review should be directed to Mike Wisko, Agency Chief, Texas Commission on Fire Protection, P.O. Box 2286, Austin, Texas, 78768-2286 or by email to amanda.khan@tcfp.texas.gov. Any proposed changes to the rules as a result of the review will be published in the *Texas Register* in compliance with Texas Government Code, Chapter 2001, and will be open for the required public comment period prior to final adoption or repeal by the commission.

TRD-202204897
Mike Wisko
Agency Chief
Texas Commission on Fire Protection
Filed: December 9, 2022

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The Texas Commission on Fire Protection (commission) files this notice of intention to review and consider for re-adoption, revision, or repeal, Texas Administrative Code, Title 37, Part 13, Chapter 431, concerning Fire Investigator. Chapter 431 consists of §431.1, Minimum Standards for Arson Investigation Personnel, §431.3, Minimum Standards for Basic Arson Investigator Certification, §431.5, Minimum Standards for Intermediate Arson Investigator Certification, §431.7, Minimum Standards for Advanced Arson Investigation, §431.9, Minimum Standards for Master Arson Investigator Certification, §431.11, Minimum Standards for Arson Investigator Certification for Law Enforcement Personnel, §431.13, International Fire Service Accreditation Congress (IFSAC) Seal.

This review will be conducted pursuant to Texas Government Code §2001.039. The commission will accept comments for 30 days following publication of this notice in the *Texas Register* as to whether the reason for the rule continues to exist.

The Texas Commission on Fire Protection, which administers these rules, believes the reason for the rules contained in this chapter continue to exist. Any questions or written comments pertaining to this notice of intention to review should be directed to Mike Wisko, Agency Chief, Texas Commission on Fire Protection, P.O. Box 2286, Austin, Texas, 78768-2286 or by email to amanda.khan@tcfp.texas.gov. Any proposed changes to the rules as a result of the review will be published in the *Texas Register* in compliance with Texas Government Code, Chapter 2001, and will be open for the required public comment period prior to final adoption or repeal by the commission.

TRD-202204900
Mike Wisko
Agency Chief
Texas Commission on Fire Protection
Filed: December 9, 2022

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The Texas Commission on Fire Protection (commission) files this notice of intention to review and consider for re-adoption, revision, or repeal, Texas Administrative Code, Title 37, Part 13, Chapter 433, concerning Driver/Operator. Chapter 433 consists of §433.1, Driver/Operator-Pumper Certification, §433.3, Minimum Standards for Driver/Operator-Pumper Certification, §435.5, Examination Requirements, §433.7, International Fire Service Accreditation Congress (IFSAC) Seal, §433.201, Driver/Operator-Aerial Apparatus Certification, §433.203, Minimum Standards for Driver/Operator-Aerial Apparatus Certification, §433.205, Examination Requirements, §433.207, International Fire Service Accreditation Congress (IFSAC) Seal.

This review will be conducted pursuant to Texas Government Code §2001.039. The commission will accept comments for 30 days following publication of this notice in the *Texas Register* as to whether the reason for the rule continues to exist.

The Texas Commission on Fire Protection, which administers these rules, believes the reason for the rules contained in this chapter continue to exist. Any questions or written comments pertaining to this notice of intention to review should be directed to Mike Wisko, Agency Chief, Texas Commission on Fire Protection, P.O. Box 2286, Austin, Texas, 78768-2286 or by email to amanda.khan@tcfp.texas.gov. Any proposed changes to the rules as a result of the review will be published in the *Texas Register* in compliance with Texas Government Code, Chapter 2001, and will be open for the required public comment period prior to final adoption or repeal by the commission.

TRD-202204901
Mike Wisko
Agency Chief
Texas Commission on Fire Protection
Filed: December 9, 2022

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The Texas Commission on Fire Protection (commission) files this notice of intention to review and consider for re-adoption, revision, or repeal, Texas Administrative Code, Title 37, Part 13, Chapter 437, concerning Fees. Chapter 437 consists of §437.1, Purpose and Scope, §437.3, Certification Application Processing Fees, §437.5, Renewal Fees, §437.7, Standards Manual and Certification Curriculum Manual Fees, §437.11, Copying Fees, §437.13, Processing Fees for Test Application, §437.15 International Fire Service Accreditation Congress (IFSAC) Seal Fees, §437.17, Records Review Fees, §437.19, Early Review Fees.

This review will be conducted pursuant to Texas Government Code §2001.039. The commission will accept comments for 30 days following publication of this notice in the *Texas Register* as to whether the reason for the rule continues to exist.

The Texas Commission on Fire Protection, which administers these rules, believes the reason for the rules contained in this chapter continue

to exist. Any questions or written comments pertaining to this notice of intention to review should be directed to Mike Wisko, Agency Chief, Texas Commission on Fire Protection, P.O. Box 2286, Austin, Texas, 78768-2286 or by email to amanda.khan@tcfp.texas.gov. Any proposed changes to the rules as a result of the review will be published in the *Texas Register* in compliance with Texas Government Code, Chapter 2001, and will be open for the required public comment period prior to final adoption or repeal by the commission.

TRD-202204904
Mike Wisko
Agency Chief
Texas Commission on Fire Protection
Filed: December 9, 2022

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The Texas Commission on Fire Protection (commission) files this notice of intention to review and consider for re-adoption, revision, or repeal, Texas Administrative Code, Title 37, Part 13, Chapter 441, concerning Continuing Education. Chapter 441 consists of §441.1, Objective, §441.3, Definitions, §441.5, Requirements, §441.7, Continuing Education for Structure Fire Protection Personnel, §441.9, Continuing Education for Aircraft Rescue Fire Fighting Personnel, §441.13, Continuing Education for Fire Inspection Personnel, §437.15, Continuing Education for Arson Investigator or Fire Investigator, §441.17, Continuing Education for Hazardous Materials Technician, §441.19, Continuing Education for Head of a Fire Department, §441.21, Continuing Education for Fire Service Instructor, §441.23, Continuing Education for Wildland Fire Fighter.

This review will be conducted pursuant to Texas Government Code §2001.039. The commission will accept comments for 30 days following publication of this notice in the *Texas Register* as to whether the reason for the rule continues to exist.

The Texas Commission on Fire Protection, which administers these rules, believes the reason for the rules contained in this chapter continue to exist. Any questions or written comments pertaining to this notice of intention to review should be directed to Mike Wisko, Agency Chief, Texas Commission on Fire Protection, P.O. Box 2286, Austin, Texas, 78768-2286 or by email to amanda.khan@tcfp.texas.gov. Any proposed changes to the rules as a result of the review will be published in the *Texas Register* in compliance with Texas Government Code, Chapter 2001, and will be open for the required public comment period prior to final adoption or repeal by the commission.

TRD-202204911
Mike Wisko
Agency Chief
Texas Commission on Fire Protection
Filed: December 9, 2022

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The Texas Commission on Fire Protection (commission) files this notice of intention to review and consider for re-adoption, revision, or repeal, Texas Administrative Code, Title 37, Part 13, Chapter 443, concerning Certification Curriculum Manual. Chapter 443 consists of §443.1, Approval by the Fire Fighter Advisory Committee, §443.3, Approval by the Texas Commission on Fire Protection, §445.5, Effective Date of New or Revised Curricula and Training Programs Required by Law or Rule, §443.7, Effective Date of New or Revised Curricula and Training Programs Which are Voluntary, §443.9, National Fire Protection Association Standard.

This review will be conducted pursuant to Texas Government Code §2001.039. The commission will accept comments for 30 days following publication of this notice in the *Texas Register* as to whether the reason for the rule continues to exist.

The Texas Commission on Fire Protection, which administers these rules, believes the reason for the rules contained in this chapter continue to exist. Any questions or written comments pertaining to this notice of intention to review should be directed to Mike Wisko, Agency Chief, Texas Commission on Fire Protection, P.O. Box 2286, Austin, Texas, 78768-2286 or by email to amanda.khan@tcfp.texas.gov. Any proposed changes to the rules as a result of the review will be published in the *Texas Register* in compliance with Texas Government Code, Chapter 2001, and will be open for the required public comment period prior to final adoption or repeal by the commission.

TRD-202204912
Mike Wisko
Agency Chief
Texas Commission on Fire Protection
Filed: December 9, 2022

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The Texas Commission on Fire Protection (commission) files this notice of intention to review and consider for re-adoption, revision, or repeal, Texas Administrative Code, Title 37, Part 13, Chapter 447, concerning Part-Time Fire Protection Employee. Chapter 447 consists of §447.1, Minimum Standards for Part-Time Fire Protection Employees, §447.3, Minimum Standards for Higher Levels of Part-Time Certification, §447.5, Permissible Hours of Work for Part-Time Fire Protection Employees.

This review will be conducted pursuant to Texas Government Code §2001.039. The commission will accept comments for 30 days following publication of this notice in the *Texas Register* as to whether the reason for the rule continues to exist.

The Texas Commission on Fire Protection, which administers these rules, believes the reason for the rules contained in this chapter continue to exist. Any questions or written comments pertaining to this notice of intention to review should be directed to Mike Wisko, Agency Chief, Texas Commission on Fire Protection, P.O. Box 2286, Austin, Texas, 78768-2286 or by email to amanda.khan@tcfp.texas.gov. Any proposed changes to the rules as a result of the review will be published in the *Texas Register* in compliance with Texas Government Code, Chapter 2001, and will be open for the required public comment period prior to final adoption or repeal by the commission.

TRD-202204913
Mike Wisko
Agency Chief
Texas Commission on Fire Protection
Filed: December 9, 2022

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The Texas Commission on Fire Protection (commission) files this notice of intention to review and consider for re-adoption, revision, or repeal, Texas Administrative Code, Title 37, Part 13, Chapter 449, concerning Head of a Fire Department. Chapter 449 consists of §449.1, Minimum Standards for the Head of a Suppression Fire Department, §449.201, Minimum Standards for the Head of a Prevention Only Fire Department.

This review will be conducted pursuant to Texas Government Code §2001.039. The commission will accept comments for 30 days following publication of this notice in the *Texas Register* as to whether the reason for the rule continues to exist.

The Texas Commission on Fire Protection, which administers these rules, believes the reason for the rules contained in this chapter continue to exist. Any questions or written comments pertaining to this notice of intention to review should be directed to Mike Wisko, Agency Chief, Texas Commission on Fire Protection, P.O. Box 2286, Austin, Texas 78768-2286 or by email to amanda.khan@tcfp.texas.gov. Any proposed changes to the rules as a result of the review will be published in the *Texas Register* in compliance with Texas Government Code, Chapter 2001, and will be open for the required public comment period prior to final adoption or repeal by the commission.

TRD-202204971
Mike Wisko
Agency Chief
Texas Commission on Fire Protection
Filed: December 12, 2022

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The Texas Commission on Fire Protection (commission) files this notice of intention to review and consider for re-adoption, revision, or repeal, Texas Administrative Code, Title 37, Part 13, Chapter 451, concerning Fire Officer. Chapter 451 consists of §451.1, Fire Office I Certification, §451.3, Minimum Standards for Fire Officer I Certification, §451.5, Examination Requirements, §451.7, International Fire Service Accreditation Congress (IFSAC) Seal, §451.201, Fire Officer II Certification, §451.203, Minimum Standards for Fire Officer II Certification, §451.205, Examination Requirements, §451.207, International Fire Service Accreditation Congress (IFSAC) Seal, §451.301, Fire Officer III Certification, §451.303, Minimum Standards for Fire Officer III Certification, §451.305, Examination Requirements, §51.307, International Fire Service Accreditation Congress (IFSAC) Seal, §451.401, Fire Officer IV Certification, §451.403, Minimum Standards for Fire Officer IV Certification, §451.405, Examination Requirements, §451.07, International Fire Service Accreditation Congress (IFSAC) Seal.

This review will be conducted pursuant to Texas Government Code §2001.039. The commission will accept comments for 30 days following publication of this notice in the *Texas Register* as to whether the reason for the rule continues to exist.

The Texas Commission on Fire Protection, which administers these rules, believes the reason for the rules contained in this chapter continue to exist. Any questions or written comments pertaining to this notice of intention to review should be directed to Mike Wisko, Agency Chief, Texas Commission on Fire Protection, P.O. Box 2286, Austin, Texas 78768-2286 or by email to amanda.khan@tcfp.texas.gov. Any proposed changes to the rules as a result of the review will be published in the *Texas Register* in compliance with Texas Government Code, Chapter 2001, and will be open for the required public comment period prior to final adoption or repeal by the commission.

TRD-202204976
Mike Wisko
Agency Chief
Texas Commission on Fire Protection
Filed: December 12, 2022

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The Texas Commission on Fire Protection (commission) files this notice of intention to review and consider for re-adoption, revision, or repeal, Texas Administrative Code, Title 37, Part 13, Chapter 453, concerning Hazardous Materials. Chapter 453 consists of §453.1, Hazardous Materials Technician Certification, §453.3, Minimum Standards for Hazardous Materials Technician Certification, §453.5, Examination Requirements, §453.7, International Fire Service Accreditation Congress (IFSAC) Seal, §453.201, Hazardous Materials Incident Commander Certification, §453.203, Minimum Standards for Hazardous Materials Incident Commander, §453.205, Examination Requirements, §453.207, International Fire Service Accreditation Congress (IFSAC) Seal.

This review will be conducted pursuant to Texas Government Code §2001.039. The commission will accept comments for 30 days following publication of this notice in the *Texas Register* as to whether the reason for the rule continues to exist.

The Texas Commission on Fire Protection, which administers these rules, believes the reason for the rules contained in this chapter continue to exist. Any questions or written comments pertaining to this notice of intention to review should be directed to Mike Wisko, Agency Chief, Texas Commission on Fire Protection, P.O. Box 2286, Austin, Texas 78768-2286 or by email to amanda.khan@tcfp.texas.gov. Any proposed changes to the rules as a result of the review will be published in the *Texas Register* in compliance with Texas Government Code, Chapter 2001, and will be open for the required public comment period prior to final adoption or repeal by the commission.

TRD-202204989
Mike Wisko
Agency Chief
Texas Commission on Fire Protection
Filed: December 12, 2022

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The Texas Commission on Fire Protection (commission) files this notice of intention to review and consider for re-adoption, revision, or repeal, Texas Administrative Code, Title 37, Part 13, Chapter 455, concerning Minimum Standards for Wildland Fire Protection Certification. Chapter 455 consists of §455.1, Minimum Standards for Wildland Fire Protection Personnel, §455.3, Minimum Standards for Basic Wildland Fire Protection Certification, §455.5, Minimum Standards for Intermediate Wildland Fire Protection Certification, §455.7, Examination Requirements.

This review will be conducted pursuant to Texas Government Code §2001.039. The commission will accept comments for 30 days following publication of this notice in the *Texas Register* as to whether the reason for the rule continues to exist.

The Texas Commission on Fire Protection, which administers these rules, believes the reason for the rules contained in this chapter continue to exist. Any questions or written comments pertaining to this notice of intention to review should be directed to Mike Wisko, Agency Chief, Texas Commission on Fire Protection, P.O. Box 2286, Austin, Texas, 78768-2286 or by email to amanda.khan@tcfp.texas.gov. Any proposed changes to the rules as a result of the review will be published in the *Texas Register* in compliance with Texas Government Code, Chapter 2001, and will be open for the required public comment period prior to final adoption or repeal by the commission.

TRD-202204914
Mike Wisko
Agency Chief
Texas Commission on Fire Protection
Filed: December 9, 2022

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The Texas Commission on Fire Protection (commission) files this notice of intention to review and consider for re-adoption, revision, or repeal, Texas Administrative Code, Title 37, Part 13, Chapter 457, con-

cerning Minimum Standards for Incident Safety Officer Certification. Chapter 457 consists of §457.1, Incident Safety Officer Certification, §457.3, Minimum Standards for Incident Safety Officer Certification, §457.5, Examination Requirements, §457.7, International Fire Service Accreditation Congress (IFSAC) Seal.

This review will be conducted pursuant to Texas Government Code §2001.039. The commission will accept comments for 30 days following publication of this notice in the *Texas Register* as to whether the reason for the rule continues to exist.

The Texas Commission on Fire Protection, which administers these rules, believes the reason for the rules contained in this chapter continue to exist. Any questions or written comments pertaining to this notice of intention to review should be directed to Mike Wisko, Agency Chief, Texas Commission on Fire Protection, P.O. Box 2286, Austin, Texas 78768-2286 or by email to amanda.khan@tcfp.texas.gov. Any proposed changes to the rules as a result of the review will be published in the *Texas Register* in compliance with Texas Government Code, Chapter 2001, and will be open for the required public comment period prior to final adoption or repeal by the commission.

TRD-202204990
Mike Wisko
Agency Chief
Texas Commission on Fire Protection
Filed: December 12, 2022

♦ ♦ ♦

The Texas Commission on Fire Protection (commission) files this notice of intention to review and consider for re-adoption, revision, or repeal, Texas Administrative Code, Title 37, Part 13, Chapter 459, concerning Minimum Standards for Fire and Life Safety Educators. Chapter 459 consists of §459.1, Fire and Life Safety Educator I Certification, §459.3, Minimum Standards for Fire and Life Safety Educator I Certification, §459.5, Examination Requirement, §459.7, International Fire Service Accreditation Congress (IFSAC) Seal, §459.201, Fire and Life Safety Educator II Certification, §459.203 Minimum Standards for Fire and Life Safety Educator II Certification, §459.205, Examination Requirement, §459.207, International Fire Service Accreditation Congress (IFSAC) Seal.

This review will be conducted pursuant to Texas Government Code §2001.039. The commission will accept comments for 30 days following publication of this notice in the *Texas Register* as to whether the reason for the rule continues to exist.

The Texas Commission on Fire Protection, which administers these rules, believes the reason for the rules contained in this chapter continue to exist. Any questions or written comments pertaining to this notice of intention to review should be directed to Mike Wisko, Agency Chief, Texas Commission on Fire Protection, P.O. Box 2286, Austin, Texas, 78768-2286 or by email to amanda.khan@tcfp.texas.gov. Any proposed changes to the rules as a result of the review will be published in the *Texas Register* in compliance with Texas Government Code, Chapter 2001, and will be open for the required public comment period prior to final adoption or repeal by the commission.

TRD-202204991
Mike Wisko
Agency Chief
Texas Commission on Fire Protection
Filed: December 12, 2022

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The Texas Commission on Fire Protection (commission) files this notice of intention to review and consider for re-adoption, revision, or repeal, Texas Administrative Code, Title 37, Part 13, Chapter 461, concerning Incident Commanders. Chapter 461 consists of §461.1, Incident Commander Certification, §461.3, Minimum Standards for Incident Commander Certification, §461.5, Examination Requirement.

This review will be conducted pursuant to Texas Government Code §2001.039. The commission will accept comments for 30 days following publication of this notice in the *Texas Register* as to whether the reason for the rule continues to exist.

The Texas Commission on Fire Protection, which administers these rules, believes the reason for the rules contained in this chapter continue to exist. Any questions or written comments pertaining to this notice of intention to review should be directed to Mike Wisko, Agency Chief, Texas Commission on Fire Protection, P.O. Box 2286, Austin, Texas, 78768-2286 or by email to amanda.khan@tcfp.texas.gov. Any proposed changes to the rules as a result of the review will be published in the *Texas Register* in compliance with Texas Government Code, Chapter 2001, and will be open for the required public comment period prior to final adoption or repeal by the commission.

TRD-202204992
Mike Wisko
Agency Chief
Texas Commission on Fire Protection
Filed: December 12, 2022

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The Texas Commission on Fire Protection (commission) files this notice of intention to review and consider for re-adoption, revision, or repeal, Texas Administrative Code, Title 37, Part 13, Chapter 491, concerning Voluntary Regulation of State Agencies and State Agency Employees. Chapter 491 consists of §491.1, Election of Components for Voluntary Regulation, §491.3, Documentation, §491.5, Notification.

This review will be conducted pursuant to Texas Government Code §2001.039. The commission will accept comments for 30 days following publication of this notice in the *Texas Register* as to whether the reason for the rule continues to exist.

The Texas Commission on Fire Protection, which administers these rules, believes the reason for the rules contained in this chapter continue to exist. Any questions or written comments pertaining to this notice of intention to review should be directed to Mike Wisko, Agency Chief, Texas Commission on Fire Protection, P.O. Box 2286, Austin, Texas, 78768-2286 or by email to amanda.khan@tcfp.texas.gov. Any proposed changes to the rules as a result of the review will be published in the *Texas Register* in compliance with Texas Government Code, Chapter 2001, and will be open for the required public comment period prior to final adoption or repeal by the commission.

TRD-202204994
Mike Wisko
Agency Chief
Texas Commission on Fire Protection
Filed: December 12, 2022

♦ ♦ ♦

The Texas Commission on Fire Protection (commission) files this notice of intention to review and consider for re-adoption, revision, or repeal, Texas Administrative Code, Title 37, Part 13, Chapter 493, concerning Voluntary Regulation of Federal Agencies and Federal Fire Fighters. Chapter 493 consists of §493.1, Election of Components for Voluntary Regulation, §493.3, Documentation, §493.5, Notification.

This review will be conducted pursuant to Texas Government Code §2001.039. The commission will accept comments for 30 days following publication of this notice in the *Texas Register* as to whether the reason for the rule continues to exist.

The Texas Commission on Fire Protection, which administers these rules, believes the reason for the rules contained in this chapter continue to exist. Any questions or written comments pertaining to this notice of intention to review should be directed to Mike Wisko, Agency Chief, Texas Commission on Fire Protection, P.O. Box 2286, Austin, Texas, 78768-2286 or by email to amanda.khan@tcfp.texas.gov. Any proposed changes to the rules as a result of the review will be published in the *Texas Register* in compliance with Texas Government Code, Chapter 2001, and will be open for the required public comment period prior to final adoption or repeal by the commission.

TRD-202204997
Mike Wisko
Agency Chief
Texas Commission on Fire Protection
Filed: December 12, 2022

♦ ♦ ♦

The Texas Commission on Fire Protection (commission) files this notice of intention to review and consider for re-adoption, revision, or repeal, Texas Administrative Code, Title 37, Part 13, Chapter 495, concerning Regulation of Nongovernmental Departments. Chapter 495 consists of §495.1, Application Procedures, §495.3, Notification, §495.5, Nongovernmental Fire Protection Employees, §495.201, Nongovernmental Organizations, §495.203, Nongovernmental Organization Employees, §495.205, Nongovernmental Personnel, §495.207, Regulation and Certification.

This review will be conducted pursuant to Texas Government Code §2001.039. The commission will accept comments for 30 days following publication of this notice in the *Texas Register* as to whether the reason for the rule continues to exist.

The Texas Commission on Fire Protection, which administers these rules, believes the reason for the rules contained in this chapter continue to exist. Any questions or written comments pertaining to this notice of intention to review should be directed to Mike Wisko, Agency Chief, Texas Commission on Fire Protection, P.O. Box 2286, Austin, Texas, 78768-2286 or by email to amanda.khan@tcfp.texas.gov. Any proposed changes to the rules as a result of the review will be published in the *Texas Register* in compliance with Texas Government Code, Chapter 2001, and will be open for the required public comment period prior to final adoption or repeal by the commission.

TRD-202204999
Mike Wisko
Agency Chief
Texas Commission on Fire Protection
Filed: December 12, 2022

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Adopted Rule Reviews

Texas Department of Agriculture

Title 4, Part 1

Pursuant to Texas Government Code, §2001.039, the Texas Department of Agriculture (Department) has completed its review of Texas Administrative Code, Title 4, Part 1, Chapter 8 (Agricultural Hazard Communication Regulations). The notice of intent to review this chapter was published in the October 7, 2022 issue of the *Texas Register* (47 TexReg 6636). No comments were received in response to this notice.

In addition to publishing notice of the proposed rule review, the Department informally notified external stakeholders, in advance of the proposed rule review. The Department did not receive any comments in response to this notice.

The Department finds that the reasons for initially adopting the rules in this chapter continue to exist and readopts this chapter with proposed amendments. The proposed amendments can be found in the Proposed Rules section of this issue.

TRD-202204860
Skyler Shafer
Assistant General Counsel
Texas Department of Agriculture
Filed: December 7, 2022

♦ ♦ ♦

Pursuant to the Texas Government Code (Code), §2001.039, the Texas Department of Agriculture (Department) has completed its review of Texas Administrative Code, Title 4, Part 1, Chapter 12, Weights and Measures, Subchapter A, General Provisions; Subchapter B, Devices; Subchapter C, Packages and Price Verification; Subchapter D, Metrology; Subchapter E, Service Companies; Subchapter G, Service Technicians; and Subchapter H, Public Weighers.

The notice of intent to review was published in the October 7, 2022 issue of the *Texas Register* (47 TexReg 6636). No comments were received in response to this notice.

Before publishing notice of this rule review, the Department issued an informal advance notice of the proposed rule review to stakeholders. In response, the Department received three comments.

One comment appeared to express general concern over the five-year testing requirement for service technicians contained in §12.60, but did not make a direct reference to this rule or propose a specific change to it. Section 12.60 calls for service technicians to reregister, and consequently retest, every five years to maintain their status.

The Department determined that changes to testing requirements in this rule did not necessitate an amendment at this time, as the Department believes this requirement is appropriate for registration as a service technician.

One comment addressed two aspects of the definition for "test kit" in §12.1. First, the definition's requirement that the standard weights in these kits be able to test a 30-pound scale in one-pound increments is inconsistent with the method called for testing such scales by the National Institute of Standards and Technology's Handbook 112 (NIST Handbook 112). NIST Handbook 112 contains procedures for testing commercial weighing and measuring devices. Second, this comment stated that the definition's requirement that test kits contain "at least two" one-pound standard weights is inconsistent with the current composition of test kits. This comment noted that they contain only one one-pound standard weight, and regardless, could still meet the definition's requirement of having sufficient weight standards to test 30-pound scales in one-pound increments.

Concerning the comment to the definition for "test kit" in §12.1, the Department does not believe changes to the one-pound increment testing requirement for 30-pound scales appropriate at this time. The Department notes that this chapter does not contain any adoption by reference of NIST Handbook 112. At the same time, the Department did find test kits on the market with only one one-pound standard weight that could meet the Department's testing requirements for 30-pound scales. Ac-

cordingly, and to reflect the current market, the Department proposes an amendment to the definition for "test kit" in §12.1 to allow for only one one-pound weight.

One comment requested changes in the requirement of §12.74 that public weighers maintain copies of issued official certificates "in a well-bound book." This comment suggested public weighers have the option of maintaining these certificates in either physical or electronic form.

The Department believes the ubiquity of electronic business transactions relying on electronic recordkeeping allows for public weighers to have the option to maintain official certificates in this format. Accordingly, the Department proposes a change to §12.74 to allow issued official certificates to be kept in either electronic or physical form.

The Department finds that the reasons for initially adopting the rules in this chapter continue to exist, with the exception of §12.70. Accordingly, the Department readopts with no changes §12.20 and §12.43. The Department further proposes the repeal of §12.70. Lastly, the Department readopts all other rules in Chapter 12 with proposed amendments , which can be found in the Proposed Rules section of this issue.

TRD-202204957
Skyler Shafer
Assistant General Counsel
Texas Department of Agriculture
Filed: December 12, 2022

♦ ♦ ♦

Pursuant to Texas Government Code, §2001.039, the Texas Department of Agriculture (Department) has completed its review of Texas Administrative Code, Title 4, Part 1, Chapter 18, Organic Standards and Certification, and Chapter 21, Citrus.

The Department considered whether the reasons for the adoption of the rules in these chapters continue to exist. Notice of the review was published in the September 23, 2022, issue of the *Texas Register* (47 TexReg 6255). No comments were received as a result of this notice.

The Department finds that the reasons for initially adopting the rules in Chapters 18 and 21 continue to exist and readopts the rules without changes.

TRD-202205007
Skyler Shafer
Assistant General Counsel
Texas Department of Agriculture
Filed: December 13, 2022

♦ ♦ ♦

Pursuant to the Texas Government Code (Code), §2001.039, the Texas Department of Agriculture (Department) has completed its review of Texas Administrative Code, Title 4, Part 1, Chapter 20 (Cotton Pest Control), Subchapter A (General Provisions), Subchapter B (Quarantine Requirements), Subchapter C (Stalk Destruction Program), and Subchapter D (Regulation of Volunteer and Other Noncommercial Cotton; Hostable Cotton Fee).

The notice of intent to review was published in the October 7, 2022 issue of the *Texas Register* (47 TexReg 6636). No comments were received in response to this notice.

The Department finds that the reasons for initially adopting the rules in this chapter continue to exist and readopts with no changes Subchapter B, §§20.10, 20.11 and 20.16 and Subchapter C, §§20.20-20.22. In addition, the Department readopts with proposed amendments Subchapter A, §§20.1, 20.3; Subchapter B, §§20.12-20.15 and 20.17; and Subchapter D, §§20.30, 20.31. The proposed amendments can be found in the Proposed Rules section of this issue.

TRD-202204879
Skyler Shafer
Assistant General Counsel
Texas Department of Agriculture
Filed: December 8, 2022

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Health and Human Services Commission

Title 26, Part 1

The Health and Human Services Commission (HHSC) adopts the review of the chapter below in Title 26, Part 1, of the Texas Administrative Code:

Chapter 550, Licensing Standards for Prescribed Pediatric Extended Care Centers

Subchapter A, Purpose, Scope, Limitations, Compliance, and Definitions

Subchapter B, Licensing Application, Maintenance, and Fees

Subchapter C, General Provisions

Subchapter D, Transportation

Subchapter E, Building Requirements

Subchapter F, Inspections and Visits

Subchapter G, Enforcement

Notice of the review of this chapter was published in the August 19, 2022, issue of the *Texas Register* (47 TexReg 5006). HHSC received no comments concerning this chapter.

HHSC has reviewed Chapter 550 in accordance with §2001.039 of the Government Code, which requires state agencies to assess, every four years, whether the initial reasons for adopting a rule continue to exist. The agency determined that the original reasons for adopting all rules in the chapter continue to exist and readopts Chapter 550. Any appropriate amendments to Chapter 550 identified by HHSC during the rule review will be proposed in a future issue of the *Texas Register.*

This concludes HHSC's review of 26 TAC Chapter 550 as required by the Government Code, §2001.039.

TRD-202204993
Mahan Farman-Farmaian
Director Rules Coordination Office
Health and Human Services Commission
Filed: December 12, 2022

♦ ♦ ♦

The Health and Human Services Commission (HHSC) adopts the review of the chapter below in Title 26, Part 1, of the Texas Administrative Code:

Chapter 558, Licensing Standards for Home and Community Support Services Agencies

Subchapter A, General Provisions

Subchapter B, Criteria and Eligibility, Application Procedures, and Issuance of a License

Subchapter C, Minimum Standards for All Home and Community Support Services Agencies

Subchapter D, Additional Standards Specific to License Category and Specific to Special Services

Subchapter E, Licensure Surveys

Subchapter F, Enforcement

Subchapter G, Home Health Aides

Subchapter H, Standards Specific to Agencies Licensed to Provide Hospice Services

Notice of the review of this chapter was published in the August 19, 2022, issue of the *Texas Register* (47 TexReg 5007). HHSC received no comments concerning this chapter.

HHSC has reviewed Chapter 558 in accordance with §2001.039 of the Government Code, which requires state agencies to assess, every four years, whether the initial reasons for adopting a rule continue to exist. The agency determined that the original reasons for adopting the rules in the chapter continue to exist and readopts Chapter 558. Any appropriate amendments to Chapter 558 identified by HHSC during the rule review will be proposed in a future issue of the *Texas Register*.

This concludes HHSC's review of 26 TAC Chapter 558 as required by the Government Code, §2001.039.

TRD-202204995
Mahan Farman-Farmaian
Director, Rules Coordination Office
Health and Human Services Commission
Filed: December 12, 2022

TABLES & GRAPHICS

Graphic images included in rules are published separately in this tables and graphics section. Graphic images are arranged in this section in the following order: Title Number, Part Number, Chapter Number and Section Number.

Graphic images are indicated in the text of the emergency, proposed, and adopted rules by the following tag: the word "Figure" followed by the TAC citation, rule number, and the appropriate subsection, paragraph, subparagraph, and so on.

Figure: 10 TAC §11.2(a)

Deadline	Documentation Required
01/02/2023	Application Acceptance Period Begins. Public Comment period starts.
01/06/2023	Pre-Application Final Delivery Date (including waiver requests). Supplemental Housing Tax Credits Intent to Request deadline.
02/13/2023	Deadline for submission of Request for Preliminary Determination in accordance with §11.8(d) of this chapter.
02/15/2023	Deadline for submission of Application for .ftp access if pre-application not submitted.
03/01/2023	End of Application Acceptance Period and Full Application Delivery Date (including Quantifiable Community Participation documentation; Environmental Site Assessments (ESAs), Scope and Cost Reviews (SCRs); Appraisals; Primary Market Area Map; Feasibility Report; all Resolutions necessary under §11.3 of this chapter related to Housing De-Concentration Factors). Final Input from Elected Officials Delivery Date (including Resolution for Local Government Support pursuant to §11.9(d)(1) of this chapter and State Representative Input pursuant to §11.9(d)(5) of this chapter).
04/03/2023	Market Analysis Delivery Date pursuant to §11.205 of this chapter.

05/05/2023	Deadline for Third Party Request for Administrative Deficiency.
Early June 2023	Scoring Notices Issued for Majority of Applications Considered "Competitive."
06/01/2023	Public comment deadline for the comment to be included in the Board materials relating to the July presentation of awards are due in accordance with §1.10.
June 2023	On or before June 30, publication of the list of Eligible Applications for Consideration for Award in July.
July 2023	On or before July 31, Board issuance of Final Awards.
August 2023	Commitments are Issued.
11/01/2023	Carryover Documentation Delivery Date.
11/30/2023	Deadline for closing under §11.9(c)(8) (if applicable) (not subject to an extension under §11.2(a) pursuant to the requirements of §11.9(c)(8)).
07/01/2024	10% Test Documentation Delivery Date.
12/31/2025	Placement in Service.
Five business days after the date on the Deficiency Notice (without incurring point loss)	Administrative Deficiency Response Deadline (unless an extension has been granted).

Figure: 10 TAC §11.1002

Deadline	Documentation Required
11/14/2022	Department releases Materials for Notice of Intent for Supplemental Allocations.
11/22/2022	Department releases Materials for Supplemental Allocations.
1/6/2023	Deadline for Notice of Intent due for Supplemental Allocations.
1/27/2023	Deadline for all Requests for Supplemental Allocations.
March Board meeting	Board approval of Supplemental Allocations under this Subchapter
05/01/2023 (est.)	Commitments for Supplemental Allocations are Issued.
05/15/2023 (est.)	Commitment Fees for the Supplemental Allocation and any conditions of the credit Allocation are to be met.
11/01/2023	Carryover Documentation Delivery Date.
11/30/2023	Deadline for closing under §11.9(c)(8) (if applicable) (not subject to an extension under §11.2(a) pursuant to the requirements of §11.9(c)(8)).
07/21/2024	10% Test Documentation Delivery Date.
12/31/2025	Placement in Service.
Five business days after the date on the Deficiency Notice (without incurring point loss)	Administrative Deficiency Response Deadline (unless an extension has been granted).

Figure: 25 TAC §265.193(c)

Required Chemical Levels			
Disinfectant Level	Minimum	Ideal	Maximum
Pool Free Available Chlorine	1.0 ppm	2.0 – 3.0 ppm	8.0 ppm
Spa Free Available Chlorine	2.0 ppm	3.0 ppm	8.0 ppm
Pool Bromine	3.0 ppm	4.0 – 6.0 ppm	10.0 ppm
Spa Bromine	4.0 ppm	5.0 ppm	10.0 ppm
Combined Chlorine	None	None	0.4 ppm
pH	Not less than 7.0	7.2 – 7.6	7.8
Cyanuric Acid	None	30 – 50 ppm	100 ppm
ORP	600 mV	650 – 750 mV	900 mV
Alkalinity	60 ppm	60 ppm – 180 ppm	>180 ppm
Calcium Hardness in Pools	150 ppm	>150 – 400 ppm	1000 ppm
Calcium Hardness in Spas	100 ppm	150 – 400 ppm	800 ppm

IN ADDITION

The *Texas Register* is required by statute to publish certain documents, including applications to purchase control of state banks, notices of rate ceilings issued by the Office of Consumer Credit Commissioner, and consultant proposal requests and awards. State agencies also may publish other notices of general interest as space permits.

Office of the Attorney General

Texas Water Code and Texas Health and Safety Code
Settlement Notice

The State of Texas gives notice of the following proposed resolution of an environmental enforcement action under the Texas Health and Safety Code and the Texas Water Code. Before the State may enter into 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: *State of Texas v. Shawn Mark Yarbrough d/b/a Walnut Ridge Estates Water System;* Cause No. D-1-GN-19-003973, in the 126th Judicial District Court, Travis County, Texas.

Background: Defendant Shawn Mark Yarbrough owns and operates a public drinking water system doing business as Walnut Ridge Estates Water System, located on 160 Lake Road, Zavalla, 75980, Angelina County, Texas ("the Facility"). The State filed a civil enforcement suit on behalf of the Texas Commission on Environmental Quality ("TCEQ"), under the Texas Water Code and the Texas Health and Safety Code, against Mr. Yarbrough for violations of safe drinking water laws at the Facility and in violation of TCEQ administrative orders.

Proposed Settlement: The parties propose an Agreed Final Judgment which provides for an award to the State of $15,000 in civil penalties and $3,000 in attorney's 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 Ixchel Parr, Assistant Attorney General, Office of the Attorney General of Texas, P.O. Box 12548, MC-066, Austin, Texas 78711-2548; (512) 463-2012; facsimile (512) 320-0911; email: Ixchel.Parr@oag.texas.gov. Written comments must be received within 30 days of publication of this notice to be considered.

TRD-202205009
Austin Kinghorn
General Counsel
Office of the Attorney General
Filed: December 13, 2022

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Comptroller of Public Accounts

Local Sales Tax Rate Changes Effective January 1, 2023

An additional 1/4 percent city sales and use tax for Municipal Street Maintenance and Repair as permitted under Chapter 327 of the Texas Tax Code will be abolished effective December 31, 2022 in the city listed below.

CITY NAME	LOCAL CODE	LOCAL RATE	TOTAL RATE
Rice (Navarro Co)	2175063	.017500	.080000

A 1/2 percent special purpose district sales and use tax will become effective January 1, 2023 in the special purpose district listed below.

SPD NAME	LOCAL CODE	NEW RATE	DESCRIPTION
Parker County Emergency Services District No. 7	5184561	.005000	SEE NOTE 1

The combined areas have been created to administer the local sales and use tax between overlapping local jurisdictions as permitted under Chapter 321 of the Texas Tax Code, effective January 1, 2023 in the entities listed below.

COMBINED AREA NAME	LOCAL CODE	NEW RATE	DESCRIPTION
Itasca/Hill County Emergency Services District No. 2-A	6109616	.015000	SEE NOTE 2
Webberville/Travis County Emergency Services District No. 12-A	6227052	.020000	SEE NOTE 3

NOTE 1: The boundaries for the Parker County Emergency Services District No. 7 are the same boundaries as the city of Cool. Contact the district representative at 817-613-7898 for additional boundary information.

NOTE 2: The Itasca/Hill County Emergency Services District No. 2-A combined area is the area within the Hill County Emergency Services District No. 2-A annexed by the city of Itasca on or after September 22, 2022.

NOTE 3: The Webberville/Travis County Emergency Services District No. 12-A combined area is the area within the Travis County Emergency Services District No. 12-A annexed by the city of Itasca on or after March 9, 2022.

TRD-202204896
Jenny Burleson
Director, Tax Policy Division
Comptroller of Public Accounts
Filed: December 9, 2022

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Notice of Public Hearing on Proposed Broadband Development Office Rules Concerning the Broadband Development Program

The Comptroller of Public Accounts will conduct a public hearing to receive comments from interested persons concerning proposed new 34 TAC §§16.30 - 16.46, concerning the Broadband Development Program. The proposal was published in the September 23, 2022, issue of the *Texas Register* (47 TexReg 6174).

The hearing is scheduled for Wednesday, December 28, 2022, at 2:00 p.m. There is no physical location for this meeting. To access the online public meeting by web browser, please enter the following URL into your browser: https://txcpa.webex.com/txcpa/j.php?MTID=m3d63625302701a1a7abca3d5cc7bbb96. To join the meeting by phone, call +1 (408) 418-9388, and use the access code 2497 417 4007. The password is DYip2F9aVi2 (39472392 from phones). Persons who are interested in providing comments at the public hearing must contact Mr. Greg Conte, Office of the Comptroller of Public Accounts, at broadband@cpa.texas.gov or by calling (512) 463-7611 by 5:00 p.m. on Tuesday, December 27, 2022. Any person who has not preregistered may not provide comments at the hearing but may provide them in writing.

Any interested person may attend and offer comments or statements. Organizations, associations, or groups are encouraged to present their commonly held views or similar comments through a representative member where possible.

Persons with disabilities who plan to participate in this meeting and who may need auxiliary aids or services should contact Mr. Greg Conte at broadband@cpa.texas.gov. Requests should be made as far in advance as possible so that appropriate arrangements can be made.

Persons who choose not to provide comments during this public hearing may still provide written comments to the Comptroller. Beginning Tuesday, December 27, 2022, at 8:00 a.m., written comments on the proposed rules may be submitted to Mr. Greg Conte, Office of the Comptroller of Public Accounts, at broadband@cpa.texas.gov. The deadline for submission of written comments is December 28, 2022, at 5:00 p.m.

TRD-202205033
Don Neal
General Counsel, Operations and Support Legal Services
Comptroller of Public Accounts
Filed: December 14, 2022

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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 12/19/22 - 12/25/22 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 12/19/22 - 12/25/22 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-202205034
Leslie L. Pettijohn
Commissioner
Office of Consumer Credit Commissioner
Filed: December 14, 2022

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Texas Education Agency

Notice of Correction Concerning the 2023-2025 Charter School Program (Subchapter C and D) Grant under Request for Applications (RFA) #701-23-107

Filing Authority. The availability of grant funds is authorized by Public Law 114-95, Elementary and Secondary Education Act of 1965, as amended by the Every Student Succeeds Act of 2015, Title IV, Part C, Expanding Opportunity Through Quality Charter Schools; Texas Education Code, Chapter 12; and 19 Texas Administrative Code Chapter 100, Subchapter AA.

The Texas Education Agency (TEA) published Request for Applications Concerning the 2023-2025 Charter School Program (Subchapter C and D) Grant in the November 4, 2022, issue of the *Texas Register* (47 TexReg 7444).

TEA is correcting the applicant eligibility. In the Eligible Applicants section, the criteria are amended to read, "(3) An open-enrollment charter school authorized by the commissioner under the Generation 27 charter application pursuant to TEC, Chapter 12, Subchapter D, that has never received funds under this grant program."

Issued in Austin, Texas, on December 14, 2022.

TRD-202205030
Cristina De La Fuente-Valadez
Director, Rulemaking
Texas Education Agency
Filed: December 14, 2022

♦ ♦ ♦

Texas Commission on Environmental Quality

Agreed Orders

The Texas Commission on Environmental Quality (TCEQ or commission) staff is providing an opportunity for written public comment on the listed Agreed Orders (AOs) in accordance with Texas Water Code (TWC), §7.075. TWC, §7.075, requires that before the commission may approve the AOs, the commission shall allow the public an opportunity to submit written comments on the proposed AOs. TWC, §7.075, requires that notice of the proposed orders and the opportunity to comment must be published in the *Texas Register* no later than the 30th day before the date on which the public comment period closes, which in this case is **January 25, 2023.** TWC, §7.075, also requires that the commission promptly consider any written comments received and that the commission may withdraw or withhold approval of an AO if a comment discloses facts or considerations that indicate that consent is inappropriate, improper, inadequate, or inconsistent with the requirements of the statutes and rules within the commission's jurisdiction or the commission's orders and permits issued in accordance with the commission's regulatory authority. Additional notice of changes to a proposed AO is not required to be published if those changes are made in response to written comments.

A copy of each proposed AO is available for public inspection at both the commission's central office, located at 12100 Park 35 Circle, Building C, 1st Floor, Austin, Texas 78753, (512) 239-2545 and at the applicable regional office listed as follows. Written comments about an AO should be sent to the enforcement coordinator designated for each AO at the commission's central office at P.O. Box 13087, Austin, Texas 78711-3087 and must be received by 5:00 p.m. on **January 25, 2023.** 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: Aquatic Company; DOCKET NUMBER: 2021-0373-AIR-E; IDENTIFIER: RN100219104; LOCATION: Lancaster, Dallas County; TYPE OF FACILITY: plastic composite bath products plant; RULES VIOLATED: 30 TAC §§101.20(2), 113.100, 116.115(c), and 122.143(4), 40 Code of Federal Regulations (CFR) §63.9(e), New Source Review (NSR) Permit Number 9519, Special Conditions (SC) Number 8.A, Federal Operating Permit (FOP) Number O1063, General Terms and Conditions (GTC) and Special Terms and Conditions (STC) Numbers 1.A and 8, and Texas Health and Safety Code (THSC), §382.085(b), by failing to notify the administrator in writing at least 60 calendar days before the performance test is scheduled; and 30 TAC §§101.20(2), 113.1060, 116.115(b)(2)(F) and (c), and 122.143(4), 40 CFR §63.5805(a)(1), NSR Permit Number 9519, SC Numbers 1 and 8.B, FOP Number O1063, GTC and STC Numbers 1.A and 8, and THSC, §382.085(b), by failing to reduce the total organic hazardous air pollutants emissions by at least 95% by weight, and failing to comply with the maximum allowable emissions rate; PENALTY: $42,000; ENFORCEMENT COORDINATOR: Amanda Diaz, (713) 422-8912; REGIONAL OFFICE: 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(2) COMPANY: Cecil Joe Stark Sawmill and Logging, Incorporated; DOCKET NUMBER: 2022-0573-WQ-E; IDENTIFIER: RN110053329; LOCATION: Jones Creek, Brazoria County; TYPE OF FACILITY: aggregate production operation; RULES VIOLATED: 30 TAC §281.25(a)(4), TWC, §26.121(a)(1), and 40 Code of Federal Regulations §122.26(c), by failing to maintain authorization to discharge stormwater associated with industrial activities; and TWC, §26.121(a)(1), by failing to prevent an unauthorized discharge of stormwater into or adjacent to any water in the state; PENALTY: $8,938; ENFORCEMENT COORDINATOR: Katelyn Tubbs, (512) 239-2512; REGIONAL OFFICE: 5425 Polk Street, Suite H, Houston, Texas 77023-1452, (713) 767-3500.

(3) COMPANY: City of Rotan; DOCKET NUMBER: 2022-1223-UTL-E; IDENTIFIER: RN101428282; LOCATION: Rotan, Fisher County; TYPE OF FACILITY: retail public utility, exempt utility, or provider or conveyor of potable or raw water service; RULE VIOLATED: TWC, §13.1394(b)(2), by failing to adopt and submit to the TCEQ for approval an emergency preparedness plan that demonstrates the facility's ability to provide emergency operations; PENALTY: $920; ENFORCEMENT COORDINATOR: Daniel Brill, (512) 239-2564; REGIONAL OFFICE: 1977 Industrial Boulevard, Abilene, Texas 79602-7833, (325) 698-9674.

(4) COMPANY: Corpus Christi Liquefaction, LLC; DOCKET NUMBER: 2021-1033-AIR-E; IDENTIFIER: RN104104716; LOCATION: Gregory, San Patricio County; TYPE OF FACILITY: liquefied natural gas terminal; RULES VIOLATED: 30 TAC §§101.20(1) and (3), 115.112(c)(1), 116.115(c) and 122.143(4), 40 Code of Federal Regulations §60.112b(a)(3), New Source Review (NSR) Permit Numbers 105710 and PSDTX1306M1, Special Conditions (SC) Number 2.B, Federal Operating Permit (FOP) Number O3580, General Terms and Conditions (GTC) and Special Terms and Conditions (STC) Numbers 1.A, 4, and 8, and Texas Health and Safety Code (THSC), §382.085(b), by failing to replace the carbon canisters after exceeding the volatile organic compounds concentration limit; 30 TAC §§101.20(3), 116.115(b)(2)(F) and (c), and 122.143(4), NSR Permit Numbers 105710 and PSDTX1306M1, SC Number 1, FOP Number O3580, GTC and STC Number 9, and THSC, §382.085(b), by failing to comply with the maximum allowable emissions rates; and 30 TAC §§101.20(3), 116.115(c), and 122.143(4), NSR Permit Numbers 105710 and PSDTX1306M1, SC Number 10, FOP Number O3580, GTC and STC Number 9, and THSC, §382.085(b), by failing to comply with the minimum outlet temperature for the thermal oxidizer; PENALTY: $114,750; SUPPLEMENTAL ENVIRONMENTAL PROJECT OFFSET AMOUNT: $45,900; ENFORCEMENT COORDINATOR: Yuliya Dunaway, (210) 403-4077; REGIONAL OFFICE: 500 North Shoreline Boulevard, Suite 500, Corpus Christi, Texas 78401, (361) 881-6900.

(5) COMPANY: Indorama Ventures Oxides LLC; DOCKET NUMBER: 2021-0866-AIR-E; IDENTIFIER: RN100225721; LOCATION: Dayton, Liberty County; TYPE OF FACILITY: chemical manufacturing plant; RULES VIOLATED: 30 TAC §116.115(c), New Source Review Permit Number 3275A, Special Conditions Number 1, and Texas Health and Safety Code, §382.085(b), by failing to prevent unauthorized emissions; PENALTY: $3,750; ENFORCEMENT COORDINATOR: Yuliya Dunaway, (210) 403-4077; REGIONAL OFFICE: 5425 Polk Street, Suite H, Houston, Texas 77023-1452, (713) 767-3500.

(6) COMPANY: LAKESHORE UTILITY COMPANY; DOCKET NUMBER: 2022-1191-UTL-E; IDENTIFIER: RN102681665; LOCATION: Eustace, Henderson County; TYPE OF FACILITY: public water supply; RULE VIOLATED: TWC, §13.1394(b)(2), by failing to adopt and submit to the TCEQ for approval an emergency preparedness plan that demonstrates the facility's ability to provide emergency operations; PENALTY: $750; ENFORCEMENT COORDINATOR: Epifanio Villarreal, (361) 881-6991; REGIONAL OFFICE: 2916 Teague Drive, Tyler, Texas 75701-3734, (903) 535-5100.

(7) COMPANY: LAKESHORE UTILITY COMPANY; DOCKET NUMBER: 2022-1267-UTL-E; IDENTIFIER: RN101266039; LOCATION: Eustace, Henderson County; TYPE OF FACILITY: public water supply; RULE VIOLATED: TWC, §13.1394(b)(2), by failing to adopt and submit to the TCEQ for approval an emergency preparedness plan that demonstrates the facility's ability to provide emergency operations; PENALTY: $725; ENFORCEMENT COORDINATOR: Ashley Lemke, (512) 239-1118; REGIONAL OFFICE: 2916 Teague Drive, Tyler, Texas 75701-3734, (903) 535-5100.

(8) COMPANY: LAKESHORE UTILITY COMPANY; DOCKET NUMBER: 2022-1331-UTL-E; IDENTIFIER: RN101174902; LOCATION: Arp, Smith County; TYPE OF FACILITY: public water supply; RULE VIOLATED: TWC, §13.1394(b)(2), by failing to adopt and submit to the TCEQ for approval an emergency preparedness plan that demonstrates the facility's ability to provide emergency operations; PENALTY: $645; ENFORCEMENT COORDINATOR: Ashley Lemke, (512) 239-1118; REGIONAL OFFICE: 2916 Teague Drive, Tyler, Texas 75701-3734, (903) 535-5100.

(9) COMPANY: Little Elm Valley Water Supply Corporation; DOCKET NUMBER: 2022-1189-UTL-E; IDENTIFIER: RN101377489; LOCATION: Cameron, Bell County; TYPE OF FACILITY: public water supply; RULE VIOLATED: TWC, §13.1394(b)(2), by failing to adopt and submit to the TCEQ for approval an emergency preparedness plan that demonstrates the facility's ability to provide emergency operations; PENALTY: $500; ENFORCEMENT COORDINATOR: Epifanio Villarreal, (361) 881-6991; REGIONAL OFFICE: 6801 Sanger Avenue, Suite 2500, Waco, Texas 76710-7826, (254) 751-0335.

(10) COMPANY: Nocona Hills Water Supply Corporation; DOCKET NUMBER: 2022-1344-UTL-E; IDENTIFIER: RN101230472; LOCATION: Nocona, Montague County; TYPE OF FACILITY: public water supply; RULE VIOLATED: TWC, §13.1394(b)(2), by failing to adopt and submit to the TCEQ for approval an emergency preparedness plan that demonstrates the facility's ability to provide emergency operations; PENALTY: $500; ENFORCEMENT COORDINATOR: Epifanio Villarreal, (361) 881-6991; REGIONAL OFFICE: 1977 Industrial Boulevard, Abilene, Texas 79602-7833, (325) 698-9674.

(11) COMPANY: Petra Firma Development Group, Incorporated; DOCKET NUMBER: 2022-1342-UTL-E; IDENTIFIER: RN109875062; LOCATION: Christoval, Tom Green County; TYPE OF FACILITY: public water supply; RULE VIOLATED: TWC, §13.1394(b)(2), by failing to adopt and submit to the TCEQ for approval an emergency preparedness plan that demonstrates the facility's ability to provide emergency operations; PENALTY: $610; ENFORCEMENT COORDINATOR: Epifanio Villarreal, (361) 881-6991; REGIONAL OFFICE: 622 South Oakes, Suite K, San Angelo, Texas 76903-7035, (325) 655-9479.

(12) COMPANY: T and J AUTO, INCORPORATED; DOCKET NUMBER: 2022-0658-PST-E; IDENTIFIER: RN101831972; LOCATION: Plainview, Hale County; TYPE OF FACILITY: temporarily out-of-service underground storage tank (UST) system; RULES VIOLATED: 30 TAC §37.815(a) and (b) and §334.54(e)(5), by failing to provide financial assurance or conduct a site check and perform any necessary corrective actions for a temporarily out-of-service UST system in order to meet financial assurance exemption requirements; PENALTY: $3,375; ENFORCEMENT COORDINATOR: Courtney Gooris, (817) 588-5863; REGIONAL OFFICE: 5012 50th Street, Suite 100, Lubbock, Texas 79414-3426, (806) 796-7092.

TRD-202205000
Gitanjali Yadav
Deputy Director, Litigation
Texas Commission on Environmental Quality
Filed: December 13, 2022

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Enforcement Orders

An agreed order was adopted regarding HOCHHEIM PRAIRIE HERMANN SONS HALL ASSOCIATION, Docket No. 2021-1010-PWS-E on December 13, 2022, assessing $1,863 in administrative penalties with $372 deferred. Information concerning any aspect of this order may be obtained by contacting Ronica Rodriguez, 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 L.F. Manufacturing, Inc., Docket No. 2021-1138-AIR-E on December 13, 2022, assessing $3,500 in administrative penalties with $700 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 BELL CONTRACTORS, INC., Docket No. 2021-1292-WQ-E on December 13, 2022, assessing $6,750 in administrative penalties with $1,350 deferred. Information concerning any aspect of this order may be obtained by contacting Alejandro Laje, Enforcement Coordinator at (512) 239-2545, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was adopted regarding Ashley and Fagan Investments Co. Inc. dba Rio Brazos Water System, Docket No. 2021-1293-PWS-E on December 13, 2022, assessing $6,972 in administrative penalties with $1,394 deferred. Information concerning any aspect of this order may be obtained by contacting Samantha Salas, 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 Halyard Energy Henderson, LLC, Docket No. 2021-1296-AIR-E on December 13, 2022, assessing $2,250 in administrative penalties with $450 deferred. Information concerning any aspect of this order may be obtained by contacting Danielle Porras, 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 Sam Surani dba Tonies Beer & Grocery, Docket No. 2021-1316-PST-E on December 13, 2022, assessing $3,937 in administrative penalties with $787 deferred. Information concerning any aspect of this order may be obtained by contacting Stephanie McCurley, Enforcement Coordinator at (512) 239-2545, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was adopted regarding RoadLink Inc, Docket No. 2021-1347-EAQ-E on December 13, 2022, assessing $7,500 in administrative penalties with $1,500 deferred. Information concerning any aspect of this order may be obtained by contacting Mark Gamble, 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 Kenneth Wayne Butts, Docket No. 2021-1380-OSS-E on December 13, 2022, assessing $510 in administrative penalties with $102 deferred. Information concerning any aspect of this order may be obtained by contacting Cheryl Thompson, 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 Gladstone Investment Group Inc., Docket No. 2021-1398-WQ-E on December 13, 2022, assessing $5,625 in administrative penalties with $1,125 deferred. Information concerning any aspect of this order may be obtained by contacting Harley Hobson, Enforcement Coordinator at (512) 239-2545, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was adopted regarding Seabrook Seafood, Inc., Docket No. 2021-1487-PWS-E on December 13, 2022, assessing $1,962 in administrative penalties with $392 deferred. Information concerning any aspect of this order may be obtained by contacting Samantha Salas, 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 Grizzly Pines, LLC, Docket No. 2022-0008-PWS-E on December 13, 2022, assessing $2,187 in administrative penalties with $437 deferred. Information concerning any aspect of this order may be obtained by contacting Ecko Beggs, 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 North Runnels Water Supply Corporation, Docket No. 2022-0095-PWS-E on December 13, 2022, assessing $1,589 in administrative penalties with $317 deferred. Information concerning any aspect of this order may be obtained by contacting Ashley Lemke, 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 PUNJABI DHABBA INC, Docket No. 2022-0220-PWS-E on December 13, 2022, assessing $4,750 in administrative penalties with $950 deferred. Information concerning any aspect of this order may be obtained by contacting Ecko Beggs, 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 Wood Acres Properties LLC., Docket No. 2022-0393-PWS-E on December 13, 2022, assessing $1,650 in administrative penalties with $330 deferred. Information concerning any aspect of this order may be obtained by contacting Epifanio Villarreal, Enforcement Coordinator at (512) 239-2545, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was adopted regarding Sherman/Grayson Hospital, LLC dba Wilson N Jones Medical Center, Docket No. 2022-0416-PST-E on December 13, 2022, assessing $4,875 in administrative penalties with $975 deferred. Information concerning any aspect of this order may be obtained by contacting Courtney Gooris, 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 EOG Resources, Inc., Docket No. 2022-0471-AIR-E on December 13, 2022, assessing $7,500 in administrative penalties with $1,500 deferred. Information concerning any aspect of this order may be obtained by contacting Kate Dacy, 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 Todd Tays dba Lost Alaskan RV Park and Shazlyn Tays dba Lost Alaskan RV Park, Docket No. 2022-0487-PWS-E on December 13, 2022, assessing $262 in adminis-

trative penalties with $52 deferred. Information concerning any aspect of this order may be obtained by contacting Carlos Molina, 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 William Donald Smith dba Kingmont Mobile Home Park, Docket No. 2022-0492-PWS-E on December 13, 2022, assessing $1,245 in administrative penalties with $249 deferred. Information concerning any aspect of this order may be obtained by contacting Ecko Beggs, Enforcement Coordinator at (512) 239-2545, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

A field citation was adopted regarding City of Beeville, Docket No. 2022-0825-WQ-E on December 13, 202,2 assessing $875 in administrative penalties. Information concerning any aspect of this citation may be obtained by contacting Mark Gamble, Enforcement Coordinator at (512) 239-2545, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

A field citation was adopted regarding Baldemar J. Maldonado, Docket No. 2022-0837-WOC-E on December 13, 2022, assessing $175 in administrative penalties. Information concerning any aspect of this citation may be obtained by contacting Corinna Willis, Enforcement Coordinator at (512) 239-2545, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

A field citation was adopted regarding EARTH HAULERS INC, Docket No. 2022-0851-WQ-E on December 13, 2022, assessing $875 in administrative penalties. Information concerning any aspect of this citation may be obtained by contacting Mark Gamble, Enforcement Coordinator at (512) 239-2545, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

A field citation was adopted regarding Richard P. Abbuhl, Docket No. 2022-0859-WOC-E on December 13, 2022, assessing $175 in administrative penalties. Information concerning any aspect of this citation may be obtained by contacting Corinna Willis, Enforcement Coordinator at (512) 239-2545, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

A field citation was adopted regarding Northwest Harris County Mud 15, Docket No. 2022-0883-WQ-E on December 13, 2022, assessing $875 in administrative penalties. Information concerning any aspect of this citation may be obtained by contacting Harley Hobson, Enforcement Coordinator at (512) 239-2545, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

A field citation was adopted regarding City of Jacinto City, Docket No. 2022-0968-WQ-E on December 13, 2022, assessing $875 in administrative penalties. Information concerning any aspect of this citation may be obtained by contacting Mark Gamble, Enforcement Coordinator at (512) 239-2545, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

A field citation was adopted regarding BUFORD - THOMPSON COMPANY, LTD., Docket No. 2022-1044-WQ-E on December 13, 2022, assessing $875 in administrative penalties. Information concerning any aspect of this citation may be obtained by contacting Cheryl Thompson, Enforcement Coordinator at (512) 239-2545, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

A field citation was adopted regarding John K. Sheffield, Docket No. 2022-1072-OSI-E on December 13, 2022, assessing $175 in administrative penalties. Information concerning any aspect of this citation may be obtained by contacting Cheryl Thompson, Enforcement Coordinator at (512) 239-2545, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

A field citation was adopted regarding Pappys Sand & Gravel Inc, Docket No. 2022-1074-WQ-E on December 13, 2022, assessing $875 in administrative penalties. Information concerning any aspect of this citation may be obtained by contacting Harley Hobson, Enforcement Coordinator at (512) 239-2545, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

A field citation was adopted regarding Rebecca Ann Rodriquez, Docket No. 2022-1078-WOC-E on December 13, 2022, assessing $175 in administrative penalties. Information concerning any aspect of this citation may be obtained by contacting Daniel Brill, Enforcement Coordinator at (512) 239-2545, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

A field citation was adopted regarding Bar V Holdings LLC, Docket No. 2022-1128-WR-E on December 13, 2022, assessing $875 in administrative penalties. Information concerning any aspect of this citation may be obtained by contacting Cheryl Thompson, Enforcement Coordinator at (512) 239-2545, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

TRD-202205049
Laurie Gharis
Chief Clerk
Texas Commission on Environmental Quality
Filed: December 14, 2022

Enforcement Orders

An agreed order was adopted regarding City of George West, Docket No. 2018-1738-MWD-E on December 14, 2022, assessing $96,476 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 BEN-HUR ENTERPRISES, LTD., Docket No. 2019-0802-WQ-E on December 14, 2022, assessing $33,750 in administrative penalties. Information concerning any aspect of this order may be obtained by contacting Casey Kurnath, 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 WPL Investments III, L.L.C. dba Pine Ridge Mobile Home Park, Docket No. 2019-0877-MSW-E on December 14, 2022, assessing $2,165 in administrative penalties. Information concerning any aspect of this order may be obtained by contacting Misty James, Staff Attorney at (512) 239-3400, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was adopted regarding City of Petersburg, Docket No. 2019-1548-MSW-E on December 14, 2022, assessing $9,150 in administrative penalties with $1,830 deferred. Information concerning any aspect of this order may be obtained by contacting Stephanie McCurley, Enforcement Coordinator at (512) 239-2545, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was adopted regarding Turner Concrete Products Holdings, LP, Docket No. 2020-0883-AIR-E on December 14, 2022, assessing $17,855 in administrative penalties with $3,571 deferred. Information concerning any aspect of this order may be obtained by contacting Toni Red, Enforcement Coordinator at (512) 239-2545, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was adopted regarding City of Morgan's Point, Docket No. 2020-0934-MWD-E on December 14, 2022, assessing $33,000 in administrative penalties. Information concerning any aspect of this order may be obtained by contacting Mark Gamble, 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 CIRCLE "R" RANCHETTES RECREATION AND COMMUNITY CORPORATION, Docket No. 2020-1394-PWS-E on December 14, 2022, assessing $3,719 in administrative penalties. Information concerning any aspect of this order may be obtained by contacting Casey Kurnath, 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 g Donald R. Cole dba Blue Ridge Water System and Susan E. Cole dba Blue Ridge Water System, Docket No. 2020-1508-PWS-E on December 14, 2022, assessing $4,395 in administrative penalties. Information concerning any aspect of this order may be obtained by contacting William Hogan, 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 Equistar Chemicals, LP, Docket No. 2020-1543-AIR-E on December 14, 2022, assessing $187,773 in administrative penalties with $37,553 deferred. Information concerning any aspect of this order may be obtained by contacting Amanda Diaz, 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 Schenck Builders, LLC, Docket No. 2021-0036-WQ-E on December 14, 2022, assessing $2,779 in administrative penalties. Information concerning any aspect of this order may be obtained by contacting Cynthia Sirois, 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 Chevron Phillips Chemical Company LP, Docket No. 2021-0278-AIR-E on December 14, 2022, assessing $75,189 in administrative penalties with $15,037 deferred. Information concerning any aspect of this order may be obtained by contacting Toni Red, 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 INEOS USA LLC, Docket No. 2021-0298-AIR-E on December 14, 2022, assessing $614,092 in administrative penalties with $7,918 deferred. Information concerning any aspect of this order may be obtained by contacting Danielle Porras, 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 Phillips 66 Company, Docket No. 2021-0335-AIR-E on December 14, 2022, assessing $100,403 in administrative penalties with $2,527 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 Lonestar Operating, LLC, Docket No. 2021-0400-AIR-E on December 14, 2022, assessing $17,938 in administrative penalties with $3,587 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 AWS, LLC dba AWS Communications, Docket No. 2021-0656-MLM-E on December 14, 2022, assessing $10,381 in administrative penalties. Information concerning any aspect of this order may be obtained by contacting Marilyn Norrod, 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 STRIPING TECHNOLOGY, L.P., Docket No. 2021-0701-IHW-E on December 14, 2022, assessing $11,250 in administrative penalties with $2,250 deferred. Information concerning any aspect of this order may be obtained by contacting Stephanie McCurley, Enforcement Coordinator at (512) 239-2545, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was adopted regarding LyondellBasell Acetyls, LLC, Docket No. 2021-0817-IWD-E on December 14, 2022, assessing $17,600 in administrative penalties with $3,520 deferred. Information concerning any aspect of this order may be obtained by contacting Laura Draper, 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 PADAM PRABHU INVESTMENT, INC. dba Stewart Food Mart 1, Docket No. 2021-0842-PST-E on December 14, 2022, assessing $25,928 in administrative penalties with $5,185 deferred. Information concerning any aspect of this order may be obtained by contacting Courtney Gooris, 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 290 KICKAPOO DEVELOPMENT INC., Docket No. 2021-0920-MWD-E on December 14, 2022, assessing $9,375 in administrative penalties with $1,875 deferred. Information concerning any aspect of this order may be obtained by contacting Ellen Ojeda, 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 CHAPARRAL STEEL MIDLOTHIAN, LP, Docket No. 2021-0932-IHW-E on December 14, 2022, assessing $25,885 in administrative penalties with $5,177 deferred. Information concerning any aspect of this order may be obtained by contacting Courtney Gooris, 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 New Braunfels Utilities, Docket No. 2021-0988-MWD-E on December 14, 2022, assessing $10,250 in administrative penalties. Information concerning any aspect of this order may be obtained by contacting Cheryl Thompson, 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 Sebastian Hwang, Docket No. 2021-1016-MLM-E on December 14, 2022, assessing $11,250 in administrative penalties with $2,250 deferred. Information concerning any aspect of this order may be obtained by contacting Mark Gamble, Enforcement Coordinator at (512) 239-2545, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was adopted regarding City of Dallas, Docket No. 2021-1093-MWD-E on December 14, 2022, assessing $9,625 in administrative penalties. Information concerning any aspect of this order may be obtained by contacting Cheryl Thompson, 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 Deyma Davila dba Dey's RV and Mobile Park, LLC, Docket No. 2021-1125-PWS-E on December 14, 2022, assessing $4,115 in administrative penalties with $2,212 deferred. Information concerning any aspect of this order may be obtained by contacting Ecko Beggs, 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 Stonetown Walnut Creek, LLC, Docket No. 2021-1143-MWD-E on December 14, 2022, assessing $23,713 in administrative penalties with $4,742 deferred. Information concerning any aspect of this order may be obtained by contacting Alejandro Laje, Enforcement Coordinator at (512) 239-2545, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was adopted regarding Plainview Bioenergy, LLC dba White Energy, Docket No. 2021-1153-PWS-E on December 14, 2022, assessing $3,982 in administrative penalties with $3,000 deferred. Information concerning any aspect of this order may be obtained by contacting Ecko Beggs, Enforcement Coordinator at (512) 239-2545, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was adopted regarding City of Rule, Docket No. 2021-1266-MLM-E on December 14, 2022, assessing $2,610 in administrative penalties. Information concerning any aspect of this order may be obtained by contacting Ryan Byer, 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 IACX Rock Creek LLC, Docket No. 2021-1271-AIR-E on December 14, 2022, assessing $23,875 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 Dixie Chemical Company, Inc., Docket No. 2021-1272-AIR-E on December 14, 2022, assessing $98,100 in administrative penalties with $19,620 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 CARO WATER SUPPLY CORPORATION, Docket No. 2021-1288-PWS-E on December 14, 2022, assessing $7,102 in administrative penalties. Information concerning any aspect of this order may be obtained by contacting Ecko Beggs, Enforcement Coordinator at (512) 239-2545, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was adopted regarding City of Coahoma, Docket No. 2021-1297-PWS-E on December 14, 2022, assessing $5,500 in administrative penalties. Information concerning any aspect of this order may be obtained by contacting America Ruiz, 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 Chevron Phillips Chemical Company LP, Docket No. 2021-1311-AIR-E on December 14, 2022, assessing $42,725 in administrative penalties with $8,545 deferred. Information concerning any aspect of this order may be obtained by contacting Katelyn Dacy, 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 COUTO HOMES INC., Docket No. 2021-1320-WQ-E on December 14, 2022, assessing $11,000 in administrative penalties with $2,200 deferred. Information concerning any aspect of this order may be obtained by contacting Cheryl Thompson, 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 CROWN Cork & Seal USA, Inc., Docket No. 2021-1340-AIR-E on December 14, 2022, assessing $46,314 in administrative penalties with $9,262 deferred. Information concerning any aspect of this order may be obtained by contacting Toni Red, Enforcement Coordinator at (512) 239-2545, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was adopted regarding Equistar Chemicals, LP, Docket No. 2021-1430-AIR-E on December 14, 2022, assessing $202,500 in administrative penalties. Information concerning any aspect of this order may be obtained by contacting Kate Dacy, 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 Motiva Chemicals LLC, Docket No. 2021-1461-AIR-E on December 14, 2022, assessing $52,250 in administrative penalties. Information concerning any aspect of this order may be obtained by contacting Kate Dacy, 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 COWBOY STAR INC. dba Beckley's Food Mart, Docket No. 2021-1502-PST-E on December 14, 2022, assessing $8,400 in administrative penalties with $1,680 deferred. Information concerning any aspect of this order may be obtained by contacting Ken Moller, 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 Air Liquide Large Industries U.S. LP, Docket No. 2021-1513-AIR-E on December 14, 2022, assessing $12,300 in administrative penalties with $2,460 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 HARTLEY WATER SUPPLY CORPORATION, Docket No. 2021-1529-PWS-E on December 14, 2022, assessing $3,986 in administrative penalties. Information concerning any aspect of this order may be obtained by contacting America Ruiz, 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 Metro Water Systems, Inc., Docket No. 2021-1537-IWD-E on December 14, 2022, assessing $16,875 in administrative penalties with $3,375 deferred. 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 UNION CARBIDE CORPORATION, Docket No. 2022-0023-AIR-E on December 14, 2022, assessing $19,225 in administrative penalties with $3,845 deferred. Information concerning any aspect of this order may be obtained by contacting Toni Red, 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 MIMS WATER SUPPLY CORPORATION, Docket No. 2022-0070-PWS-E on December 14, 2022, assessing $2,625 in administrative penalties with $2,625 deferred. Information concerning any aspect of this order may be obtained by contacting America Ruiz, 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 Jose Isaias Roque and Jose Conejo, Docket No. 2022-0071-MLM-E on December 14, 2022, assessing $10,144 in administrative penalties. Information concerning any aspect of this order may be obtained by contacting Jennifer Peltier, 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 Bexar County Hospital District, Docket No. 2022-0111-PST-E on December 14, 2022, assessing $8,438 in administrative penalties with $1,687 deferred. Information concerning any aspect of this order may be obtained by contacting Stephanie McCurley, Enforcement Coordinator at (512) 239-2545, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was adopted regarding Texas Sigma Partners, LLC, Docket No. 2022-0166-AIR-E on December 14, 2022, assessing $18,750 in administrative penalties with $3,750 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 Sonnyreena corporation dba Retail King Mart, Docket No. 2022-0183-PST-E on December 14, 2022, assessing $7,699 in administrative penalties with $1,539 deferred. Information concerning any aspect of this order may be obtained by contacting Courtney Gooris, 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 3M Company, Docket No. 2022-0235-AIR-E on December 14, 2022, assessing $41,625 in administrative penalties with $8,325 deferred. Information concerning any aspect of this order may be obtained by contacting Danielle Porras, Enforcement Coordinator at (512) 239-2545, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

TRD-202205050
Laurie Gharis
Chief Clerk
Texas Commission on Environmental Quality
Filed: December 14, 2022

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Notice and Comment Hearing Draft Permit No.: O1061

This is a notice for a notice and comment hearing on Federal Operating Permit Number O1061. During the notice and comment hearing informal questions on the Federal Operating Permit will be answered and formal comments will be received. The Texas Commission on Environmental Quality (TCEQ) has scheduled the notice and comment hearing regarding this application and draft permit as follows:

Date: January 30, 2023

Time: 7:00 p.m.

Location: Pasadena Convention Center & Fairgrounds

7902 Fairmont Parkway

Pasadena, Texas 77507, Texas

Location phone: (713) 848-5333

Application and Draft Permit. Intercontinental Terminals Company, LLC, PO Box 698, Deer Park, Texas 77536-0698, an Other Warehousing and Storage facility, has applied to the TCEQ for a Renewal of Federal Operating Permit (herein referred to as permit) No. O1061, Application No. 28256, to authorize operation of the Deer Park Terminal. The area addressed by the application is located at 1943 Independence Pkwy. S. in La Porte, Harris County, Texas 77571-9801. This application was received by the TCEQ on October 17, 2018.

The TCEQ Executive Director has completed the technical review of the application and prepared a draft permit. The draft permit, if approved, will codify the conditions under which the site must operate. The TCEQ Executive Director recommends issuance of the draft permit. The purpose of a federal operating permit is to improve overall compliance with the rules governing air pollution control by clearly listing all applicable requirements, as defined in Title 30 Texas Administrative Code (30 TAC) § 122.10. The permit will not authorize new construction or new emissions.

Notice and Comment Hearing. The hearing will be structured for the receipt of oral or written comments by interested persons. Registration and an informal discussion period with commission staff members will begin during the first 30 minutes. During the informal discussion period, the public is encouraged to ask questions and engage in open discussion with the applicant and the TCEQ staff concerning this application and draft permit. Issues raised during this discussion period **will only** be addressed in the formal response to comments if the issue is also presented during the hearing. After the conclusion of the informal discussion period, the TCEQ will conduct a notice and comment hearing regarding the application and draft permit. Individuals may present oral statements when called upon in order of registration. A five-minute time limit may be established at the hearing to assure that enough time is allowed for every interested person to speak. There will be no open discussion during the hearing; however, commission staff members will be available to discuss the proposal and answer questions after the hearing. The purpose of this hearing will be to receive formal public comment which the TCEQ will consider in determining whether to revise and/or issue the permit and in determining the accuracy and completeness of the permit. Any person may attend this meeting and submit written or oral comments. The hearing will be conducted in accordance with the Texas Clean Air Act § 382.0561, as codified in the Texas Health and Safety Code, and 30 TAC §122.340.

Persons who have special communication or other accommodation needs who are planning to attend the hearing should contact the TCEQ Public Education Program toll free at 1-800-687-4040 or 1-800-RELAY-TX (TDD), at least five business days prior to the hearing.

Any person may also submit written comments before the hearing to the Texas Commission on Environmental Quality, Office of Chief Clerk, MC-105, P. O. Box 13087, Austin, Texas 78711-3087, or electronically at www14.tceq.texas.gov/epic/eComment/. Written comments should include (1) your name, address, and daytime telephone number, and (2) the draft permit number found at the top of this notice.

A notice of proposed final action that includes a response to comments and identification of any changes to the draft permit will be mailed to everyone who submitted: written comments, and/or hearing requests, attended the hearing, or requested to be on the mailing list for this application. This mailing will also provide instructions for public petitions to the U.S. Environmental Protection

Agency (EPA) to request that the EPA object to the issuance of the proposed permit. After receiving a petition, the EPA may only object to the issuance of a permit which is not in compliance with applicable requirements or the requirements of 30 TAC Chapter 122.

Mailing List. In addition to submitting public comments, a person may ask to be placed on a mailing list for this application by sending a request to the TCEQ Office of the Chief Clerk at the address above. Those on the mailing list will receive copies of future public notices (if any) mailed by the Chief Clerk for this application.

Information. For additional information about this permit application or the permitting process, please contact the Texas Commission on Environmental Quality, Public Education Program, MC-108, P.O. Box 13087, Austin, Texas 78711-3087 or toll free at (800) 687-4040. General information about the TCEQ can be found at www.tceq.texas.gov. Si desea información en español, puede llamar al (800) 687-4040.

Further information may also be obtained for Intercontinental Terminals Company LLC by calling Michael Gaudet, Environmental Compliance Manager at (281) 884-0360.

Notice Issuance Date: December 9, 2022

TRD-202205042
Laurie Gharis
Chief Clerk
Texas Commission on Environmental Quality
Filed: December 14, 2022

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Notice of District Petition

Notice issued December 8, 2022

TCEQ Internal Control No. D-08222022-048; Gunter Ventures, LLC, a Texas limited liability company (Petitioner) filed a petition for creation of Sunset Ranch Municipal Utility District of Grayson County (District) with the Texas Commission on Environmental Quality (TCEQ). The petition was filed pursuant to Article XVI, § 59 of the Constitution of the State of Texas; Chapters 49 and 54 of the Texas Water Code; 30 Texas Administrative Code Chapter 293; and the procedural rules of the TCEQ.

The petition states that: (1) the Petitioner holds title to a majority in value of the land to be included in the proposed District; (2) there are no lienholders on the property to be included in the proposed District; (3) the proposed District will contain approximately 201.196 acres located within Grayson County, Texas; and (4) the proposed District is located outside of the corporate boundaries and extraterritorial jurisdiction of any municipality. The petition further states that the proposed District will: (1) purchase, construct, acquire, improve, or extend inside or outside of its boundaries any and all works, improvements, facilities, plants, equipment, and appliances necessary or helpful to supply and distribute water for municipal, domestic, and commercial purposes; (2) collect, transport, process, dispose of, and control domestic and commercial wastes; (3) gather, conduct, divert, abate, amend, and control local storm water or other local harmful excesses of water in the proposed District; (4) design, acquire, construct, finance, improve, operate, and maintain macadamized, graveled, or paved roads and turnpikes, or improvements in aid of those roads; and (5) purchase, construct, acquire, improve, or extend inside or outside of its boundaries such additional facilities, systems, plants, and enterprises as shall be consonant with the purposes for which the proposed District is created. According to the petition, a preliminary investigation has been made to determine the cost of the project, and it is estimated by the Petitioner that the cost of said project will be approximately $28,450,000. The financial analysis in the application was based on an estimated 29,655,000 ($19,235,000 for water, wastewater, and drainage plus $10,420,000 for roads) at the time of submittal.

INFORMATION SECTION

To view the complete issued notice, view the notice on our website at www.tceq.texas.gov/agency/cc/pub_notice.html or call the Office of the Chief Clerk at (512) 239-3300 to obtain a copy of the complete notice. When searching the website, type in the issued date range shown at the top of this document to obtain search results.

The TCEQ may grant a contested case hearing on the petition if a written hearing request is filed within 30 days after the newspaper publication of the 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) the name of the Petitioner and the TCEQ Internal Control Number; (3) the statement "I/we request a contested case hearing"; (4) a brief description of how you would be affected by the petition in a way not common to the general public; and (5) the location of your property relative to the proposed District's boundaries. You may also submit your proposed adjustments to the petition. 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. The Executive Director may approve the petition unless a written request for a contested case hearing is filed within 30 days after the newspaper publication of this notice. If a hearing request is filed, the Executive Director will not approve the petition and will forward the petition and hearing request to the TCEQ Commissioners for their consideration at a scheduled Commission meeting. If a contested case hearing is held, it will be a legal proceeding similar to a civil trial in state district court. Written hearing requests should be submitted to the Office of the Chief Clerk, MC 105, TCEQ, P.O. Box 13087, Austin, Texas 78711-3087. 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 Districts Review Team, at (512) 239-4691. Si desea información en español, puede llamar al (512) 239-0200. General information regarding TCEQ can be found at our website at www.tceq.texas.gov.

TRD-202205038
Laurie Gharis
Chief Clerk
Texas Commission on Environmental Quality
Filed: December 14, 2022

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Notice of District Petition

Notice issued December 14, 2022

TCEQ Internal Control No. D-091122022-023; Cedar Creek East LP, a Texas limited partnership, CTX SPE 3, LP, a Texas limited partnership, 5 Star Family Holdings LP, a Texas limited partnership, Austin14 SAI Investments LLC, a Texas limited liability company, and NEU Community Creekside LLC, a Texas limited liability company (the "Petitioners"), filed an amended petition (petition) for creation of Bastrop County Municipal Utility District No. 3 (District) with the Texas Commission on Environmental Quality (TCEQ). The petition was filed pursuant to Article XVI, § 59 of the Constitution of the State of Texas; Chapters 49 and 54 of the Texas Water Code; 30 Texas Administrative Code Chapter 293; and the procedural rules of the TCEQ. The petition states that: (1) the Petitioners hold title to a majority in value of the land to be included in the proposed District; (2) there are three lienholders, Stallion Texas Real Estate Fund, LLC, Stallion Texas Real Estate Fund II-REIT, LLC, and Austerra Stable Income Fund, L.P., on a portion of

the property to be included in the proposed District and the aforementioned entities have consented to the creation of the District; (3) the proposed District will contain approximately 636.979 acres of land located within Bastrop County, Texas; and (4) all of the land to be included within the proposed district is located within the extraterritorial jurisdiction of the City of Bastrop (City). In accordance with Local Government Code Section 42.042 and Texas Water Code Section 54.016, a petition was submitted to the City, requesting the City's consent to the creation of the District. After more than 90 days passed without receiving consent, a petition was submitted to the City to provide water and sewer services to the District. The 120-day period for reaching a mutually agreeable contract as established by the Texas Water Code Section 54.016(c) expired and information provided indicates that the Petitioners and the City have not executed a mutually agreeable contract for service. Pursuant to Texas Water Code Section 54.016(d), failure to execute such an agreement constitutes authorization for the Petitioners to proceed to the TCEQ for inclusion of the land into the District. The petition further states that the proposed District will: (1) purchase, design, construct, acquire, maintain, own, operate, repair, improve and extend of a waterworks and sanitary sewer system for residential and commercial purposes; (2) construct, acquire, improve, extend, maintain, and operate works, improvements, facilities, plants, equipment and appliances helpful or necessary to provide more adequate drainage for the District; (3) control, abate and amend local storm waters or other harmful excesses of waters; (4) purchase, construct, acquire, maintain, own, operate, repair, improve and extend such additional facilities, including roads, parks and recreation facilities, systems, plants and enterprises as shall be consistent with all of the purposes for which the proposed District is created. According to the petition, a preliminary investigation has been made to determine the cost of the project, and it is estimated by the Petitioners that the cost of said project will be approximately $110,640,000 (including $92,760,000 for water, wastewater, and drainage plus $9,455,000 for roads and $8,425,000 for recreational facilities).

INFORMATION SECTION

To view the complete issued notice, view the notice on our web site at www.tceq.texas.gov/agency/cc/pub_notice.html or call the Office of the Chief Clerk at 512-239-3300 to obtain a copy of the complete notice. When searching the web site, type in the issued date range shown at the top of this document to obtain search results.

The TCEQ may grant a contested case hearing on the petition if a written hearing request is filed within 30 days after the newspaper publication of the 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) the name of the Petitioner and the TCEQ Internal Control Number; (3) the statement "I/we request a contested case hearing"; (4) a brief description of how you would be affected by the petition in a way not common to the general public; and (5) the location of your property relative to the proposed District's boundaries. You may also submit your proposed adjustments to the petition. 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. The Executive Director may approve the petition unless a written request for a contested case hearing is filed within 30 days after the newspaper publication of this notice. If a hearing request is filed, the Executive Director will not approve the petition and will forward the petition and hearing request to the TCEQ Commissioners for their consideration at a scheduled Commission meeting. If a contested case hearing is held, it will be a legal proceeding similar to a civil trial in state district court. Written hearing requests should be submitted to the Office of the Chief Clerk, MC 105, TCEQ, P.O. Box 13087, Austin, Texas 78711-3087. 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 Districts Review Team, at (512) 239-4691. Si desea información en español, puede llamar al (512) 239-0200. General information regarding TCEQ can be found at our web site at www.tceq.texas.gov.

TRD-202205039
Laurie Gharis
Chief Clerk
Texas Commission on Environmental Quality
Filed: December 14, 2022

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Notice of District Petition

Notice issued December 14, 2022

TCEQ Internal Control No. D-03172022-031; Treasure Island Laguna Azure, LLC, a Wyoming limited liability company (Petitioner), filed a petition for the creation of Grayson County Municipal Utility District No. 6-A (District) with the Texas Commission on Environmental Quality (TCEQ). The petition was filed pursuant to Article XVI, § 59 of the Constitution of the State of Texas; Chapters 49 and 54 of the Texas Water Code; 30 Texas Administrative Code Chapter 293; and the procedural rules of the TCEQ.

The petition states that: (1) the Petitioner holds title to a majority in value of the land to be included in the proposed District; (2) there is one lienholder, MCI Preferred Income Fund II, LLC, a Delaware limited liability company, on the property to be included in the proposed District and information provided indicates that the aforementioned entity has consented to the petition; (3) the proposed District will contain approximately 596.73 acres located within Grayson County, Texas; and (4) the land within the proposed District is located wholly within the extraterritorial jurisdiction of the City of Van Alstyne, Texas (City). The petition further states that the proposed District will: (1) construct, maintain, and operate a waterworks system, including the purchase and sale of water, for domestic and commercial purposes; (2) construct, maintain, and operate a sanitary sewer collection, treatment, and disposal system, for domestic and commercial purposes; (3) construct, install, maintain, purchase, and operate drainage and roadway facilities and improvements; and (4) construct, install, maintain, purchase, and operate facilities, systems, plants, and enterprises of such additional facilities as shall be consonant with all of the purposes for which the proposed District is created.

According to the petition, a preliminary investigation has been made to determine the cost of the project, and it is estimated by the Petitioner that the cost of said project will be approximately $108,335,000 ($93,895,000 for water, wastewater, and drainage plus $14,440,000 for roads). In accordance with Local Government Code §42.042 and Texas Water Code §54.016, the Petitioner submitted a petition to the City, requesting the City's consent to the creation of the District. After more than 90 days passed without receiving consent, the Petitioner submitted a petition to the City to provide water and sewer services to the District. The 120-day period for reaching a mutually agreeable contract as established by the Texas Water Code §54.016(c) expired and information provided indicates that the Petitioner and the City have not executed a mutually agreeable contract for service. Pursuant to Texas Water Code §54.016(d), failure to execute such an agreement constitutes authorization for the Petitioner to proceed to the TCEQ for inclusion of their Property into the District.

INFORMATION SECTION

To view the complete issued notice, view the notice on our web site at www.tceq.texas.gov/agency/cc/pub_notice.html or call the Office of the Chief Clerk at (512) 239-3300 to obtain a copy of the complete notice. When searching the web site, type in the issued date range shown at the top of this document to obtain search results.

The TCEQ may grant a contested case hearing on the petition if a written hearing request is filed within 30 days after the newspaper publication of the 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) the name of the Petitioner and the TCEQ Internal Control Number; (3) the statement "I/we request a contested case hearing"; (4) a brief description of how you would be affected by the petition in a way not common to the general public; and (5) the location of your property relative to the proposed District's boundaries. You may also submit your proposed adjustments to the petition. 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. The Executive Director may approve the petition unless a written request for a contested case hearing is filed within 30 days after the newspaper publication of this notice. If a hearing request is filed, the Executive Director will not approve the petition and will forward the petition and hearing request to the TCEQ Commissioners for their consideration at a scheduled Commission meeting. If a contested case hearing is held, it will be a legal proceeding similar to a civil trial in state district court. Written hearing requests should be submitted to the Office of the Chief Clerk, MC 105, TCEQ, P.O. Box 13087, Austin, Texas 78711-3087. 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 Districts Review Team, at (512) 239-4691. *Si desea informacíon en español, puede llamar al (512) 239-0200.* General information regarding TCEQ can be found at our web site at www.tceq.texas.gov.

TRD-202205040
Laurie Gharis
Chief Clerk
Texas Commission on Environmental Quality
Filed: December 14, 2022

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Notice of District Petition

Notice issued December 14, 2022

TCEQ Internal Control No. D-03172022-032; Treasure Island Laguna Azure, LLC, a Wyoming limited liability company (Petitioner), filed a petition for the creation of Grayson County Municipal Utility District No. 6-B (District) with the Texas Commission on Environmental Quality (TCEQ). The petition was filed pursuant to Article XVI, § 59 of the Constitution of the State of Texas; Chapters 49 and 54 of the Texas Water Code; 30 Texas Administrative Code Chapter 293; and the procedural rules of the TCEQ.

The petition states that: (1) the Petitioner holds title to a majority in value of the land to be included in the proposed District; (2) there is one lienholder, MCI Preferred Income Fund II, LLC, a Delaware limited liability company, on the property to be included in the proposed District and information provided indicates that the aforementioned entity has consented to the petition; (3) the proposed District will contain approximately 531.98 acres located within Grayson County, Texas; and (4) the land within the proposed District is located wholly within the extraterritorial jurisdiction of the City of Van Alstyne, Texas (City). The petition further states that the proposed District will: (1) construct, maintain, and operate a waterworks system, including the purchase and sale of water, for domestic and commercial purposes; (2) construct, maintain, and operate a sanitary sewer collection, treatment, and disposal system, for domestic and commercial purposes; (3) construct, install, maintain, purchase, and operate drainage and roadway facilities and improvements; and (4) construct, install, maintain, purchase, and operate facilities, systems, plants, and enterprises of such additional facilities as shall be consonant with all of the purposes for which the proposed District is created.

According to the petition, a preliminary investigation has been made to determine the cost of the project, and it is estimated by the Petitioner that the cost of said project will be approximately $98,085,000 ($86,415,000 for water, wastewater, and drainage plus $11,670,000 for roads). In accordance with Local Government Code §42.042 and Texas Water Code §54.016, the Petitioner submitted a petition to the City, requesting the City's consent to the creation of the District. After more than 90 days passed without receiving consent, the Petitioner submitted a petition to the City to provide water and sewer services to the District. The 120-day period for reaching a mutually agreeable contract as established by the Texas Water Code §54.016(c) expired and information provided indicates that the Petitioner and the City have not executed a mutually agreeable contract for service. Pursuant to Texas Water Code §54.016(d), failure to execute such an agreement constitutes authorization for the Petitioner to proceed to the TCEQ for inclusion of their Property into the District.

INFORMATION SECTION

To view the complete issued notice, view the notice on our website at www.tceq.texas.gov/agency/cc/pub_notice.html or call the Office of the Chief Clerk at (512) 239-3300 to obtain a copy of the complete notice. When searching the website, type in the issued date range shown at the top of this document to obtain search results.

The TCEQ may grant a contested case hearing on the petition if a written hearing request is filed within 30 days after the newspaper publication of the 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) the name of the Petitioner and the TCEQ Internal Control Number; (3) the statement "I/we request a contested case hearing"; (4) a brief description of how you would be affected by the petition in a way not common to the general public; and (5) the location of your property relative to the proposed District's boundaries. You may also submit your proposed adjustments to the petition. 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. The Executive Director may approve the petition unless a written request for a contested case hearing is filed within 30 days after the newspaper publication of this notice. If a hearing request is filed, the Executive Director will not approve the petition and will forward the petition and hearing request to the TCEQ Commissioners for their consideration at a scheduled Commission meeting. If a contested case hearing is held, it will be a legal proceeding similar to a civil trial in state district court. Written hearing requests should be submitted to the Office of the Chief Clerk, MC 105, TCEQ, P.O. Box 13087, Austin, Texas 78711-3087. 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 Districts Review Team, at (512) 239-4691. Si desea información en español, puede llamar al (512) 239-0200. General information regarding TCEQ can be found at our website at www.tceq.texas.gov.

TRD-202205041

Laurie Gharis
Chief Clerk
Texas Commission on Environmental Quality
Filed: December 14, 2022

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Notice of District Petition

Notice issued December 14, 2022

TCEQ Internal Control No. D-06082022-029; Rasor Family Ranch LP, a Texas limited partnership (Petitioner) filed a petition for creation of West Preston Municipal Utility District No. 1 of Collin County (District) with the Texas Commission on Environmental Quality (TCEQ). The petition was filed pursuant to Article XVI, §59 of the Constitution of the State of Texas; Chapters 49 and 54 of the Texas Water Code; 30 Texas Administrative Code Chapter 293; and the procedural rules of the TCEQ. The petition states that: (1) the Petitioner holds title to a majority in value of the land to be included in the proposed District; (2) there are no lienholders on the property to be included in the proposed District; (3) the proposed District will contain approximately 1,097.42 acres located within Collin County, Texas, and (4) all of the land within the proposed District is within the corporate limits of the City of Celina. By Resolution No. 2022-08R, passed and adopted on February 8, 2022, the City of Celina, Texas, gave its consent to the creation of the proposed District, pursuant to Texas Water Code §54.016.

The territory to be included in the proposed District is depicted in the vicinity map designated as Exhibit "A," which is attached to this document. The petition further states that the proposed District will: (1) purchase, construct, acquire, improve, or extend inside or outside of its boundaries any and all works, improvements, facilities, plants, equipment, and appliances necessary or helpful to supply and distribute water for municipal, domestic, and commercial purposes; (2) collect, transport, process, dispose of, and control domestic and commercial wastes; (3) gather, conduct, divert, abate, amend, and control local storm water or other local harmful excesses of water in the proposed District; (4) design, acquire, construct, finance, improve, operate, and maintain macadamized, graveled, or paved roads and turnpikes, or improvements in aid of those roads; and (5) purchase, construct, acquire, improve, or extend inside or outside of its boundaries such additional facilities, systems, plants, and enterprises as shall be consonant with the purposes for which the proposed District is created.

According to the petition, a preliminary investigation has been made to determine the cost of the project, and it is estimated by the Petitioners that the cost of said project will be approximately $48,790,000 ($17,160,000 for water, wastewater, and drainage plus $31,630,000 for roads).

INFORMATION SECTION

To view the complete issued notice, view the notice on our website at www.tceq.texas.gov/agency/cc/pub_notice.html or call the Office of the Chief Clerk at (512) 239-3300 to obtain a copy of the complete notice. When searching the website, type in the issued date range shown at the top of this document to obtain search results.

The TCEQ may grant a contested case hearing on the petition if a written hearing request is filed within 30 days after the newspaper publication of the 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) the name of the Petitioner and the TCEQ Internal Control Number; (3) the statement "I/we request a contested case hearing"; (4) a brief description of how you would be affected by the petition in a way not common to the general public; and (5) the location of your property relative to the proposed District's boundaries. You may also submit your proposed adjustments to the petition. 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. The Executive Director may approve the petition unless a written request for a contested case hearing is filed within 30 days after the newspaper publication of this notice. If a hearing request is filed, the Executive Director will not approve the petition and will forward the petition and hearing request to the TCEQ Commissioners for their consideration at a scheduled Commission meeting. If a contested case hearing is held, it will be a legal proceeding similar to a civil trial in state district court. Written hearing requests should be submitted to the Office of the Chief Clerk, MC 105, TCEQ, P.O. Box 13087, Austin, Texas 78711-3087. 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 Districts Review Team, at (512) 239-4691. Si desea información en español, puede llamar al (512) 239-0200. General information regarding TCEQ can be found at our website at www.tceq.texas.gov.

TRD-202205047
Laurie Gharis
Chief Clerk
Texas Commission on Environmental Quality
Filed: December 14, 2022

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Notice of Opportunity to Comment on an Agreed Order of Administrative Enforcement Actions

The Texas Commission on Environmental Quality (TCEQ or commission) staff is providing an opportunity for written public comment on the listed Agreed Order (AO) in accordance with Texas Water Code (TWC), §7.075. TWC, §7.075, requires that before the commission may approve the AO, the commission shall allow the public an opportunity to submit written comments on the proposed AO. TWC, §7.075, requires that notice of the opportunity to comment must be published in the *Texas Register* no later than the 30th day before the date on which the public comment period closes, which in this case is **January 25, 2023.** TWC, §7.075, also requires that the commission promptly consider any written comments received and that the commission may withdraw or withhold approval of an AO if a comment discloses facts or considerations that indicate that consent is inappropriate, improper, inadequate, or inconsistent with the requirements of the statutes and rules within the commission's jurisdiction or the commission's orders and permits issued in accordance with the commission's regulatory authority. Additional notice of changes to a proposed AO is not required to be published if those changes are made in response to written comments.

A copy of the proposed AO is available for public inspection at both the commission's central office, located at 12100 Park 35 Circle, Building A, 3rd Floor, Austin, Texas 78753, (512) 239-3400 and at the applicable regional office listed as follows. Written comments about an AO should be sent to the attorney designated for the AO at the commission's central office at P.O. Box 13087, MC 175, Austin, Texas 78711-3087 and must be **received by 5:00 p.m. on January 25, 2023.** The designated attorney is available to discuss the AO and/or the comment procedure at the listed phone number; however, TWC, §7.075, provides that comments on an AO shall be submitted to the commission in **writing.**

(1) COMPANY: City of Blanco; DOCKET NUMBER: 2019-1675-MWD-E; TCEQ ID NUMBER: RN101614386; LOCATION: 1015 Fulcher Street, Blanco, Blanco County; TYPE OF FACILITY: water

treatment facility; RULES VIOLATED: 30 TAC §305.125(1) and (5), and §319.5(b), and Texas Pollutant Discharge Elimination System (TPDES) Permit Number WQ0010549003, Effluent Limitations and Monitoring Requirements Number 1 and Operational Requirements Number 5, by failing to provide an effluent flow measuring device to measure flow five times per week; 30 TAC §305.125(1) and TPDES Permit Number WQ0010549003, Permit Conditions Number 2.e, by failing to obtain authorization before beginning any change in the permitted facility that may result in noncompliance with any permit requirements; 30 TAC §305.125(1) and §319.5(b), and TPDES Permit Number WQ0010549003, Effluent Limitations and Monitoring Requirements Numbers 1 and 2, by failing to collect and analyze effluent samples at the intervals specified in the permit; 30 TAC §305.125(1) and (17) and §319.7(d), and TPDES Permit Number WQ0010549003, Monitoring and Reporting Requirements Number 1 and Other Requirements Number 3, by failing to submit monitoring results at intervals specified in the permit; TWC, §26.121(a)(1), 30 TAC §305.125(1) and (5), and TPDES Permit Number WQ0010549003, Permit Conditions Number 2.g, by failing to prevent an unauthorized discharge of wastewater into or adjacent to any water in the state; 30 TAC §305.125(1) and TPDES Permit Number WQ0010549003, Other Requirements Number 4, by failing to submit a Notice of Completion Form 20007 to the TCEQ at least 45 days prior to plant startup or anticipated discharge; 30 TAC §305.125(1) and TPDES Permit Number WQ0010549003, Permit Conditions Number 4.c, by failing to apply for an amendment or renewal at least 180 days prior to expiration of the existing permit; and TWC, §26.121(a)(1) and 30 TAC §305.65, by failing to maintain authorization to discharge wastewater into or adjacent to any water in the state; PENALTY: $97,313; STAFF ATTORNEY: Misty James, Litigation, MC 175, (512) 239-0631; REGIONAL OFFICE: Austin Regional Office, 12100 Park 35 Circle, Building A, Room 179, Austin, Texas 78753, (512) 339-2929.

TRD-202205001
Gitanjali Yadav
Deputy Director, Litigation
Texas Commission on Environmental Quality
Filed: December 13, 2022

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Notice of Opportunity to Comment on Default Orders of Administrative Enforcement Actions

The Texas Commission on Environmental Quality (TCEQ or commission) staff is providing an opportunity for written public comment on the listed Default Orders (DOs). The commission staff proposes a DO when the staff has sent the Executive Director's Preliminary Report and Petition (EDPRP) to an entity outlining the alleged violations; the proposed penalty; the proposed technical requirements necessary to bring the entity back into compliance; and the entity fails to request a hearing on the matter within 20 days of its receipt of the EDPRP or requests a hearing and fails to participate at the hearing. Similar to the procedure followed with respect to Agreed Orders entered into by the executive director of the commission, in accordance with Texas Water Code (TWC), §7.075, this notice of the proposed order and the opportunity to comment is published in the *Texas Register* no later than the 30th day before the date on which the public comment period closes, which in this case is **January 25, 2023**. The commission will consider any written comments received, and the commission may withdraw or withhold approval of a DO if a comment discloses facts or considerations that indicate that consent to the proposed DO is inappropriate, improper, inadequate, or inconsistent with the requirements of the statutes and rules within the commission's jurisdiction, or the commission's orders and permits issued in accordance with the commission's regulatory authority. Additional notice of changes to a proposed DO is not required to be published if those changes are made in response to written comments.

A copy of each proposed DO is available for public inspection at both the commission's central office, located at 12100 Park 35 Circle, Building A, 3rd Floor, Austin, Texas 78753, (512) 239-3400 and at the applicable regional office listed as follows. Written comments about the DO should be sent to the attorney designated for the DO at the commission's central office at P.O. Box 13087, MC 175, Austin, Texas 78711-3087 and must be **received by 5:00 p.m. on January 25, 2023**. The commission's attorneys are available to discuss the DOs and/or the comment procedure at the listed phone numbers; however, TWC, §7.075, provides that comments on the DOs shall be submitted to the commission in **writing**.

(1) COMPANY: Bobby Krout; DOCKET NUMBER: 2020-0388-MSW-E; TCEQ ID NUMBER: RN110651510; LOCATION: 7120 Retta Mansfield Road, Mansfield, Tarrant County; TYPE OF FACILITY: unauthorized scrap tire storage site and unauthorized scrap tire transporter site; RULES VIOLATED: 30 TAC §328.57(c)(1), by failing to register as a scrap tire transporter prior to transporting scrap tires; Texas Health and Safety Code (THSC), §361.112(g) and 30 TAC §328.57(d), by failing to retain all manifests, work orders and invoices showing the collection and disposition of all used or scrap tires and tire pieces; and THSC, §361.112(a) and 30 TAC §328.60(a), by failing to obtain a scrap tire storage site registration prior to storing more than 500 used or scrap tires on the ground or 2,000 used or scrap tires in trailers or lockable containers; PENALTY: $12,037; STAFF ATTORNEY: Benjamin Pence, Litigation, MC 175, (512) 239-2157; REGIONAL OFFICE: Dallas-Fort Worth Regional Office, 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(2) COMPANY: Cammie Panks; DOCKET NUMBER: 2021-1547-MSW-E; TCEQ ID NUMBER: RN111126488; LOCATION: 124 Wandering Oak Street near Bastrop, Bastrop County; TYPE OF FACILITY: unauthorized municipal solid waste (MSW) site; RULE VIOLATED: 30 TAC §330.15(c), by causing, suffering, allowing, or permitting the unauthorized disposal of MSW; PENALTY: $4,538; STAFF ATTORNEY: William Hogan, Litigation, MC 175, (512) 239-5918; REGIONAL OFFICE: Austin Regional Office, 12100 Park 35 Circle, Building A, Room 179, Austin, Texas 78753, (512) 339-2929.

TRD-202205002
Gitanjali Yadav
Deputy Director, Litigation
Texas Commission on Environmental Quality
Filed: December 13, 2022

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Notice of Public Hearing on Assessment of Administrative Penalties and Requiring Certain Actions of Farm Machine Shop, Inc. SOAH Docket No. 582-23-07275 TCEQ Docket No. 2021-0994-PST-E

The Texas Commission on Environmental Quality (TCEQ or the Commission) has referred this matter to the State Office of Administrative Hearings (SOAH). An Administrative Law Judge with the State Office of Administrative Hearings will conduct a public hearing at:

10:00 a.m. - January 12, 2023

William P. Clements Building

300 West 15th Street, 4th Floor

Austin, Texas 78701

The purpose of the hearing will be to consider the Executive Director's Preliminary Report and Petition mailed September 8, 2022 concerning assessing administrative penalties against and requiring certain actions of Farm Machine Shop, Inc., for violations in Atascosa County, Texas, of: 30 Texas Administrative Code §§ 334.7(d)(1)(A), (d)(1)(B), and (d)(3) and 334.47(a)(2).

The hearing will allow Farm Machine Shop, Inc., the Executive Director, and the Commission's Public Interest Counsel to present evidence on whether a violation has occurred, whether an administrative penalty should be assessed, and the amount of such penalty, if any. The first convened session of the hearing will be to establish jurisdiction, afford Farm Machine Shop, Inc., the Executive Director of the Commission, and the Commission's Public Interest Counsel an opportunity to negotiate and to establish a discovery and procedural schedule for an evidentiary hearing. Unless agreed to by all parties in attendance at the preliminary hearing, an evidentiary hearing will not be held on the date of this preliminary hearing. **Upon failure of Farm Machine Shop, Inc. to appear at the preliminary hearing or evidentiary hearing, the factual allegations in the notice will be deemed admitted as true, and the relief sought in the notice of hearing may be granted by default. The specific allegations included in the notice are those set forth in the Executive Director's Preliminary Report and Petition, attached hereto and incorporated herein for all purposes.** Farm Machine Shop, Inc., the Executive Director of the Commission, and the Commission's Public Interest Counsel are the only designated parties to this proceeding.

Legal Authority: Tex. Water Code §7.054 and Tex. Water Code chs. 7 and 26 and 30 Texas Administrative Code chs. 70 and 334; Tex. Water Code §7.058, and the Rules of Procedure of the Texas Commission on Environmental Quality and the State Office of Administrative Hearings, including 30 Texas Administrative Code §§70.108 and 70.109 and ch. 80, and 1 Texas Administrative Code ch. 155.

Further information regarding this hearing may be obtained by contacting Jennifer Peltier, Staff Attorney, Texas Commission on Environmental Quality, Litigation Division, Mail Code 175, P.O. Box 13087, Austin, Texas 78711-3087, telephone (512) 239-3400. Information concerning your participation in this hearing may be obtained by contacting Sheldon Wayne, Staff Attorney, Office of Public Interest Counsel, Mail Code 103, at the same P.O. Box address given above, or by telephone at (512) 239-6363.

Any document filed prior to the hearing must be filed with TCEQ's Office of the Chief Clerk and SOAH. Documents filed with the Office of the Chief Clerk may be filed electronically at www.tceq.texas.gov/goto/efilings or sent to the following address: TCEQ Office of the Chief Clerk, Mail Code 105, P.O. Box 13087, Austin, Texas 78711-3087. Documents filed with SOAH may be filed via fax at (512) 322-2061 or sent to the following address: SOAH, 300 West 15th Street, Suite 504, Austin, Texas 78701. When contacting the Commission or SOAH regarding this matter, reference the SOAH docket number given at the top of this notice.

In accordance with 1 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."

Persons who need special accommodations at the hearing should call the SOAH Docketing Department at (512) 475-3445, at least one week before the hearing.

Issued: December 13, 2022

TRD-202205044

Laurie Gharis
Chief Clerk
Texas Commission on Environmental Quality
Filed: December 14, 2022

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Notice of Public Hearing on Assessment of Administrative Penalties and Requiring Certain Actions of Ranch Hand Apartments, LLC SOAH Docket No. 582-23-05477 TCEQ Docket No. 2022-0063-PWS-E

The Texas Commission on Environmental Quality (TCEQ or the Commission) has referred this matter to the State Office of Administrative Hearings (SOAH). An Administrative Law Judge with the State Office of Administrative Hearings will conduct a public hearing at:

10:00 a.m. - January 12, 2023

William P. Clements Building

300 West 15th Street, 4th Floor

Austin, Texas 78701

The purpose of the hearing will be to consider the Executive Director's Preliminary Report and Petition mailed September 7, 2022 concerning assessing administrative penalties against and requiring certain actions of Ranch Hand Apartments, LLC, for violations in Randall County, Texas, of: Tex. Health & Safety Code §§ 341.0315(c) and 341.035(a), 30 Texas Administrative Code §290.39(e)(1) and (h)(1) and §290.45(b)(1)(C)(ii) and (iii), and TCEQ Agreed Order Docket No. 2019-0303-PWS-E, Ordering Provisions Nos. 2.c.i., 2.c.ii., 2.c.iii., and 2.e.

The hearing will allow Ranch Hand Apartments, LLC, the Executive Director, and the Commission's Public Interest Counsel to present evidence on whether a violation has occurred, whether an administrative penalty should be assessed, and the amount of such penalty, if any. The first convened session of the hearing will be to establish jurisdiction, afford Ranch Hand Apartments, LLC, the Executive Director of the Commission, and the Commission's Public Interest Counsel an opportunity to negotiate and to establish a discovery and procedural schedule for an evidentiary hearing. Unless agreed to by all parties in attendance at the preliminary hearing, an evidentiary hearing will not be held on the date of this preliminary hearing. **Upon failure of Ranch Hand Apartments, LLC to appear at the preliminary hearing or evidentiary hearing, the factual allegations in the notice will be deemed admitted as true, and the relief sought in the notice of hearing may be granted by default. The specific allegations included in the notice are those set forth in the Executive Director's Preliminary Report and Petition, attached hereto and incorporated herein for all purposes.** Ranch Hand Apartments, LLC, the Executive Director of the Commission, and the Commission's Public Interest Counsel are the only designated parties to this proceeding.

Legal Authority: Tex. Health & Safety Code ch. 341 and 30 Texas Administrative Code chs. 70 and 290; Tex. Water Code § 7.058, and the Rules of Procedure of the Texas Commission on Environmental Quality and the State Office of Administrative Hearings, including 30 Texas Administrative Code §70.108 and §70.109 and ch. 80, and 1 Texas Administrative Code ch. 155.

Further information regarding this hearing may be obtained by contacting Megan L. Grace, Staff Attorney, Texas Commission on Environmental Quality, Litigation Division, Mail Code 175, P.O. Box 13087, Austin, Texas 78711-3087, telephone (512) 239-3400. Information concerning your participation in this hearing may be obtained by contacting Sheldon Wayne, Staff Attorney, Office of Public Interest

Counsel, Mail Code 103, at the same P. O. Box address given above, or by telephone at (512) 239-6363.

Any document filed prior to the hearing must be filed with TCEQ's Office of the Chief Clerk and SOAH. Documents filed with the Office of the Chief Clerk may be filed electronically at www.tceq.texas.gov/goto/efilings or sent to the following address: TCEQ Office of the Chief Clerk, Mail Code 105, P.O. Box 13087, Austin, Texas 78711-3087. Documents filed with SOAH may be filed via fax at (512) 322-2061 or sent to the following address: SOAH, 300 West 15th Street, Suite 504, Austin, Texas 78701. When contacting the Commission or SOAH regarding this matter, reference the SOAH docket number given at the top of this notice.

In accordance with 1 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."

Persons who need special accommodations at the hearing should call the SOAH Docketing Department at (512) 475-3445, at least one week before the hearing.

Issued: December 13, 2022

TRD-202205045
Laurie Gharis
Chief Clerk
Texas Commission on Environmental Quality
Filed: December 14, 2022

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Notice of Public Hearing on Assessment of Administrative Penalties and Requiring Certain Actions of RCH Water Supply Corporation SOAH Docket No. 582-23-07274 TCEQ Docket No. 2021-0601-PWS-E

The Texas Commission on Environmental Quality (TCEQ or the Commission) has referred this matter to the State Office of Administrative Hearings (SOAH). An Administrative Law Judge with the State Office of Administrative Hearings will conduct a public hearing at:

10:00 a.m. - January 12, 2023

William P. Clements Building

300 West 15th Street, 4th Floor

Austin, Texas 78701

The purpose of the hearing will be to consider the Executive Director's Preliminary Report and Petition mailed December 2, 2021 concerning assessing administrative penalties against and requiring certain actions of RCH WATER SUPPLY CORPORATION, for violations in Rockwall County, Texas, of: 30 Texas Administrative Code §290.44(h)(1)(A).

The hearing will allow RCH WATER SUPPLY CORPORATION, the Executive Director, and the Commission's Public Interest Counsel to present evidence on whether a violation has occurred, whether an administrative penalty should be assessed, and the amount of such penalty, if any. The first convened session of the hearing will be to establish jurisdiction, afford RCH WATER SUPPLY CORPORATION, the Executive Director of the Commission, and the Commission's Public Interest Counsel an opportunity to negotiate and to establish a discovery and procedural schedule for an evidentiary hearing. Unless agreed to by all parties in attendance at the preliminary hearing, an evidentiary hearing will not be held on the date of this preliminary hearing. **Upon failure of RCH WATER SUPPLY CORPORATION to appear at the preliminary hearing or evidentiary hearing, the factual allegations in the notice will be deemed admitted as true, and the relief sought in the notice of hearing may be granted by default. The specific allegations included in the notice are those set forth in the Executive Director's Preliminary Report and Petition, attached hereto and incorporated herein for all purposes.** RCH WATER SUPPLY CORPORATION, the Executive Director of the Commission, and the Commission's Public Interest Counsel are the only designated parties to this proceeding.

Legal Authority: Tex. Health & Safety Code ch. 341 and 30 Texas Administrative Code chs. 70 and 290; Tex. Water Code § 7.058, and the Rules of Procedure of the Texas Commission on Environmental Quality and the State Office of Administrative Hearings, including 30 Texas Administrative Code §70.108 and §70.109 and ch. 80, and 1 Texas Administrative Code ch. 155.

Further information regarding this hearing may be obtained by contacting Megan L. Grace, Staff Attorney, Texas Commission on Environmental Quality, Litigation Division, Mail Code 175, P.O. Box 13087, Austin, Texas 78711-3087, telephone (512) 239-3400. Information concerning your participation in this hearing may be obtained by contacting Sheldon Wayne, Staff Attorney, Office of Public Interest Counsel, Mail Code 103, at the same P.O. Box address given above, or by telephone at (512) 239-6363.

Any document filed prior to the hearing must be filed with TCEQ's Office of the Chief Clerk and SOAH. Documents filed with the Office of the Chief Clerk may be filed electronically at www.tceq.texas.gov/goto/efilings or sent to the following address: TCEQ Office of the Chief Clerk, Mail Code 105, P.O. Box 13087, Austin, Texas 78711-3087. Documents filed with SOAH may be filed via fax at (512) 322-2061 or sent to the following address: SOAH, 300 West 15th Street, Suite 504, Austin, Texas 78701. When contacting the Commission or SOAH regarding this matter, reference the SOAH docket number given at the top of this notice.

In accordance with 1 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."

Persons who need special accommodations at the hearing should call the SOAH Docketing Department at (512) 475-3445, at least one week before the hearing.

TRD-202205046
Laurie Gharis
Chief Clerk
Texas Commission on Environmental Quality
Filed: December 14, 2022

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Notice of Public Meeting For an Air Quality Permit. Permit Number: 83817

APPLICATION. Lyondell Chemical Company, PO Box 777, Channelview, Texas 77530-0777, has applied to the Texas Commission on Environmental Quality (TCEQ) for an amendment to Air Quality Permit Number 83817, which would authorize modification to the Lyondell Chemical Channelview facility at 2502 Sheldon Rd, Channelview, Harris County, Texas 77530. This application was submitted to the TCEQ on July 21, 2021. The existing facility will emit the following air contaminants: carbon monoxide, hazardous air pollutants, nitrogen oxides, organic compounds, particulate matter including particu-

late matter with diameters of 10 microns or less and 2.5 microns or less and sulfur dioxide.

The executive director has completed the technical review of the application and 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.

PUBLIC COMMENT/PUBLIC MEETING. You may submit public comments to the Office of the Chief Clerk at the address below. The TCEQ will consider all public comments in developing a final decision on the application. A public meeting will be held and will consist of two parts, an Informal Discussion Period and a Formal Comment Period. A public meeting is not a contested case hearing under the Administrative Procedure Act. During the Informal Discussion Period, the public will be encouraged to ask questions of the applicant and TCEQ staff concerning the permit application. The comments and questions submitted orally during the Informal Discussion Period will not be considered before a decision is reached on the permit application, and no formal response will be made. Responses will be provided orally during the Informal Discussion Period. During the Formal Comment Period on the permit application, members of the public may state their formal comments orally into the official record. At the conclusion of the comment period, all formal comments will be considered before a decision is reached on the permit application. A written response to all formal comments will be prepared by the executive director and will be sent to each person who submits a formal comment or who requested to be on the mailing list for this permit application and provides a mailing address. Only relevant and material issues raised during the Formal Comment Period can be considered if a contested case hearing is granted on this permit application.

The Public Meeting is to be held:

Thursday, January 12, 2023 at 7:00 PM

San Jacinto College North Campus

N-12.200 (Monument Room)

5800 Uvalde Road

Houston, Texas 77049

INFORMATION. Members of the public are encouraged to submit written comments anytime during the public meeting or by mail before the close of the public comment period to the Office of the Chief Clerk, TCEQ, Mail Code MC-105, P.O. Box 13087, Austin, Texas 78711-3087 or electronically at http://www.tceq.texas.gov/goto/comment. If you need more information about the permit application or the permitting process, please call the TCEQ Public Education Program, toll free, at (800) 687-4040. General information can be found at our Web site at www.tceq.texas.gov. *Si desea información en español, puede llamar al (800) 687-4040.*

The permit application, executive director's preliminary decision, and draft permit will be available for viewing and copying at the TCEQ central office, the TCEQ Houston regional office, and at the North Channel Library, 15741 Wallisville Road, Channelview, Harris County, Texas. The facility's compliance file, if any exists, is available for public review at the TCEQ Houston Regional Office, 5425 Polk St Ste H, Houston, Texas. Further information may also be obtained from Lyondell Chemical Company at the address stated above or by calling Mrs. Teresa Peneguy, Environmental Permitting at (281) 452-8330.

Persons with disabilities who need special accommodations at the meeting should call the Office of the Chief Clerk at (512) 239-3300 or (800) RELAY-TX (TDD) at least five business days prior to the meeting.

Notice Issuance Date: December 08, 2022

TRD-202205035
Laurie Gharis
Chief Clerk
Texas Commission on Environmental Quality
Filed: December 14, 2022

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Notice of Public Meeting for TPDES Permit for Municipal Wastewater New Permit No. WQ0016060001

APPLICATION. South Central Water Company, P.O. Box 570177, Houston, Texas 77257, has applied to the Texas Commission on Environmental Quality (TCEQ) for new Texas Pollutant Discharge Elimination System (TPDES) Permit No. WQ0016060001, to authorize the discharge of treated domestic wastewater at a daily average flow not to exceed 600,000 gallons per day.

The facility will be located approximately 4,300 feet north of the intersection of Farm-to-Market Road 1863 and Stahl Lane, in Comal County, Texas 78163. The treated effluent will be discharged via pipe to an unnamed ditch; thence to Upper Cibolo Creek in Segment No. 1908 of the San Antonio River Basin. The unclassified receiving water use is minimal aquatic life use for the unnamed ditch. The designated uses for Segment No. 1908 are primary contact recreation, public water supply, aquifer protection, and high aquatic life use. The aquifer protection use applies as the facility is located in the Edwards Aquifer contributing zone. In accordance with 30 Texas Administrative Code Section 307.5 and the TCEQ's *Procedures to Implement the Texas Surface Water Quality Standards* (June 2010), an antidegradation review of the receiving waters was performed. A Tier 1 antidegradation review has preliminarily determined that existing water quality uses will not be impaired by this permit action. Numerical and narrative criteria to protect existing uses will be maintained. A Tier 2 review has preliminarily determined that no significant degradation of water quality is expected in Upper Cibolo Creek, which has been identified as having high aquatic life use. Existing uses will be maintained and protected. The preliminary determination can be reexamined and may be modified if new information is received. This link to an electronic map of the site or facility's general location is provided as a public courtesy and is not part of the application or notice. For the exact location, refer to the application.

https://tceq.maps.arcgis.com/apps/webappviewer/index.html?id=db5bac44afbc468bbddd360f8168250f&marker=-98.411388%2C29.759722&level=12

The TCEQ Executive Director has completed the technical review of the application and prepared a draft permit. The draft permit, if approved, would establish the conditions under which the facility must operate. The Executive Director has made a preliminary decision that this permit, if issued, meets all statutory and regulatory requirements.

PUBLIC COMMENT / PUBLIC MEETING. A public meeting will be held and will consist of two parts, an Informal Discussion Period and a Formal Comment Period. A public meeting is not a contested case hearing under the Administrative Procedure Act. During the Informal Discussion Period, the public will be encouraged to ask questions of the applicant and TCEQ staff concerning the permit application. The comments and questions submitted orally during the Informal Discussion Period will not be considered before a decision is reached on the permit application and no formal response will be made. Responses will be provided orally during the Informal Discussion Period. During the Formal Comment Period on the permit application, members of the public may state their formal comments orally into the official record. A written response to all timely, relevant and material, or sig-

nificant comments will be prepared by the Executive Director. All formal comments will be considered before a decision is reached on the permit application. A copy of the written response will be sent to each person who submits a formal comment or who requested to be on the mailing list for this permit application and provides a mailing address. Only relevant and material issues raised during the Formal Comment Period can be considered if a contested case hearing is granted on this permit application.

The Public Meeting is to be held:

Thursday, January 26, 2023 at 7:00 PM

Hampton Inn Bulverde Texas Hill Country

499 Singing Oaks

Spring Branch, Texas 78070

INFORMATION. Members of the public are encouraged to submit written comments anytime during the meeting or by mail before the close of the public comment period to the Office of the Chief Clerk, TCEQ, Mail Code MC-105, P.O. Box 13087, Austin, Texas 78711-3087 or electronically at www.tceq.texas.gov/goto/comment. If you need more information about the permit application or the permitting process, please call the TCEQ Public Education Program, Toll Free, at (800) 687-4040. *Si desea información en español, puede llamar (800) 687-4040.* General information about the TCEQ can be found at our web site at https://www.tceq.texas.gov.

The permit application, Executive Director's preliminary decision, and draft permit are available for viewing and copying at Mammen Family Public Library, 131 Bulverde Crossing, Bulverde, Texas. Further information may also be obtained from South Central Water Company at the address stated above or by calling Mr. Doug Bailey, South Central Water Company, at (713) 783-6611.

Persons with disabilities who need special accommodations at the meeting should call the Office of the Chief Clerk at (512) 239-3300 or (800) RELAY-TX (TDD) at least five business days prior to the meeting.

Issued: December 13, 2022

TRD-202205043
Laurie Gharis
Chief Clerk
Texas Commission on Environmental Quality
Filed: December 14, 2022

♦ ♦ ♦

Notice of Public Meeting for TPDES Permit for Municipal Wastewater New Permit No. WQ0016077001

APPLICATION. Smiling Mallard Development, Ltd., 3608 East 29th Street, Suite 100, Bryan, Texas 77802, has applied to the Texas Commission on Environmental Quality (TCEQ) for new Texas Pollutant Discharge Elimination System (TPDES) Permit No. WQ0016077001, to authorize the discharge of treated domestic wastewater at a daily average flow not to exceed 100,000 gallons per day.

The facility will be located approximately 2,000 feet southwest of the intersection of Mesa Verde Drive and State Highway 6, in Brazos County, Texas 77845. The treated effluent will be discharged to an unnamed tributary of Peach Creek, thence to Peach Creek, thence to the Navasota River Below Lake Limestone in Segment No. 1209 of the Brazos River Basin. The unclassified receiving water uses are minimal aquatic life use for the unnamed tributary, and limited aquatic life use for Peach Creek. The designated uses for Segment No. 1209 are primary contact recreation, public water supply, and high aquatic life use. In accordance with 30 Texas Administrative Code Section 307.5 and the TCEQ's *Procedures to Implement the Texas Surface Water Quality Standards* (June 2010), an antidegradation review of the receiving waters was performed. A Tier 1 antidegradation review has preliminarily determined that existing water quality uses will not be impaired by this permit action. Numerical and narrative criteria to protect existing uses will be maintained. This review has preliminarily determined that no water bodies with exceptional, high, or intermediate aquatic life uses are present within the stream reach assessed; therefore, no Tier 2 degradation determination is required. No significant degradation of water quality is expected in water bodies with exceptional, high, or intermediate aquatic life uses downstream, and existing uses will be maintained and protected. The preliminary determination can be reexamined and may be modified if new information is received. This link to an electronic map of the site or facility's general location is provided as a public courtesy and is not part of the application or notice. For the exact location, refer to the application.

https://tceq.maps.arcgis.com/apps/webappviewer/index.html?id=db5bac44afbc468bbddd360f8168250f&marker=-95.784722%2C30.24&level=12

The TCEQ Executive Director has completed the technical review of the application and prepared a draft permit. The draft permit, if approved, would establish the conditions under which the facility must operate. The Executive Director has made a preliminary decision that this permit, if issued, meets all statutory and regulatory requirements.

PUBLIC COMMENT / PUBLIC MEETING. A public meeting will be held and will consist of two parts, an Informal Discussion Period and a Formal Comment Period. A public meeting is not a contested case hearing under the Administrative Procedure Act. During the Informal Discussion Period, the public will be encouraged to ask questions of the applicant and TCEQ staff concerning the permit application. The comments and questions submitted orally during the Informal Discussion Period will not be considered before a decision is reached on the permit application and no formal response will be made. Responses will be provided orally during the Informal Discussion Period. During the Formal Comment Period on the permit application, members of the public may state their formal comments orally into the official record. A written response to all timely, relevant and material, or significant comments will be prepared by the Executive Director. All formal comments will be considered before a decision is reached on the permit application. A copy of the written response will be sent to each person who submits a formal comment or who requested to be on the mailing list for this permit application and provides a mailing address. Only relevant and material issues raised during the Formal Comment Period can be considered if a contested case hearing is granted on this permit application.

The Public Meeting is to be held:

Monday, January 23, 2023, at 7:00 p.m.

Embassy Suites

201 University Drive East

College Station, Texas 77840

INFORMATION. Members of the public are encouraged to submit written comments anytime during the meeting or by mail before the close of the public comment period to the Office of the Chief Clerk, TCEQ, Mail Code MC-105, P.O. Box 13087, Austin, Texas 78711-3087 or electronically at www.tceq.texas.gov/goto/comment. If you need more information about the permit application or the permitting process, please call the TCEQ Public Education Program, Toll Free, at (800) 687-4040. *Sí desea informacíon en español, puede llamar (800)*

687-4040. General information about the TCEQ can be found at our web site at https://www.tceq.texas.gov.

The permit application, Executive Director's preliminary decision, and draft permit are available for viewing and copying at Brazos County Clerk's Office, 300 East 26th Street, Suite 1430, Bryan, Texas. Further information may also be obtained from Smiling Mallard Development, Ltd. at the address stated above or by calling Mr. Paul Clarke, at (979) 846-4384.

Persons with disabilities who need special accommodations at the meeting should call the Office of the Chief Clerk at (512) 239-3300 or (800) RELAY-TX (TDD) at least five business days prior to the meeting.

Issued: December 08, 2022

TRD-202205036
Laurie Gharis
Chief Clerk
Texas Commission on Environmental Quality
Filed: December 14, 2022

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Notice of Water Quality Application

The following notice was issued on December 08, 2022:

The following notice 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 FROM THE NOTICE ISSUANCE DATE.

INFORMATION SECTION

The Texas Commission on Environmental Quality has initiated a minor amendment of Texas Pollutant Discharge Elimination System Permit No. WQ0005297000 issued to Air Liquide Large Industries U.S., LP, which operates Bay City LMA, an industrial gas manufacturing facility, to authorize the addition of total copper effluent limitations based on the submission of data required by Other Requirement No. 7. The existing permit authorizes the discharge of cooling tower blowdown, equipment wash water, and stormwater collected inside of diked containment areas at daily average flow not to exceed 180,100 gallons per day via Outfall 001. The facility is located at 2170 Farm-to-Market Road 3057, south of the City of Bay City, in Matagorda County, Texas 77414.

TRD-202205037
Laurie Gharis
Chief Clerk
Texas Commission on Environmental Quality
Filed: December 14, 2022

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Notice of Water Quality Application

The following notice was issued on December 13, 2022.

The following notice 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 FROM THE NOTICE ISSUANCE DATE.

INFORMATION SECTION

Exxonmobil Oil Corporation, which operates Beaumont Polyethylene Plant, has applied for a minor amendment to Texas Pollutant Discharge Elimination System (TPDES) Permit No. WQ0002029000 to remove Item 2 from the internal Outfalls 101 and 201, which pertains to the discharge of floading solids or visible foam. The draft permit authorizes the discharge of previously monitored effluent (from internal Outfalls 101 and 201), steam condensate, air conditioning condensate, hydrostatic test water, and stormwater on an intermittent and flow-variable basis via Outall 001; and stormwater from PE Unit rail yard on an intermittent and flow-variable basis via Outfll 002. The facility is located at 11440 U.S. Highway 90, near the City of Beaumont, Jefferson County, Texas 77713.

TRD-202205048
Laurie Gharis
Chief Clerk
Texas Commission on Environmental Quality
Filed: December 14, 2022

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Notice of Water Rights Application

Notice Issued December 14, 2022

APPLICATION NO. 5731A

Lower Colorado River Authority (LCRA), P.O. Box 220, Austin, Texas 78767-0220, Applicant, seeks to amend Water Use Permit No. 5731 (Permit) to authorize its existing J. Scott Arbuckle Reservoir, authorized by Certificate of Adjudication No. 14-5476, as a specific off-channel reservoir in which LCRA can store water diverted under the Permit. The reservoir is located within the Colorado River Basin in Wharton County. More information on the application and how to participate in the permitting process is given below.

The application and fees were received on December 23, 2020. The application was declared administratively complete and accepted for filing with the Office of the Chief Clerk on February 3, 2021. The Executive Director has completed the technical review of the application and prepared a draft amendment. The draft amendment, if granted, would include a special condition regarding the accounting plan. The application, technical memoranda, and Executive Director's draft amendment are available for viewing on the TCEQ web page at https://www.tceq.texas.gov/permitting /water rights/wr-permitting/view-wr-pend-apps. 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, 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 http://www14.tceq.texas.gov/epic/eComment/ by entering WRPERM 5731 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-202205051
Laurie Gharis
Chief Clerk
Texas Commission on Environmental Quality
Filed: December 14, 2022

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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 November 28, 2022 to December 2, 2022. As required by federal law, the public is given an opportunity to comment on the consistency of proposed activities in the coastal zone undertaken or authorized by federal agencies. Pursuant to 31 TAC §§506.25, 506.32, and 506.41, the public comment period extends 30 days from the date published on the Texas General Land Office web site. The notice was published on the web site on Friday, December 9, 2022. The public comment period for this project will close at 5:00 p.m. on Sunday, January 8, 2023.

FEDERAL AGENCY ACTIONS:

Applicant: Calhoun County

Location: The project site is located in East Matagorda Bay, at Magnolia Beach near Indian Point, in Calhoun County, Texas.

Latitude & Longitude (NAD 83): 28.556335, - 96.524277

Project Description: The applicant proposes to discharge approximately 8,510 cubic yards of fill in the construction of a headland breakwater system in addition to beach nourishment. The headland breakwater system will be composed of concrete, rock, steel, mesh, geotextile, geogrid, bedding stone, piles, chains, anchors, and floating platforms. It will include the installation of a T-head shaped groin measuring 300-foot-long with a T-head measuring 108-foot-wide in combination with two oblique groins measuring 320 and 360 feet in length. The proposed groins will measure approximately 60-foot in width and constructed to a height of +4 feet NAVD 88. Approximately 13,800 cubic yards of fill composed of sand will be placed along an 800-foot-long by 320-foot-wide section of shoreline within the limits of the oblique groins to create a pocket beach for additional erosion protection.

Type of Application: U.S. Army Corps of Engineers permit application # SWG-2022-00561. This application will be reviewed pursuant to Section 10 of the Rivers and Harbors Act of 1899 and Section 404 of the Clean Water Act. Note: The consistency review for this project may be conducted by the Texas Commission on Environmental Quality as part of its certification under §401 of the Clean Water Act.

CMP Project No: 23-1087-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-202204940
Mark Havens
Chief Clerk, Deputy Land Commissioner
General Land Office
Filed: December 12, 2022

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Office of the Governor

Notice of Inflation Rate for Termination of Defunding Municipality Determination During Fiscal Year 2023

Pursuant to Texas Local Government Code Section 109.006(a)(2), the Criminal Justice Division (CJD) of the Office of the Governor publishes this notice to all persons regarding the inflation rate used for termination of a defunding municipality determination during fiscal year 2023. As required by law, the CJD has computed the inflation rate using a price index that accurately reports changes in the purchasing power of the dollar for municipalities in this state. This computation is based on economic data evaluating the difference in the Consumer Price Index (CPI) between September 2022 and September 2021 and made available by the Texas Comptroller's Office available at Key Economic Indicators (texas.gov). The CJD has determined an inflation rate of 9.3% for fiscal year 2023.

TRD-202204868
Aimee Snoddy
Executive Director, Public Safety Office
Office of the Governor
Filed: December 8, 2022

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Texas Health and Human Services Commission

Public Notice: Proposed Revisions to the UC Ambulance Protocol and Tool as Required by CMS

The Texas Health and Human Services Commission (HHSC) announces that Center for Medicare & Medicaid Services (CMS) requires revisions to the Uncompensated Care (UC) Payment Protocol and cost reporting tool for the Uncompensated Care (UC) Ambulance program.

The Uncompensated Care (UC) Payment Protocol is submitted pursuant to the Special Terms and Conditions (STCs) of the Texas Health-

care Transformation and Quality Improvement Program, Section 1115 Waiver Demonstration No. 11-W-00278/6.

CMS requested that HHSC make modifications to the Ambulance UC protocol to restrict the ability of providers to claim costs in excess of those for direct medical care associated with uninsured charity care. The changes in the protocol and cost report tool will specify that UC Ambulance providers report uninsured charity care costs directly attributed to direct medical services. These changes will be submitted to CMS on January 6, 2023.

The proposed changes that will be submitted to CMS are available for viewing on the Provider Finance Department website: https://pfd.hhs.texas.gov/acute-care/ambulance-services

This is a courtesy notice. HHSC will not be opening a public comment process on the protocol changes as the changes are requirements from CMS.

In addition, CMS has informed the state that the changes would not require a formal waiver amendment or federal comment period.

Questions regarding this public notice or about the UC Ambulance program can be directed to: pfd_hospitals@hhsc.state.tx.us

TRD-202205012
Karen Ray
Chief Counsel
Texas Health and Human Services Commission
Filed: December 13, 2022

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Texas Department of Housing and Community Affairs

2023-1 Multifamily Direct Loan Annual Notice of Funding Availability (NOFA)

I. Sources of Multifamily Direct Loan Funds.

Multifamily Direct Loan funds are made available in this Annual Notice of Funding Availability through 2023 Grant Year National Housing Trust Fund (NHTF) and HOME Investment Partnerships Program (HOME) Allocations.

II. Notice of Funding Availability (NOFA).

The Texas Department of Housing and Community Affairs (the Department) announces the availability of $6,116,029 in HOME Investment Partnerships Program (HOME) and $42,637,605 of national Housing Trust Fund (NHTF) funding for the development of affordable multifamily rental housing for low-income Texans.

III. Application Deadline and Availability.

Applicants under the 2023-1 NOFA will be accepted from January 2, 2023, through October 31, 2023 (if sufficient funds remain). The "2023-1 Multifamily Direct Loan Annual NOFA" is posted on the Department's website: http://www.tdhca.state.tx.us/multifamily/nofas-rules.htm.

The Multifamily Direct Loan program provides loans to for-profit and nonprofit entities to develop affordable housing for low-income Texans qualified earning 80 percent or less of the applicable Area Median Family Income.

Questions regarding the 2023-1 Multifamily Direct Loan Annual NOFA may be addressed Connor Jones at (512) 475-3986 or connor.jones@tdhca.state.tx.us.

TRD-202205032
Bobby Wilkinson
Executive Director
Texas Department of Housing and Community Affairs
Filed: December 14, 2022

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2023-2 HOME American Rescue Plan Rental Housing Notice of Funding Availability

The Texas Department of Housing and Community Affairs (the Department) announces the availability of $46,511,887 in HOME (HOME) American Rescue Plan (ARP) for the development of affordable multifamily rental housing including funds for a portion of the property's eligible capitalized operating expenses, and $3,324,229 in nonprofit capacity building/nonprofit operating funds for eligible costs related to developing the capacity of nonprofit organizations to successfully carry out HOME-ARP eligible activities related to rental housing. Only applicants applying for development funds are eligible to apply for the capacity building or operating funds.

The availability and use of these funds are subject but not limited to the following rules in effect at the time of application review or contract execution (as applicable): Title 10, Part 1, Chapter 1 (Administration); Chapter 2 (Enforcement); Chapter 10 (Uniform Multifamily Rules); Chapter 11 (Qualified Allocation Plan); Chapter 12 (Multifamily Housing Revenue Bond Rules); Chapter 13 (Multifamily Direct Loan Rule); and Tex. Gov't Code §2306. Other federal and state regulations include but are not limited to: 24 CFR Part 92 (HOME Investment Partnerships Program Final Rule); CPD Notice 21-10 and Appendix: Waivers and Alternative Requirements for Implementation of the HOME-ARP Program (HOME-ARP Notice); Federal Fair Housing Act, 42 U.S.C. 3601-19; 24 CFR Part 50 or 58 (Environmental Compliance); Section 104(d) of Housing and Community Development Act of 1974; and HUD Handbook 1378 (Uniform Relocation Assistance); 40 U.S.C. §3141-3144 and 3146-3148, 24 CFR §92.354 (Davis-Bacon and Related Labor Acts); 24 CFR Part 75 (Section 3); 2021 HOME-ARP Allocation Plan. Applicants must familiarize themselves with all of the applicable state and federal rules that govern the HOME-ARP Program.

Eligible Activities and Application Details

Applicants under the HOME-ARP 2023-2 NOFA will be accepted during two Application Acceptance periods, if sufficient funds remain. The first Application Acceptance period will begin December 9, 2022 until January 31, 2023, at 5:00 p.m. Austin local time. Eligible Applicants are developers that are only requesting HOME-ARP from the Department, or are requesting HOME-ARP layered with 2022 or 2023 4% Housing Tax Credits (HTCs), 2022 9% HTC, HOME annual, or National Housing Trust Fund (NHTF). NHTF Applicants are only eligible in the event that the per unit subsidy limit for NHTF would be exceeded with additional NHTF. If funding is available, the second Application Acceptance period will begin February 1, 2023 until March 1, 2023, at 5:00 p.m. Austin local time, and is for layering HOME-ARP with the 2023 9% HTC Supportive Housing Applicants only. Details for eligible applications, submission and scoring requirements, and permissible loan structures are in the posted NOFA on the Department's website at https://www.tdhca.state.tx.us/nofa.htm.

Additional Information

The NOFA is available on the Department's website at http://www.tdhca.state.tx.us/nofa.htm.

All Application materials are available on the Department's website at https://www.tdhca.state.tx.us/multifamily/special-initiatives.htm.

For questions regarding this NOFA, please contact Tiara Hardaway, HOME-ARP Manager, at Tiara.Hardaway@tdhca.state.tx.us.

TRD-202205008
Bobby Wilkinson
Executive Director
Texas Department of Housing and Community Affairs
Filed: December 13, 2022

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Notice of Funding Availability (NOFA) Release for 2023 Community Services Block Grant Discretionary (CSBG-D) Funds - Native American and Migrant Seasonal Farm Worker Education and Employment Initiatives

The Texas Department of Housing and Community Affairs (the Department) announces the availability of $300,000 in CSBG-Discretionary funding for education and employment initiatives for migrant seasonal farm worker and Native American populations. Each year the Department sets aside 5% of its annual CSBG allocation for state discretionary use. Each year funds from CSBG-Discretionary are used for specific identified efforts that the Department supports and other ongoing initiatives such as employment and education programs for migrant and seasonal farm workers and Native Americans. This year, $300,000 has been programmed for migrant and seasonal farm worker and Native American populations' employment and education programs for which the Department is issuing this NOFA. The Department will release funds competitively.

The Department's anticipated contract period for 2023 CSBG-Discretionary migrant and seasonal farm worker and Native American employment and education initiatives is March 1, 2023, through February 29, 2024.

Interested applicants must meet the requirements set forth in the application and must submit a complete application through the established system described in the NOFA by Tuesday, January 10, 2023, 5:00 p.m., Austin local time.

The application forms contained in this packet and submission instructions are available on the Department's web site at http://www.tdhca.state.tx.us/nofa.htm. Should you have any related questions, please contact Rita Gonzales-Garza at (512) 475-3905 or rita.garza@tdhca.state.tx.us.

TRD-202204869
Bobby Wilkinson
Executive Director
Texas Department of Housing and Community Affairs
Filed: December 8, 2022

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Public Hearing on the 2023 Annual Public Housing Agency PHA Plan for the Housing Choice Voucher Program

Notice of Public Hearing on the 2023 Annual Public Housing Agency PHA Plan for the Housing Choice Voucher Program. Section 511 of Title V of the Quality Housing and Work Responsibility Act of 1998 (P. L. 205-276) requires the Texas Department of Housing and Community Affairs (the Department) to prepare a 2019 Streamlined Annual Public Housing Agency PHA Plan for the Housing Choice Voucher Program. Title 24, §903.17 of the Code of Federal Regulations requires that the Department conduct a public hearing regarding that plan. The Department will hold a public hearing to receive oral and written comments for the development of the Department's 2023 Annual Public Housing Agency PHA Plan for the Housing Choice Voucher Program. The hearing will take place at the following time and location:

The public comment period begins Thursday, January 26, 2023 at 5:00 p.m. Austin local time.

The virtual public hearing will convene at 12 p.m. Austin local time, Thursday, January 26, 2023.

The proposed 2023 Annual Public Housing Agency PHA Plan for the Housing Choice Voucher Program and all supporting documentation are available to the public for viewing at TDHCA Public Comment Center at: http://www.tdhca.state.tx.us/public-comment.htm to access the Plan.

The proposed plan will also be available for viewing on the Department's website at: www.tdhca.state.tx.us/section-8/announcements.htm.

Written comments from any interested persons unable to attend the hearing may be submitted by e-mail to Andre Adams, Section 8 Program Manager, and Community Affairs Division at andre.adams@tdhca.state.tx.us. Comments must be received by 5:00 p.m. Thursday, January 26, 2023.

The public hearing for the proposed 2023 Annual Public Housing Agency PHA Plan for the Housing Choice Voucher Program will be held virtually and is accessible to the public via the web link information below. In order to engage in two-way communication during the hearing, persons must first register (at no cost) to attend the webinar via the link provided below. Anyone who calls into the hearing without registering online will not be able to provide comment, but the hearing will still be audible.

GoToWebinar:

Dial-in number: tel:+14086503123, access code 927003877# (persons who use the dial-in number and access code without registering online will only be able to hear the public hearing and will not be able to provide comment).

After registering, you will receive a confirmation email containing information about joining the Public Hearing Webinar.

Local officials and citizens are encouraged to participate in the hearing process. Written and oral comments received will be used to finalize the Plan.

TRD-202204925
Bobby Wilkinson
Executive Director
Texas Department of Housing and Community Affairs
Filed: December 12, 2022

♦ ♦ ♦

Texas Department of Insurance

Company Licensing

Application for incorporation in the state of Texas for Verda Health Plan of Texas, Inc., a domestic Health Maintenance Organization (HMO). The home office is in Texas.

Application to do business in the state of Texas for WestGUARD Insurance Company, a foreign fire and/or casualty company. The home office is in Wilkes-Barre, Pennsylvania.

Application for incorporation in the state of Texas for Porch Insurance Reciprocal Exchange, a domestic Lloyds/reciprocal. The home office is in Irving, Texas.

Application for Landmark Life Insurance Company, a domestic life, accident and/or health company, to change its name to Truespire Retirement Insurance Company. The home office is in Brownwood, Texas.

Application for Peachtree Casualty Insurance Company, a foreign fire and/or casualty company, to change its name to Go Insurance Company. The home office is in Los Angeles, California.

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 John Carter, 1601 Congress Ave., Suite 6.900, Austin, Texas 78711.

TRD-202205031
Justin Beam
Chief Clerk
Texas Department of Insurance
Filed: December 14, 2022

♦ ♦ ♦

Texas Lottery Commission

Notice of Public Comment Hearing

A public hearing to receive comments regarding proposed new 16 TAC §§402.331 (Shutter Card Bingo Systems - Definitions), 402.332 (Shutter Card Bingo Systems - Site System Standards), 402.333 (Shutter Card Bingo Systems - Shutter Card Station and Customer Account Standards), 402.334 (Shutter Card Bingo Systems - Approval of Shutter Card Bingo Systems), 402.335 (Shutter Card Bingo Systems - Licensed Authorized Organization Requirements), 402.336 (Shutter Card Bingo Systems - Distributor Requirements), 402.337 (Shutter Card Bingo Systems - Security Standards), and 402.338 (Shutter Card Bingo Systems - Inspections and Restrictions) will be held on Wednesday, January 18, 2023, at 9:00 a.m., at 1700 N. Congress Ave., Austin, Texas 78701, Stephen F. Austin State Office Building, Room 170.

Persons requiring any accommodation for disability should notify Debbie Jamieson at (512) 344-5038 at least 72 hours prior to the public hearing.

TRD-202204962
Bob Biard
General Counsel
Texas Lottery Commission
Filed: December 12, 2022

♦ ♦ ♦


TEXAS

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 47 (2022) is cited as follows: 47 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 "47 TexReg 2 issue date," while on the opposite page, page 3, in the lower right-hand corner, would be written "issue date 47 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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