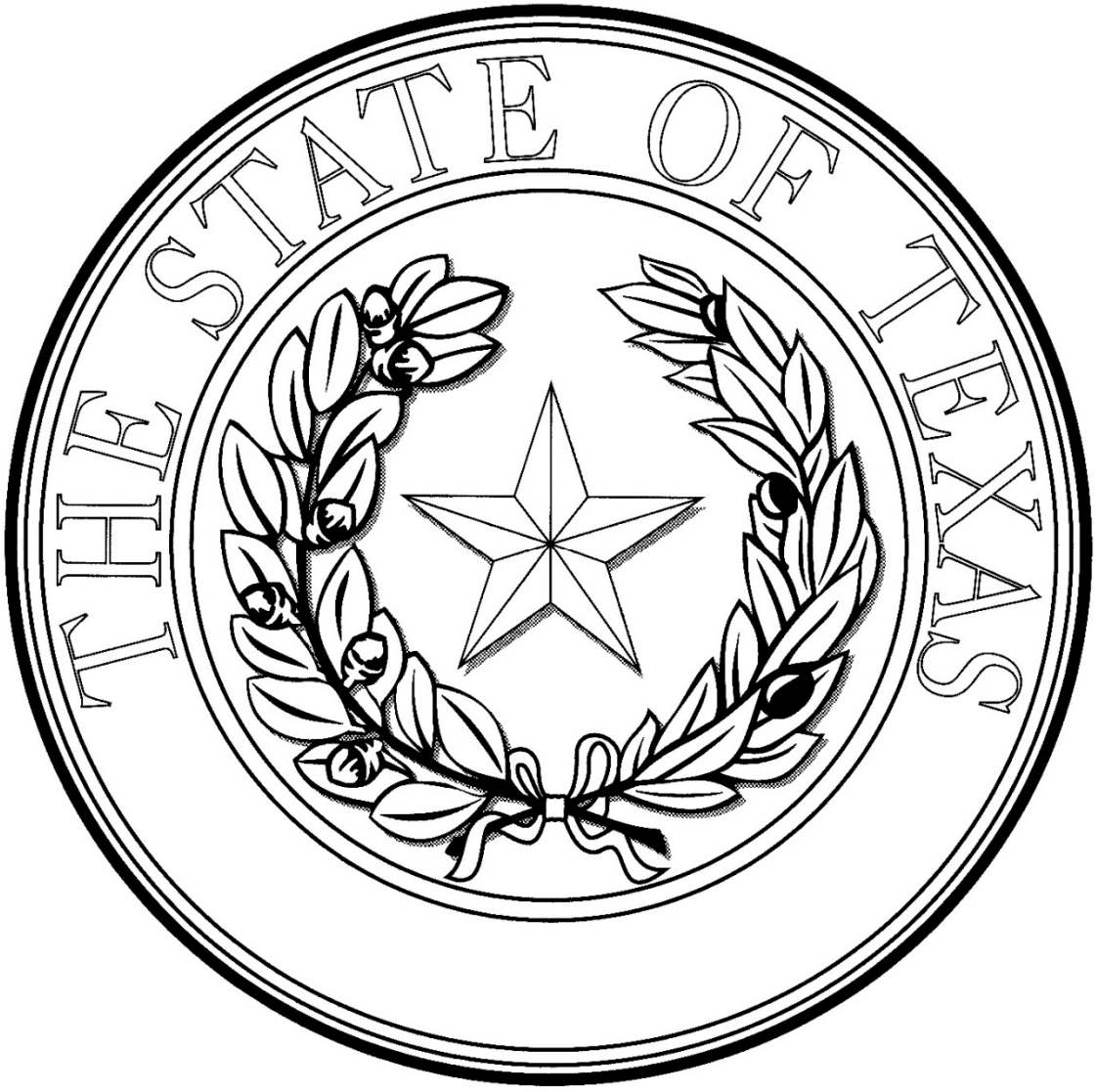
TEXAS REGISTER

Volume 48 Number 4 *January 27, 2023* *Pages 255 - 442*



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

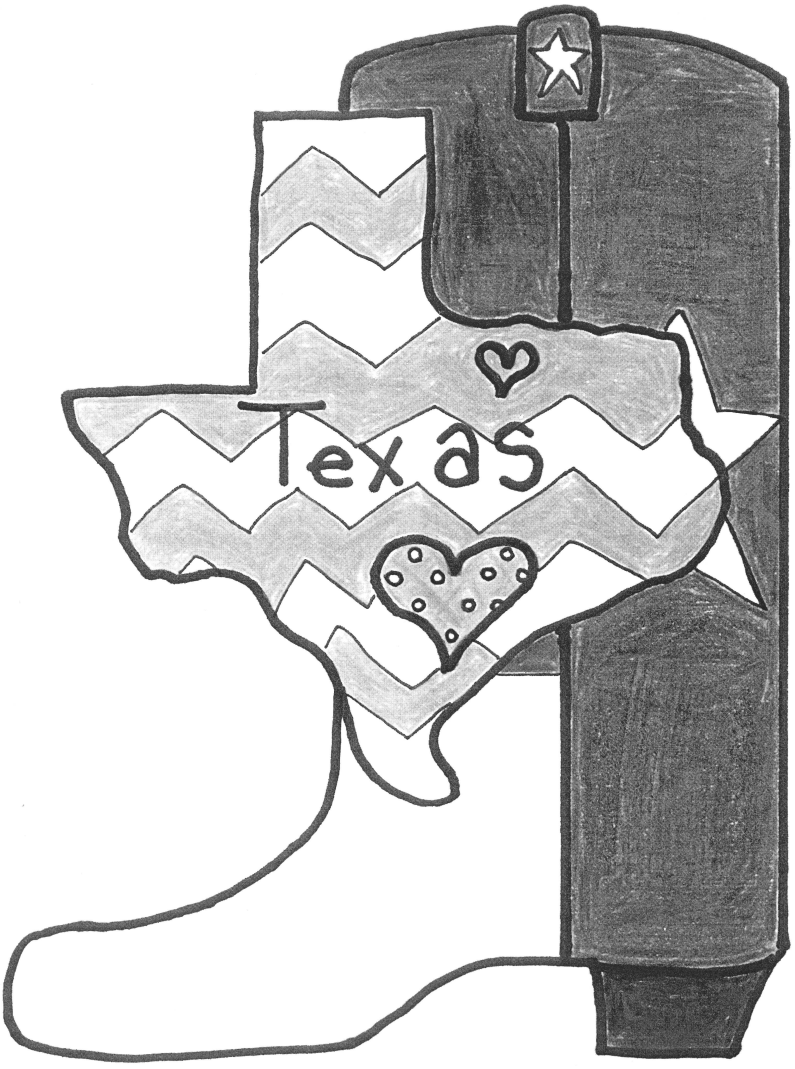
https://www.sos.texas.gov
register@sos.texas.gov

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

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

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

In This Issue


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 January 11, 2023

Pursuant to HB 3257, 87th Legislature, Regular Session, appointed to the Texas Holocaust, Genocide, and Antisemitism Advisory Commission for a term to expire on February 1, 2027, Ira M. Mitzner of Houston, Texas.

Appointments for January 13, 2023

Appointed to the Nursing Facility Administrators Advisory Committee for a term to expire February 1, 2027, Donald L. "Don" King of Fort Worth, Texas (replacing Ronald S. "Ron" Palomares, Ph.D. of Dallas who resigned).

Greg Abbott, Governor

TRD-202300175

♦ ♦ ♦

Proclamation 41-3952

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 12th day of January, 2023.

Greg Abbott, Governor

TRD-202300176

♦ ♦ ♦

Proclamation 41-3953

TO ALL TO WHOM THESE PRESENTS SHALL COME:

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

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

WHEREAS, pursuant to the Texas Disaster Act of 1975, I have issued a series of executive orders and suspensions of Texas laws aimed at protecting the health and safety of Texans, ensuring uniformity throughout the State, and achieving the least restrictive means of combatting the evolving threat posed by COVID-19; and

WHEREAS, Executive Orders GA-13, GA-37, GA-38, GA-39, and GA-40 remain in effect with "the force and effect of law" under Section 418.012 of the Texas Government Code; and

WHEREAS, ending the disaster declaration would terminate the executive orders that protect Texans' freedom by suspending the power of local governments to require masks, compel vaccinations, and close businesses; and

WHEREAS, I intend to keep these executive orders and suspensions in place until the Legislature can enact laws this session to prohibit local governments from imposing restrictions like mask mandates and vaccine mandates; and

WHEREAS, renewing the disaster declaration in no way infringes on the rights or liberties of any law-abiding Texans; and

WHEREAS, under the Texas Disaster Act of 1975, a state of disaster continues to exist in all counties during Texas' successful economic recovery from COVID-19;

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

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

Under the terms of Executive Orders GA-38, GA-39, and GA-40, all of which remain in effect by virtue of this renewal, local governments are divested of any lawful authority to subject Texans to mask mandates, vaccine mandates, or business-closure mandates. As a matter of state law, COVID-19 cannot justify those local intrusions upon personal liberty.

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

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

IN TESTIMONY WHEREOF, I have hereunto signed my name and have officially caused the Seal of State to be affixed at my office in the City of Austin, Texas, this the 15th day of January, 2023.

Greg Abbott, Governor

TRD-202300177

♦ ♦ ♦

THE ATTORNEY GENERAL

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

An index to the full text of these documents is available on the Attorney General's website at https://www.texas.attorneygeneral.gov/attorney-general-opinions. For information about pending requests for opinions, telephone (512) 463-2110.

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

Requests for Opinions

RQ-0495-KP

Requestor:

The Honorable Terry Canales

Chair, House Committee on Transportation

Texas House of Representatives

Post Office Box 2910

Austin, Texas 78768-2910

Re: Whether a member of the Board of Trustees of the La Joya Independent School District may simultaneously serve as a member of the Board of Directors of the Hidalgo County Irrigation District No. 6 (RQ-0495-KP)

Briefs requested by February 9, 2023

RQ-0496-KP

Requestor:

The Honorable Roberto Serna

293rd Judicial District Attorney

458 Madison Street

Eagle Pass, Texas 78852

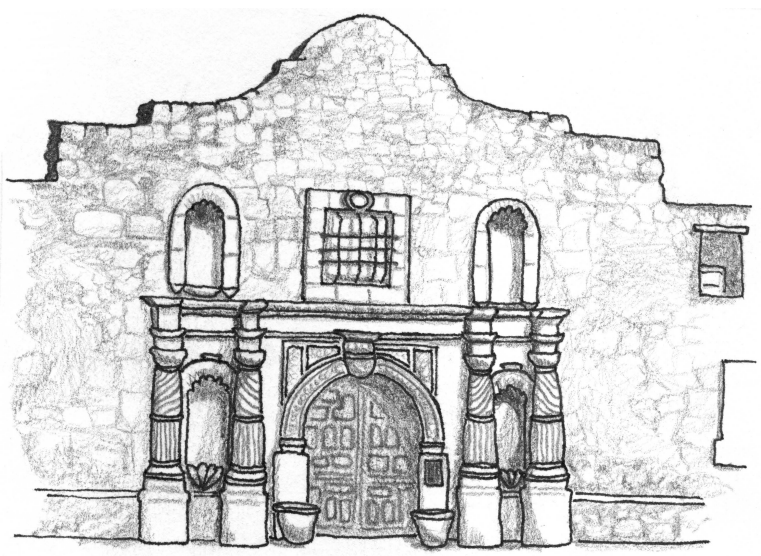
Re: Whether city council places are separate offices subject to a city charter's term-limit provisions, and whether the mayor pro-tem position is a separate office from a council position (RQ-0496-KP)

Briefs requested by February 9, 2023

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

TRD-202300173
Austin Kinghorn
General Counsel
Office of the Attorney General
Filed: January 17, 2023

♦ ♦ ♦



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

TITLE 26. HEALTH AND HUMAN SERVICES

PART 1. HEALTH AND HUMAN SERVICES COMMISSION

CHAPTER 600. LIMITED SERVICES RURAL HOSPITALS

26 TAC §600.1

The Executive Commissioner of the Texas Health and Human Services Commission (HHSC) adopts on an emergency basis in Title 26 Texas Administrative Code, Chapter 600, Limited Services Rural Hospitals, new §600.1, concerning an emergency rule to permit qualified rural hospitals to apply for licensure as a limited services rural hospital.

This emergency rule is proposed under and implements Texas Health and Safety Code Chapter 241, Subchapter K, which allows a qualified rural hospital that is designated as rural emergency hospital by the Centers for Medicare and Medicaid Services (CMS) to become licensed as a limited services rural hospital and remain open to treat patients.

As authorized by Texas Government Code §2001.034, HHSC may adopt an emergency rule without prior notice or hearing upon finding that an imminent peril to the public health, safety, or welfare requires adoption on fewer than 30 days' notice. Emergency rules adopted under Texas Government Code §2001.034 may be effective for not longer than 120 days and may be renewed for not longer than 60 days.

The purpose of the emergency rulemaking is to implement Senate Bill 1621, 86th Legislature, Regular Session, 2019, which the Legislature enacted to further federal efforts to ensure individuals living in rural areas continue to have access to hospital care, in response to the closure of rural hospitals. HHSC accordingly finds that this threat to access to hospital care constitutes an imminent peril to the public health, safety, and welfare of the state that requires immediate adoption of this emergency rule for limited services rural hospitals.

To protect individuals living in rural areas and the public health, safety, and welfare of the state, HHSC is adopting this emergency rule to permit a qualified rural hospital to become licensed as a limited services rural hospital under Texas Health and Safety Code Chapter 241, Subchapter K.

BACKGROUND AND PURPOSE

Senate Bill 1621 added Texas Health and Safety Code Chapter 241, Subchapter K, which, in part, requires HHSC to adopt licensing standards for limited services rural hospitals if the United States Congress passes a bill creating a payment program specifically for limited services rural hospitals or similarly designated hospitals that becomes law. The Consolidated Appropriations Act, 2021, became law on December 27, 2020, and required CMS to establish a federal rural emergency hospital designation. The CMS conditions of participation for rural emergency hospitals took effect January 1, 2023.

The requirements and flexibilities established in this section are applicable while this emergency rule is in effect pursuant to Texas Government Code §2001.034 (relating to Emergency Rulemaking) and Texas Government Code §531.0055 (relating to Executive Commissioner: General Responsibility for Health and Human Services System, respectively).

STATUTORY AUTHORITY

The emergency rulemaking is adopted under Texas Government Code §2001.034 and §531.0055 and Texas Health and Safety Code §§241.302 and 241.303. Texas Government Code §2001.034 authorizes the adoption of emergency rules without prior notice and hearing, if an agency finds that an imminent peril to the public health, safety, or welfare requires adoption of a rule on fewer than 30 days' notice. Texas Government Code §531.0055 authorizes the Executive Commissioner of HHSC to adopt rules and policies necessary for the operation and provision of health and human services by the health and human services system. Texas Health and Safety Code §241.302 authorizes the Executive Commissioner of HHSC to adopt rules governing licensing standards for limited services rural hospitals, and §241.303 authorizes the Executive Commissioner to establish and collect licensing fees for limited services rural hospitals.

The new section implements Texas Government Code §531.0055 and Texas Health and Safety Code §§241.302 and 241.303.

§600.1. Limited Services Rural Hospital.

(a) Based on Texas Health and Safety Code (HSC) Chapter 241, Subchapter K (relating to Limited Services Rural Hospital), as added by Senate Bill 1621, 86th Legislature, Regular Session, 2019, the Texas Health and Human Services Commission (HHSC) adopts this emergency rule to establish requirements for qualified rural hospitals to apply to HHSC for a limited services rural hospital (LSRH) license and forego any conflicting inpatient license and operational requirements, to protect public health and safety of rural communities until HHSC adopts standard rules for LSRH licensure in the Texas Administrative Code.

(b) To the extent this emergency rule conflicts with Texas Administrative Code Title 25 (25 TAC) Chapter 133 (relating to Hospital Licensing), this emergency rule controls.

(c) In this section, "qualified rural hospital" means a hospital that meets the requirements to be designated as a rural emergency hospital under the Code of Federal Regulations Part 42 (42 CFR) §485.502 (relating to Definitions), and §485.506 (relating to Designation and Certification of REHs) that is currently licensed under HSC Chapter 241 (relating to Hospitals); and is:

(1) located in a rural area, as defined by United State Code Title 42 Section 1395ww(d)(2)(D); or

(2) designated by the Centers for Medicare and Medicaid Services as a critical access hospital, rural referral center, or sole community hospital.

(d) Notwithstanding the licensing and operational requirements in 25 TAC Chapter 133, a qualified rural hospital may apply to HHSC for an LSRH license using a form prescribed by HHSC as described on the HHSC website.

(e) The presurvey conference and architectural and compliance inspections under 25 TAC §133.22 (relating to Application and Issuance of Initial License) are not required for licensure under this emergency rule.

(f) If HHSC approves a hospital's LSRH application, HHSC will issue the hospital an LSRH license with the same expiration date as the hospital's current license and the hospital's existing license becomes void.

(g) An LSRH shall comply with the following:

(1) 42 CFR Part 485, Subpart E (relating to Conditions of Participation: Rural Emergency Hospitals (REHs));

(2) 25 TAC §133.44 (relating to Hospital Patient Transfer Policy); and

(3) 25 TAC §133.61 (relating to Hospital Patient Transfer Agreements).

(h) In addition to the conditions of participation (CoPs) at 42 CFR Part 485, Subpart E, the hospital shall comply with 25 TAC Chapter 133 to the extent it does not conflict with the CoPs.

(i) An LSRH licensed under this section shall comply with 25 TAC §133.23 (relating to Application and Issuance of Renewal License). The renewal licensure fee shall be the amount the hospital previously paid for its most recent hospital license.

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

Filed with the Office of the Secretary of State on January 13, 2023.

TRD-202300169
Karen Ray
Chief Counsel
Health and Human Services Commission
Effective date: January 13, 2023
Expiration date: May 12, 2023
For further information, please call: (512) 834-4591

♦ ♦ ♦

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 10. COMMUNITY DEVELOPMENT

PART 1. TEXAS DEPARTMENT OF HOUSING AND COMMUNITY AFFAIRS

CHAPTER 1. ADMINISTRATION
SUBCHAPTER B. ACCESSIBILITY AND REASONABLE ACCOMMODATIONS

10 TAC §§1.201 - 1.207

The Texas Department of Housing and Community Affairs (the "Department") proposes the repeal of 10 TAC Chapter 1, Subchapter B, Accessibility and Reasonable Accommodations. The purpose of the proposed repeal is to eliminate an outdated rule while adopting a new updated rule under separate action.

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

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

1. Bobby Wilkinson, Executive Director, has determined that, for the first five years the repeal will be in effect, the repeal does not create or eliminate a government program, but relates to the repeal, and simultaneous adoption making changes to the rule governing Accessibility and Reasonable Accommodations.

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

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

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

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

6. The action will repeal an existing regulation, but is associated with a simultaneous readoption making changes to the existing procedures for accessibility and accommodation activity.

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 will be in effect there will be no economic effect on local employment; therefore no local employment impact statement is required to be prepared for the rule.

e. PUBLIC BENEFIT/COST NOTE REQUIRED BY TEX. GOV'T CODE §2001.024(a)(5). Mr. Wilkinson has determined that, for each year of the first five years the repeal is in effect, the public benefit anticipated as a result of the repealed section would be an elimination of an outdated rule while adopting a new updated rule under separate action. There will be no 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.

REQUEST FOR PUBLIC COMMENT. The public comment period will be held January 27, 2023, to February 27, 2023, to receive input on the repealed section. Written comments may be submitted to the Texas Department of Housing and Community Affairs, Attn: Brooke Boston, Rule Comments, P.O. Box 13941, Austin, Texas 78711-3941 or email brooke.boston@td-hca.state.tx.us. ALL COMMENTS MUST BE RECEIVED BY 5:00 P.M. Austin local time February 27, 2023.

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

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

10 TAC Chapter 1, Subchapter B, Accessibility and Reasonable Accommodations

§1.201. Purpose.

§1.202. Definitions.

§1.203. General Requirements and Effect of Non Compliance.
§1.204. Reasonable Accommodations.
§1.205. Compliance with the Fair Housing Act.
§1.206. Applicability of the Construction Standards for Compliance with §504 of the Rehabilitation Act of 1973.
§1.207. General Requirements for Multifamily Housing Developments.

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 January 12, 2023.

TRD-202300142
Bobby Wilkinson
Executive Director
Texas Department of Housing and Community Affairs
Earliest possible date of adoption: February 26, 2023
For further information, please call: (512) 475-3959

♦ ♦ ♦

10 TAC §§1.201 - 1.207

The Texas Department of Housing and Community Affairs (the "Department") proposes new 10 TAC Chapter 1, Subchapter B, Accessibility and Reasonable Accommodations. The purpose of the proposed new section is to make changes updating the rule for federal guidance that has been released since the last rulemaking, adding several new programs to the rule that were not previously programs overseen by the Department, bringing the rule up to date and streamlining requirements.

Tex. Gov't Code §2001.0045(b) does not apply to the rule being adopted under items (4) and (9) of that section. The rule ensures Department compliance with the Fair Housing Act and other federal civil rights laws. In spite of these exceptions, it should be noted that no costs are associated with this action that would have prompted a need to be offset.

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

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

Bobby Wilkinson, Executive Director, has determined that, for the first five years the proposed new rule will be in effect:

1. The new rule does not create or eliminate a government program, but relates to the readoption of this rule, which makes changes to the rules that govern accessibility and reasonable accommodations.

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

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

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

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

6. The rule will not limit, expand or repeal an existing regulation but merely revises a rule.

7. The new rule does not increase or decrease the number of individuals to whom this rule applies; and

8. The new 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.

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 in place for properties and subrecipients that have been funded by the Department. Other than in the case of a small or micro-business that participate in such programs, no small or micro-businesses are subject to the rule. If a small or micro-business does participate in the program, the rule provides a clear set of regulations for the handling of reasonable accommodations and accessibility.

3. The Department has determined that because this rule relates only to a revision to a rule subrecipients/owners and tenants of an existing program, there will be no economic effect on small or micro-businesses or rural communities.

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

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

The Department has evaluated the rule as to its possible effects on local economies and has determined that for the first five years the rule will be in effect the new rule has no economic effect on local employment because this rule relates only to the processes used in existing multifamily properties and other portfolio subrecipients; therefore no local employment impact statement is required to be prepared for the rule.

Texas Gov't Code §2001.022(a) states that this "impact statement must describe in detail the probable effect of the rule on employment in each geographic region affected by this rule..." Considering that the rule relates only to the continuation of the rules in place 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 sections are in effect, the public benefit anticipated as a result of the proposed new rule will be a clearer rule for Recipients and assurance of the program having transparent compliant regulations. There will be no economic cost to any individuals required to comply with the proposed new rule because the activities described by the rule has already been in existence.

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 as this rule relates only to a process that already exists and is not being significantly revised.

REQUEST FOR PUBLIC COMMENT. The Department will accept public comment from January 27, 2023, through February 27, 2023. Written comments may be submitted to the Texas Department of Housing and Community Affairs, Attn: Brooke Boston, Rule Comments, P.O. Box 13941, Austin, Texas 78711-3941, or by email to brooke.boston@tdhca.state.tx.us. ALL COMMENTS MUST BE RECEIVED BY 5:00 pm Austin local time, February 27, 2023.

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

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

§1.201. Purpose.

(a) The purpose of this subchapter is to establish a framework for informing compliance with the requirements of Tex. Gov't Code §§2306.6722, 2306.6725, and 2306.6730, and the requirements of the Americans with Disabilities Act, Section 504 of the 1973 Rehabilitation Act (Section 504) and the Fair Housing Act for Recipients of awards from the Texas Department of Housing and Community Affairs (the Department) including but not limited to:

(1) Community Services Block Grant;

(2) Low Income Home Energy Assistance Program (LIHEAP) (including the two programs utilizing this funding source: the LIHEAP Weatherization Assistance Program and the Comprehensive Energy Assistance Program);

(3) Emergency Solutions Grant (ESG);

(4) Texas Housing Trust Fund;

(5) Low Income Housing Tax Credit, including Exchange;

(6) Multifamily Bond Programs (Bond);

(7) National Housing Trust Fund (NHTF);

(8) Neighborhood Stabilization Program (NSP);

(9) HOME;

(10) TCAP;

(11) TCAP- Returned Funds (TCAP-RF);

(12) Section 8;

(13) Department of Energy Weatherization Assistance Program;

(14) Homeless Housing and Services Program (HHSP);

(15) Ending Homelessness Fund (EH);

(16) Community Development Block Grant (CDBG);

(17) Community Development Block Grant - CARES Act (CDBG-CV);

(18) 811 Project Rental Assistance (811 PRA);

(19) Emergency Rental Assistance (ERA);

(20) Department of Energy Weatherization Program (DOE WAP); and

(21) HOME American Rescue Plan (HOME-ARP).

(b) Unless otherwise indicated in the applicable notice of funding availability or required by contract, this subchapter does not apply to contracts for the procurement of goods or services by the Department.

§1.202. Definitions.

Capitalized words in this subchapter have the meaning assigned in the specific chapter and rules of the title that govern the program associated with the matter or assigned by federal or state law. In addition, the following terms are used for the purposes of this subchapter:

(1) 2010 ADA Standards--The term 2010 ADA Standards refers to the 2010 ADA Standards for Accessible Design implementing Title II of the Americans with Disabilities Act of 1990, including the ADA Amendments of 2008, found at 28 CFR Part 35. This term includes both the Title II (28 CFR §35.151) and 2004 ADAAG (36 CFR Part 1991). If there is a conflict between 2004 ADAAG and Title II the requirements of Title II prevail.

(2) Accessible Route--A continuous unobstructed path connecting accessible elements and spaces in a facility or building that complies with the space and reach requirements of the applicable accessibility standard.

(3) Alteration--Any physical change in a facility or its permanent fixtures or equipment. It includes, but is not limited to, remodeling, renovation, rehabilitation, reconstruction, changes or rearrangements in structural parts and extraordinary repairs. It does not include normal maintenance or repairs, reroofing, interior decoration, or changes to mechanical systems.

(4) Disability--A physical or mental impairment that substantially limits one or more major life activities; or having a record of such an impairment; or being regarded as having such an impairment. Nothing in this definition requires that a dwelling be made available to an individual whose tenancy would constitute a direct threat to the health or safety of other individuals or whose tenancy would result in substantial physical damage to the property of others. Included in this meaning is the term handicap as defined in the Fair Housing Act, and the term disability as defined in the Americans with Disabilities Act.

(5) Multifamily Housing Development--A project that includes five or more dwelling units. A project may consist of five single family homes, a single building with five or more units, or five or more units in multiple buildings each with one or more units. A project includes the whole of one or more residential structures and appurtenant structures, equipment, roads, walks, and parking lots which are covered by a single contract or application, or which are treated as a whole for processing purposes, whether or not located on a common site.

(6) Reasonable Accommodation--An accommodation and/or modification that is an alteration, change, exception, or adjustment to a program, policy, service, building, or dwelling unit, that will allow a qualified person with a Disability to:

(A) Participate fully in a program;

(B) Take advantage of a service;

(C) Live in a dwelling; or

(D) Use and enjoy a dwelling.

(7) Recipient--Includes a Subrecipient or Administrator and means any State or its political subdivision, any instrumentality of a State or its political subdivision, any public or private agency, institution, organization, or other entity, or any person to whom assistance or an award is extended for any program or activity directly or through another Recipient, including any successor, assignee, or transferee of a Recipient, but excluding the ultimate beneficiary of

the assistance. Recipients include private entities in partnership with Recipients to own or operate a program or service. This term includes Development Owner.

§1.203. General Requirements and Effect of Non Compliance.

(a) No individual with a Disability shall, by reason of their Disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any Department awarded program or activity.

(b) There are additional requirements for compliance with Section 504 of the 1973 Rehabilitation Act; Title VI of the Civil Rights Act of 1964; the Fair Housing Act; the Americans with Disabilities Act; and other civil rights laws, regulations and Executive Orders by Recipients of Department program or activities. This subchapter addresses only the requirements relating to physical accessibility, and reasonable accommodations under Section 504, the American with Disabilities Act, and the Fair Housing Act. Other disability-related requirements include, but are not limited to:

(1) Operating housing that is not segregated based upon disability or type of disability, unless authorized by federal statute or executive order;

(2) Providing auxiliary aids and services necessary for effective communication with persons with disabilities; and

(3) Operating programs in the most integrated setting appropriate to the needs of qualified individuals with disabilities.

(c) Compliance with accessibility requirements, as applicable, including compliance with the Fair Housing Act, the Americans with Disabilities Act, and Section 504 of the Rehabilitation Act of 1973, other civil rights laws, regulations and Executive Orders; and Chapters 2105 and 2306 of the Tex. Gov't Code is the sole responsibility of the Recipient. By providing guidance and monitoring for compliance, the Department in no way assumes any liability whatsoever for any action or failure to act by the Recipient.

(d) Failure to comply with the provisions of this subchapter may result in the assessment of administrative penalties and/or debarment, as further outlined in this title.

§1.204. Reasonable Accommodations.

(a) Applicability. This policy relates to a request for Reasonable Accommodations made by an applicant or participant of a Department program to a Recipient, or made by an applicant or occupant to a property funded by the Department to the property. The policy regarding a request for Reasonable Accommodation by the Department is found at 10 TAC §1.1 of this chapter.

(b) General Considerations in Handling of Reasonable Accommodations. An applicant, participant, or occupant who has a disability may request an accommodation and, depending on the program funding the property or activity and whether the accommodation requested is a reasonable accommodation, their request must be timely addressed.

(1) When the Department monitors a property or activity for how reasonable accommodation requests have been handled, it will consider such things as whether the person working on behalf of the program or property which the Department is monitoring:

(A) Timely received the request and recorded it;

(B) Took into consideration how action on the request would impact the person making the request; and

(C) Engaged in communication with the requestor to understand the nature of their request and whether there was a reasonable way to make an accommodation.

(2) If the person responsible for responding to a request for an accommodation needs assistance or clarification as to how the requirement may apply to their program or property they should contact the Compliance Division immediately to discuss the matter. The Compliance Division cannot provide legal advice or direct the person to respond in any specific manner, but they can, in some instances, point to appropriate federal guidance or other resources such as the Texas Workforce Commission Civil Rights Division. A person who contacts the Compliance Division or anyone else for such reasons should document such contact in their files because the process of obtaining guidance may impact the timeliness of their response.

(3) Unless there is a clear documented need for a lengthier process or there is a controlling federal statute or regulation specifying a different deadline, when a person requests an accommodation they should be given a response as soon as possible but not later than 14 calendar days.

(c) To show that a requested Reasonable Accommodation may be necessary, there must be an identifiable relationship between the requested accommodation and the individual's Disability.

(d) Responses to Reasonable Accommodation requests must be provided within a reasonable amount of time, not to exceed 14 calendar days. The response must either be to grant the request, deny the request, offer alternatives to the request, or request additional information to clarify the Reasonable Accommodation request. Examples when it would not be reasonable to wait 14 calendar days to provide a response include but are not limited to: moving the due date for rent to coincide with the date the requestor receives their social security disability check; allowing a service animal in an emergency shelter in spite of a no pets policy; or assisting an applicant with a Disability that prevents them from writing legibly when they request help filling out an program or project application. Should additional information be required and an interactive process be necessary, this process must also be completed within a reasonable amount of time. An undue delay in responding to a Reasonable Accommodation request may be deemed by the Department to be a failure to provide a Reasonable Accommodation.

(e) When a participant, applicant, or occupant requires an accessible unit, feature, space or element, or a policy modification, or other Reasonable Accommodation to accommodate a Disability, the Recipient must provide and pay for the requested accommodation, unless doing so would result in a fundamental alteration in the nature of the program or an undue financial and administrative burden. A fundamental alteration is an accommodation that is so significant that it alters the essential nature of the Recipient's operations. A Recipient that owns a tax credit or Multifamily Bond Development with no federal or state funds awarded before September 1, 2001, must allow but may not need to pay for the Reasonable Accommodation, except if the accommodation requested should have been made as part of the original design and construction requirements under the Fair Housing Act, or is a Reasonable Accommodation identified by the U.S. Department of Justice or the U.S. Department of Housing and Urban Development with a de minimis cost (e.g., assigned existing parking spot and no deposit for service/assistance animals).

(f) A Recipient may not charge a fee, deposit, or place conditions on a participant, occupant, or applicant in exchange for making the accommodation.

(g) A Reasonable Accommodation request of an individual with a Disability that amounts to an Alteration should be made to meet the needs of the individual with a Disability, rather than being limited to compliance with a particular accessible code specification. How-

ever, the Recipient must still follow accessible code specifications, as identified in its Contract or LURA.

(1) Recipients are not required to make structural changes where other methods, which may not cost as much, are effective in making programs or activities readily accessible to and usable by persons with Disabilities.

(2) In choosing among available methods for meeting the requirements of this section, the Recipient must give priority to those methods that offer programs and activities to qualified individuals with Disabilities in the most integrated setting appropriate.

(3) Undue burden.

(A) The determination of undue financial and administrative burden will be made by the Department on a case-by-case basis, involving various factors, such as the cost of the Reasonable Accommodation, the financial resources of the Development, the benefits the accommodation would provide to the requester, and the availability of alternative accommodations that would adequately meet the requester's Disability-related needs.

(B) In considering whether an expense would constitute an undue burden the Department may, as applicable, consider the following items (though it may consider factors not on this list):

(i) payment for Alteration from operating funds, residual receipts accounts, or reserve replacement accounts must be sought using appropriate approval procedures.

(ii) the approved amount must generally be able to be replenished through property rental income within one year without a corresponding raise in rental rates.

(iii) a projected inability to replenish an operating fund account or the reserve for replacement account within one year for funds spent in providing Alterations under this subsection is some evidence that the Alteration would be an undue financial and administrative burden.

(C) If providing accessibility would result in an undue financial and administrative burden, the Recipient must still take other reasonable steps to achieve accessibility.

(D) If a structural change would constitute an undue financial and administrative burden, and the tenant/requestor still wants that particular change to be made, the tenant/requestor must be allowed to make and pay for the accommodation.

(4) Recipients are not required to install an elevator solely for the purpose of making units accessible as a Reasonable Accommodation.

(5) Recipients do not have to make mechanical rooms and similar spaces accessible when, because of their intended use, they do not require accessibility by the public, by tenants, or by employees with physical disabilities.

(6) Recipients are not required to make building alterations that have little likelihood of being accomplished without removing or altering a load-bearing structural member, as a Reasonable Accommodation.

(h) If a Recipient refuses to provide a requested accommodation because it is either an undue financial and administrative burden or would result in a fundamental alteration to the nature of the program, the Recipient must make a reasonable attempt to engage in an interactive dialogue with the requester to determine if there is an alternative accommodation that would adequately address the requester's Disability-related needs. If an alternative accommodation would meet the individual's needs and is reasonable, the Recipient must provide it.

(i) Examples of reasonable accommodations, while not exhaustive, include moving the due date for rent to coincide with the date the requestor receives their social security disability check; providing a designated accessible parking space from existing parking spaces; creating an accessible parking space to accommodate a wheelchair-equipped van; allowing a service or support animal or animals in spite of a no pets policy; modifying door knobs to levers; providing assistance in filling out a program application for the activity or unit; in the case of a service provider providing computer lab classes with laptops, providing a loan of the laptop computer with the training software; in the case of a weatherization provider serving a family with a child with asthma, seeing if an alternative sealant could be used when the sealant typically used may trigger an asthma attack; installing grab bars; providing an accessible entrance to a resident's current unit, unless it would be an undue financial and administrative hardship or a fundamental alteration of the program to do so; and providing a ramp in excess of usual specifications for such alternations to accommodate a scooter type wheelchair, unless it would be an undue financial and administrative hardship or a fundamental alteration of the program to do so.

(j) Recipients must follow federal and state regulations regarding service/assistance animals. A housing provider may not require an applicant, participant, or occupant to pay a pet deposit if the animal is a service/assistance animal.

§1.205. Compliance with the Fair Housing Act.

(a) Generally, housing designed and constructed for first occupancy after March 13, 1991, must comply with the Fair Housing Act. This includes Units, common areas, and amenities added to existing buildings, or on land under common ownership and contiguous with housing otherwise exempt from the Fair Housing Act.

(b) Compliance with the Fair Housing Act makes it unlawful to discriminate based on a person's disability, race, color, religion, sex, familial status, or national origin unless there is an exception in federal law.

(c) The Department requires compliance with HUD's Fair Housing Act Design Manual, including the ability to claim exemptions or exceptions provided for therein.

§1.206. Applicability of the Construction Standards for Compliance with §504 of the Rehabilitation Act of 1973.

(a) The following types of Multifamily Housing Developments must comply with the construction standards of §504 of the Rehabilitation Act of 1973, as further defined through the Uniform Federal Accessibility Standards (UFAS):

(1) New construction and reconstruction HOME and NSP Multifamily Housing Developments that began construction before March 12, 2012;

(2) Rehabilitation HOME and NSP Multifamily Housing Developments that submitted a full application for funding before January 1, 2014; and

(3) All Housing Tax Credit and Tax Exempt Bond Developments that were awarded after September 1, 2001, and submitted a full application before January 1, 2014.

(b) The following types of Multifamily Housing Developments must comply with the construction requirements of 2010 ADA standards with the exceptions listed in "Nondiscrimination on the Basis of Disability in Federally Assisted Programs and Activities" 79 Federal Register 29671 and not otherwise modified in this subchapter:

(1) New construction and reconstruction HOME and NSP Multifamily Housing Developments that began construction after March 12, 2012; and

(2) All Multifamily Housing Developments that submit a full application for funding after January 1, 2014.

(c) Recipients of CDBG, CDBG-CV, ESG, EH, HHSP, and HOME-ARP (for Non-Congregate Shelter) funds must comply with 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 and not otherwise modified in this subchapter.

(d) Effect on LURAs. These rules do not serve to amend contractual undertakings memorialized in a recorded LURA but may, by operation of law, place requirements on a property owner beyond those contained in the LURA.

§1.207. General Requirements for Multifamily Housing Developments.

(a) All Units that are accessible to persons with mobility impairments must be on an Accessible Route.

(b) Recipients must give priority to methods that offer housing in the most integrated setting possible (i.e., a setting that enables qualified persons with Disabilities and persons without Disabilities to interact to the fullest extent possible). This means the distribution will provide individuals requiring accessible units with a choice of location, layout, and price that is substantially equivalent to the choice available to others. Distribution of accessible units may be further described in federal law, regulation, or governing Rules in this Title. To the maximum extent feasible and subject to reasonable health and safety requirements, accessible units must be:

(1) Distributed throughout the Development and site; and

(2) Made available in a sufficient range of sizes and amenities so that the choice of living arrangements of qualified persons with Disabilities is, as a whole, comparable to that of other persons eligible for housing assistance under the same program.

(c) All Multifamily Housing Developments that submit full applications after January 1, 2014, must have a minimum of 5 percent of Units that are accessible to persons with mobility impairments, and a minimum of 2 percent of the Units must be accessible to persons with visual and hearing impairments. In addition, common areas and amenities must also be accessible as identified in 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.

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 January 12, 2023.

TRD-202300143
Bobby Wilkinson
Executive Director
Texas Department of Housing and Community Affairs
Earliest possible date of adoption: February 26, 2023
For further information, please call: (512) 475-3959

♦ ♦ ♦

CHAPTER 10. UNIFORM MULTIFAMILY RULES

SUBCHAPTER H. INCOME AND RENT LIMITS

10 TAC §§10.1001 - 10.1006

The Texas Department of Housing and Community Affairs (the Department) proposes the repeal of 10 TAC Chapter 10, Uniform Multifamily Rules, Subchapter H, Income and Rent Limits. The purpose of the proposed repeal is to eliminate an outdated rule while adopting a new updated rule under separate action.

The Department has analyzed this 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.

1. Mr. Bobby Wilkinson, Executive Director, has determined that, for the first five years the proposed repeal would be in effect, the proposed repeal does not create or eliminate a government program, but relates to the repeal, and simultaneous readoption making changes to an existing activity, adding new multifamily programs to the Income and Rent limits rule.

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 workload 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 or 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 making changes to an existing activity, including the addition of new programs to the Income and Rent limits rule.

7. The proposed repeal will not increase or decrease the number of individuals subject to the rule's applicability.

8. The proposed 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 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 the addition of new multifamily programs to the Income and Rent limits rule. 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 public comment period will be held January 27, 2023, to February 27, 2023, to receive input on the proposed repealed section. Written comments may be submitted to the Texas Department of Housing and Community Affairs, Attn: Wendy Quackenbush, Rule Comments, P.O. Box 13941, Austin, Texas 78711-3941 or emailed to wendy.quackenbush@tdhca.state.tx.us. ALL COMMENTS MUST BE RECEIVED BY 5:00 p.m., Austin local time, FEBRUARY 27, 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 sections affect no other code, article, or statute.

§10.1001. Purpose.
§10.1002. Definitions.
§10.1003. Tax Exempt Bond Developments.
§10.1004. Housing Tax Credit Properties, TCAP, Exchange and SHTF.
§10.1005. HOME, TCAP RF, and NSP.
§10.1006. National Housing Trust Fund (NHTF).

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 January 12, 2023.

TRD-202300144
Bobby Wilkinson
Executive Director
Texas Department of Housing and Community Affairs
Earliest possible date of adoption: February 26, 2023
For further information, please call: (512) 475-3959

♦ ♦ ♦

10 TAC §§10.1001 - 10.1007

The Texas Department of Housing and Community Affairs (the Department) proposes new 10 TAC Chapter 10, Uniform Multifamily Rules, Subchapter H, Income and Rent Limits. The purpose of the proposed new rule is to provide compliance with Tex. Gov't Code §2306.053 and is to make changes to add two new programs - the HOME American Rescue Plan (HOME-ARP) and Emergency Rental Assistance (ERA) as well as make other non-substantive administrative corrections.

Tex. Gov't Code §2001.0045(b) does not apply to the new rule proposed for action because it was determined that no cost are associated with this action, and therefore no cost 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:

The proposed new rule does not create or eliminate a government program, but relates to the readoption of this rule, which makes changes to an existing activity, to ensure all applicable federal requirements relating to income and rent limits are specified.

1. 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 workload to a degree that eliminates any existing employee positions.

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

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

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

5. The proposed new rule will not expand, limit, or repeal an existing regulation.

6. The proposed new rule will not increase or decrease the number of individuals subject to the rule's applicability;

7. The proposed new 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 proposed new 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, §2306.053.

1. The Department has evaluated this new rule 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 this rule provides specific detail on how income and rent limits will be applied for a variety of federal and state programs. Other than, in a case of small or micro-businesses or rural communities that participates in one of these programs, it is anticipated there will be no economic effect on small or micro-businesses or rural communities. If a small or micro-business or rural community does participate

in the program, the rule provides a clear set of regulations for the handling of income and rent limits.

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

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

The Department has evaluated the new rule as to its possible effects on local economies and has determined that for the first five years the new rule will be in effect the proposed new rule has no economic effect on local employment because the rule relates only to the establishment of income and rent limits; therefore, no local employment impact statement is required to be prepared for the new rule.

Tex. Gov't Code §2001.022(a) states that this "impact statement must describe in detail the probable effect of the new rule on employment in each geographic region affected by this new rule..." Considering that the rule is applicable to all properties statewide, 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. Bobby Wilkinson, Executive Director, has determined that, for each year of the first five years the new rule is in effect, the public benefit anticipated as a result of the new rule will be a clearer rule for properties and assurance that the rules include income and rent limits for all applicable federal and state programs. There will not be any economic cost to any individuals required to comply with the new rule because the activities described by the rule have already been in existence.

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 rule is in effect, enforcing or administering the new rule does not have any foreseeable implications related to costs or revenues of the state or local governments because the rule relates to a process that already exists and is not being significantly revised.

REQUEST FOR PUBLIC COMMENT. The public comment period will be held January 27, 2023, to February 27, 2023, to receive input on the newly proposed rule. Written comments may be submitted to the Texas Department of Housing and Community Affairs, Attn: Wendy Quackenbush, Rule Comments, P.O. Box 13941, Austin, Texas 8711-3941, by fax to (512) 475-0220, or by email to wendy.quackenbush@tdhca.state.tx.us. ALL COMMENTS MUST BE RECEIVED BY 5:00 p.m., Austin local time, February 27, 2023.

STATUTORY AUTHORITY. The new rule(s) is/are proposed pursuant to Tex. Gov't Code §2306.053, which authorizes the Department to adopt rules.

Except as described herein the proposed new rules affect no other code, article, or statute.

§10.1001. Purpose.

The purpose of this subchapter is to codify the income and rent limits applicable to the multifamily programs administered by the Texas Department of Housing and Community Affairs (the Department). The Department may, but is not required to, calculate and provide income and rent limits for programs administered by the Department. Income and rent limits will be derived from data released by Federal agencies including the U.S. Department of Housing and Urban Development (HUD).

§10.1002. Definitions.

(a) Unless otherwise defined here, terms have the meaning in §11.1 of this title (relating to Definitions), or federal or state law.

(b) Multifamily Tax Subsidy Program Imputed Income Limit--Using the income limits provided by HUD pursuant to §142(d), the imputed income limit is the income limitation which would apply to individuals occupying the unit if the number of individuals occupying the unit were as described in paragraphs (1) and (2) of this subsection:

(1) in the case of a unit which does not have a separate bedroom, 1 individual; or

(2) in the case of a unit which has 1 or more separate bedrooms, 1.5 individuals for each separate bedroom.

(c) Tax Credit Assistance Program (TCAP)--Funds awarded as part of the American Recovery and Reinvestment Act to assist Low Income Housing Tax Credit projects funded during 2007, 2008, and 2009.

(d) Tax Credit Assistance Program Repayment Funds (TCAP RF)--Multifamily Direct Loan funds made available through income generated from loan repayments from the Tax Credit Assistance Program.

§10.1003. Tax Exempt Bond Developments.

(a) Tax Exempt Bond Developments must use the Multifamily Tax Subsidy Program (MTSP) income limits released by HUD, generally, on an annual basis. The MTSP limit tables include:

(1) The 50% and 60% Area Median Gross Income (AMGI) by household size.

(2) In areas where the income limits did not decrease in 2007 and 2008 because of HUD's hold harmless policy, a HERA Special 50% and HERA Special 60% income limit by household size. These higher limits can only be used if at least one building in the Project was placed in service on or before December 31, 2008.

(b) If HUD releases a 20%, 30%, 40%, 60%, 70% or 80% income limit in the MTSP charts the Department will make that data available without any calculations. Otherwise, the following methodology will be used, without rounding, to determine additional income limits:

(1) To calculate the 20% AMGI, the 50% AMGI limit will be multiplied by .40 or 40%.

(2) To calculate the 30% AMGI, the 50% AMGI limit will be multiplied by .60 or 60%.

(3) To calculate the 40% AMGI, the 50% AMGI limit will be multiplied by .80 or 80%.

(4) To calculate the 60% AMGI, the 50% AMGI limit will be multiplied by 1.2 or 120%.

(5) To calculate the 70% AMGI, the 50% AMGI limit will be multiplied by 1.4 or 140%.

(6) To calculate the 80% AMGI, the 50% AMGI limit will be multiplied by 1.6 or 160%.

(c) The Land Use Restriction Agreement (LURA) for some, but not all, Tax Exempt Bond properties restricts the amount of rent the Development Owner is permitted to charge. If the LURA restricts rents, rent limits will be calculated in accordance with §10.1004(d) of this subchapter (relating to Housing Tax Credit Properties, TCAP, Exchange and HTF).

(d) Tax Exempt Bond LURAs are hereby amended to be consistent with this section.

(e) The Department will make available a memorandum in a recordable form reflecting the applicable rent limits in accordance with this section and the legal description of the affected property. The owner of the property will bear any costs associated with recording such memorandum in the real property records for the county in which the property is located.

(f) Nothing in this section prevents a Development Owner from pursuing a Material Amendment to their LURA in accordance with the procedures found in §10.405 of this chapter (relating to Amendments and Extensions).

§10.1004. Housing Tax Credit Properties, TCAP, Exchange and SHTF.

(a) Except for certain rural properties, Housing Tax Credit, TCAP, Exchange, and SHTF Developments must use the Multifamily Tax Subsidy Program (MTSP) income limits released by HUD, generally, on an annual basis. The MTSP limit tables include:

(1) The 50% and 60% Area Median Gross Income (AMGI) by household size.

(2) In areas where the income limits did not decrease in 2007 and 2008 because of HUD's hold harmless policy, a HERA Special 50% and HERA Special 60% income limit by household size. These higher limits can only be used if at least one building in the Project (as defined on line 8b on Form 8609) was placed in service on or before December 31, 2008.

(b) If HUD releases a 20%, 30%, 40%, 60%, 70% or 80% income limit in the MTSP charts, the Department will use that data. Otherwise, the following calculation will be used, without rounding, to determine additional income limits:

(1) To calculate the 20% AMGI, the 50% AMGI limit will be multiplied by .40 or 40%.

(2) To calculate the 30% AMGI, the 50% AMGI limit will be multiplied by .60 or 60%.

(3) To calculate the 40% AMGI, the 50% AMGI limit will be multiplied by .80 or 80%.

(4) To calculate the 60% AMGI, the 50% AMGI limit will be multiplied by 1.2 or 120%.

(5) To calculate the 70% AMGI, the 50% AMGI limit will be multiplied by 1.4 or 140%.

(6) To calculate the 80% AMGI, the 50% AMGI limit will be multiplied by 1.6 or 160%.

(c) Treatment of Rural Properties. Section 42(i)(8) of the Code permits certain Housing Tax Credit, Exchange, and Tax Credit Assistance properties to use the national non-metropolitan median income limit when the area median gross income limit for a place is less than the national non-metropolitan median income.

(1) The Department will identify rural eligible places in accordance with:

(A) Section 520 of the Housing Act of 1949, as amended from time to time; and

(B) Chapter 2306 of the Texas Government Code, as amended from time to time.

(2) The Department allows the use of rural income limits for SHTF multifamily rental Developments that are considered rural using the process described in this subsection.

(d) Rent limits are a calculation of income limits and cannot exceed 30% of the applicable Imputed Income Limit. Rent limits are published by number of bedrooms and will be rounded down to the nearest dollar.

(1) Example 1004(1): To calculate the 30% 1 bedroom rent limit:

(A) Determine the imputed income limited by multiplying the number of bedrooms by 1.5: 1 bedroom x 1.5 persons = 1.5.

(B) To calculate the 1.5 person income limit, average the 1 person and 2 person income limits: If the 1 person 30% income limit is $12,000 and the 2 person 30% income limit is $19,000, the imputed income limit would be $15,500 ($12,000 + $19,000 = $31,000/2 = $15,500).

(C) To calculate the 30% 1 bedroom rent limit, multiply the imputed income limit of $15,500 by 30%, then divide by 12 months and round down. In this example, the 30% 1 bedroom limit is $387 ($15,500 times 30% divided by 12 = $387.50 per month. Rounded down the limit is $387).

(2) Example 1004(2): to calculate the 50% 2 bedroom rent limit:

(A) Determine the imputed income limited to be calculated by multiplying the number of bedrooms by 1.5: 2 bedrooms x 1.5 persons = 3.

(B) The 3 person income limit is already published; for this example the applicable 3 person 50% income limit is $27,000.

(C) To calculate the 50% 2 bedroom rent limit, multiply $27,000 by 30%, then divide by 12. In this example, the 50% 2 bedroom limit is $675 ($27,000 times 30% divided by 12 = $675. No rounding is needed since the calculation yields a whole number).

(e) The Department releases rent limits assuming that the gross rent floor is set by the date the Housing Tax Credits were allocated.

(1) For a 9% Housing Tax Credit, the allocation date is the date the Carryover Agreement is signed by the Department.

(2) For a 4% Housing Tax Credit, the allocation date is the date of the Determination Notice.

(3) For TCAP, the allocation date is the date the accompanied credit was allocated.

(4) For Exchange, the allocation date is the effective date of the Subaward agreement.

(f) Revenue Procedure 94-57 permits, but does not require, owners to set the gross rent floor to the limits that are in effect at the time the Project (as defined on line 8b on Form 8609) places in service. However, this election must be made prior to the Placed in Service Date. A Gross Rent Floor Election form is available on the Department's website. Unless otherwise elected, the initial date of allocation described in subsection (e) of this section will be used.

(1) In the event an owner elects to set the gross rent floor based on the income limits that are in effect at the time the Project places in service and wishes to revoke such election, prior approval from the Department is required. The request will be treated as non-material amendment, subject to the fee described in §11.901of this title (relating to Fee Schedule) and the process described in §10.405 of this chapter (relating to Amendments and Extensions).

(2) An owner may request to change the election only once during the Compliance Period.

(g) For the SHTF program, the date the LURA is executed is the date that sets the gross rent floor.

(h) Held Harmless Policy.

(1) In accordance with Section 3009 of the Housing and Economic Recovery Act of 2008, once a Project (as defined on line 8b on Form 8609) places in service, the income limits shall not be less than those in effect in the preceding year.

(2) Unless other guidance is received from the U.S. Treasury Department, in the event that a place no longer qualifies as rural, a Project that was placed in service prior to loss of rural designation can continue to use the rural income limits that were in effect before the place lost such designation for the purposes of determining the applicable income and rent limit. However, if in any subsequent year the rural income limits increase, the existing project cannot use the increased rural limits. Example 1004(3): Project A was placed in service in 2010. At that time, the place was classified as Rural. In 2012 that place lost its rural designation. The rural income limits increased in 2013. Project A can continue to use the rural income limits in effect in 2012 but cannot use the higher 2013 rural income limits. For owners that execute a carryover for a Project located in a rural place that loses such designation prior to the placed in service date, unless other guidance is received from the U.S. Treasury Department, the Department will monitor using the rent limits calculated from the rural limits that were in effect at the time of the carryover. However, for the purposes of determining household eligibility, such Project must use the applicable MTSP income limits published by HUD.

§10.1005. HOME, HOME-ARP, TCAP RF, and NSP.

(a) HOME, HOME-ARP and TCAP RF Developments must use the HOME Program Income and Rent Limits that are calculated annually by HUD's Office of Policy Development and Research (PDR). The limits are made available for each Metropolitan Statistical Areas (MSA), Primary Metropolitan Statistical Areas (PMSA) and Area, District or County by State.

(1) Upon publication, the Department will determine which counties are in each MSA, PMSA, Area or District.

(2) Generally, PDR publishes income limits in tables identifying the following Area Median Gross Income (AMGI) by household size:

(A) Extremely Low-Income Limits which are generally 30% of median income, which will be shown as the 30% limit in the Department's income limits;

(B) Very Low-Income Limits which are generally 50% of median income, which will be shown as the 50% limit in the Department's income limits;

(C) 60% Limits;

(D) Low-Income Limits which are generally 80% of the median income, but capped at the national median income with some exceptions which will be shown as the 80% limits in the Department's income limits.

(3) If not published, the Department will use the following methodology to calculate, without rounding, additional income limits from the HOME Program income limits released by PDR:

(A) To calculate the 30% AMGI, the 50% AMGI limit will be multiplied by .60 or 60%.

(B) To calculate the 40% AMGI, the 50% AMGI limit will be multiplied by .80 or 80%.

(C) To calculate the 60% AMGI, the 50% AMGI limit will be multiplied by 1.2 or 120%.

(b) PDR publishes High and Low HOME rent limits by bedroom size.

(c) PDR does not publish a 30% or 40% rent limits that certain HOME, HOME-ARP and TCAP RF Developments are required to use. These limits will be calculated using the same formulas described in §10.1004 of this subchapter (relating to Housing Tax Credit Properties, TCAP, Exchange and SHTF).

(d) In the event that PDR publishes rent limits after the HOME program income limits, the Department permits HOME, HOME-ARP and TCAP RF Developments to delay the implementation of the 30% and 40% rent limits until the High and Low HOME rent limits must be used.

(e) NSP income limits are published annually by HUD for each county with tables identifying the 50% AMGI and 120% AMGI for household size. If not published, the Department will use the following methodology to calculate, without rounding, additional income limits from the HOME Program income limits released by HUD:

(1) To calculate the 30% AMGI, the 50% AMGI limit will be multiplied by .60 or 60%.

(2) To calculate the 40% AMGI, the 50% AMGI limit will be multiplied by .80 or 80%.

(3) To calculate the 60% AMGI, the 50% AMGI limit will be multiplied by 1.2 or 120%.

(4) To calculate the 80% AMGI, the 50% AMGI limit will be multiplied by 1.6 or 160%.

(f) If the LURA for an NSP Development restricts rents, the amount of rent the Development Owner is permitted to charge will be the High or Low HOME rent published by PDR or calculated in the same manner described in §10.1004 of this subchapter using the HOME income limits.

(g) The LURA for HOME-ARP may require the rent and income limit to follow a different Department program during the state affordability period. In that case, rent will be calculated in the manner of the program identified in the LURA and described in this subchapter.

§10.1006. National Housing Trust Fund (NHTF).

(a) The 30% National Housing Trust Fund Income and Rent Limits are calculated annually by HUD's Office of Policy Development and Research (PDR). The limits are made available for each Metropolitan Statistical Areas (MSA), Primary Metropolitan Statistical Areas (PMSA) and Area, District or County by State. Generally, PDR publishes income limits in tables identifying the Area Median Gross Income (AMGI) by household size. The 30% NHTF income limit is the greater of the 30% limit and the federal poverty line. The 15% NHTF income limit will be half of the 30% NHTF income limit.

(b) PDR publishes 30% NHTF Rent Limits by bedroom size. The 30% NHTF rent limit is calculated based on the greater of the 30% AMGI or the federal poverty line. The 15% NHTF rent limit will be half of the 30% NHTF rent limit.

§10.1007. Emergency Rental Assistance (ERA).

(a) The Emergency Rental Assistance Developments (ERA) must use the Section 8 income limits released by HUD, generally, on an annual basis. The Section 8 limit tables include the 30% and 50% by household size.

(b) The Land Use Restriction Agreement (LURA), for Emergency Rental Assistance Developments restricts the amount of rent the Development Owner is permitted to charge.

(1) If ERA is layered with Housing Tax Credit Properties, TCAP, Exchange and SHTF, the LURA restricted rent limits will be calculated in accordance with §10.1004(d) of this subchapter (relating to Housing Tax Credit properties, TCAP, Exchange and SHTF)

(2) If ERA is layered with HOME, HOME-ARP, TCAP RF, and NSP, the LURA restricted rent limits will be calculated in accordance with §10.1005(b) of this subchapter (relating to HOME, HOME-ARP, TCAP RF, and NSP)

(3) If ERA is layered with NHTF, the LURA restricted rent limits will be calculated in accordance with §10.1006(b) of this subchapter (relating to NHTF).

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 January 12, 2023.

TRD-202300145
Bobby Wilkinson
Executive Director
Texas Department of Housing and Community Affairs
Earliest possible date of adoption: February 26, 2023
For further information, please call: (512) 475-3959

♦ ♦ ♦

TITLE 19. EDUCATION

PART 1. TEXAS HIGHER EDUCATION COORDINATING BOARD

CHAPTER 1. AGENCY ADMINISTRATION

SUBCHAPTER C. STANDARDS OF CONDUCT

19 TAC §§1.80 - 1.87

The Texas Higher Education Coordinating Board (Coordinating Board) proposes the repeal of Texas Administrative Code, Title 19, Part 1, Chapter 1, Subchapter C, Standards of Conduct, §§1.80 - 1.87. Specifically, the repeal is in anticipation of establishing new Subchapter C rules in Title 19, Chapter 1.

The review of the rules and repeal of existing Subchapter C and, via separate rulemaking, the re-adoption make minor substantive amendments to the rule to set out the parameters of the agency and Board's relationship with its official non-profit partner, the Texas Higher Education Foundation. Additional minor conforming edits will further explain the processes for the acceptance of gifts and donations to the agency that align with Texas law, and re-adopt the ethical boundaries by which the Board and employees govern themselves.

Nichole Bunker-Henderson, General Counsel, has determined that for each of the first five years the sections are in effect there would be no fiscal implications for state or local governments as a result of enforcing or administering the rules. There are no estimated reductions in costs to the state and to local governments as a result of enforcing or administering the rule. There are no estimated losses or increases in revenue to the state or to local governments as a result of enforcing or administering the rule.

There is no impact on small businesses, micro businesses, and rural communities. There is no anticipated impact on local employment.

Nichole Bunker-Henderson has also determined that for each year of the first five years the section is in effect, the public benefit anticipated as a result of administering the section will be updating the Board's ethics policies to reflect current practice and demonstrate compliance with state law and best practices. There are no anticipated economic costs to persons who are required to comply with the sections as proposed.

Government Growth Impact Statement

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

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

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

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

(5) the rules will not create a new rule but will be replaced by proposed new Subchapter C rules in Title 19, Chapter 1;

(6) the rules will not limit an existing rule;

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

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

Comments on the proposal may be submitted to Nichole Bunker-Henderson, General Counsel, P.O. Box 12788, Austin, Texas 78711-2788, or via email at Nichole.Bunker-Henderson@highered.texas.gov. Comments will be accepted for 30 days following publication of the proposal in the *Texas Register.*

The repeal is proposed under Texas Education Code, Section 61.068, which provides the Coordinating Board with the authority to accept gifts and donations. The repeal is further proposed pursuant to the authority of Texas Government Code chapters 575 and 2255.001.

The proposed repeal affects Texas Education Code, Sections 61.089, 61.5361, 61.5391, 61.609, 61.658, 61.707, 61.793, 61.867, 61.885, 61.907, 61.957, 61.9608, 61.9625, 61.9657, 61.9704, 61.9728, 61.9755, 61.9776, 61.9795, 61.9805, 61.9818, 61.9827, 61.9837, 61.9858, and 61.9965.

§1.80. Scope and Purpose.

§1.81. Definitions.

§1.82. Donations by Private Donors to the Board.

§1.83. Donations by a Private Donor to a Private Organization That Exists To Further the Purposes and Duties of the Board.

§1.84. Organizing a Private Organization That Exists To Further the Duties and Purposes of the Board.

§1.85. Relationship between a Private Organization and the Board.

§1.86. Standards of Conduct Between Board Employees and Private Donors.

§1.87. Miscellaneous.

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 January 13, 2023.

TRD-202300154
Nichole Bunker-Henderson
General Counsel
Texas Higher Education Coordinating Board
Earliest possible date of adoption: February 26, 2023
For further information, please call: (512) 427-6297

♦ ♦ ♦

19 TAC §§1.80 - 1.87

The Texas Higher Education Coordinating Board (Coordinating Board) proposes the repeal of Texas Administrative Code, Title 19, Part 1, Chapter 1, Subchapter C, and new rules in Chapter 1, Subchapter C, Acceptance of Gifts and Donations By Board And Employees, §§1.80-1.87. Specifically, the repeal and new rules provides the opportunity to review and update the Board's ethics policies to reflect current agency practice, demonstrate compliance with current state law, and implement state governance best practices

Rule 1.80 sets out the scope and purpose of the rules, which is to comply with applicable provisions of state law, ensure compliance with ethics best practices, and properly govern the relationship between the Board and its official non-profit partner organization, the Texas Higher Education Foundation, which has supported the Board's mission and initiatives since 2001.

Rule 1.81 sets out the definitions used in the rules, including updating the name of the Texas Higher Education Foundation.

Rule 1.82 governs the relationship of the Texas Higher Education Foundation (Foundation) with the board and designates it as the official nonprofit partner of the Board. This rule implements ethical best practices and specifies the control that each the Foundation and Board may have with one another.

Rule 1.83 specifies how the Board may spend gifts and donations consistent with state law.

Rule 1.84 provides for the donation of gifts to the Board from private donors. Subsection (b) also specifies that the relationship between the Board and Foundation shall be established in a Memorandum of Understanding, consistent with the current relationship.

Rule 1.85 sets out what support the Foundation may offer the Board and the support the Board may use to further the purposes of the Foundation. These limitations are specified in rule to avoid conflicts of interest, create transparency, and ensure that the relationship with the Board's official non-profit support organization remains consistent with state law. The means of support and relationship are set out in the Memorandum of Understanding, as described in the rule.

Rules 1.86 and 1.87 establish the methods by which the Board members will avoid prohibit conflicts of interest consistent with Government Code 575 and best practices.

Nichole Bunker-Henderson, General Counsel, has determined that for each of the first five years the sections are in effect there would be no fiscal implications for state or local governments as a result of enforcing or administering the rules. There are no estimated reductions in costs to the state and to local governments as a result of enforcing or administering the rule. There are no estimated losses or increases in revenue to the state or to local governments as a result of enforcing or administering the rule.

There is no impact on small businesses, micro businesses, and rural communities. There is no anticipated impact on local employment.

Nichole Bunker-Henderson has also determined that for each year of the first five years the section is in effect, the public benefit anticipated as a result of administering the section will be updating the Board's ethics policies to reflect current practice and demonstrate compliance with state law and best practices. There are no anticipated economic costs to persons who are required to comply with the sections as proposed.

Government Growth Impact Statement

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

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

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

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

(5) the rules will create new rules;

(6) the rules will not limit an existing rule;

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

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

Comments on the proposal may be submitted to Nichole Bunker-Henderson, General Counsel, P.O. Box 12788, Austin, Texas 78711-2788, or via email at Nichole.Bunker-Henderson@highered.texas.gov. Comments will be accepted for 30 days following publication of the proposal in the *Texas Register.*

The new section is proposed under Texas Education Code, Section 61.068, which provides the Coordinating Board with the authority to accept gifts and donations. The rule is further proposed pursuant to the authority of Texas Government Code chapters 575 and 2255.001.

The proposed new section affects Texas Education Code, Sections 61.089, 61.5361, 61.5391, 61.609, 61.658, 61.707, 61.793, 61.867, 61.885, 61.907, 61.957, 61.9608, 61.9625, 61.9657, 61.9704, 61.9728, 61.9755, 61.9776, 61.9795, 61.9805, 61.9818, 61.9827, 61.9837, 61.9858, and 61.9965.

§1.80. Scope and Purpose.

(a) This subchapter establishes the criteria, procedures, and standards of conduct governing the relationship between the Texas Higher Education Coordinating Board (Board) and its officers and employees and private donors and private organizations that exist to further the duties and purposes of the Board. This subchapter sets out the Board's process for acceptance of gifts and donations.

(b) The purpose of this subchapter is to comply with the provisions of Texas Government Code chapters 575 and 2255.001 and implement the provisions of chapter 61 of the Texas Education Code authorizing the Board to accept gifts and donations.

§1.81. Definitions.

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

(1) Board--The Texas Higher Education Coordinating Board.

(2) Commissioner--The Commissioner of the Texas Higher Education Coordinating Board.

(3) Donation--A contribution of anything of value (including a gift or in-kind gift such as goods or services) given to the Board for public higher education purposes or to the Texas Higher Education Foundation for the benefit of the Board. The Board may not accept donations of real property (real estate) without the express permission and authorization of the legislature.

(4) Employee--A regular, acting, exempt, full-time or part-time employee of the agency.

(5) Gift--A donation of money or property.

(6) Private donor--People or private organizations that make a donation to the Board for higher education purposes, or that make a donation to the Higher Education Foundation to assist in accomplishing the duties of the Board.

(7) The Texas Higher Education Foundation--A 501(c)(3) organized for the purpose of supporting the mission, objectives, and public purpose of the Texas Higher Education Coordinating Board by providing resources obtained primarily from private, non-governmental sources, or its successor organization designated as the official nonprofit partner of the Board.

§1.82. The Texas Higher Education Foundation.

(a) The Texas Higher Education Foundation is designated as the official nonprofit partner of the Board.

(b) The Chair of the Board and the Board of Trustees of the Texas Higher Education Foundation may cooperatively appoint a board of trustees for the organization, subject to the following requirements:

(1) The Commissioner shall serve as an ex officio trustee with no vote;

(2) Board employees may serve as an ex officio, non-voting trustee, provided there is no conflict of interest in accordance with all federal and state laws and Board policies. This provision applies to the employee's spouse and children; and

(3) Members of the Board may serve on the Board of Trustees of the Texas Higher Education Foundation, but such members will not comprise a majority of the Board of Trustees.

(c) The Board shall review its relationship with the Texas Higher Education Foundation on a schedule to be established by the Board, but not less than once every 10 years.

(d) The Texas Higher Education Foundation may not expend funds for the purpose of influencing legislative action, either directly or indirectly.

§1.83. Gifts and Donations to the Board.

(a) A private donor may make a donation to the Board to be used or spent for specified or unspecified public higher education purposes. If the donor specifies the purpose, the Board must use or expend the donation only for that purpose.

(b) The Board shall use or spend all donations in accordance with the provisions of the State Appropriations Act. The Board shall deposit all gifts in the state treasury unless exempted by specific statutory authority.

(c) The Board may not transfer a private donation to a foundation or private/public development fund without specific written permission from the donor and the written approval of the Commissioner.

(d) The Board authorizes the Commissioner to accept donations on its behalf.

(e) The Board will acknowledge the acceptance of a gift or donation at the next Board meeting immediately after the date the Commissioner accepts a gift on the Board's behalf.

(f) The Board will log gifts in its minutes as required by chapter 575 of the Government Code.

§1.84. Donations by a Private Donor to the Texas Higher Education Foundation.

(a) A private donor may make a donation to the Texas Higher Education Foundation to assist in accomplishing the duties of the Board.

(b) The Texas Higher Education Foundation shall administer and use the donation in accordance with the provisions in the memorandum of understanding between the Texas Higher Education Foundation and the Board, as described in §1.85(c) of this title (relating to Relationship between the Texas Higher Education Foundation and the Board).

§1.85. Relationship between the Texas Higher Education Foundation and the Board.

(a) The Board may provide to the Texas Higher Education Foundation:

(1) fundraising and solicitation assistance;

(2) staff services to coordinate activities;

(3) administrative and clerical services;

(4) office and meeting space;

(5) training;

(6) any service or agreement authorized by the legislature; and

(7) other miscellaneous services as needed to further the duties and purposes of the Board.

(b) In addition to gifts and donations authorized by law, the Texas Higher Education Foundation may provide:

(1) postage;

(2) printing, including letterhead and newsletters;

(3) special event insurance;

(4) recognition of donors;

(5) bond and liability insurance for organization officers; and

(6) other miscellaneous services as needed to further the duties and purposes of the Board.

(c) The Texas Higher Education Foundation and the Board shall enter into a memorandum of understanding (MOU) which contains specific provisions regarding:

(1) the relationship between the Board and the Texas Higher Education Foundation and a mechanism for solving any conflicts or disputes;

(2) fundraising and solicitation;

(3) the use of all donations from fundraising or solicitation, less legitimate expenses as described in the MOU, for the benefit of the Board;

(4) the maintenance by the Foundation of receipts and documentation of all funds and other donations received, including furnishing such records to the Board;

(5) the furnishing to the Board of any audit of the Texas Higher Education Foundation by the Internal Revenue Service or a private firm; and

(6) the reasonable use of Board employees, equipment, or property in order to further or support the purposes or programs of the Board, provided such usage is commensurate with the benefit received or to be received by the Board.

§1.86. Standards of Conduct Between Board Employees and Private Donors.

(a) A Board officer or employee shall not accept or solicit any gift, favor, or service from a private donor that might reasonably tend to influence his/her official conduct.

(b) A Board officer or employee shall not accept employment or engage in any business or professional activity with a private donor which the officer or employee might reasonably expect would require or induce him/her to disclose confidential information acquired by reason of his/her official position.

(c) A Board officer or employee shall not accept other employment or compensation from a private donor that would reasonably be expected to impair the officer or employee's independence of judgment in the performance of his/her official position.

(d) A Board officer or employee shall not make personal investments in association with a private donor that could reasonably be expected to create a substantial conflict between the officer or employee's private interest and the interest of the Board.

(e) A Board officer or employee shall not solicit, accept, or agree to accept any benefits for having exercised his/her official powers on behalf of a private donor or performed his official duties in favor of private donor.

(f) A Board officer or employee who has policy direction over the Board and who serves as an officer or director on a board of a private donor shall not vote on any measure, proposal, or decision pending before the private donor if the Board might reasonably be expected to have an interest in such measure, proposal, or decision.

(g) A Board officer or employee shall not authorize a private donor to use property of the Board unless the property is used in accordance with a contract or memorandum of understanding between the Board and the private donor, or the Board is otherwise compensated for the use of the property.

(h) A Board officer affiliated with a private donor or organization shall at all times be mindful of his/her obligations under Texas Government Code chapter 572.

§1.87. Miscellaneous.

The relationship between a private donor, Texas Higher Education Foundation, and the Board, including fundraising and solicitation activities, is subject to all applicable federal and state laws, rules and regulations, and local ordinances governing each entity and its employees.

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 January 13, 2023.

TRD-202300153
Nichole Bunker-Henderson
General Counsel
Texas Higher Education Coordinating Board
Earliest possible date of adoption: February 26, 2023
For further information, please call: (512) 427-6297

SUBCHAPTER O. LEARNING TECHNOLOGY ADVISORY COMMITTEE

19 TAC §1.188, §1.190

The Texas Higher Education Coordinating Board (Coordinating Board) proposes amendments to Texas Administrative Code, Title 19, Part 1, Chapter 1, Subchapter O, §1.188 and §1.190, concerning the Learning Technology Advisory Committee. Specifically, this amendment will extend the abolishment date of the Learning Technology Advisory Committee and update the tasks assigned to the Committee.

Texas Education Code, §61.026 authorizes the Coordinating Board to appoint advisory committees as considered necessary. This amendment will extend the abolishment date of the current Learning Technology Advisory Committee and update tasks assigned to the Committee to align with other proposed amendments to the Texas Administrative Code relating to distance education.

Rule 1.188, Duration, contains the abolishment date of the Learning Technology Advisory Committee, which will be extended to April 27, 2028.

Rule 1.190, Tasks Assigned to the Committee, lists the responsibilities of the Learning Technology Advisory Committee. The amendments clarify how those responsibilities will shift to align with proposed changes to distance education program approval processes in Chapter 2, Subchapter J: §1.190(1) removes the responsibility of the Committee to analyze duplication of distance education programs in the state; §1.190(2) amends the Committee's scope for development of policy recommendations to the Board by including the development of affordable learning materials such as open educational resources (§1.190(2)(B)), and the review and update of the Principles of Good Practice for Distance Education (§1.190(2)(C)); and §1.190(3) adds the review and provision of recommendations on Institutional Plans for Distance Education to the responsibilities of the Committee, while removing the task of reviewing and providing recommendations on distance education doctoral programs.

Dr. Michelle Singh, Assistant Commissioner for Digital Learning, has determined that for each of the first five years the sections are in effect there would be no fiscal implications for state or local governments as a result of enforcing or administering the rules. There are no estimated reductions in costs to the state and to local governments as a result of enforcing or administering the rule. There are no estimated losses or increases in revenue to the state or to local governments as a result of enforcing or administering the rule.

There is no impact on small businesses, micro businesses, and rural communities. There is no anticipated impact on local employment.

Dr. Michelle Singh has also determined that for each year of the first five years the section is in effect, the public benefit anticipated as a result of administering the section will be the continuation of work of the Learning Technology Advisory Committee and clarification of the Committee's responsibilities. There are no anticipated economic costs to persons who are required to comply with the sections as proposed.

Government Growth Impact Statement

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

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

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

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

(5) the rules will not create a new rule;

(6) the rules will not limit an existing rule;

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

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

Comments on the proposal may be submitted to Dr. Michelle Singh, Assistant Commissioner for Digital Learning, P.O. Box 12788, Austin, Texas 78711-2788, or via email at digitallearning@highered.texas.gov. Comments will be accepted for 30 days following publication of the proposal in the *Texas Register.*

The amendment is proposed under Texas Education Code, Section 61.0512(g), which provides the Coordinating Board with the authority to approve distance learning courses at institutions of higher education.

The proposed amendment affects Texas Education Code Section 61.0512(g).

§1.188. Duration.
The committee shall be abolished no later than April 27, 2028 [~~October 31, 2025~~], in accordance with Texas Government Code, Chapter 2110. It may be reestablished by the Board.

§1.190. Tasks Assigned the Committee.
Tasks assigned the committee include:

(1) Analysis of the current state of distance education in Texas higher education including the use of various distance education modalities, the cost of distance education, the availability of high need and high demand degree programs through distance education, institutional fee structures associated with distance education, the role of technology in instructional cost effectiveness[, ~~duplication of distance education programs~~], and public/private distance education collaborations;

(2) Development of policy recommendations to the Board on critical issues such as:

(A) The development of distance education institutional collaboratives;

(B) The development of affordable [~~shared~~] electronic course resources and learning materials, including open educational resources, textbooks, and other digital learning objects;

(C) Best practices in the evaluation of distance education, including review and update of the Principles of Good Practice for Distance Education;

(D) The role of online and hybrid education in offering accessible and affordable degree programs;

(E) Partnerships between community colleges and universities that leverage technology to increase the number of degree completion options available to students;

(F) Ways to creatively and innovatively use technology to change the way in which higher education is offered; and

(G) Ways to creatively and innovatively use technology to increase student retention and success through programs such as just-in-time, on-demand academic support services.

(3) Review and provide recommendations on Institutional Plans for Distance Education [~~of all distance education doctoral proposals~~] to promote [~~ensure~~] the development and delivery of high-quality [~~high quality~~] programs.

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

Filed with the Office of the Secretary of State on January 13, 2023.

TRD-202300162
Nichole Bunker-Henderson
General Counsel
Texas Higher Education Coordinating Board
Earliest possible date of adoption: February 26, 2023
For further information, please call: (512) 427-6284

♦ ♦ ♦

CHAPTER 2. ACADEMIC AND WORKFORCE EDUCATION

SUBCHAPTER A. GENERAL PROVISIONS

19 TAC §2.9

The Texas Higher Education Coordinating Board (Coordinating Board) proposes amendments to Texas Administrative Code, Title 19, Part 1, Chapter 2, Subchapter A, §2.9, concerning revisions and modifications to an approved program. Specifically, this amendment will clarify how institutions report changes in a program's modality of delivery, specifically stating that institutions should notify the Coordinating Board of intent to offer a program through the distance education modality.

The Coordinating Board has authority to approve courses offered through distance education under Texas Education Code §61.0512(g). Board staff has developed a revised approval process that provides for conferring distance education approval at the institutional level, maintaining the requirement that institutions notify Board staff of intent to implement a new distance education program. The amendments to this rule conform to this new process, and issue further clarification that this process does not apply to changes to a program's physical location or site. These amendments do not change current processes, as institutions must currently notify the Coordinating Board of changes to distance education programs.

Rule 2.9, Revisions and Modifications to an Approved Program, contains the procedures institutions must follow to request a revision or modification to a certificate or degree program that already has Coordinating Board approval. The amendments clarify how the Coordinating Board will process changes to a pro-

gram's modality of delivery: subsection 2.9(a)(1) more clearly states that Assistant Commissioner approval applies to the entire relocation of a program; subsection (c)(3) notes that only requests for off-campus face-to-face programs fall within the non-substantive revisions and modifications category; and section 2.9(e) explains the change categories that qualify for Notification Only approval, including program delivery through distance education. This level of approval aligns Chapter 2, Subsection A, with proposed new changes to distance education program approval processes in Chapter 2, Subsection J.

Michelle Singh, Assistant Commissioner for Digital Learning, has determined that for each of the first five years the sections are in effect there would be no fiscal implications for state or local governments as a result of enforcing or administering the rules. There are no estimated reductions in costs to the state and to local governments as a result of enforcing or administering the rule. There are no estimated losses or increases in revenue to the state or to local governments as a result of enforcing or administering the rule.

There is no impact on small businesses, micro businesses, and rural communities. There is no anticipated impact on local employment.

Michelle Singh, Assistant Commissioner for Digital Learning, has also determined that for each year of the first five years the section is in effect, the public benefit anticipated as a result of administering the section will be the continued maintenance of the Coordinating Board's Distance Education Inventory. There are no anticipated economic costs to persons who are required to comply with the sections as proposed.

Government Growth Impact Statement

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

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

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

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

(5) the rules will not create a new rule;

(6) the rules will not limit an existing rule;

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

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

Comments on the proposal may be submitted to Michelle Singh, Assistant Commissioner for Digital Learning, P.O. Box 12788, Austin, Texas 78711-2788, or via email at digitallearning@highered.texas.gov. Comments will be accepted for 30 days following publication of the proposal in the *Texas Register.*

The amendment is proposed under Texas Education Code, Section 61.0512(g), which provides the Coordinating Board with the authority to approve distance learning courses offered by institutions of higher education.

The proposed amendment affects Texas Education Code §61.0512(g).

§2.9. Revisions and Modifications to an Approved Program.

(a) Substantive revisions and modifications that materially alter the nature of the program, physical location, or modality of delivery, as determined by the Assistant Commissioner, include, but are not limited to:

(1) Closing the program in one location and moving it to a second location [~~Changing the location of the program~~]; and

(2) Changing the funding from self-supported to formula-funded or vice versa.

(b) For a program that initially required Board Approval beginning as of September 1, 2023, and doctoral and professional programs approved by the Board on or before September 1, 2023, any substantive revision or modification to that program will require Board Approval under §2.4 of this subchapter. For all other programs, including programs that initially required Board Approval prior to September 1, 2023, any substantive revision or modification will require Assistant Commissioner Approval under §2.4(a)(2) of this subchapter.

(c) Non-substantive revisions and modifications that do not materially alter the nature of the program, location, or modality of delivery, as determined by the Assistant Commissioner, include, but are not limited to:

(1) Increasing the number of semester credit hours of a program for reasons other than a change in programmatic accreditation requirements;

(2) Consolidating a program with one or more existing programs;

(3) Offering a program in an off-campus face-to-face format [~~Changing the modality of the program~~];

(4) Altering any condition listed in the program approval notification;

(5) Changing the CIP Code of the program;

(6) Increasing the number of semester credit hours if the increase is due to a change in programmatic accreditation requirements;

(7) Reducing the number of semester credit hours, so long as the reduction does not reduce the number of required hours below the minimum requirements of the institutional accreditor, program accreditors, and licensing bodies, if applicable;

(8) Changing the Degree Title or Designation; and

(9) Other non-substantive revisions that do not materially alter the nature of the program, location, or modality of delivery, as determined by the Assistant Commissioner.

(d) The non-substantive revisions and modifications in subsection (c)(1) - (5) of this section are subject to Assistant Commissioner Approval Regular Review under §2.4 of this subchapter. All other non-substantive revisions and modifications are subject to Assistant Commissioner Approval Expedited Review under §2.4(a)(2)(B) of this subchapter.

(e) The following program revisions or modifications require Notification Only under §2.4(1) of this subchapter:

(1) [~~(e)~~] Public universities and public health-related institutions must notify the Coordinating Board of changes to administrative units, including creation, consolidation, or closure of an administrative unit. Coordinating Board Staff will update the institution's Program Inventory pursuant to this notification.

(2) All institutions must notify the Coordinating Board of the intent to offer an approved program through distance education following the procedures in §2.206 of this chapter (relating to Distant Education Degree or Certificate Program Notification).

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

Filed with the Office of the Secretary of State on January 13, 2023.

TRD-202300160
Nichole Bunker-Henderson
General Counsel
Texas Higher Education Coordinating Board
Earliest possible date of adoption: February 26, 2023
For further information, please call: (512) 427-6284

♦ ♦ ♦

SUBCHAPTER J. APPROVAL OF DISTANCE EDUCATION FOR PUBLIC INSTITUTIONS

19 TAC §§2.200 - 2.207

The Texas Higher Education Coordinating Board (Coordinating Board) proposes new rules in Texas Administrative Code (TAC), Title 19, Part 1, Chapter 2, Subchapter J, §§2.200-2.207, concerning approval of distance education for public institutions. Specifically, this new section will amend definitions of distance education courses and programs and revise the approval process for public institutions seeking to offer distance education. At a later date, the Coordinating Board intends to repeal existing Distance Education rules located in TAC Chapter 4, Subchapter P, which will be superseded by these rules.

Texas Education Code (TEC), Section 61.0512(g), provides the Coordinating Board with the authority to approve distance learning courses at institutions of higher education.

Rule 2.200, Purpose, states the intention of the subchapter to establish rules for all public institutions of higher education in Texas regarding the delivery of distance education.

Rule 2.201, Authority, established the statutory authority for the subchapter in TEC Section 61.0512(g).

Rule 2.202, Definitions, provides the meanings of terms used in the subchapter, including new definitions for 100-Percent Online Course, Hybrid Course, 100-Percent Online Program, and Hybrid Program. These definitions bring Coordinating Board rules in closer alignment with standard practices in the industry.

Rule 2.203, Applicability of Subchapter, specifies that the subchapter applies to institutions seeking to offer one or more Credit Courses and does not govern course eligibility for funding. While non-credit courses and programs offered through distance education may not be subject to the approval or notification requirements of the chapter, they will still be eligible for formula reimbursement through the proposed TAC Chapter 13, Subchapter O.

Rule 2.204, Distance Education Standards and Criteria; the Principles of Good Practice for Distance Education, explains the Principles of Good Practice for Distance Education and their relevance to distance education delivery, details the contents of the Principles of Good Practice for Distance Education, and describes the process for Board approval of the Principles of Good Practice for Distance Education. This process ensures that the Coordinating Board will use a standard, Board-approved rubric for evaluating institutions' ability to deliver quality distance education.

Rule 2.205, Institutional Plan for Distance Education, explains the purpose of the Institutional Plan for Distance Education and its relation to Board approval for an institution to offer distance education courses. This rule also details the process to review and approve Institutional Plans for Distance Education, which includes Coordinating Board staff and Learning Technology Advisory Committee review and recommendations prior to final approval. This process ensures that each public institution of higher education will have its distance education processes and administration evaluated against the standard Principles of Good Practice for Distance Education, as adopted by the Board, on a regular basis; institutions facing a potential denial from the Commissioner have the opportunity to appeal to the Board. Institutions with an Institutional Plan for Distance Education in good standing or on provisional status with the Coordinating Board have authorization to offer distance education instruction under TEC Section 61.0512(g).

Rule 2.206, Distance Education Degree or Certificate Program Notification, describes the process for institutional notification to Board staff prior to offering an existing program via distance modality or offering a new distance education program. New programs must also follow program approval request rules as detailed in the appropriate subchapter. This provision ensures that the Coordinating Board's existing Distance Education Program Inventory will remain up-to-date, accurately reflecting the distance education program offerings across the state.

Rule 2.207, Effective Date of Rules, establishes the effective date of the subchapter as December 1, 2023, and provides for a pause in the review of distance education doctoral programs by the Learning Technology Advisory Committee.

Dr. Michelle Singh, Assistant Commissioner for Digital Learning, has determined that for each of the first five years the sections are in effect there would be no fiscal implications for state or local governments as a result of enforcing or administering the rules. There are no estimated reductions in costs to the state and to local governments as a result of enforcing or administering the rule. There are no estimated losses or increases in revenue to the state or to local governments as a result of enforcing or administering the rule.

There is no impact on small businesses, micro businesses, and rural communities. There is no anticipated impact on local employment.

Dr. Michelle Singh has also determined that for each year of the first five years the section is in effect, the public benefit anticipated as a result of administering the section will be the rigorous and uniform process for administering approvals to offer distance education that allows for continuous improvement of distance education program offerings in the state. There are no anticipated economic costs to persons who are required to comply with the sections as proposed.

Government Growth Impact Statement

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

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

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

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

(5) the rules will not create a new rule;

(6) the rules will not limit an existing rule;

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

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

Comments on the proposal may be submitted to Dr. Michelle Singh, Assistant Commissioner of Digital Learning, P.O. Box 12788, Austin, Texas 78711-2788, or via email at digitallearning@highered.texas.gov. Comments will be accepted for 30 days following publication of the proposal in the *Texas Register.*

The new sections are proposed under Texas Education Code, Section 61.0512(g), which provides the Coordinating Board with the authority to approve distance learning courses at institutions of higher education.

The proposed new section affects Texas Education Code, Section 61.0512(g).

§2.200. Purpose.

This subchapter establishes rules for all public institutions of higher education in Texas regarding the delivery of distance education. The rules are designed to provide Texas residents with access to courses and programs that meet their needs and to promote course and program quality.

§2.201. Authority.

Authority for this subchapter is provided by Texas Education Code §61.0512(g), which provides the Board with the authority to approve distance education offered for credit.

§2.202. Definitions.

The following words and terms, when used in this subchapter, shall have the following meanings, unless the context clearly indicates otherwise. The definitions in 19 TAC, Chapter 2, Subchapter A, §2.3, apply for this subchapter unless a more specific definition for the same term is indicated in this rule.

(1) Credit course--A college-level course that, if successfully completed, can be applied toward the number of courses required for achieving an academic or workforce degree, diploma, certificate, or other formal award.

(2) Distance Education--The formal educational process that occurs when students and instructors are in separate physical locations for the majority (more than 50 percent) of instruction.

(3) Distance Education Course--A course in which a majority (more than 50 percent) of the instruction occurs when the student(s) and instructor(s) are in separate physical locations. The definition of distance education course does not include courses with 50 percent or less instruction when the student(s) and instructor(s) are in separate physical locations. Two categories of distance education courses are defined:

(A) 100-Percent Online Course--A distance education course in which 100 percent of instructional activity takes place when the student(s) and instructor(s) are in separate physical locations. Requirements for on-campus or in-person orientation, testing, academic support services, internships/fieldwork, or other non-instructional activities do not exclude a course from this category.

(B) Hybrid Course--A distance education course in which more than 50 percent but less than 100 percent of instructional activity takes place when the student(s) and instructor(s) are in separate physical locations.

(4) Distance Education Degree or Certificate Program--A program in which a student may complete a majority (more than 50 percent) of the credit hours required for the program through distance education courses. The definition of a Distance Education Degree or Certificate Program does not include programs in which 50 percent or less of the required credit hours are offered through distance education. Two categories of distance education programs are defined:

(A) 100-Percent Online Program--A degree program in which students complete 100 percent of the credit hours required for the program through 100-Percent Online Courses. Requirements for on-campus or in-person orientation, testing, academic support services, internships/fieldwork, or other non-instructional activities do not exclude a program from this category.

(B) Hybrid Program--A degree program in which students complete 50 percent or more and less than 100 percent of the credit hours required for the program through Distance Education Courses.

(5) Institutional Accreditor--A federally recognized institutional accreditor approved by the Department of Education under 20 U.S.C. §1099b.

(6) Institutional Plan for Distance Education ("Plan" or "IPDE")--A plan that an institution must submit for Coordinating Board approval prior to offering a distance education program for the first time. Each institution shall periodically update its plan on a schedule as specified in §2.205 of this subchapter.

(7) Principles of Good Practice for Distance Education--Standards and criteria for distance education delivered by Texas public institutions. This document is reviewed and adopted by the Board every three years in accordance with §2.204 of this subchapter. This document is also known as "Principles of Good Practice for Academic Degree and Certificate Programs and Credit Courses Offered at a Distance."

§2.203. Applicability of Subchapter.

(a) This subchapter applies to an institution that seeks to offer one or more Credit Courses as defined in §2.202(1) of this subchapter via distance education.

(b) This subchapter does not apply to an institution that seeks to offer non-credit courses, including non-credit continuing education, via distance education. An institution offering only non-credit course(s) via distance education is not required to obtain approval under this subchapter regardless whether the course is otherwise eligible for funding.

(c) This subchapter applies only to determination of whether an institution is authorized to offer course(s) via distance education and does not govern the course eligibility for funding. The agency shall determine whether a course is eligible for funding based on the applicable statutes and rules in the Texas Administrative Code.

§2.204. Distance Education Standards and Criteria; the Principles of Good Practice for Distance Education.

The following provisions apply to all institutions covered under this subchapter, unless otherwise specified:

(1) Principles of Good Practice for Distance Education. The Coordinating Board will adopt standards and criteria for Distance Education in the Principles of Good Practice for Distance Education. An institution's Institutional Plan for Distance Education ("Plan" or "IPDE") shall conform to the Principles of Good Practice for Distance Education in effect at the time the institution submits the Plan, as described in §2.205 of this subchapter.

(A) Content of the Principles of Good Practice for Distance Education. The Principles of Good Practice for Education will

contain a list of criteria necessary for the institution to demonstrate provision of high-quality distance education. These criteria may Include provisions relating to:

(i) Institutional Context and Commitment;

(ii) Curriculum and Instruction;

(iii) Faculty;

(iv) Evaluation and Assessment;

(v) Facilities and Finances; and

(vi) Adherence to Federal Requirements.

(B) Process to Adopt the Principles of Good Practice for Distance Education. Board Staff will present the Principles of Good Practice for Distance Education to the Board for adoption no less than every three years. In revising the Principles of Good Practice, Board Staff may consider input from the Learning Technology Advisory Committee and best practice standards developed by external bodies, including institutional accreditors.

(2) Institutions offering or seeking to offer distance education programs shall comply with:

(A) Principles and policies of their institutional accreditor.

(B) Procedures governing the approval of distance education programs.

(C) Standards outlined in Principles of Good Practice for Distance Education.

(D) Data reporting associated with distance education offerings as required by the Commissioner.

§2.205. Institutional Plan for Distance Education.

(a) Each institution shall submit an Institutional Plan for Distance Education ("IPDE") containing evidence of the institution's compliance with the mandatory Principles of Good Practice for Distance Education to the Coordinating Board prior to delivering any distance education programs for the first time. Board Staff will develop the IPDE form based on the standards and criteria contained in the Principles of Good Practice.

(b) The Coordinating Board authorizes an institution to offer distance education courses under Texas Education Code §61.0512(g) upon approving an institution's IPDE in good standing or if the institution is on provisional status pending final approval of their IPDE. An institution may receive formula funding for distance education courses under Chapter 13, Subchapter O, of this title. An institution shall notify the Coordinating Board of intent to offer new Distance Education Degree or Certificate Programs under §2.206 of this subchapter.

(c) Institutional academic and administrative policies shall reflect a commitment to maintain the quality of distance education courses and programs in accordance with the provisions of this subchapter. An IPDE shall conform to the Principles of Good Practice for Distance Education in effect at the time the institution submits the Plan.

(d) Process to Review and Approve IPDEs.

(1) IPDE Due Dates.

(A) Initial Approval. Each institution of higher education shall assess its distance education in accordance with the Principles of Good Practice for Distance Education. Institutions must report results of that assessment in an IPDE to Board Staff prior to seeking approval to offer distance education programs or certificates.

(B) Renewal. Each public institution of higher education shall assess its distance education on an ongoing basis in accordance with the Principles of Good Practice for Distance Education. Institutions must report results of that assessment in an updated IPDE to Board Staff by the earlier of the following deadlines:

(i) no later than one year after receiving final disposition of the institution's comprehensive renewal of accreditation report from their institutional accreditor as required by 34 CFR §602.19, or

(ii) no later than ten years after the approval of their last IPDE to the Coordinating Board.

(C) An institution may submit a request to the Commissioner for an extension of this due date of no more than two years. The Commissioner may approve this request only if the institution demonstrates good cause, e.g., the institutional accreditor has postponed the institution's renewal of accreditation cycle beyond the ten-year period.

(2) Initial Board Staff Review. Board Staff must review IPDEs for completeness and may request additional information from the institution upon determining the submitted IPDE is incomplete. Upon receipt of a completed IPDE, Board Staff must review the submission and make the following determination:

(A) Institutions Accredited by the Southern Association of Colleges and Schools Commission on Colleges ("SACSCOC"). Board Staff must determine whether the institution's IPDE has met SACSCOC policy and procedure standards related to the delivery of distance education during the prior renewal of accreditation cycle. Board Staff must forward the IPDE for Learning Technology Advisory Committee ("LTAC") review of the IPDE's adherence to the Principles of Good Practice for Distance Education under subsection (d)(3) of this section.

(B) Institutions Accredited by an Institutional Accreditor Other Than SACSCOC. Board Staff must forward the IPDE for LTAC review of the IPDE's adherence to the Principles of Good Standards for Distance Education under subsection (d)(3) of this section.

(C) Resubmitted IPDEs. If the IPDE is a resubmission that was previously denied by the Commissioner under subsection (d)(4)(B) of this section or by the Board under subsection (d)(4)(B)(ii)(II) of this section Board Staff must forward the resubmitted IPDE to LTAC review of the IPDE's adherence to the Principles of Good Standards for Distance Education under subsection (d)(3) of this section.

(3) Learning Technology Advisory Committee Review. LTAC must review and issue a recommendation as to the adherence of an IPDE to the Principles of Good Practice for Distance Education for the Board. LTAC may conduct this review using the following process:

(A) LTAC may assign each IPDE to a subcommittee chaired by LTAC members and comprised of other LTAC members and/or distance education experts who volunteer to serve in this capacity.

(B) The LTAC subcommittee assigned to review updated Institutional Plans shall review those Plans for alignment with the Principles of Good Practice. The LTAC subcommittee may ask questions and consult with the submitting institution to make this determination.

(i) If the LTAC subcommittee reviews and finds an IPDE in alignment with the PGP, the subcommittee shall issue a recommendation to LTAC that the institution be approved to offer distance education.

(ii) If the LTAC subcommittee finds an Institutional Plan is not aligned with the PGP, the subcommittee will identify areas of misalignment, provide feedback for improvement, make suggestions for the content of a remediation letter, and submit these recommendations to LTAC.

(C) LTAC may review and approve the recommendations of the LTAC subcommittee and submit these recommendations to Board Staff. Board Staff will submit these recommendations to the Commissioner for Commissioner Review under subsection (d)(4) of this section.

(4) Commissioner Review and Approval. The Commissioner has discretion to approve or deny an IPDE.

(A) Approval. If the Commissioner approves the IPDE, the institution's IPDE will be filed in good standing with the Coordinating Board. The Commissioner will send a notification to the institution of this decision.

(B) Denial. If the Commissioner denies the IPDE, the Commissioner will send an institution a remediation letter containing a notification of this decision. The remediation letter may contain the recommendations for improvement compiled by the LTAC subcommittee under subsection (d)(3)(B)(ii) of this section. The institution may then take one of two actions:

(i) Resubmission. The institution must resubmit the revised IPDE to Board Staff under subsection (d)(2) of this section no earlier than one year after the date of the letter containing Commissioner's notification of denial. The institution will remain on provisional status until final approval of the IPDE.

(ii) Appeal. The institution may appeal the Commissioner's decision to the Board. The Commissioner may issue a recommendation for approval or denial to the Board. The Board has final authority to appeal or deny the institution's IPDE.

(I) Approval. If the Board approves the IPDE, the institution's IPDE will be filed in good standing with the Coordinating Board.

(II) Denial and Resubmission. If the Board denies the institution's IPDE, the institution must resubmit the revised IPDE to Board Staff under subsection (d)(2) of this section no earlier than one year after the Board's decision. The institution will remain on provisional status until final approval of the IPDE.

§2.206. Distance Education Degree or Certificate Program Notification.

The following provisions apply to all programs covered under this subchapter, unless otherwise specified:

(1) Board Staff must maintain an accurate inventory of Distance Education Degree or Certificate Programs in the Distance Education Program Inventory.

(2) To offer an existing certificate or degree through the Distance Education modality, an institution must notify Board Staff of intent to offer an approved degree or certificate program through the Distance Education modality. To submit this notification, the institution must certify that it has an Institutional Plan for Distance Education in good standing and compliance with §2.204(b) of this subchapter. Board Staff will update the institution's Distance Education Program Inventory.

(3) To offer a new certificate or degree, an institution shall follow the program approval request rules laid out in the appropriate subchapter of this chapter and indicate its intent to deliver the new program through Distance Education on the program request form. To offer a new certificate or degree through Distance Education, the institution must certify that it has an Institutional Plan for Distance Education in good standing and compliance with §2.204(b) of this subchapter. Board Staff will update the institution's Distance Education Program Inventory upon the program's final approval.

(4) If an institution intends to cease offering an approved program via Distance Education modality, the institution must notify Board Staff. If an institution intends to phase out an approved degree or certificate program completely, the institution must follow the process in Chapter 2, Subchapter H of this title (relating to Phasing Out Degree and Certificate Programs). Board Staff will update the institutions Distance Education Program Inventory.

§2.207. Effective Date of Rules.

The effective date of this subchapter is December 1, 2023. Each institution must submit an Institutional Plan for Distance Education ("IPDE") in accordance with this subchapter on or after that date by the due dates set out in §2.205(d)(1) of this subchapter. IPDEs currently on file as of December 1, 2023, will remain filed in good standing until the first due date under §2.205(d)(1). Learning Technology Advisory Committee shall cease conducting reviews and make recommendations regarding distance education doctoral program proposals under 19 TAC §1.190(3) upon final adoption of this subchapter. An institution is not required to submit a request for review under 19 TAC §1.190(3) upon final adoption of this subchapter.

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

Filed with the Office of the Secretary of State on January 13, 2023.

TRD-202300166
Nichole Bunker-Henderson
General Counsel
Texas Higher Education Coordinating board
Earliest possible date of adoption: February 26, 2023
For further information, please call: (512) 427-6284

♦ ♦ ♦

CHAPTER 4. RULES APPLYING TO ALL PUBLIC INSTITUTIONS OF HIGHER EDUCATION IN TEXAS

SUBCHAPTER Q. APPROVAL OF OFF-CAMPUS AND SELF-SUPPORTING COURSES AND PROGRAMS FOR PUBLIC INSTITUTIONS

19 TAC §4.279

The Texas Higher Education Coordinating Board (Coordinating Board) proposes amendments to Texas Administrative Code, Title 19, Part 1, Chapter 4, Subchapter Q, §4.279(b), concerning formula funding for out-of-state or out-of-country programs. Specifically, this amendment will create an exception to allow formula funding for courses that are part of a Texas public community college program located in the same Metropolitan Area as the college but across a state line dividing the Metropolitan Area, and at a regional airport that serves Texas residents.

Current Board Rules §4.279(b) prescribes formula funding for courses taught in out-of-state or out-of-country programs. Such programs are presumed to provide no service or benefit to the state or its residents and are generally located in a municipality that is wholly separate from that of the college offering the program. This amendment will provide an exception for courses taught as part of a Texas public community college program offered at a regional airport located no more than five miles across a state line, provided the regional airport is located in the same Metropolitical Area as the Texas college offering the program, serves Texas residents, and supports the Texas region's economy.

Tina M. Jackson, Ph.D., Assistant Commissioner for Workforce Education, has determined that for each of the first five years the sections are in effect there would be a minimal fiscal implication for state or local governments as a result of enforcing or administering the rules due to funding of additional community college contact hours by the Legislature. There are no estimated reductions in costs to the state and to local governments as a result of enforcing or administering the rule. There are no estimated losses and may later be marginal increases in revenue to the state or to local governments as a result of enforcing or administering the rule.

There is no impact on small businesses, micro businesses, and rural communities. There is no measurable anticipated impact on local employment.

Tina M. Jackson, Ph.D., Assistant Commissioner for Workforce Education, has also determined that for each year of the first five years the section is in effect, the public benefit anticipated as a result of administering the section is that a Texas community college may provide technical training to aircraft workers at a regional airport serving a Texas city but located a short distance across the Texas state line supporting the regional public facility. There are no anticipated economic costs to persons who are required to comply with the sections as proposed.

Government Growth Impact Statement

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

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

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

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

(5) the rules will not create a new rule;

(6) the rules will not limit an existing rule;

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

(8) the rules may benefit this state's economy.

Comments on the proposal may be submitted to Tina M. Jackson, Ph.D., Assistant Commissioner for Workforce Education, P.O. Box 12788, Austin, Texas 78711-2788, or via email at tina.jackson@highered.texas.gov. Comments will be accepted for 30 days following publication of the proposal in the *Texas Register.*

The amendment is proposed under Texas Education Code, Section 61.0512(g), which provides the Coordinating Board with the authority to approve courses for credit and distance education programs, including off-campus programs. The amendment is also proposed under Texas Education Code, Section 130.003 which provides contact hour funding for community colleges.

The proposed amendment affects Texas Education Code § 130.003 and 19 Texas Administrative Code, Chapter 9, Subchapter F.

§4.279. Formula Funding General Provisions.

(a) Institutions shall report off-campus courses submitted for formula funding in accordance with the Board's uniform reporting system and the provisions of this subchapter.

(b) Institutions shall not submit for formula funding courses in out-of-state or out-of-country programs[.], except that a Texas public community college may submit for formula funding courses taught in an approved program offered at a regional airport located no more than five miles across a state line, provided the regional airport:

(1) is located in the same Metropolitical Area or Nonmetropolitan Area as promulgated by the United States Office of Management and Budget as the Texas college offering the program;

(2) serves Texas residents; and

(3) supports the Texas region's economy.

(c) Institutions shall not submit self-supporting courses for formula funding.

(d) Institutions shall not submit non-state funded lower-division credit courses to Regional Councils.

(e) Institutions shall not jeopardize or diminish the status of formula-funded on-campus courses and programs in order to offer self-supporting courses. Self-supporting courses shall not be a substitute for offering a sufficient number of formula-funded on-campus courses.

(f) For courses not submitted for formula funding, institutions shall charge fees that are equal to or greater than Texas resident tuition and applicable fees, and that are sufficient to cover the total cost of instruction and overhead, including administrative costs, benefits, computers and equipment, and other related costs. Institutions shall report fees received for self-supporting and out-of-state/country courses in accordance with general institutional accounting practices.

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 January 13, 2023.

TRD-202300156
Nichole Bunker-Henderson
General Counsel
Texas Higher Education Coordinating Board
Earliest possible date of adoption: February 26, 2023
For further information, please call: (512) 427-6209

♦ ♦ ♦

CHAPTER 13. FINANCIAL PLANNING
SUBCHAPTER N. TEXAS RESKILLING AND UPSKILLING THROUGH EDUCATION (TRUE) GRANT PROGRAM

19 TAC §§13.400 - 13.408

The Texas Higher Education Coordinating Board (THECB) proposes a new subchapter with new rules in Texas Administrative Code, Title 19, Part 1, Chapter 13, Subchapter N, §§13.400 - 13.408, concerning the Texas Reskilling and Upskilling Through Education (TRUE) Grant Program. The proposed new rules establish the TRUE Grant Program to strengthen the Texas workforce and build a stronger Texas economy. The new rules implement SB 1102 (87R) requirements for the operation of the TRUE Grant Program.

The program provides grants to eligible entities for creating, redesigning, or expanding workforce training programs and delivering education and workforce training. There are also provisions for the process of data collection and reporting undertaken by TRUE grantees and THECB, which will gauge the impact of the TRUE Grant Program on student success.

Rule 13.400, Authority, identifies the section of the Texas Education Code that grants the Board authority over the TRUE Grant Program.

Rule 13.401, Purpose, sets out the purpose of the chapter as a whole, to establish processes for the TRUE Grant Program's organization and implementation.

Rule 13.402, Definitions, lists definitions broadly applicable to all sections of Subchapter N. The definitions establish a common understanding of the meaning of key terms used in the rules.

Rule 13.403, Eligibility, identifies eligible entities that may apply for the TRUE grant as specified by statute. The TRUE Grant Program has three categories of eligible entities:

(1) lower-division institution of higher education; (2) consortium of lower-division institutions of higher education; or (3) local chamber of commerce, trade association, or economic development corporation that partners with a lower-division institution of higher education or a consortium of lower-division institutions of higher education.

Rule 13.404, Application Procedures, identifies TRUE grant application procedures so that grant applicants understand high level requirements and refer to the TRUE Grant Program RFA for specifics. Grant application procedures described include the number of applications eligible entities may submit, the process of submitting applications to the THECB, the importance of adhering to grant program requirements, and the requirement for proper authorization and timely submission of applications.

Rule 13.405, Awards, identifies the size and provision of TRUE grant awards. TRUE Grant Program available funding is dependent on the legislative appropriation for the program for each biennial state budget. Consequently, award levels and estimated number of awards will be specified in the program's RFA. This section also provides reference on the establishment of processes for application approval and award sizes.

Rule 13.406, Review Criteria, provides TRUE grant application review procedures. This section describes how the THECB will utilize specific requirements and award criteria described in a TRUE Grant Program RFA to review applications. Award criteria will include, but may not be limited to, consideration of key factors and preferred application attributes described in the RFA.

Rule 13.407, Reporting Criteria, describes TRUE grant reporting requirements. THECB will request data on TRUE Grant Program funded credential programs as well as data on students enrolled in those programs. Student level data will enable THECB to track student enrollment, credential completion, and employment data through state education and workforce databases.

Rule 13.408, General Information, indicates general information concerning the cancellation or suspension of TRUE grant solicitations and the use of the Notice of Grant Award (NOGA).

Tina Jackson, Ph.D., Assistant Commissioner for Workforce Education, has determined that for each of the first five years the new rules are in effect there would be no fiscal implications for state or local governments as a result of enforcing or administering the rules. There are no estimated reductions in costs to the state and to local governments as a result of enforcing or administering the rules. There are no estimated losses or increases in revenue to the state or to local governments as a result of enforcing or administering the rules.

There is no impact on small businesses, micro businesses, and rural communities. There is no anticipated impact on local employment.

Dr. Jackson has also determined that for each year of the first five years the rules are in effect, the public benefit anticipated as a result of administering the rules will be creation of the administrative code necessary for the efficient administration of the TRUE Grant Program, created by Senate Bill 1102 (87R). There are no anticipated economic costs to persons who are required to comply with the rules as proposed.

Government Growth Impact Statement

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

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

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

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

(5) the rules will create new rules;

(6) the rules will not limit an existing rule;

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

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

Comments on the proposal may be submitted to Sheri Ranis, Director for Workforce Education and Innovation, P.O. Box 12788, Austin, Texas 78711-2788, or via email at reskilling@highered.texas.gov. Comments will be accepted for 30 days following publication of the proposal in the *Texas Register.*

The new rules are proposed under the Texas Education Code, Chapter 61, Subchapter T-2, §61.882(b), which provides the Coordinating Board with the authority to adopt rules requiring eligible entities awarded a TRUE grant to report necessary information to the THECB.

The proposed new rules affect Texas Education Code, Chapter 61, Subchapter T-2, §§61.881-61.886.

§13.400. Purpose.

The purpose of this subchapter is to establish the Texas Reskilling and Upskilling through Education (TRUE) Program to strengthen the Texas workforce and build a stronger Texas economy. Awards will be made to eligible entities for creating, redesigning, or expanding workforce training programs and delivering education and workforce training.

§13.401. Authority.

The authority for this subchapter is found in Texas Education Code, Chapter 61, Subchapter T-2, §§61.882(b)1-886, which provides the board with the authority to administer the TRUE Program in accordance with the subchapter and rules adopted under the subchapter.

§13.402. Definitions.

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

(1) Board or THECB--The Texas Higher Education Coordinating Board.

(2) Commissioner--The Commissioner of Higher Education.

(3) Eligible entity--A lower-division institution of higher education; a consortium of lower-division institutions or higher education; or a local chamber of commerce, trade association, or economic development corporation that partners with a lower-division institution of higher education or a consortium of lower-division institutions of higher education per Texas Education Code §61.881(1).

(4) Lower-Division Institution of Higher Education--A public junior college, public state college, or public technical institute per Texas Education Code §61.881(1).

(5) Necessary information--Data and reporting on student enrollment, credential completion, and employment outcomes for students in TRUE funded programs per Texas Education Code §61.883(a)(6).

(6) Program--The TRUE Grant Program.

(7) Request for Applications (RFA)--A type of solicitation notice in which the THECB announces available grant funding, sets forth the guidelines governing the program, provides evaluation criteria for submitted applications, and provides instructions for eligible entities to submit applications for such funding. The guidelines governing the program may include a Letter of Intent, eligibility requirements, performance expectations, budget guidelines, reporting requirements, and other standards of accountability for this program.

§13.403. Eligibility.

Eligible entities may apply for a grant under the TRUE Grant Program.

§13.404. Grant Application Procedures.

(a) Unless otherwise specified in the RFA, eligible entities may submit a maximum of two applications: one as a single recipient and the other as a member of a consortium.

(b) To qualify for funding consideration, an eligible entity must submit an application to the THECB and each application must:

(1) Be submitted electronically in a format and location specified in the RFA;

(2) Adhere to the grant program requirements contained in the RFA; and

(3) Be submitted with proper authorization on or before the day and time specified by the RFA.

§13.405. Awards.

(a) The amount of funding available to the program is dependent on the legislative appropriation for the program for each biennial state budget. Award levels and estimated number of awards will be specified in the RFA.

(b) TRUE Grant Program awards shall be subject to approval pursuant to 19 Texas Administrative Code §1.16.

(c) The size of award may be adjusted by the Commissioner to best fulfill the purpose of the RFA.

§13.406. Review Criteria.

(a) Applicants shall be selected for funding based on requirements and award criteria provided in the RFA. Award criteria shall at a minimum include consideration of the following key factors:

(1) Projects that lead to postsecondary industry certifications or other workforce credentials required for high-demand occupations;

(2) Projects that are developed and provided in consultation with employers who are hiring in high-demand occupations;

(3) Projects that create pathways to employment for students and learners;

(4) Projects with at least one eligible entity located in each region of the state to the extent practicable;

(5) Projects that ensure that each training program matches regional workforce needs, are supported by a labor market analysis of job postings and employers hiring roles with the skills developed by the program; and do not duplicate existing program offerings except as necessary to accommodate regional demand; and

(6) The evaluation of the application by three or more selected reviewers as determined by THECB staff.

(b) Projects may be given preference that:

(1) Represent a consortium of lower-division institutions of higher education;

(2) Prioritize training to displaced workers;

(3) Offer affordable training programs to students; or

(4) Partner with local chambers of commerce, trade associations, economic development corporations, and local workforce boards to analyze job postings and identify employers hiring roles with the skills developed by the training programs.

§13.407. Reporting Criteria.

(a) Interim and Final Reporting for the TRUE Grant Program. Grantees must file program and expenditure reports and student reports if applicable with THECB during the grant period and at its conclusion as required by the RFA. Grantees shall provide information that includes, but is not limited to, the following:

(1) Characteristics of the credential programs that are being worked on by the project;

(2) Status of the grant project activities;

(3) Budget expenditures by budget category;

(4) Student level data for students receiving financial aid funded by the grant as applicable;

(5) Student enrollment data as applicable; and

(6) Any other information required by the RFA.

(b) Ongoing Data Collection and Reporting for the TRUE Grant Program. Grantees shall submit necessary information concerning student enrollment, credential completion, and employment outcomes for students in TRUE funded programs per Texas Education Code §61.883(a)(6).

(c) THECB will request an updated list of TRUE developed and funded credential programs with required data points from grant holders annually at the end of June of each year following the end of the grant period.

(d) THECB will request a roster with required data points for all students enrolled in the listed credential program or programs funded through TRUE from grant holders annually at the end of June of each year following the end of the grant period.

§13.408. General Information.

(a) Cancellation or Suspension of Grant Solicitations. The Board and Commissioner retain the right to reject all applications and cancel a grant solicitation at any point.

(b) Notice of Grant Award (NOGA). Before release of funds, the successful applicants must sign a NOGA issued by the Board.

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 January 13, 2023.

TRD-202300164
Nichole Bunker-Henderson
Genera Counsel
Texas Higher Education Coordinating Board
Earliest possible date of adoption: February 26, 2023
For further information, please call: (512) 427-6209

♦ ♦ ♦

SUBCHAPTER O. FORMULA FUNDING FOR DISTANCE EDUCATION

19 TAC §§13.450 - 13.454

The Texas Higher Education Coordinating Board (Coordinating Board) proposes new rules in Texas Administrative Code (TAC), Title 19, Part 1, Chapter 13, Subchapter O, §§13.450 - 13.454, concerning the formula funding rules for distance education. Specifically, this new subchapter will move existing rules related to distance education formula funding from TAC Chapter 4 to Chapter 13 without any substantive changes. The rules are reorganized and recodified without substantive revisions modifying any existing funding policy.

The proposed rules move formula funding rules related to distance education from TAC Chapter 4, Subchapter P, to Chapter 13, Subchapter O, without any substantive changes. This change is part of a larger reorganization and revision of the Coordinating Board's rules related to distance education. The agency is working on moving all funding rules into Chapter 13, Financial Planning, as this chapter of the Texas Administrative Code contains the agency's rules related to formula funding. This change will improve the agency's rule readability and help institutions navigate Title 19, Part 1, of the TAC. The authority for this rule is provided by TEC §61.059, which gives the board the authority to develop policy related to formula funding.

Rule 13.540 sets out the purpose of the subchapter, which is to establish formula funding rules for distance education instruction.

Rule 13.451 contains the statutory authority for this subchapter, which comes from TEC §61.0512(g) establishing Coordinating Board authority to approve distance education courses and §61.059 establishing the Board's role in developing formula funding policies.

Rule 13.452 directs the reader to find the appropriate definitions in Chapter 2, Subchapter J, of this title. The proposed Chapter 13, Subchapter O, uses the same definitions as the proposed subchapter that will govern agency approval of distance education more generally.

Rule 13.453 contains the substantive provisions related to formula funding. These provisions are identical to the formula funding provisions for distance education currently contained in TAC Chapter 4, Subchapter P. These provisions establish in rule several statutory restrictions on formula funding relevant for distance education - for example, requirements to collect sufficient tuition for non-formula-supported programs under TEC §54.545 and special provisions solely applicable to Texas A&M University-Texarkana under §§54.231 and 61.059(n).

Rule 13.454 contains the effective date of the proposed rules, scheduled for December 1, 2023.

Michelle Singh, Assistant Commissioner for Digital Learning, has determined that for each of the first five years the sections are in effect there would be no fiscal implications for state or local governments as a result of enforcing or administering the rules. There are no estimated reductions in costs to the state and to local governments as a result of enforcing or administering the rule. There are no estimated losses or increases in revenue to the state or to local governments as a result of enforcing or administering the rule.

There is no impact on small businesses, micro businesses, and rural communities. There is no anticipated impact on local employment.

Michelle Singh, Assistant Commissioner for Digital Learning, has also determined that for each year of the first five years the section is in effect, the public benefit anticipated as a result of administering the section will be reducing regulatory burden on public institutions of higher education while allowing the Coordinating Board to conduct appropriate scrutiny and approval of distance education, in fulfillment of the agency's obligation in Texas Education Code §61.0512(g). This rule makes no substantive changes, but rather reorganizes formula funding-related rules in the Coordinating Board's formula funding-specific chapter of the Texas Administrative Code. There are no anticipated economic costs to persons who are required to comply with the sections as proposed.

Government Growth Impact Statement

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

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

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

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

(5) the rules will not create a new rule;

(6) the rules will not limit an existing rule;

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

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

Comments on the proposal may be submitted to Michelle Singh, Assistant Commissioner for Digital Learning, P.O. Box 12788, Austin, Texas 78711-2788, or via email at digitallearning@highered.texas.gov. Comments will be accepted for 30 days following publication of the proposal in the *Texas Register.*

The new sections are proposed under Texas Education Code, Section 61.059, which provides the Coordinating Board with the authority to devise, establish, and periodically review and revise formula funding for public institutions of higher education, and Section 61.0512(g), which provides the Coordinating Board with the authority to approve institutions' distance education offerings.

The proposed new sections affect Texas Education Code §§54.231, 54.545, and 61.059.

§13.450. Purpose and Scope.

The purpose of this subchapter is to establish the methods for issuing formula funding for instruction delivered via distance education.

§13.451. Authority.

Authority for this subchapter is provided by Texas Education Code §61.0512(g), which provides the authority for the Coordinating Board to approve courses for credit and distance education programs, as well as Texas Education Code §61.059, which provides the Coordinating Board the authority to devise formulas to submit as recommendations to the Legislature and the Governor for all institutions of higher education.

§13.452. Definitions.

The definitions in this subchapter are contained in Chapter 2, Subchapter J, §2.202 of this title (relating to Definitions).

§13.453. Formula Funding for Distance Education - General Provisions.

The following provisions apply to distance education courses and programs offered with authorization under Chapter 2, Subchapter J, of this title (relating to Approval of Distance Education for Public Institutions).

(1) Institutions shall report distance education courses submitted for formula funding in accordance with the Board's uniform reporting system and the provisions of this subchapter.

(2) Institutions may submit for formula funding academic credit courses delivered by distance education to any student located in Texas or to Texas residents located out-of-state or out-of-country.

(3) Institutions, with the exception of those outlined in paragraph (5) of this section, shall not submit for formula funding 100-percent online courses taken by non-resident students who are located out-of-state or out-of-country, courses in out-of-state or out-of-country programs taken by any student, or self-supporting courses.

(4) For courses not submitted for formula funding, institutions shall charge fees that are equal to or greater than Texas resident tuition and applicable fees and that are sufficient to cover the total cost of instruction and overhead, including administrative costs, benefits, computers and equipment, and other related costs. Institutions shall report fees received for self-supporting and out-of-state/country courses in accordance with general institutional accounting practices.

(5) Pursuant to Texas Education Code §54.231(a) and (f) and §61.059(n), Texas A&M University-Texarkana may submit distance education courses for formula funding that are taken by students enrolled in the university that reside in a county contiguous to the county in which Texas A&M University-Texarkana is located and who, under Texas Education Code §54.060(a), are eligible to pay resident tuition.

(6) If a non-Texas resident student enrolls in regular, on-campus courses for at least one-half of the normal full-time course load as determined by the institution, the institution may report that student's fully distance education or hybrid/blended courses for formula funding enrollments.

(7) If a non-Texas resident student enrolls in regular, on-campus courses for at least one-half of the normal full-time course load as determined by the institution, the institution may report that student's fully distance education or hybrid/blended courses for formula funding enrollments.

§13.454. Effective Date.

Each rule under this subchapter applies to distance education delivered on or after December 1, 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 January 13, 2023.

TRD-202300163
Nichole Bunker-Henderson
General Counsel
Texas Higher Education Coordinating Board
Earliest possible date of adoption: February 26, 2023
For further information, please call: (512) 427-6284

♦ ♦ ♦

CHAPTER 22. STUDENT FINANCIAL AID PROGRAMS

SUBCHAPTER A. GENERAL PROVISIONS

19 TAC §22.1

The Texas Higher Education Coordinating Board (Coordinating Board) proposes amendments to Texas Administrative Code, Title 19, Part 1, Chapter 22, Subchapter A, §22.1, concerning Definitions. Specifically, this amendment will clarify the definition of "expected family contribution" to reflect that the phrase refers to the applicable federal methodology.

The Coordinating Board is authorized to adopt rules to effectuate the provisions of Texas Education Code, Chapter 61, including §61.051(a)(5) regarding the administration of financial aid programs. The phrase "expected family contribution" is referenced in multiple chapters relating to financial aid programs in both the Texas Education Code and Texas Administrative Code. The Coordinating proposes amending Texas Administrative Code §22.1 so that the administration of state financial aid programs is not adversely impacted by changes in the federal government's terminology regarding the federal methodology for financial aid.

Charles W. Contéro-Puls, Assistant Commissioner for Student Financial Aid Programs, has determined that for each of the first five years the sections are in effect there would be no fiscal implications for state or local governments as a result of enforcing or administering the rules. There are no estimated reductions in costs to the state and to local governments as a result of enforcing or administering the rule. There are no estimated losses or

increases in revenue to the state or to local governments as a result of enforcing or administering the rule.

There is no impact on small businesses, micro businesses, and rural communities. There is no anticipated impact on local employment.

Charles W. Contéro-Puls, Assistant Commissioner for Student Financial Aid Programs, has also determined that for each year of the first five years the section is in effect, the public benefit anticipated as a result of administering the section will be the continued operation of the state's student financial aid programs during the federal government's transition of the federal financial aid methodology from "expected family contribution" to "student aid index." There are no anticipated economic costs to persons who are required to comply with the sections as proposed.

Government Growth Impact Statement

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

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

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

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

(5) the rules will not create a new rule;

(6) the rules will not limit an existing rule;

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

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

Comments on the proposal may be submitted Charles W. Contéro-Puls, Assistant Commissioner for Student Financial Aid Programs, P.O. Box 12788, Austin, Texas 78711-2788, or via email at charles.contero-puls@highered.texas.gov. Comments will be accepted for 30 days following publication of the proposal in the *Texas Register.*

The amendment is proposed under Texas Education Code (TEC), §61.027, which authorizes the Coordinating Board to adopt rules to effectuate the provisions of TEC Chapter 61, including §61.051(a)(5) regarding the administration of financial aid programs.

The proposed amendment affects Texas Administrative Code, Chapter 22.

§22.1. Definitions.

The following words and terms, when used in Chapter 22, shall have the following meanings, unless otherwise defined in a particular subchapter:

(1) Academic Year--The combination of semesters defined by a public or private institution of higher education to fulfill the federal "academic year" requirement as defined by 34 CFR 668.3.

(2) Attempted Semester Credit Hours--Every course in every semester for which a student has been registered as of the official Census Date, including but not limited to, repeated courses and courses the student drops and from which the student withdraws. For transfer students, transfer hours and hours for optional internship and cooperative education courses are included if they are accepted by the receiving institution towards the student's current program of study.

(3) Awarded--Offered to a student.

(4) Board or Coordinating Board--The Texas Higher Education Coordinating Board.

(5) Board Staff--The staff of the Texas Higher Education Coordinating Board.

(6) Categorical Aid--Gift aid that the institution does not award to the student, but that the student brings to the school from a non-governmental third party.

(7) Commissioner--The Commissioner of Higher Education, the Chief Executive Officer of the Board.

(8) Cost of Attendance/Total Cost of Attendance--An institution's estimate of the expenses incurred by a typical financial aid recipient in attending a particular institution of higher education. It includes direct educational costs (tuition and fees) as well as indirect costs (room and board, books and supplies, transportation, personal expenses, and other allowable costs for financial aid purposes).

(9) Degree or certificate program of four years or less--A baccalaureate degree or certificate program other than a program determined by the Board to require four years or less to complete.

(10) Degree or certificate program of more than four years--A baccalaureate degree or certificate program determined by the Board to require more than four years to complete.

(11) Encumber--Program funds that have been officially requested by an institution through procedures developed by the Coordinating Board.

(12) Entering undergraduate--A student enrolled in the first 30 semester credit hours or their equivalent, excluding hours taken during dual enrollment in high school and courses for which the student received credit through examination.

(13) Expected Family Contribution (EFC)--A measure that reflects an evaluation of a student's and his or her family's approximate financial resources [~~of how much the student and his or her family can be expected~~] to contribute to the cost of the student's education for the year as determined by the applicable [~~following the~~] federal methodology.

(14) Financial Need--The Cost of Attendance at a particular public or private institution of higher education less the Expected Family Contribution. The Cost of Attendance and Expected Family Contribution are to be determined in accordance with Board guidelines.

(15) Full-Time--For undergraduate students, enrollment or expected enrollment for the equivalent of twelve or more semester credit hours per semester. For graduate students, enrollment or expected enrollment for the normal full-time course load of the student's program of study as defined by the institution.

(16) Gift Aid--Grants, scholarships, exemptions, waivers, and other financial aid provided to a student without a requirement to repay the funding or earn the funding through work.

(17) Graduate student--A student who has been awarded a baccalaureate degree and is enrolled in coursework leading to a graduate or professional degree.

(18) Half-Time--For undergraduates, enrollment or expected enrollment for the equivalent of at least six but fewer than nine semester credit hours per regular semester. For graduate students, enrollment or expected enrollment for the equivalent of 50 percent of the normal full-time course load of the student's program of study as defined by the institution.

(19) Period of enrollment--The semester or semesters within the current state fiscal year (September 1 - August 31) for

which the student was enrolled in an approved institution and met all eligibility requirements for an award through this program.

(20) Program Officer--The individual named by each participating institution's chief executive officer to serve as agent for the Board. The Program Officer has primary responsibility for all ministerial acts required by the program, including the determination of student eligibility, selection of recipients, maintenance of all records, and preparation and submission of reports reflecting program transactions. Unless otherwise indicated by the institution's chief executive officer, the director of student financial aid shall serve as Program Officer.

(21) Residency Core Questions--A set of questions developed by the Coordinating Board to be used to determine a student's eligibility for classification as a resident of Texas, available for downloading from the Coordinating Board's website, and incorporated into the ApplyTexas application for admission.

(22) Resident of Texas--A resident of the State of Texas as determined in accordance with Chapter 21, Subchapter B of this title (relating to Determination of Resident Status). Nonresident students who are eligible to pay resident tuition rates are not residents of Texas.

(23) Semester--A payment period, as defined by 34 CFR 668.4(a) or 34 CFR 668.4(b)(1).

(24) Three-Quarter-Time--For undergraduate students, enrollment or expected enrollment for the equivalent of at least nine but fewer than 12 semester credit hours per semester. For graduate students, enrollment or expected enrollment for the equivalent of 75 percent of the normal full-time course load of the student's program of study as defined by the institution.

(25) Timely Distribution of Funds--Activities completed by institutions of higher education related to the receipt and distribution of state financial aid funding from the Board and subsequent distribution to recipients or return to the Board.

(26) Undergraduate student--An individual who has not yet received a baccalaureate degree.

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 January 13, 2023.

TRD-202300157
Nichole Bunker-Henderson
General Counsel
Texas Higher Education Coordinating Board
Earliest possible date of adoption: February 26, 2023
For further information, please call: (512) 427-6365

SUBCHAPTER B. PROVISIONS FOR THE TUITION EQUALIZATION GRANT PROGRAM

19 TAC §§22.22 - 22.24, 22.28, 22.29

The Texas Higher Education Coordinating Board (Coordinating Board) proposes amendments to Texas Administrative Code, Title 19, Part 1, Chapter 22, Subchapter B, §§22.22 - 22.24, 22.28, and 22.29, concerning the Tuition Equalization Grant program. Specifically, this amendment will provide private and independent institutions with greater flexibility in supporting economically disadvantaged students through funds from the Tuition and Equalization Grant (TEG) program. The amendments also provide clarity for the allocation process and remove unnecessary language.

In §22.22, two redundant definitions are repealed, since the items are explained elsewhere in the subchapter. In §22.23, the timing of data submissions is clarified to ensure that allocation activities can occur in a timely manner. In §22.24(8), eligibility criteria are provided for exceptional TEG need. In §22.28, a clarifying reference to §22.4 is added. In §22.29, outdated language is removed, with appropriate clarifying language. Section 22.29(c) is also removed, since the language is being proposed separately as a new §22.30.

Based on feedback from the financial aid community, the Coordinating Board initiated a review of how exceptional TEG need was defined. Since exceptional TEG need has a direct impact on the allocation methodology for the TEG program, the Coordinating Board convened negotiated rulemaking activities, as required by Texas Education Code, §61.0331, in matters relating to the allocation of funds, including financial aid. The proposed amendments were reached by consensus during negotiated rulemaking activities occurring on November 7, 2022.

Dr. Charles Contéro-Puls, Assistant Commissioner for Student Financial Aid Programs, has determined that for each of the first five years the sections are in effect there would be no fiscal implications for state or local governments as a result of enforcing or administering the rules. There are no estimated reductions in costs to the state and to local governments as a result of enforcing or administering the rule. There are no estimated losses or increases in revenue to the state or to local governments as a result of enforcing or administering the rule.

There is no impact on small businesses, micro businesses, and rural communities. There is no anticipated impact on local employment.

Dr. Charles Contéro-Puls, Assistant Commissioner for Student Financial Aid Programs, has also determined that for each year of the first five years the section is in effect, the public benefit anticipated as a result of administering the section will be providing private and independent institutions with greater flexibility in supporting economically disadvantaged students through funds from the Tuition and Equalization Grant program. There are no anticipated economic costs to persons who are required to comply with the sections as proposed.

Government Growth Impact Statement

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

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

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

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

(5) the rules will not create a new rule;

(6) the rules will not limit an existing rule;

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

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

Comments on the proposal may be submitted to Dr. Charles Contéro-Puls, Assistant Commissioner for Student Financial Aid

Programs, P.O. Box 12788, Austin, Texas 78711-2788, or via email at charles.contero-puls@highered.texas.gov. Comments will be accepted for 30 days following publication of the proposal in the *Texas Register.*

The amendment is proposed under Texas Education Code, Sections 61.229 and 61.0331, which provides the Coordinating Board with the authority to make reasonable regulations, consistent with the purposes and policies of Texas Education Code, Chapter 61, Subchapter F, relating to the Tuition Equalization Grant Program, and which requires the Coordinating Board to use negotiated rulemaking in matters relating to the allocation of funds, including financial aid.

The proposed amendment affects Texas Administrative Code, Title 19, Part 1, Chapter 22, Subchapter B.

§22.22. Definitions.

In addition to the words and terms defined in Texas Administrative Code 22.1 the following words and terms, when used in this subchapter, shall have the following meanings, unless the context clearly indicates otherwise:

(1) Adjusted gross need--An amount equal to a student's financial need less the amount of his or her Federal Pell Grant and any categorical aid the student might have brought to the institution.

~~[(2) Exceptional TEG need--An additional amount of TEG funds for which an undergraduate student may qualify on the basis of having an expected family contribution generated through the use of the federal methodology, less than or equal to $1,000.]~~

(2) [~~(3)~~] First award--The first Tuition Equalization Grant ever awarded to and received by a specific student.

(3) [~~(4)~~] Forecast--The FORECAST function in Microsoft Excel.

(4) [~~(5)~~] Private or independent institution--Any college or university defined as a private or independent institution of higher education by Texas Education Code, §61.003.

(5) [~~(6)~~] Program maximum--The TEG Program award maximum determined by the Board in accordance with Texas Education Code, §61.227 (relating to Payment of Grant; Amount).

(6) [~~(7)~~] Program or TEG--The Tuition Equalization Grant Program.

(7) [~~(8)~~] Religious ministry--Roles serving as clergy, religious leaders, or similar positions within any sect or religious society, as demonstrated through ordination, licensure to preach, or other mechanisms particular to a given sect or society that are used to identify clergy, religious leaders, or such similar positions.

(8) [~~(9)~~] Subsequent award--A TEG grant received in any academic year other than the year in which an individual received his or her first TEG award.

~~[(10) TEG need--The basic amount of TEG funds that an eligible student could receive, subject to the limit in Texas Education Code §61.227(c).]~~

(9) [~~(11)~~] Tuition differential--The difference between the tuition paid at the private or independent institution attended and the tuition the student would have paid to attend a comparable public institution.

§22.23. Eligible Institutions.

(a) Eligibility.

(1) Any private or independent institution of higher education, or a branch campus of a private or independent institution of higher education located in Texas and accredited on its own or with its main campus institution by the Commission on Colleges of the Southern Association of Colleges and Schools, other than theological or religious seminaries, is eligible to participate in the TEG Program.

(2) No participating institution may, on the grounds of race, color, national origin, gender, religion, age, or disability exclude an individual from participation in, or deny the benefits of, the program described in this subchapter.

(3) Each participating institution must follow the Civil Rights Act of 1964, Title VI (Public Law 88-352) in avoiding discrimination in admissions or employment.

(4) A private or independent institution of higher education that previously qualified under paragraph (1) of this subsection but no longer holds the same accreditation as public institutions of higher education may temporarily participate in the TEG Program if it is:

(A) accredited by an accreditor recognized by the Board;

(B) actively working toward the same accreditation as public institutions of higher education;

(C) participating in the federal financial aid program under 20 United States Code (U.S.C.) §1070a; and

(D) a "part B institution" as defined by 20 U.S.C. §1061(2) and listed in 34 Code of Federal Regulations §608.2.

(5) The Board may grant temporary approval to participate in the TEG program to an institution described under paragraph (4) of this subsection for a period of two years. The Board may renew that approval for a given institution twice for a period of two years.

(6) A private or independent institution of higher education that previously qualified under paragraph (1) of this subsection but no longer holds the same accreditation as public institutions of higher education may participate in the TEG Program if it is:

(A) accredited by an accreditor recognized by the Board in accordance with Texas Administrative Code, §7.6;

(B) a work college, as that term is defined by 20 U.S.C. Section 1087-58; and

(C) participating in the federal financial aid program under 20 U.S.C. §1070(a).

(b) Approval.

(1) Agreement. Each approved institution must enter into an agreement with the Board, prior to being approved to participate in the program, the terms of which shall be prescribed by the Commissioner or his/her designee.

(2) Intent to Participate. An eligible institution interested in participating in the Program must indicate this intent by June 1 of each odd-numbered year in order for qualified students enrolled in that institution to be eligible to receive grants in the following fiscal biennium. An eligible institution's data submissions, as required in Section 22.29 (relating to Allocation of Funds), must occur on or before the institution's indication of its intent to participate.

(c) Responsibilities. Participating institutions are required to abide by the General Provisions outlined in Chapter 22, Subchapter A of this title (relating to General Provisions).

§22.24. Eligible Students.

Eligible Students. To receive an award through the TEG Program, a student must:

(1) be enrolled on at least a three-fourths of full-time enrollment;

(2) show financial need;

(3) maintain satisfactory academic progress in his or her program of study as determined by the institution at which the person is enrolled and as required by §22.25 of this title (relating to Satisfactory Academic Progress);

(4) be a resident of Texas as determined based on data collected using the Residency Core Questions and in keeping with Chapter 21, Subchapter B of this title (relating to Determination of Resident Status);

(5) be enrolled in an approved institution in an individual degree plan leading to a first associate degree, first baccalaureate degree, first master's degree, first professional degree, or first doctoral degree, but not in a degree plan that is intended to lead to religious ministry;

(6) be required to pay more tuition than is required at a comparable public college or university and be charged no less than the tuition required of all similarly situated students at the institution;

(7) not be a recipient of any form of athletic scholarship during the semester or semesters he or she receives a TEG; and [.];

(8) demonstrate eligibility for exceptional TEG need, be an undergraduate student, and have an expected family contribution less than or equal to fifty percent of the Federal Pell Grant eligibility cap for the year reported in the institution's Financial Aid Database submission.

§22.28. Award Amounts and Adjustments.

(a) Award Amount. Each academic year, no TEG award shall exceed the least of:

(1) the student's financial need;

(2) the student's tuition differential; or

(3) the maximum award allowed based on the student's EFC, which is:

(A) 150 percent of the program maximum for undergraduate students demonstrating exceptional TEG need, as outlined in §22.24 of this Subchapter (relating to Eligible Students); or

(B) the program maximum for all other eligible students.

(b) Term or Semester Disbursement Limit. The amount of any disbursement in a single term or semester may not exceed the student's financial need or tuition differential for that term or semester or the program maximum for the academic year, whichever is the least.

(c) Award calculations and disbursements are to be completed in accordance with Chapter 22, Subchapter A of this title (relating to General Provisions).

§22.29. Allocation [and Disbursement] of Funds.

[(a) Allocations for Fiscal Year 2019 and prior. Allocations for the TEG Program are to be determined on an annual basis as follows:]

[(1) All eligible institutions will be invited to participate; those choosing not to participate will be left out of the calculations for the relevant year.]

[(2) The allocation base for each institution choosing to participate will be its three-year average share of the total statewide amount of TEG that could be awarded, subject to the limits in Texas Education Code, §61.227(c) and (e).]

[(3) The source of data used for the allocation calculations are the three most recently completed TEG Need Survey Reports submitted to the Board by the institutions. The reports include data for each student identified by the school as eligible to receive a first or subsequent TEG award as described in §22.24 or §22.25 of this title in the fall term in which the report is submitted. The data from the Need Survey used to calculate the amount of TEG an individual could receive includes:]

[(A) Each reported student's TEG need, as defined in §22.22 of this title (relating to Definitions); and]

[(B) The student's exceptional TEG need, as defined in §22.22 of this title.]

[(4) A student's TEG need may not exceed the least of his or her adjusted gross need, tuition differential, or the TEG maximum award as set in accordance with Texas Education Code, §61.227(c).]

[(5) A student's exceptional TEG need plus TEG need may not exceed the least of the student's adjusted gross need, tuition differential, or 150 percent of the current year's statutory TEG maximum award as set in accordance with Texas Education Code, §61.227(c).]

[(6) The maximum amount of need that may be recorded for any single student in the TEG Need Survey may not exceed the sum of his or her TEG need plus his or her exceptional TEG need.]

[(7) The total amount allocated for an institution may not exceed the sum of the individual maximum need for all students included in the most recent TEG Need Survey.]

[(8) Verification of Data.

(A) To provide data needed to confirm a reported need amount does not exceed one of the award limits listed in paragraphs (4) and (5) of this subsection, the Need Survey collects the following data for each student:]

[(i) Cost of attendance;]

[(ii) Expected family contribution;]

[(iii) Pell Grant amount;]

[(iv) Categorical aid amount;]

[(v) Classification (graduate or undergraduate); and]

[(vi) An indication of whether the student's need was limited by his or her tuition differential.]

[(B) The statewide TEG Need Survey summary will be provided to the institutions for review and the institutions will be given 10 working days, beginning the day of the notice's distribution and excluding State holidays, to confirm that the Survey accurately reflects the data they submitted or to advise Board staff of any inaccuracies.]

(a) [(b)] [Allocations for Fiscal Year 2020 and later.] Allocations for the TEG Program are to be determined on an annual basis as follows:

(1) All eligible institutions will be invited to participate; those choosing not to participate will be left out of the calculations for the relevant year.

(2) The allocation base for each institution choosing to participate will be its three-year average share of the total statewide amount of the total amount of TEG funds that eligible students at an approved institution could receive if the program were fully funded,

subject to the limits in Texas Education Code, §61.227(c) and (e), based on the students who met the following criteria:

(A) Enrollment on at least a three-fourths or three-quarters basis;

(B) An Expected Family Contribution, calculated using federal methodology, that results in demonstrated Adjusted Gross Need greater than zero;

(C) Maintain satisfactory academic progress in his or her program of study as required by §22.24(b) of this title (relating to Eligible Students);

(D) Classified as a Resident of Texas;

(E) Be enrolled in an approved institution in an individual degree plan leading to a first associates degree, first baccalaureate degree, first master's degree, first professional degree, or first doctoral degree;

(F) Not be enrolled in a degree plan that is intended to lead to religious ministry;

(G) Be required to pay more tuition than is required at a comparable public college or university and be charged no less than the tuition required of all similarly situated students at the institution; and

(H) Not be a recipient of any form of athletic scholarship.

(3) [~~Sources of data.~~]

[~~(A) For allocations for Fiscal Year 2020. The sources of data used for the allocations are the certified Fiscal Year 2018 Financial Aid Database (FADS) report and the fall 2015 and fall 2016 completed TEG Need Survey reports submitted to the Board by the institutions.~~]

[~~(B) For allocations for Fiscal Year 2021. The sources of data used for the allocations are the certified Fiscal Year 2018 and 2019 FADS reports and the fall 2016 completed TEG Need Survey report submitted to the Board by the institutions.~~]

[~~(C)~~] [~~For allocations for Fiscal Year 2022 and Later.~~] The source of data used for the allocations are the three most recently certified Financial Aid Database (FADS) [~~FADS~~] reports submitted to the Board by the institutions.

(4) A student's TEG need may not exceed the least of his or her adjusted gross need, tuition differential, or the TEG maximum award as set in accordance with Texas Education Code, §61.227(c).

(5) A student's exceptional TEG need plus TEG need may not exceed the least of the student's adjusted gross need, tuition differential or 150 percent of the current year's statutory TEG maximum award as set in accordance with Texas Education Code, §61.227(c).

(6) The maximum amount of need that may be recorded for any single student in the allocation calculation may not exceed the sum of his or her TEG need plus his or her exceptional TEG need.

(7) The total amount allocated for an institution may not exceed the sum of the individual maximum amount of [~~TEG~~] need for all students calculated using the sources of data outlined in paragraph (3) of this subsection.

(8) Verification of Data. The TEG allocation spreadsheet will be provided to the institutions for review and the institutions will be given 10 working days, beginning the day of the notice's distribution and excluding State holidays, to confirm that the spreadsheet accurately reflects the data they submitted or to advise Board staff of any inaccuracies.

(9) Allocations for both years of the state appropriations' biennium will be completed at the same time. For the allocations process of the second year of the state appropriations' biennium, the sources of data outlined in paragraph (3) of this subsection will be utilized to forecast an additional year of data. This additional year of data, in combination with the two most recent years outlined in paragraph (3) of this subsection, will be utilized to calculate the three-year average share outlined in paragraph (2) of this subsection. Institutions will receive notification of their allocations for both years of the biennium at the same time.

[~~(c) Disbursement of Funds to Institutions. As requested by institutions throughout the academic year, the Board shall forward to each participating institution a portion of its allocation of funds for timely disbursement to students. Institutions will have until the close of business on August 1, or the first working day thereafter if it falls on a weekend or holiday, to encumber program funds from their allocation. After that date, institutions lose claim to any funds in the current fiscal year not yet drawn down from the Board for timely disbursement to students. Funds released in this manner in the first year of the biennium become available to the institution for use in the second year of the biennium. Funds released in this manner in the second year of the biennium become available to the Board's program for utilization in grant processing. Should these unspent funds result in additional funding available for the next biennium's program, revised allocations, calculated according to the allocation methodology specified in this rule, will be issued to participating institutions during the fall semester.~~]

(b) [~~(d)~~] Reductions in Funding.

(1) If annual funding for the program is reduced after the start of a fiscal year, the Board may take steps to help distribute the impact of reduced funding across all participating institutions by an across-the-board percentage decrease in all institutions' allocations.

(2) If annual funding for the program is reduced prior to the start of a fiscal year, the Board may recalculate the allocations according to the allocation methodology outlined in this rule for the affected fiscal year based on available dollars.

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 January 13, 2023.

TRD-202300158
Nichole Bunker-Henderson
General Counsel
Texas Higher Education Coordinating Board
Earliest possible date of adoption: February 26, 2023
For further information, please call: (512) 427-6365

♦ ♦ ♦

SUBCHAPTER B. PROVISIONS FOR THE TUITION EQUALIZATION GRANT PROGRAM

19 TAC §22.30

The Texas Higher Education Coordinating Board (Coordinating Board) proposes new rules in Texas Administrative Code, Title 19, Part 1, Chapter 22, Subchapter B, §22.30, concerning the Tuition Equalization Grant (TEG) program. Specifically, this new

section will establish language currently in §22.29 as a separate rule for greater clarity.

Based on feedback from the financial aid community, the Coordinating Board initiated a review of how exceptional TEG need was defined. Since exceptional TEG need has a direct impact on the allocation methodology for the TEG program, the Coordinating Board convened negotiated rulemaking activities, as required by Texas Education Code, §61.0331, in matters relating to the allocation of funds, including financial aid. The proposed new rule was reached by consensus during negotiated rulemaking activities occurring on November 7, 2022.

Dr. Charles Contéro-Puls, Assistant Commissioner for Student Financial Aid Programs, has determined that for each of the first five years the sections are in effect there would be no fiscal implications for state or local governments as a result of enforcing or administering the rules. There are no estimated reductions in costs to the state and to local governments as a result of enforcing or administering the rule. There are no estimated losses or increases in revenue to the state or to local governments as a result of enforcing or administering the rule.

There is no impact on small businesses, micro businesses, and rural communities. There is no anticipated impact on local employment.

Dr. Charles Contéro-Puls, Assistant Commissioner for Student Financial Aid Programs, has also determined that for each year of the first five years the section is in effect, the public benefit anticipated as a result of administering the section will be providing private and independent institutions with greater flexibility in supporting economically disadvantaged students through funds from the Tuition and Equalization Grant program. There are no anticipated economic costs to persons who are required to comply with the sections as proposed.

Government Growth Impact Statement

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

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

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

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

(5) the rules will not create a new rule;

(6) the rules will not limit an existing rule;

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

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

Comments on the proposal may be submitted to Dr. Charles Contéro-Puls, Assistant Commissioner for Student Financial Aid Programs, P.O. Box 12788, Austin, Texas 78711-2788, or via email at charles.contero-puls@highered.texas.gov. Comments will be accepted for 30 days following publication of the proposal in the *Texas Register.*

The new section is proposed under Texas Education Code, Sections 61.229 and 61.0331, which provides the Coordinating Board with the authority to make reasonable regulations, consistent with the purposes and policies of Texas Education Code, Chapter 61, Subchapter F, relating to the Tuition Equalization Grant Program, and which requires the Coordinating Board to use negotiated rulemaking in matters relating to the allocation of funds, including financial aid.

The new section affects Texas Administrative Code, Title 19, Part 1, Chapter 22, Subchapter B.

§22.30. Disbursement of Funds.

As requested by institutions throughout the academic year, the Board shall forward to each participating institution a portion of its allocation of funds for timely disbursement to students. Institutions will have until the close of business on August 1, or the first working day thereafter if it falls on a weekend or holiday, to encumber program funds from their allocation. After that date, institutions lose claim to any funds in the current fiscal year not yet drawn down from the Board for timely disbursement to students. Funds released in this manner in the first year of the biennium become available to the institution for use in the second year of the biennium. Funds released in this manner in the second year of the biennium become available to the Board's program for utilization in grant processing. Should these unspent funds result in additional funding available for the next biennium's program, revised allocations, calculated according to the allocation methodology specified in §22.29 of this subchapter (relating to Allocation of Funds), will be issued to participating institutions during the fall semester.

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 January 13, 2023.

TRD-202300159
Nichole Bunker-Henderson
General Counsel
Texas Higher Education Coordinating Board
Earliest possible date of adoption: February 26, 2023
For further information, please call: (512) 427-6365

♦ ♦ ♦

SUBCHAPTER C. HINSON-HAZLEWOOD COLLEGE STUDENT LOAN PROGRAM

19 TAC §22.49

The Texas Higher Education Coordinating Board (Coordinating Board) proposes amendments to Texas Administrative Code, Title 19, Part 1, Chapter 22, Subchapter C, §22.49, concerning Hinson-Hazlewood College Student Loan Program. Specifically, this amendment will implement new standards regarding the aggregate and annual loan limits.

The amendments to Texas Administrative Code (TAC) §22.49 are proposed to provide a clearer indication of the alignment between the rule regarding the amount of a loan and the limitations on the loan amount as outlined in Texas Education Code (TEC) §52.33. The proposed language in §22.49(a) aligns the statutory intent regarding what a student may reasonably be expected to pay with the Board's Long-Range Master Plan for Higher Education and the manageable debt guidelines therein. The proposed language in 22.49(b) captures the agency's interpretation of how federal student loan eligibility is considered when calculating the financial resources indicated in TEC §52.33.

Dr. Charles Contéro-Puls, Assistant Commissioner for Student Financial Aid Programs, has determined that for each of the first

five years the sections are in effect there would be no fiscal implications for state or local governments as a result of enforcing or administering the rules. There are no estimated reductions in costs to the state and to local governments as a result of enforcing or administering the rule. There are no estimated losses or increases in revenue to the state or to local governments as a result of enforcing or administering the rule.

There is no impact on small businesses, micro businesses, and rural communities. There is no anticipated impact on local employment.

Dr. Charles Contéro-Puls, Assistant Commissioner for Student Financial Aid Programs, has also determined that for each year of the first five years the section is in effect, the public benefit anticipated as a result of administering the section will be the more manageable student debt levels for individuals participating in the College Access Loan administered by the Coordinating Board under the Hinson-Hazlewood College Student Loan Program. There are no anticipated economic costs to persons who are required to comply with the sections as proposed.

Government Growth Impact Statement

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

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

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

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

(5) the rules will not create a new rule;

(6) the rules will not limit an existing rule;

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

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

Comments on the proposal may be submitted to Dr. Charles Contéro-Puls, Assistant Commissioner for Student Financial Aid Programs, P.O. Box 12788, Austin, Texas 78711-2788, or via email at charles.contero-puls@highered.texas.gov. Comments will be accepted for 30 days following publication of the proposal in the *Texas Register.*

The amendment is proposed under Texas Education Code, Section 52.33, which provides the Coordinating Board with the authority to adopt rules regarding the amount of loan a student may borrow, and Section 52.54, which provides the Coordinating Board with the authority to adopt rules regarding the Hinson-Hazlewood College Student Loan Program.

The proposed amendment affects the College Access Loan program, as administered by the Coordinating Board under the Hinson-Hazlewood College Student Loan Program and authorized by Texas Education Code, Chapter 52.

§22.49. Amount of Loan.

(a) Aggregate Loan Limit.

(1) The maximum aggregate loan amount for an eligible undergraduate student shall be limited to an amount of debt defined as "manageable debt" under the Board's Long-Range Master Plan for Higher Education. The maximum amount of student loan debt is based on a reasonable monthly student loan payment, taking into consideration the borrower's area of study, as outlined in Figure 1. The agency may not loan a borrower an amount of College Access Loans that would cause the borrower's aggregate educational loan debt, as reported on the borrower's credit report, to exceed the maximum amount outlined in Figure 1.

(2) The maximum aggregate loan amount for an eligible graduate or professional student is the sum of the student's annual limits.

[(a) ~~Amount of Loan. The amount of loan shall not exceed the amount that the student needs in order to meet reasonable expenses as a student.~~]

(b) Annual [~~and Aggregate~~] Loan Limit. [~~The maximum annual and aggregate loan amounts for any eligible student shall be determined from time to time by the Commissioner.~~] In no case shall the maximum annual loan amount exceed the difference between the cost of attendance and the financial resources available to the applicant, including the applicant's scholarships, gifts, grants, and other financial aid. The student's maximum eligibility for Federal Direct Loans, except for Federal Plus loans, must be considered by the institution as other financial aid, whether or not the student actually receives such assistance [~~be greater than the annual cost of attendance for the student at the eligible institution~~].

Figure: 19 TAC §22.49(b)

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

Filed with the Office of the Secretary of State on January 13, 2023.

TRD-202300161
Nichole Bunker-Henderson
General Counsel
Texas Higher Education Coordinating Board
Earliest possible date of adoption: February 26, 2023
For further information, please call: (512) 427-6365

♦ ♦ ♦

TITLE 30. ENVIRONMENTAL QUALITY

PART 1. TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

CHAPTER 5. ADVISORY COMMITTEES AND GROUPS

SUBCHAPTER B. ADVISORY COMMITTEES

30 TAC §5.3, §5.15

The Texas Commission on Environmental Quality (TCEQ, agency, or commission) proposes the amendment to §5.3; and new §5.15.

Background and Summary of the Factual Basis for the Proposed Rules

This proposed rulemaking implements the requirements of Texas Government Code, Chapter 2110 with respect to establishing in rule the date on which an advisory committee is abolished.

During Sunset review, Sunset Commission staff recommended that the agency renew advisory committees created by the

commission through a rulemaking process. Texas Government Code, §2110.008 provides that an advisory committee is automatically abolished on the fourth anniversary date of its creation unless the state agency has established, by rule, a different date on which the advisory committee will automatically be abolished. In consideration of the Sunset review recommendation, the commission determined that seven advisory committees that do not have dates for abolishment currently established in statute or rule should continue in existence because they continue to serve the purpose of providing advice to the agency. This rulemaking proposes to continue the existence of those seven advisory committees: the Water Utility Operator Licensing Advisory Committee, the Municipal Solid Waste Management and Resource Recovery Advisory Council, the Irrigator Advisory Council, the Concho River Watermaster Advisory Committee, the Rio Grande Watermaster Advisory Committee, the South Texas Watermaster Advisory Committee, and the Brazos Watermaster Advisory Committee. The proposed rule specifies December 31, 2032, as the date of abolishment for these advisory committees. Advisory committees that are subject to a statutory duration or excluded from the applicability of Texas Government Code, Chapter 2110 are not included in this proposed rule.

Section by Section Discussion

The commission proposes to amend §5.3 to provide that advisory committees created by the commission are to be automatically abolished according to the requirements of Texas Government Code, §2110.008 unless the advisory committee is required to remain in effect without abolishment under a state or federal law, or a different date for abolishment is established under §5.15. An advisory committee that is subject to a requirement under a state or federal law to remain in effect without abolishment or an advisory committee that is not subject to Texas Government Code, §2110.008 is not subject to abolishment under §5.3 or §5.15.

The commission proposes new §5.15 to establish the duration of advisory committees under subchapter B. New subsection (a) provides that the advisory committees listed in subsection (b) are renewed and continue to exist with the abolishment date established for the listed advisory committee. New subsection (b) establishes an abolishment date of December 31, 2032, for the following advisory committees: the Water Utility Operator Licensing Advisory Committee, the Municipal Solid Waste Management and Resource Recovery Advisory Council, the Irrigator Advisory Council, the Concho River Watermaster Advisory Committee, the Rio Grande Watermaster Advisory Committee, the South Texas Watermaster Advisory Committee, and the Brazos Watermaster Advisory Committee. The commission expects that future rulemaking may add to the list of advisory committees or amend the date of abolishment for any advisory committee.

Fiscal Note: Costs to State and Local Government

Jené Bearse, Deputy Director in the Budget and Planning Division, has determined that for the first five-year period the proposed rules are in effect, no fiscal implications are anticipated for the agency or for other units of state or local government as a result of administration or enforcement of the proposed rule.

Public Benefits and Costs

Ms. Bearse determined that for each year of the first five years the proposed rules are in effect, the public benefit anticipated will be clear communication with the public on the duration of the advisory committees and improved compliance with the Texas Government Code, Section 2110.008. The proposed rulemaking is not anticipated to result in fiscal implications for businesses or individuals.

Local Employment Impact Statement

The commission reviewed this proposed rulemaking and determined that a Local Employment Impact Statement is not required because the proposed rulemaking does not adversely affect a local economy in a material way for the first five years that the proposed rule is in effect.

Rural Communities Impact Assessment

The commission reviewed this proposed rulemaking and determined that the proposed rulemaking does not adversely affect rural communities in a material way for the first five years that the proposed rules are in effect. The amendments would apply statewide and have the same effect in rural communities as in urban communities.

Small Business and Micro-Business Assessment

No adverse fiscal implications are anticipated for small or micro-businesses due to the implementation or administration of the proposed rule for the first five-year period the proposed rules are in effect.

Small Business Regulatory Flexibility Analysis

The commission reviewed this proposed rulemaking and determined that a Small Business Regulatory Flexibility Analysis is not required because the proposed rule does not adversely affect a small or micro-business in a material way for the first five years the proposed rules are in effect.

Government Growth Impact Statement

The commission prepared a Government Growth Impact Statement assessment for this proposed rulemaking. The proposed rulemaking does not create or eliminate a government program and will not require an increase or decrease in future legislative appropriations to the agency. The proposed rulemaking does not require the creation of new employee positions, eliminate current employee positions, nor require an increase or decrease in fees paid to the agency. The proposed rulemaking does amend an existing regulation by clarifying the abolishment date for certain advisory committees. The proposed rulemaking does not increase or decrease the number of individuals subject to its applicability. During the first five years, the proposed rule should not impact positively or negatively the state's economy.

Draft Regulatory Impact Analysis Determination

The commission reviewed the proposed rulemaking in light of the regulatory analysis

requirements of the Texas Government Code, §2001.0225, and determined that the action is not subject to Texas Government Code, §2001.0225, because it does not meet the definition of a "Major environmental rule" as defined in that statute. A "Major environmental rule" is a rule the specific intent of which is to protect the environment or reduce risks 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 the state or a sector of the state. The proposed rulemaking is not a major environmental rule because it is not anticipated to adversely effect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state since

the proposed rulemaking addresses procedural requirements for the abolishment of advisory committees. Likewise, there will be no adverse effect in a material way on the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state from the revisions because the changes are not substantive. The rulemaking addresses procedural requirements for establishing the dates on which listed advisory committees are to be abolished.

Texas Government Code, §2001.0225, applies to a major environmental rule, the result of which is to: exceed a standard set by federal law, unless the rule is specifically required by state law; exceed an express requirement of state law, unless the rule is specifically required by federal law; exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program; or adopt a rule solely under the general authority of the commission. The proposed rulemaking does not meet any of the four applicability requirements listed in Texas Government Code, §2001.0225.

First, the rulemaking does not exceed a standard set by federal law because the commission is proposing this rulemaking to continue advisory committees and establish the dates on which the advisory committees will be abolished. There are no standards set by federal law that are exceeded by the proposed rules.

Second, the proposed rulemaking does not exceed a requirement of state law because Texas Government Code Chapter 2110 authorizes a state agency to establish, by rule, the date on which an advisory committee is to be abolished.

Third, the rulemaking does not exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government, where the delegation agreement or contract is to implement a state and federal program. There is no applicable delegation agreement or contract addressing the duration requirements for advisory committees.

And fourth, this rulemaking does not seek to adopt a rule solely under the general powers of the agency. Rather, this rulemaking is authorized by Texas Water Code, §5.103 which provides specific authority to adopt rules and §5.107 which authorizes the commission to create advisory committees.

The commission invites public comment regarding the Draft Regulatory Impact Analysis Determination during the public comment period. Written comments on the Draft Regulatory Impact Analysis Determination may be submitted to the contact person at the address listed under the Submittal of Comments section of this preamble.

Takings Impact Assessment

The commission evaluated the proposed rulemaking and performed analysis of whether the proposed rules constitute a taking under Texas Government Code, Chapter 2007. The specific purpose of the proposed rules is to continue the existence of listed advisory committees and establish the date on which the advisory committees are to be abolished. The proposed rulemaking substantially advances these stated purposes by proposing rules that continue the existence of the Water Utility Operator Licensing Advisory Committee, the Municipal Solid Waste Management and Resource Recovery Advisory Council, the Irrigator Advisory Council, the Concho River Watermaster Advisory Committee, the Rio Grande Watermaster Advisory Committee, the South Texas Watermaster Advisory Committee, and the Brazos Watermaster Advisory Committee and establish the date of December 31, 2032, on which these committees will be abolished.

The commission's analysis indicates that the proposed rules would be neither a statutory nor a constitutional taking of private real property. Specifically, the subject proposed regulations do not affect a landowner's rights in real property because the proposed rulemaking does not burden (constitutionally); nor restrict or limit the owner's right to property and reduce its value by 25% or more beyond that which would otherwise exist in the absence of the regulations. The proposed rules are procedural, addressing the requirements for advisory committees, and do not affect real property.

Consistency with the Coastal Management Program

The commission reviewed the proposed rules and found that they are neither identified in Coastal Coordination Act implementation rules, 31 TAC §505.11(b)(2) or (4), nor will they affect any action/authorization identified in Coastal Coordination Act implementation rules, 31 TAC §505.11(a)(6). Therefore, the proposed rules are not subject to the Texas Coastal Management Program.

Written comments on the consistency of this rulemaking may be submitted to the contact person at the address listed under the Submittal of Comments section of this preamble.

Announcement of Hearing

The commission will hold a hold a hybrid virtual and in-person public hearing on this proposal in Austin on February 27 at 2:00 p.m. in Building D, Room 191, at the commission's central office located at 12100 Park 35 Circle. The hearing is structured for the receipt of oral or written comments by interested persons. Individuals may present oral statements when called upon in order of registration. Open discussion will not be permitted during the hearing; however, commission staff members will be available to discuss the proposal 30 minutes prior to the hearing.

Individuals who plan to attend the hearing virtually and want to provide oral comments and/or want their attendance on record must register by Thursday, February 23, 2023. To register for the hearing, please email Rules@tceq.texas.gov and provide the following information: your name, your affiliation, your email address, your phone number, and whether or not you plan to provide oral comments during the hearing. Instructions for participating in the hearing will be sent on Friday, February 24, 2023, to those who register for the hearing.

For the public who do not wish to provide oral comments but would like to view the hearing may do so at no cost at:

https://teams.microsoft.com/l/meetup-join/19%3ameeting_ZmMyZTk0ZTAtM2YwOC00OWZkLWI4NTEtNjVhNjhjZDg5OGY0%40thread.v2/0?context=%7b%22Tid%22%3a%22871a83a4-a1ce-4b7a-8156-3bcd93a08fba%22%2c%22Oid%22%3a%22e74a40ea-69d4-469d-a8ef-06f2c9ac2a80%22%2c%22IsBroadcastMeeting%22%3atrue%7d

Persons who have special communication or other accommodation needs who are planning to attend the hearing should contact Sandy Wong, Office of Legal Services at (512) 239-1802 or 1-800-RELAY-TX (TDD). Requests should be made as far in advance as possible.

Submittal of Comments

Written comments may be submitted to Gwen Ricco, MC 205, Office of Legal Services, Texas Commission on Environmental

Quality, P.O. Box 13087, Austin, Texas 78711-3087, or faxed to *fax4808@tceq.texas.gov.* Electronic comments may be submitted at: https://tceq.commentinput.com/. File size restrictions may apply to comments being submitted via the TCEQ Public Comment system. All comments should reference Rule Project Number 2023-006-005-LS. The comment period closes on February 28, 2023. Please choose one of the methods provided to submit your written comments.

Copies of the proposed rulemaking can be obtained from the commission's website at *https://www.tceq.texas.gov/rules/propose_adopt.html*. For further information, please contact Don Redmond, Environmental Law Division, at (512) 239-0612.

Statutory Authority

The proposed amendment and new rule are proposed under Texas Water Code (TWC), §5.013, which establishes the general jurisdiction of the commission; TWC, §5.102, which provides the commission with the authority to carry out its duties and general powers under its jurisdictional authority as provided by the TWC; and TWC, §5.103, which requires the commission to adopt any rule necessary to carry out its powers and duties under the TWC and other laws of the state. The amendments are also proposed under Texas Health and Safety Code (THSC), §361.017, which provides the commission authority to manage industrial solid waste and hazardous municipal waste; and THSC, §361.024, which authorizes the commission to adopt rules regarding the management and control of solid waste.

The proposed amendment and new rule implement TWC, §5.107 and Texas Government Code, Chapter 2110.

§5.3. Creation and Duration of Advisory Committees Created by the Commission.

Except as otherwise provided by law, advisory committees created by the commission shall be created by commission resolution. An advisory committee shall be automatically abolished in accordance with Texas Government Code, §2110.008(b), as amended, unless the advisory committee is required to remain in effect without abolishment under state or federal law, or a different date is designated under §5.15 of this chapter (relating to Duration of Advisory Committees).

§5.15. Duration of Advisory Committees.

(a) The advisory committees listed in section (b) are renewed with the expiration dates noted for each advisory committee and continue to be subject to the rules in this subchapter.

(b) List of advisory committees renewed by rule:

(1) Brazos Watermaster Advisory Committee, authorized by Tex. Water Code §11.4531, expires on December 31, 2032.

(2) Concho River Watermaster Advisory Committee, authorized by Tex. Water Code §11.557, expires on December 31, 2032.

(3) Irrigator Advisory Council, authorized by Tex. Occ. Code ch. 1903, Subch. D, expires on December 31, 2032.

(4) Municipal Solid Waste Management and Resource Recovery Advisory Council, authorized by Tex. Health & Safety Code §§363.041-046, expires on December 31, 2032.

(5) Rio Grande Watermaster Advisory Committee, authorized by Tex. Water Code §11.3261, expires on December 31, 2032.

(6) South Texas Watermaster Advisory committee, authorized by Tex. Water Code §11.3261, expires on December 31, 2032.

(7) Water Utility Operating Licensing Advisory Committee, authorized by Tex. Water Code §5.107, expires on December 31, 2032.

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 January 12, 2023.

TRD-202300133
Guy Henry
Acting Deputy Director, Environmental Law Division
Texas Commission on Environmental Quality
Earliest possible date of adoption: February 26, 2023
For further information, please call: (512) 239-6295

♦ ♦ ♦

CHAPTER 113. STANDARDS OF PERFORMANCE FOR HAZARDOUS AIR POLLUTANTS AND FOR DESIGNATED FACILITIES AND POLLUTANTS

SUBCHAPTER D. DESIGNATED FACILITIES AND POLLUTANTS

The Texas Commission on Environmental Quality (TCEQ, agency, or commission) proposes new §§113.2400, 113.2402, 113.2404, 113.2406, 113.2408, 113.2410, and 113.2412; and amended §113.2069.

The proposed new and amended sections are included in the accompanying proposed revisions to the Federal Clean Air Act (FCAA), §111(d) Texas State Plan for Existing Municipal Solid Waste (MSW) Landfills. If adopted by the commission, the revisions to Chapter 113 and the associated revisions to the state plan will be submitted to the U.S. Environmental Protection Agency (EPA) for review and approval.

Background and Summary of the Factual Basis for the Proposed Rules

The proposed amendments to Chapter 113, Standards of Performance for Hazardous Air Pollutants and for Designated Facilities and Pollutants, are necessary to implement emission guidelines in 40 Code of Federal Regulations (CFR) Part 60, Subpart Cf, Emission Guidelines and Compliance Times for Municipal Solid Waste Landfills. These emission guidelines (2016 emission guidelines) were promulgated by the EPA on August 29, 2016 (81 FR 59276), and amended on August 26, 2019 (84 FR 44547), and March 26, 2020 (85 FR 17244). The August 26, 2019, amendments to Subpart Cf were vacated on April 5, 2021, by the D.C. Circuit Court of Appeals, and are not included in this proposal. On May 21, 2021, the EPA also published a federal plan (86 FR 27756) to implement the 2016 emission guidelines for MSW landfills located in states where an approved FCAA, §111(d), state plan is not in effect. The federal plan for MSW landfills was adopted under 40 CFR Part 62, Subpart OOO.

The FCAA, §111, requires the EPA to develop performance standards and other requirements for categories of sources which the EPA finds "...causes, or contributes significantly to, air pollution which may reasonably be anticipated to endanger public health or welfare." Under FCAA, §111, the EPA promulgates New

Source Performance Standards (NSPS) and Emission Guidelines. NSPS regulations promulgated by the EPA apply to new stationary sources for which construction begins after the NSPS is proposed, or that are reconstructed or modified on or after a specified date. Emission Guidelines promulgated by the EPA are similar to NSPS, except that they apply to existing sources which were constructed on or before the date the NSPS is proposed, or that are reconstructed or modified before a specified date. Unlike the NSPS, emission guidelines are not enforceable until the EPA approves a state plan or adopts a federal plan for implementing and enforcing them.

States are required under the FCAA, §111(d), and 40 CFR Part 60, Subpart B, to adopt and submit to the EPA for approval a state plan to implement and enforce emission guidelines promulgated by the EPA. A state plan is required to be at least as protective as the corresponding emission guidelines. The FCAA also requires the EPA to develop, implement, and enforce a federal plan to implement the emission guidelines. The federal plan applies to affected units in states without an approved state plan.

In 1996, the EPA promulgated the original NSPS for MSW landfills under 40 CFR Part 60 Subpart WWW, and corresponding emission guidelines (the 1996 emission guidelines) under 40 CFR Part 60 Subpart Cc. TCEQ adopted rules under Chapter 113, Subchapter D, Division 1, and a corresponding §111(d) state plan, to implement the 1996 emission guidelines on October 7, 1998 (23 TexReg 10874). The EPA approved TCEQ's rules and state plan for existing MSW landfills on June 17, 1999 (64 FR 32427).

On August 29, 2016, the EPA adopted a new NSPS (40 CFR Part 60 Subpart XXX) and new emission guidelines (40 CFR Part 60 Subpart Cf) for MSW landfills, which essentially replaced the 1996 NSPS and emission guidelines. The 2016 emission guidelines lowered the emission threshold at which a landfill gas collection system is required from 50 megagrams (Mg) of nonmethane organic compounds (NMOC) to 34 Mg of NMOC. The EPA's 2016 adoption of NSPS Subpart XXX and the 2016 emission guidelines under Subpart Cf also included changes to monitoring, recordkeeping, and reporting requirements, relative to the original 1996 requirements of Subparts WWW and Cc.

The original deadline for states to submit a state plan to implement the EPA's 2016 emission guidelines for MSW landfills was May 30, 2017. The TCEQ submitted a request for an extension to this deadline as provided under 40 CFR §60.27(a). In June 2017, TCEQ received a response from EPA Region 6 which stated that, as a result of the stay in effect at that time, "...a state plan submittal is not required at this time." The stay expired August 29, 2017. On October 17, 2017, the EPA released a "Desk Statement" concerning the emission guidelines, which stated that "...we do not plan to prioritize the review of these state plans nor are we working to issue a Federal Plan for states that failed to submit a state plan. A number of states have expressed concern that their failure to submit a state plan could subject them to sanctions under the Clean Air Act. As the Agency has previously explained, states that fail to submit state plans are not subject to sanctions (e.g., loss of federal highway funds)." Given that the EPA's Desk Statement indicated that submittal of state plans was not a priority, and considering that the EPA had stated that a reconsideration rulemaking of the NSPS and emission guidelines was impending, TCEQ put state plan development on hiatus to monitor developments in the federal rules. On August 26, 2019, the EPA promulgated rules which established a new deadline of August 29, 2019, for states to submit a §111(d) state plan for the 2016 emission guidelines. However, the August 26, 2019, rules were vacated and remanded on April 5, 2021, effectively restoring the original Subpart B deadline of May 30, 2017. *(Environmental Defense Fund v. EPA,* No. 19-1222 (D.C. Circuit, 2021)).

On March 12, 2020, the EPA published a finding of failure to submit (85 FR 14474) that determined that 42 states and territories, including the State of Texas, had failed to submit the required §111(d) state plans to implement the 2016 emission guidelines for MSW landfills. On May 21, 2021, the EPA published a federal plan under 40 CFR Part 62, Subpart OOO, to implement the 2016 emission guidelines for MSW landfills in states where an approved §111(d) state plan for the 2016 emission guidelines was not in effect. This federal plan became effective on June 21, 2021, and currently applies to MSW landfills in Texas and numerous other states without an approved state plan implementing the 2016 emission guidelines. The overall requirements of the federal plan are similar to the emission guidelines in Subpart Cf, but EPA included certain changes and features in the federal plan to simplify compliance obligations for landfills that are already controlling emissions under prior landfill regulations such as 40 CFR Part 60, Subpart WWW, or state rules adopted as part of a previously approved state plan for the 1996 emission guidelines. Once a state has obtained approval for a §111(d) state plan implementing the 2016 emission guidelines, most requirements of the federal plan no longer apply, as affected sources would instead comply with the requirements of the approved state plan. (Some of the compliance deadlines and increments of progress specified in the federal plan may still apply.)

In order to implement the EPA's 2016 emission guidelines, TCEQ must revise the corresponding Chapter 113 rules and state plan for existing MSW landfills. The proposed changes to Chapter 113 include amendments to §113.2069 in Subchapter D, Division 1, and several new sections under a proposed Division 6. The proposed rules would phase out the requirement to comply with the commission's existing Division 1 rules and phase in new rules corresponding to the EPA's 2016 emission guidelines. The proposed Division 6 rules also incorporate certain elements from the 40 CFR Part 62 Subpart OOO federal plan to facilitate ongoing compliance for MSW landfills in Texas which have been required to comply with the federal plan since it became effective on June 21, 2021. The transition date for the applicability of the proposed Division 6 rules, and non-applicability of the existing Division 1 rules, would be the effective date of the EPA's approval of Texas' revisions to the §111(d) state plan. This is discussed in more detail in the section-by-section discussion for the proposed changes to §113.2069 and proposed new §113.2412.

Interested persons are encouraged to consult the EPA's 2016 emission guidelines under 40 CFR Part 60 Subpart Cf, and the federal plan under 40 CFR Part 62 Subpart OOO, for further information concerning the specific requirements that are the subject of this proposed rulemaking. In a concurrent action, the commission is proposing a state plan revision to implement and enforce the 2016 emission guidelines that are the subject of this proposed rulemaking.

Section by Section Discussion

§113.2069, Compliance Schedule and Transition to 2016 Landfill Emission Guidelines

The commission proposes an amendment to §113.2069. Proposed subsection (c) serves as a transition mechanism for own-

ers or operators of existing MSW landfills to end compliance with the requirements of Chapter 113, Subchapter D, Division 1, and begin compliance with the requirements of Subchapter D, Division 6, based on the implementation date specified in §113.2412. The implementation date is a future date established when the EPA's approval of the revised Texas §111(d) state plan for the 2016 emission guidelines for landfills becomes effective. On and after this date, owners or operators of MSW landfills will no longer be required to comply with the Division 1 rules, but must instead comply with the applicable requirements of Division 6.

The Division 1 rule requirements were created to implement the 1996 emission guidelines contained in 40 CFR Part 60 Subpart Cc, which have been supplanted by the more stringent 2016 emission guidelines contained in 40 CFR Part 60 Subpart Cf. These Division 1 rules will no longer be needed once the EPA approves TCEQ's new Division 6 rules and the corresponding §111(d) state plan to implement the 2016 emission guidelines.

The commission also proposes to revise the title of §113.2069 to reflect that the section now contains provisions for the transition from the Chapter 113, Division 1, requirements to the new Division 6 rules implementing the 2016 emission guidelines.

Division 6: 2016 Emission Guidelines for Existing Municipal Solid Waste Landfills

§113.2400, Applicability

The commission proposes new §113.2400, which contains requirements establishing the applicability of the new Subchapter D, Division 6, rules which implement the 2016 emission guidelines. Proposed subsection (a) specifies that the Division 6 rules apply to existing MSW landfills for which construction, reconstruction, or modification was commenced on or before July 17, 2014, except for certain landfills exempted under the provisions of proposed §113.2406. The applicability of the proposed Division 6 requirements includes MSW landfills which were previously subject to the requirements of Chapter 113, Subchapter D, Division 1; the requirements of 40 CFR Part 60 Subpart WWW; or the requirements of the federal plan adopted by the EPA to implement the 2016 emission guidelines (40 CFR Part 62 Subpart OOO).

Proposed subsection (b) is intended to clarify that physical or operational changes made to an existing landfill solely for purposes of achieving compliance with the Division 6 rules will not cause the landfill to become subject to NSPS under 40 CFR Part 60, Subpart XXX. This proposed subsection corresponds to 40 CFR Part 60, Subpart Cf, §60.31f(b).

Proposed subsection (c) is intended to clarify that MSW landfills which are subject to 40 CFR Part 60 Subpart XXX are not subject to the requirements of proposed Division 6. 40 CFR Part 60 Subpart XXX applies to landfills which have been modified, constructed, or reconstructed after July 17, 2014, whereas the proposed Division 6 requirements apply to MSW landfills which have not been modified, constructed, or reconstructed after July 17, 2014.

Proposed subsection (d) establishes that the requirements of Division 6 do not apply until the implementation date specified in proposed §113.2412(a). This implementation date corresponds to the future date when the EPA's approval of Texas' revised §111(d) state plan for existing MSW landfills becomes effective. Until that date, owners or operators of existing MSW landfills must continue complying with the Chapter 113, Division 1, requirements for existing MSW landfills. The EPA will publish a notice in the *Federal Register* once their review of the revised Texas §111(d) state plan has been completed.

§113.2402, Definitions

The commission proposes new §113.2402, which identifies the definitions that apply for the purposes of Subchapter D, Division 6. Proposed subsection (a) incorporates the definitions in 40 CFR §§60.2 and 60.41f by reference, as amended through May 16, 2007, and March 26, 2020, respectively. Proposed subsections (b) and (c) address certain exceptions or additional definitions relevant to the proposed Division 6 rules.

Proposed subsection (b) establishes that the term "Administrator" as used in 40 CFR Part 60, §§60.30f - 60.41f shall refer to the commission, except for the specific purpose of 40 CFR §60.35f(a)(5), in which case the term "Administrator" shall refer to the Administrator of the EPA. Under 40 CFR §60.30f(c)(1), approval of alternative methods to determine NMOC concentration or a site-specific methane generation rate constant cannot be delegated to States. The federal rule associated with approval of these alternative methods is 40 CFR §60.35f(a)(5), so for purposes of this specific rule the EPA must remain "the Administrator."

Proposed subsection (c) establishes a definition of a "legacy controlled landfill" for use with the proposed Division 6 rules. The proposed definition parallels the definition of "legacy controlled landfill" used by the EPA in the 40 CFR Part 62, Subpart OOO federal plan, with minor changes to align this definition with the Chapter 113 landfill rules. In plain language, a legacy controlled landfill is a landfill which submitted a collection and control system design plan before May 21, 2021, to comply with previous standards for MSW landfills (either 40 CFR Part 60, Subpart WWW, or 30 TAC Chapter 113, Division 1). This includes not only landfills which have already completed construction and installation of the GCCS, but also those that have submitted design plans and are within the 30-month timeline to install and start-up a GCCS according to 40 CFR §60.752(b)(2)(ii) (if subject to NSPS Subpart WWW), or the corresponding requirements of Chapter 113, Division 1.

§113.2404, Standards for existing municipal solid waste landfills

The commission proposes new §113.2404, which contains the technical and administrative requirements for affected MSW landfills under Subchapter D, Division 6.

Proposed subsection (a) specifies the following requirements for MSW landfills subject to Division 6: default emission standards; operational standards; compliance, testing, and monitoring provisions; recordkeeping and reporting provisions; and other technical and administrative requirements. Proposed subsection (a) refers directly to the provisions of 40 CFR Part 60, Subpart Cf, as amended, for the relevant requirement. The various sections of Subpart Cf have been amended at different times, so the most recent amendment date of each rule section is noted in the proposed rule text. Owners or operators of existing MSW landfills subject to Division 6 would be required to comply with the referenced requirements of Subpart Cf, as applicable, unless otherwise specified within the Division 6 rules. Certain landfills, such as legacy controlled landfills, are subject to different (non-Subpart Cf) requirements as addressed in proposed §113.2404(b), (c), and (d), and in §113.2410.

Proposed subsection (b) establishes that landfill gas collection and control systems that are approved by the commission and installed in compliance with 30 TAC §115.152 are deemed to

satisfy certain technical requirements of these emission guidelines. Proposed subsection (b) is intended to reduce potentially duplicative requirements relating to the landfill gas collection and control system. The gas collection and control system requirements in 30 TAC §115.152 are based on the requirements in the proposed version of the original landfill NSPS under 40 CFR Part 60, Subpart WWW (56 FR 24468, May 30, 1991). Proposed subsection (b) is essentially carried over from existing 30 TAC §113.2061(b), but the text of the proposed rule has been rephrased to more clearly state which specific design requirements of 40 CFR Part 60, Subpart Cf are satisfied. A detailed explanation of the 30 TAC §115.152 requirements and how they compare to the corresponding requirements of 40 CFR Part 60, Subpart Cf is provided in Appendix C.5 of the proposed state plan document. The technical requirements of 30 TAC §115.152 are still substantially equivalent to the corresponding Subparts Cc and Cf requirements for landfill gas collection and control systems, so preserving this previously approved aspect of the Texas state plan is still appropriate and would not result in any backsliding of emission standards or control system requirements. Owners or operators of landfills meeting the Chapter 115 requirements must still comply with all other applicable requirements of Division 6 and the associated requirements of 40 CFR Part 60, Subpart Cf, except for 40 CFR §60.33f(b) and (c).

Proposed subsection (c) allows legacy controlled landfills or landfills in the closed landfill subcategory that have already completed initial or subsequent performance tests to comply with prior landfill regulations (such as 40 CFR Part 60 Subpart WWW, or the Chapter 113, Subchapter D, Division 1, rules) to use those performance test results to comply with the proposed Division 6 rules. This proposed subsection parallels similar language in Subpart Cf at 40 CFR §60.33f(c)(2)(iii), but adds legacy controlled landfills as eligible to use this provision. This is consistent with the approach EPA used for the federal plan at 40 CFR §62.16714(c)(2)(iii). The commission believes that expanding the provision to include legacy controlled landfills, as the EPA did with the federal plan, is reasonable and will not reduce the effectiveness of the emission guidelines as implemented by the proposed revisions to the Texas §111(d) state plan for landfills. This provision will minimize the need for costly re-testing when appropriately recent test results are already available as a result of testing for compliance with prior landfill emission standards. Existing landfills in Texas will have been operating under the requirements of the federal plan for some time prior to the EPA's approval of the proposed changes to Chapter 113, and maintaining consistency with the federal plan for purposes of this requirement should reduce the potential for confusion or noncompliance while having no adverse effect on emissions or the environment.

Proposed subsection (d) specifies that legacy controlled landfills shall comply with the requirements of 40 CFR §62.16714(b)(1), as amended through May 21, 2021, in lieu of the requirements of 40 CFR §60.33f(b)(1). This change in requirements (relative to the Subpart Cf requirements) is necessary and reasonable because in the 40 CFR Part 62, Subpart OOO federal plan, 40 CFR §62.16714(b)(1)(ii) addresses the 30-month control deadlines for both legacy controlled landfills and landfills in the closed landfill subcategory, where the corresponding Subpart Cf requirement of 40 CFR §60.33f(b)(1)(ii) only addresses landfills in the closed landfill subcategory. The approach the EPA used in the federal plan to address legacy controlled landfills is an improvement relative to the corresponding provisions of Subpart Cf. Existing landfills in Texas will have been operating under the requirements of the federal plan for some time prior to the EPA's approval of the proposed changes to Chapter 113, and maintaining consistency with the federal plan for purposes of this requirement should reduce the potential for confusion or noncompliance while having no adverse effect on emissions or the environment.

§113.2406, Exemptions, Alternate Emission Standards, and Alternate Compliance Schedules

The commission proposes new §113.2406, which contains exemptions from the proposed Subchapter D, Division 6, requirements.

Proposed subsection (a) would exempt certain MSW landfills from the requirements of Division 6. This proposed exemption is carried over from the Division 1 landfill rules (30 TAC §113.2060(2)(A)) and the previously approved state plan, but has been rephrased as an explicit exemption rather than as a part of the definition of existing MSW landfill. The proposed rule exempts MSW landfills which have not accepted waste since October 9, 1993, and have no remaining waste disposal capacity. This proposed exemption modifies the applicability of the rules relative to the default federal requirements of 40 CFR Part 60, Subparts Cc and Cf, because it excludes MSW landfills which stopped accepting waste between November 8, 1987 (the date specified in the federal guidelines) and October 9, 1993. This proposed exemption is in accordance with 40 CFR §60.24(f) criteria, which allow a state rule to be less stringent for a particular designated class of facilities provided the state can show that factors exist which make application of a less stringent standard significantly more reasonable. When TCEQ adopted the Chapter 113, Division 1, rules for existing MSW landfills in 1998, the commission's analysis found that only one landfill (City of Killeen) which closed within the relevant time period had an estimated emission rate above the control threshold of 50 Mg/yr, and that the Killeen landfill's emissions were projected to fall below the 50 Mg/yr control threshold by 2004. The commission also estimated that, using an alternate calculation method, the emissions from the landfill would be even lower, and would be "borderline" relative to the 50 Mg/yr threshold. The commission further determined that the cost of installing and operating a gas collection and control system for the landfill would be unreasonable based on the short period of time the facility was projected to be above the 50 Mg/yr threshold. (*See* 23 TexReg 10876, October 23, 1999.) In EPA's approval of the TCEQ's original state plan submittal, the EPA acknowledged that no designated landfills which closed between November 8, 1987, and October 9, 1993, would have estimated non-methane organic compounds (NMOC) emissions above the 50 megagram (Mg) control threshold, and that controlling these closed landfills would not result in a significant reduction in NMOC emissions compared to the cost to install gas collection systems. (*See* 64 FR 32428.) As many years have passed since the original Texas state plan was approved in 1999, none of the landfills which stopped accepting waste during the relevant 1987-1993 time period would have current NMOC emissions above the 50 Mg/year threshold. The previous state plan analysis and other supporting material relating to this proposed exemption is included in Appendix C.5 of the proposed state plan document.

Proposed subsection (b) allows an owner or operator of an MSW landfill to apply for less stringent emission standards or longer compliance schedules, provided that the owner or operator demonstrates to the executive director and to the EPA that certain criteria are met. An exemption under subsection (b) may be requested based on unreasonable cost of control, the

physical impossibility of installing control equipment, or other factors specific to the MSW landfill that make application of a less stringent standard or compliance deadline more reasonable. The proposed provisions of subsection (b) are carried over from functionally identical provisions in the EPA-approved Division 1 landfill rules at 30 TAC §113.2067. The proposed exemption is consistent with the federal requirements in 40 CFR §60.24(f) for obtaining a less stringent emission standard or compliance schedule.

Proposed subsection (c) contains language to clarify how an owner or operator of an affected MSW landfill would request an alternate emission standard or alternate compliance schedule. Requests should be submitted to the TCEQ Office of Air, Air Permits Division, and a copy should be provided to the EPA Region 6 office.

§113.2408, Federal Operating Permit requirements

The commission proposes new §113.2408 to address federal operating permit requirements for MSW landfills subject to the proposed Chapter 113, Subchapter D, Division 6, rules. Proposed §113.2408 requires that owners or operators of MSW landfills subject to Division 6 obtain a federal operating permit as required under 40 CFR §60.31f(c) and (d) and applicable requirements of 30 TAC Chapter 122, Federal Operating Permits Program. Under 40 CFR §60.31f(c), a federal operating permit is not required for MSW landfills with a design capacity less than 2.5 million megagrams or 2.5 million cubic meters, unless the landfill is otherwise subject to the requirement to obtain an operating permit under 40 CFR Part 70 or 71. For purposes of submitting a timely application for an operating permit, the owner or operator of an MSW landfill with a design capacity greater than or equal to 2.5 million megagrams and 2.5 million cubic meters on the effective date of EPA approval of the Texas landfill state plan under §111(d) of the CAA, and not otherwise subject to either Part 70 or 71, becomes subject to the requirements of 40 CFR §70.5(a)(1)(i) or §71.5(a)(1)(i), 90 days after the effective date of the §111(d) state plan approval, even if the design capacity report is submitted earlier.

As stated in 40 CFR §60.31f(d), when an MSW landfill subject to the proposed Division 6 rules is closed (as defined in Subpart Cf) the owner or operator is no longer subject to the requirement to maintain an operating permit for the landfill if the landfill is not otherwise subject to the requirements of either Part 70 or 71 and either of the following conditions are met: (1) The landfill was never subject to the requirement to install and operate a gas collection and control system under 40 CFR §60.33f; or (2) the landfill meets the conditions for control system removal specified in 40 CFR §60.33f(f).

§113.2410, Initial and Annual Reporting, and Modified Reporting Requirements for Legacy Controlled Landfills

The commission proposes new §113.2410 to address certain initial reports and design plans which must be submitted to the executive director and to establish modified reporting requirements for legacy controlled landfills.

Proposed subsection (a) identifies the requirements for initial reports of design capacity, non-methane organic compound (NMOC) emissions, and initial gas collection and control system design plans. These proposed reporting requirements correspond to certain reports required by 40 CFR §60.38f and by the 40 CFR Part 62, Subpart OOO federal plan. The proposed subsection (a) rules do not require an owner or operator that has already submitted the specified reports to comply with the Subpart OOO federal plan to re-submit the reports to TCEQ unless specifically requested.

The commission is proposing an additional reporting requirement in 30 TAC §113.2410(a)(4) that would require owners or operators of existing MSW landfills to provide annual calculations of NMOC emissions. This proposed requirement is necessary to enable TCEQ to maintain current information on NMOC emissions from designated facilities covered by the proposed state plan and provide updated emissions inventory information to the EPA in compliance with federal annual progress report requirements of 40 CFR §60.25(e) and (f). The commission is proposing to exclude landfills with a capacity less than 2.5 million Mg by mass or 2.5 million cubic meters by volume from this annual NMOC inventory reporting requirement, as these small landfills are exempt from most substantive requirements of 40 CFR Part 60, Subpart Cf and 40 CFR Part 62, Subpart OOO, and the NMOC calculation's results would not affect the applicable emission control requirements or monitoring requirements for these small sites. If a small site were to increase capacity above the 2.5 Mg or 2.5 million cubic meter threshold, the applicable control requirements and monitoring requirements for the site would be determined by the NMOC calculation methodology specified in 40 CFR Part 60, Subpart Cf.

For the annual NMOC emission inventory reports required by proposed §113.2410(a)(4), TCEQ is proposing that designated facilities use calculation methods specified in the EPA's *Compilation of Air Pollutant Emissions Factors* (AP-42), as opposed to the calculation methods specified in 40 CFR Part 60, Subpart Cf. The proposed use of AP-42 calculation methods for purposes of the emissions inventory, rather than the methods in 40 CFR Part 60, Subpart Cf, is in accordance with federal guidance for the implementation of §111(d) state plans for MSW landfills (EPA-456R/98-009, *Summary of the Requirements for Section 111(d) State Plans for Implementing the Municipal Solid Waste Landfills Emission Guidelines*). In this guidance, the EPA explains that the calculation methods (AP-42 vs. the emission guideline rule itself) are intentionally different, as the AP-42 methodology for emission inventories is designed to reflect typical or average landfill emissions, while the emission guideline rule methodology is purposefully conservative to protect human health, encompass a wide range of MSW landfills, and encourage the use of site-specific data.

At this time, the commission is not proposing a specific method that affected facilities would use to submit the annual NMOC emission inventory reports. The commission anticipates that an electronic method would facilitate more efficient collection and analysis of the data. The annual reporting might be implemented through modification of the commission's existing Annual Emissions Inventory Report (AEIR) system, the commission's existing e-permitting system, or through a separate portal or interface. The commission invites comment on possible methods for submittal of these annual NMOC inventory reports. Depending on the comments received and other factors, the commission may specify the method of reporting in the final rule, if adopted, or in guidance posted on the commission's website.

It should be noted that proposed 30 TAC §113.2410 does not comprehensively include all reporting requirements, and that owners or operators of MSW landfills subject to Subchapter D, Division 6, must also comply with any additional reporting requirements specified in 40 CFR §60.38f or elsewhere in 40 CFR Part 60, Subpart Cf, even if not specifically identified in §113.2410.

Proposed subsection (b) establishes certain exemptions from reporting requirements for legacy controlled landfills which have already submitted similar reports to comply with prior regulations that applied to MSW landfills. Specifically, the owner or operator of a legacy controlled landfill is not required to submit an initial design capacity report, initial or subsequent NMOC emission rate report, collection and control system design plan, initial performance test report, or the initial annual report, if those report(s) were already provided under the requirements of 40 CFR Part 60, Subpart WWW, or the Chapter 113, Subchapter D, Division 1, rules. This proposed exemption corresponds to the approach EPA used for legacy controlled landfills in the 40 CFR Part 62, Subpart OOO, federal plan (specifically, 40 CFR §62.16711(h)). The commission has included this proposed provision because the approach the EPA used in the federal plan to address reporting for legacy controlled landfills is an improvement relative to the corresponding provisions of Subpart Cf. Existing landfills in Texas will have been operating under the requirements of the federal plan for some time prior to the EPA's approval of the proposed changes to Chapter 113, and maintaining consistency with this aspect of the federal plan should reduce the potential for confusion or noncompliance while having no adverse effect on emissions or the environment.

Proposed subsection (c) establishes that owners or operators of legacy controlled landfills that have already submitted an annual report under 40 CFR Part 60, Subpart WWW, or Chapter 113, Subchapter D, Division 1, are required to submit the following annual report under Division 6 no later than one year after the most recent annual report was submitted, as specified in 40 CFR §62.16724(h). This is a clarification of the timing requirements for the annual reports of legacy controlled landfills transitioning from the prior-effective landfill regulations (40 CFR Part 60 Subpart WWW, or Chapter 113, Subchapter D, Division 1) to the new Division 6 regulations. This proposed subsection corresponds to the approach EPA used for legacy controlled landfills in the 40 CFR Part 62, Subpart OOO, federal plan (specifically, 40 CFR §62.16724(h)). Existing landfills in Texas will have been operating under the requirements of the federal plan for some time prior to the EPA's approval of the proposed changes to Chapter 113 and maintaining consistency with this aspect of the federal plan should reduce the potential for confusion or noncompliance while having no adverse effect on emissions or the environment.

Proposed subsection (d) requires owners or operators of legacy controlled landfills that demonstrate compliance with the emission control requirements of Division 6 using a treatment system (as defined in 40 CFR §60.41f) to comply with 40 CFR §62.16724(d)(7). This requires the preparation of a site-specific treatment system monitoring plan no later than May 23, 2022. Legacy controlled landfills affected by this rule will have been required to prepare this plan by May 23, 2022, to comply with the federal plan, even though the proposed Subchapter D, Division 6, rules were not yet effective or approved by the EPA at that time. This proposed requirement maintains consistency with this aspect of the federal plan and ensures that TCEQ will have continuing authority to enforce this requirement for any legacy controlled landfills which fail to prepare the required treatment system monitoring plan.

§113.2412, Implementation Date and Increments of Progress

The commission proposes new §113.2412 to establish an implementation date and required increments of progress for the proposed Subchapter D, Division 6, rules.

Proposed subsection (a) contains language that requires owners or operators of existing MSWLF to comply with the Division 6 requirements beginning on the effective date of the EPA's approval of Texas' revised §111(d) state plan implementing the 2016 emission guidelines for existing MSW landfills. Prior to this implementation date, owners or operators of existing MSW landfills shall continue to comply with the Chapter 113, Subchapter D, Division 1, rules; 40 CFR Part 60, Subpart WWW; and/or 40 CFR Part 62, Subpart OOO, as applicable. On and after the implementation date specified in this subsection, owners or operators of existing MSW landfills would no longer be required to comply with the Chapter 113, Subchapter D, Division 1, requirements or the federal requirements of Subparts WWW or OOO.

Proposed subsection (b) requires owners or operators of MSW landfills subject to Subchapter D, Division 6, to comply with all applicable requirements of progress specified in 40 CFR Part 62, Subpart OOO, Table 1, as amended through May 21, 2021. These increments of progress set deadlines for certain milestones, such as the submittal of the cover page of the final control plan; the awarding of contracts; the beginning of on-site construction; the completion of on-site construction; and final compliance. The commission is proposing to require the same increments of progress as the 40 CFR Part 62 federal plan because the federal plan is already in effect, and maintaining consistency with the Subpart OOO requirements will minimize confusion and the potential for noncompliance for owners or operators who have already started the process of designing and installing controls to comply with the federal plan. In addition, 40 CFR §62.16712(c)(1), indicates that facilities subject to the federal plan will remain subject to the schedule in Table 1, even if a subsequently approved state or tribal plan contains a less stringent schedule. As stated in footnote 2 of Subpart OOO, Table 1, increments of progress that have already been completed under previous regulations do not have to be completed again.

Fiscal Note: Costs to State and Local Government

Jené Bearse, Analyst in the Budget and Planning Division, has determined that for the first five-year period the proposed rules are in effect, no fiscal implications are anticipated for the agency or for other units of state or local government as a result of administration or enforcement of the proposed rules. The federal plan adopted under 40 CFR Part 62, Subpart OOO, may have a fiscal impact to units of local government, but the proposed transfer of regulatory authority to the agency does not change that fiscal impact.

Public Benefits and Costs

Ms. Bearse determined that for each year of the first five years the proposed rules are in effect, the public benefit of the proposed transfer anticipated would be a more accessible point of contact (TCEQ) for the public and the regulated community for the regulation of landfill emissions. Because this proposal designates the TCEQ as the implementing agency for federal emission guidelines for landfills, the public may also utilize the Small Business and Local Government Assistance program (TexasEnviroHelp.org), which provides free technical assistance for the agency's regulatory programs.

The proposed rulemaking is not anticipated to result in fiscal implications for businesses or individuals. The federal plan adopted under 40 CFR Part 62, Subpart OOO, may have a fiscal impact to businesses or individuals, but the proposed transfer of regulatory authority to the agency does not change that fiscal impact.

Local Employment Impact Statement

The commission reviewed this proposed rulemaking and determined that a Local Employment Impact Statement is not required because the proposed rulemaking does not adversely affect a local economy in a material way for the first five years that the proposed rules are in effect.

Rural Communities Impact Assessment

The commission reviewed this proposed rulemaking and determined that the proposed rulemaking does not adversely affect rural communities in a material way for the first five years that the proposed rules are in effect. The amendments would apply statewide and have the same effect in rural communities as in urban communities.

Small Business and Micro-Business Assessment

No adverse fiscal implications are anticipated for small or micro-businesses due to the implementation or administration of the proposed rules for the first five-year period the proposed rules are in effect.

Small Business Regulatory Flexibility Analysis

The commission reviewed this proposed rulemaking and determined that a Small Business Regulatory Flexibility Analysis is not required because the proposed rules do not adversely affect a small or micro-business in a material way for the first five years the proposed rules are in effect.

Government Growth Impact Statement

The commission prepared a Government Growth Impact Statement assessment for this proposed rulemaking. The proposed rulemaking does not create or eliminate a government program and would not require an increase or decrease in future legislative appropriations to the agency. The proposed rulemaking does not require the creation of new employee positions, eliminate current employee positions, nor require an increase or decrease in fees paid to the agency. The proposed rulemaking does create a new regulation in Chapter 113, Subchapter D, Division 6. The proposed rulemaking phases out the requirement to comply with Chapter 113, Subchapter D, Division 1, but does not repeal it. The proposed rulemaking increases the number of individuals subject to landfill regulations under Chapter 113; however, those individuals are regulated under the federal standards and other regulations by the agency. During the first five years, the proposed rules should not impact positively or negatively the state's economy.

Draft Regulatory Impact Analysis Determination

The commission reviewed the proposed rulemaking in light of the regulatory impact analysis requirements of Tex. Gov't Code Ann., §2001.0225, and determined that the proposed rulemaking does not meet the definition of a "Major environmental rule" as defined in that statute, and in addition, if it did meet the definition, would not be subject to the requirement to prepare a regulatory impact analysis. A "Major environmental rule" means a rule, the specific intent of which is to protect the environment or reduce risks 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 the state or a sector of the state. Additionally, the proposed rulemaking does not meet any of the four applicability criteria for requiring a regulatory impact analysis for a "Major environmental rule," which are listed in Tex. Gov't Code Ann., §2001.0225. Tex. Gov't Code Ann., §2001.0225 applies only to a major environmental rule the result of which is to: 1) exceed a standard set by federal law, unless the rule is specifically required by state law; 2) exceed an express requirement of state law, unless the rule is specifically required by federal law; 3) exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program; or 4) adopt a rule solely under the general powers of the agency instead of under a specific state law.

The specific intent of these proposed rules is to comply with federal emission guidelines for existing municipal solid waste landfills mandated by 42 United States Code (U.S.C.), §7411 (Federal Clean Air Act (FCAA), §111); and required to be included in operating permits by 42 U.S.C., §7661a (FCAA, §502) as specified elsewhere in this preamble. These sources are required to comply with the federal emission guidelines whether or not the commission adopts rules to implement the federal emission guidelines. The sources are required to comply with federal plans adopted by EPA if states do not adopt state plans. As discussed in the FISCAL NOTE portion of this preamble, the proposed rules are not anticipated to add any significant additional costs to affected individuals or businesses beyond what is already required to comply with these federal standards for: the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state.

Under 42 U.S.C., §7661a (FCAA, §502), states are required to have federal operating permit programs that provide authority to issue permits and assure compliance with each applicable standard, regulation, or requirement under the FCAA; including emission guidelines, which are required under 42 U.S.C., §7411 (FCAA, §111). Similar to requirements in 42 U.S.C., §7410 (FCAA, §110) regarding the requirement to adopt and implement plans to attain and maintain the national ambient air quality standards, states are not free to ignore requirements in 42 U.S.C., §7661a (FCAA, §502), and must develop and submit programs to provide for operating permits for major sources that include all applicable requirements of the FCAA. Additionally, states are required by 42 U.S.C., §7411 (FCAA, §111), to adopt and implement plans to implement and enforce emission guidelines promulgated by the EPA.

The requirement to provide a fiscal analysis of regulations in the Texas Government Code was amended by Senate Bill (SB) 633 during the 75th Legislature, 1997. The intent of SB 633 was to require agencies to conduct a regulatory impact analysis of extraordinary rules. Such rules are identified in the statutory language as major environmental rules that will have a material adverse impact and will exceed a requirement of state law, federal law or a delegated federal program, or are adopted solely under the general powers of the agency. With the understanding that this requirement would seldom apply, the commission provided a cost estimate for SB 633 that concluded "based on an assessment of rules adopted by the agency in the past, it is not anticipated that the bill will have significant fiscal implications for the agency due to its limited application." The commission also noted that the number of rules that would require assessment under the provisions of the bill was not large. This conclusion was based, in part, on the criteria set forth in the bill that exempted rules from the full analysis unless the rule was a major environmental rule that exceeds a federal law. Because of the ongoing need to meet federal requirements, the commission routinely proposes and adopts rules designed to incorporate or satisfy specific federal requirements. The legislature is presumed

to understand this federal scheme. If each rule proposed by the commission to meet a federal requirement was considered to be a major environmental rule that exceeds federal law, then each of those rules would require the full regulatory impact analysis (RIA) contemplated by SB 633. This conclusion is inconsistent with the conclusions reached by the commission in its cost estimate and by the Legislative Budget Board (LBB) in its fiscal notes. Since the legislature is presumed to understand the fiscal impacts of the bills it passes, and that presumption is based on information provided by state agencies and the LBB, the commission concludes that the intent of SB 633 was only to require the full RIA for rules that are extraordinary in nature.

While the proposed rules may have a broad impact, that impact is no greater than is necessary or appropriate to meet the requirements of the FCAA and in fact creates no additional impacts since the proposed rules do not modify the federal emission guidelines in any substantive aspect, but merely provide for minor administrative changes as described elsewhere in this preamble. For these reasons, the proposed rules fall under the exception in Texas Government Code, §2001.0225(a), because they are required by, and do not exceed, federal law. The commission has consistently applied this construction to its rules since this statute was enacted in 1997. Since that time, the legislature has revised the Texas Government Code, but left this provision substantially unamended. It is presumed that "when an agency interpretation is in effect at the time the legislature amends the laws without making substantial change in the statute, the legislature is deemed to have accepted the agency's interpretation." *Central Power & Light Co. v. Sharp,* 919 S.W.2d 485, 489 (Tex. App. -- Austin 1995), *writ denied with per curiam opinion respecting another issue,* 960 S.W.2d 617 (Tex. 1997); *Mosley v. Tex. Health & Human Services Comm'n,* 593 S.W.3d 250 (Tex. 2019); *Tex. Ass'n of Appraisal Districts, Inc. v. Hart,* 382 S.W.3d 587 (Tex. App.--Austin 2012, no pet.); *Tex. Dep't of Protective & Regulatory Services v. Mega Child Care, Inc.,* 145 S.W.3d 170 (Tex. 2004).

The commission's interpretation of the regulatory impact analysis requirements is also supported by a change made to the Texas Administrative Procedure Act (APA) by the legislature in 1999. In an attempt to limit the number of rule challenges based upon APA requirements, the legislature clarified that state agencies are required to meet these sections of the APA against the standard of "substantial compliance," Tex. Gov't Code Ann., §2001.035. The legislature specifically identified Tex. Gov't Code Ann., §2001.0225, as falling under this standard. As discussed in this analysis and elsewhere in this preamble, the commission has substantially complied with the requirements of Tex. Gov't Code Ann., §2001.0225. The proposed rules implement the requirements of the FCAA as discussed in this analysis and elsewhere in this preamble.

The emission guidelines being proposed for incorporation are federal standards that are required by 42 U.S.C., §7411 (FCAA, §111), and are required to be included in permits under 42 U.S.C., §7661a (FCAA, §502). They are proposed with only minor administrative changes and will not exceed any standard set by state or federal law. These proposed rules will not implement an express requirement of state law. The proposed rules do not exceed a requirement of a delegation agreement or a contract between state and federal government, as the EPA will delegate implementation and enforcement of the emission guidelines to Texas if this rulemaking is adopted and EPA approves the rules as part of the State Plan required by 42 U.S.C. §7411(d) (FCAA, §111(d)). The proposed rules were not developed solely under the general powers of the agency but are authorized by specific sections of Texas Health and Safety Code, Chapter 382 (also known as the Texas Clean Air Act), and the Texas Water Code, which are cited in the STATUTORY AUTHORITY section of this preamble, including Texas Health and Safety Code, §§382.011, 382.012, and 382.017. Therefore, this proposed rulemaking action is not subject to the regulatory analysis provisions of Tex. Gov't Code Ann., §2001.0225(b).

The commission invites public comment regarding the Draft Regulatory Impact Analysis Determination during the public comment period. Written comments on the Draft Regulatory Impact Analysis Determination may be submitted to the contact person at the address listed under the Submittal of Comments section of this preamble.

Takings Impact Assessment

The commission evaluated the proposed rulemaking and performed an assessment of whether the requirements of Tex. Gov't Code Ann., Chapter 2007, are applicable. Under Tex. Gov't Code Ann., §2007.002(5), "taking" means a governmental action that affects private real property, in whole or in part, or temporarily or permanently, in a manner that requires the governmental entity to compensate the private real property owner as provided by the Fifth and Fourteenth Amendments to the United States Constitution or §17 or §19, Article I, Texas Constitution; or a governmental action that affects an owner's private real property that is the subject of the governmental action, in whole or in part or temporarily or permanently, in a manner that restricts or limits the owner's right to the property that would otherwise exist in the absence of the governmental action; and is the producing cause of a reduction of at least 25 percent in the market value of the affected private real property, determined by comparing the market value of the property as if the governmental action is not in effect and the market value of the property determined as if the governmental action is in effect.

The commission completed a takings impact analysis for the proposed rulemaking action as required by Tex. Gov't Code Ann., §2007.043. The primary purpose of this proposed rulemaking action, as discussed elsewhere in this preamble, is to propose rules to implement the federal emission guidelines for municipal solid waste landfills, mandated by 42 U.S.C., §7411 (FCAA, §111), and required to be included in operating permits by 42 U.S.C., §7661a (FCAA, §502), to facilitate implementation and enforcement of the emission guidelines by the state. States are also required to submit state plans for the implementation and enforcement of the emission guidelines to EPA for its review and approval.

Tex. Gov't Code Ann., §2007.003(b)(4), provides that the requirements of Chapter 2007 of the Texas Government Code do not apply to this proposed rulemaking because it is an action reasonably taken to fulfill an obligation mandated by federal law. In addition, the commission's assessment indicates that Texas Government Code Chapter 2007 does not apply to these proposed rules because this action is taken in response to a real and substantial threat to public health and safety; that is designed to significantly advance the health and safety purpose; and that it does not impose a greater burden than is necessary to achieve the health and safety purpose. For the reasons stated above, this action is exempt under Tex. Gov't Code Ann. §2007.003(b)(13).

Any reasonable alternative to the proposed rulemaking would be excluded from a takings analysis required under Chapter 2007

of the Texas Government Code for the same reasons as elaborated in this analysis. As discussed in this preamble, states are not free to ignore the federal requirements to implement and enforce the federal emission guidelines for municipal solid waste landfills, including the requirement to submit state plans for the implementation and enforcement of the emission guidelines to EPA for its review and approval; nor are they free to ignore the federal requirement to include the emission guideline requirements in state issued federal operating permits. If the state does not adopt the proposed rules, the federal rules will continue to apply, and sources must comply with a federal plan that implements those rules. The proposed rules present as narrowly tailored an approach to complying with the federal mandate as possible without unnecessary incursion into possible private real property interests. Consequently, the proposed rules will not create any additional burden on private real property. The proposed rules will not affect private real property in a manner that would require compensation to private real property owners under the United States Constitution or the Texas Constitution. The proposal also will not affect private real property in a manner that restricts or limits an owner's right to the property that would otherwise exist in the absence of the governmental action. Therefore, the proposed rulemaking will not cause a taking under Texas Government Code, Chapter 2007; nor does the Texas Government Code, Chapter 2007, apply to the proposed rulemaking.

Consistency with the Coastal Management Program

The commission reviewed the proposed rulemaking and found that the proposal is subject to the Texas Coastal Management Program (CMP) in accordance with the Coastal Coordination Act, Texas Natural Resources Code, §§33.201 et seq., and therefore must be consistent with all applicable CMP goals and policies. The commission conducted a consistency determination for the proposed rules in accordance with Coastal Coordination Act implementation rules, 31 TAC §505.22, and found the proposed rulemaking is consistent with the applicable CMP goals and policies.

The CMP goal applicable to this proposed rulemaking is the goal to protect, preserve, restore, and enhance the diversity, quality, quantity, functions, and values of coastal natural resource areas (31 TAC §501.12(l)). The proposed amendments to Chapter 113 would update TCEQ rules to implement federal emission guidelines for existing landfills under 40 CFR Part 60, Subpart Cf. These guidelines require certain landfills to install and operate gas collection systems to capture and control emissions. The CMP policy applicable to the proposed rulemaking is the policy that commission rules comply with federal regulations in 40 CFR to protect and enhance air quality in the coastal areas (31 TAC §501.32). This rulemaking also complies with applicable requirements of 40 CFR Part 60, Subpart B, Adoption and Submittal of State Plans for Designated Facilities.

Written comments on the consistency of this rulemaking may be submitted to the contact person at the address listed under the Submittal of Comments section of this preamble.

Effect on Sites Subject to the Federal Operating Permits Program

Sites which would be required to obtain a federal operating permit under proposed §113.2408 are already required to obtain a federal operating permit under existing federal regulations. The proposed Subchapter D, Division 6, rules would be applicable requirements under 30 TAC Chapter 122, Federal Operating Permits Program. If the proposed rules are adopted, owners or operators of affected sites subject to the federal operating permit program and these rules must, consistent with the revision process in Chapter 122, upon the effective date of the rulemaking, revise their operating permit to include the new Chapter 113 requirements.

Announcement of Hearing

The commission will hold a hybrid in-person and virtual public hearing on this proposal in Austin on February 23, 2023, at 10:00 a.m. in Building D, Room 191, at the commission's central office located at 12100 Park 35 Circle. The hearing is structured for the receipt of oral or written comments by interested persons. Individuals may present oral statements when called upon in order of registration. Open discussion will not be permitted during the hearing; however, commission staff members will be available to discuss the proposal 30 minutes prior to the hearing.

Registration

Individuals who plan to attend the hearing virtually and want to provide oral comments and/or want their attendance on record must register by Tuesday, February 21, 2023. To register for the hearing, please email *Rules@tceq.texas.gov* and provide the following information: your name, your affiliation, your email address, your phone number, and whether or not you plan to provide oral comments during the hearing.

Instructions for participating in the hearing will be sent on Wednesday, February 22, 2023, to those who register for the hearing.

Members of the public who do not wish to provide oral comments but would like to view the hearing virtually may do so at no cost at: https://teams.microsoft.com/l/meetup-join/19%3ameeting_MzRjOGJmNTktODQxNy00MWY2LWE1MTAtODk0ZTY4MTllYTg4%40thread.v2/0?context=%7b%22Tid%22%3a%22871a83a4-a1ce-4b7a-8156-3bcd93a08fba%22%2c%22Oid%22%3a%22e74a40ea-69d4-469d-a8ef-06f2c9ac2a80%22%2c%22IsBroadcastMeeting%22%3atrue%7d

Persons who have special communication or other accommodation needs who are planning to attend the hearing should contact Sandy Wong, Office of Legal Services at (512) 239-1802 or 1-800-RELAY-TX (TDD). The hearing will be conducted in English. Language interpretation services may be requested. Requests should be made as far in advance as possible.

Submittal of Comments

Written comments may be submitted to Cecilia Mena, MC 205, Office of Legal Services, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087, or faxed to *fax4808@tceq.texas.gov.* Electronic comments may be submitted through the TCEQ Public Comments system at: *https://tceq.commentinput.com/comment/search.* File size restrictions may apply to comments being submitted electronically. All comments should reference Rule Project Number 2017-014-113-AI. The comment period closes on February 28, 2023. Copies of the proposed rulemaking can be obtained from the commission's website at *https://www.tceq.texas.gov/rules/propose_adopt.html.* For further information, please contact Michael Wilhoit, Air Permits Division, (512) 239-1222.

DIVISION 1. MUNICIPAL SOLID WASTE LANDFILLS

30 TAC §113.2069

Statutory Authority

The amended section is proposed under Texas Water Code (TWC), §5.102, concerning General Powers, TWC, §5.103, concerning Rules, and TWC, §5.105, concerning General Policy, which authorize the commission to adopt rules necessary to carry out its powers and duties; and under Texas Health and Safety Code (THSC), §382.017, concerning Rules, which authorizes the commission to adopt rules consistent with the policy and purpose of the Texas Clean Air Act. The amended section is also proposed under THSC, §382.002, concerning Policy and Purpose, which establishes the commission's purpose to safeguard the state's air resources, consistent with the protection of public health, general welfare, and physical property; THSC, §382.011, concerning General Powers and Duties, which authorizes the commission to control the quality of the state's air; THSC, §382.012, concerning State Air Control Plan, which authorizes the commission to prepare and develop a general, comprehensive plan for the proper control of the state's air; THSC, §382.014, concerning Emission Inventory, which authorizes the commission to require a person whose activities cause air contaminant emissions to submit information to enable the commission to develop an emissions inventory; THSC, §382.015, concerning Power to Enter Property, which authorizes a member, employee, or agent of the commission to enter public or private property to inspect and investigate conditions relating to emissions of air contaminants to or the concentration of air contaminants in the atmosphere; THSC, §382.016, concerning Monitoring Requirements; Examination of Records, which authorizes the commission to prescribe reasonable requirements for measuring and monitoring the emissions of air contaminants, as well as require recordkeeping; THSC, §382.021, concerning Sampling Methods and Procedures, which authorizes the commission to prescribe sampling methods and procedures; THSC, §382.022, concerning Investigations, which authorizes the commission to make or require the making of investigations; and THSC, §382.051, concerning Permitting Authority of Commission; Rules, which authorizes the commission to adopt rules as necessary to comply with changes in federal law or regulations applicable to permits issued under the Texas Clean Air Act.

The proposed amended section implements TWC, §§5.102 - 5.103, and 5.105; as well as THSC, §§382.002, 382.011 - 382.017, 382.021 - 382.022, and 382.051.

§113.2069. Compliance Schedule and Transition to 2016 Landfill Emission Guidelines.

(a) An owner or operator subject to the requirements of this division shall submit the initial design capacity report in accordance with 40 Code of Federal Regulations (CFR) Part 60, §60.757(a)(2) to the executive director within 90 days from the date the commission publishes notification in the *Texas Register* [~~Texas Register~~] that the United States Environmental Protection Agency (EPA) has approved this rule.

(b) An owner or operator of a municipal solid waste landfill with a design capacity equal to or greater than 2.5 million megagrams and 2.5 million cubic meters and subject to the requirements of this division shall also submit the initial non-methane organic compound emission rate report in accordance with 40 CFR §60.757(b)(2) to the executive director within 90 days from the date the commission publishes notification in the *Texas Register* [~~Texas Register~~] that EPA has approved this rule.

(c) On and after the implementation date specified in §113.2412 of this title, owners or operators of landfills subject to the requirements of this division shall instead comply with the applicable requirements of Division 6 of this subchapter.

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

Filed with the Office of the Secretary of State on January 12, 2023.

TRD-202300135
Guy Henry
Acting Deputy Director, Environmental Law Division
Texas Commission on Environmental Quality
Earliest possible date of adoption: February 26, 2023
For further information, please call: (512) 239-6295

♦ ♦ ♦

DIVISION 6. 2016 EMISSION GUIDELINES FOR EXISTING MUNICIPAL SOLID WASTE LANDFILLS

30 TAC §§113.2400, 113.2402, 113.2404, 113.2406, 113.2408, 113.2410, 113.2412

Statutory Authority

The new sections are proposed under Texas Water Code (TWC), §5.102, concerning General Powers, TWC, §5.103, concerning Rules, and TWC, §5.105, concerning General Policy, which authorize the commission to adopt rules necessary to carry out its powers and duties; and under Texas Health and Safety Code (THSC), §382.017, concerning Rules, which authorizes the commission to adopt rules consistent with the policy and purpose of the Texas Clean Air Act. The new sections are also proposed under THSC, §382.002, concerning Policy and Purpose, which establishes the commission's purpose to safeguard the state's air resources, consistent with the protection of public health, general welfare, and physical property; THSC, §382.011, concerning General Powers and Duties, which authorizes the commission to control the quality of the state's air; THSC, §382.012, concerning State Air Control Plan, which authorizes the commission to prepare and develop a general, comprehensive plan for the proper control of the state's air; THSC, §382.014, concerning Emission Inventory, which authorizes the commission to require a person whose activities cause air contaminant emissions to submit information to enable the commission to develop an emissions inventory; THSC, §382.015, concerning Power to Enter Property, which authorizes a member, employee, or agent of the commission to enter public or private property to inspect and investigate conditions relating to emissions of air contaminants to or the concentration of air contaminants in the atmosphere; THSC, §382.016, concerning Monitoring Requirements; Examination of Records, which authorizes the commission to prescribe reasonable requirements for measuring and monitoring the emissions of air contaminants, as well as require recordkeeping; THSC, §382.021, concerning Sampling Methods and Procedures, which authorizes the commission to prescribe sampling methods and procedures; THSC, §382.022, concerning Investigations, which authorizes the commission to make or require the making of investigations; and THSC, §382.051, concerning Permitting Authority of Commission; Rules, which au-

thorizes the commission to adopt rules as necessary to comply with changes in federal law or regulations applicable to permits issued under the Texas Clean Air Act. The new sections are also proposed under TWC, §7.002, Enforcement Authority, which authorizes the commission to institute legal proceedings to compel compliance; TWC, §7.032, Injunctive Relief, which provides that injunctive relief may be sought by the executive director; and TWC, §7.302, Grounds for Revocation or Suspension of Permit, which provides authority to the commission to revoke or suspend any air quality permit.

The proposed new sections implement TWC, §§5.102 - 5.103, and 5.105; as well as THSC, §§382.002, 382.011 - 382.017, 382.021 - 382.022 and 382.051.

§113.2400. Applicability.

(a) The requirements of this division apply to existing municipal solid waste landfills (MSWLFs) for which construction, reconstruction, or modification was commenced on or before July 17, 2014, except for landfills exempted under §113.2406 of this title (relating to Exemptions, Alternate Emission Standards, and Alternate Compliance Schedules).

(b) Physical or operational changes made to an existing MSWLF solely to comply with these emission guidelines are not considered a modification or reconstruction and would not subject an existing MSWLF to the requirements of a standard of performance for new MSWLFs (such as 40 Code of Federal Regulations (CFR) Part 60, Subpart XXX).

(c) The requirements of this division do not apply to landfills which are subject to 40 CFR Part 60, Subpart XXX (Standards of Performance for Municipal Solid Waste Landfills that Commenced Construction, Reconstruction, or Modification after July 17, 2014).

(d) The requirements of this division do not apply until the implementation date specified in §113.2412 of this title (relating to Implementation Date and Increments of Progress).

§113.2402. Definitions.

(a) Except as provided in subsections (b) and (c) of this section, the terms used in this division are defined in 40 CFR §60.2 as amended through May 16, 2007, and 40 CFR §60.41f as amended through March 26, 2020, which are incorporated by reference.

(b) The term "Administrator" wherever it appears in 40 CFR Part 60, §§60.30f - 60.41f, shall refer to the commission, except for purposes of 40 CFR §60.35f(a)(5). For purposes of 40 CFR §60.35f(a)(5), the term "Administrator" means the Administrator of the U.S. Environmental Protection Agency.

(c) Legacy controlled landfill--any municipal solid waste landfill subject to this division that submitted a gas collection and control system (GCCS) design plan prior to May 21, 2021, in compliance with 40 CFR §60.752(b)(2)(i) or 30 TAC §113.2061 of this title (relating to Standards for Air Emissions), depending on which regulation was applicable to the landfill. This definition applies to those landfills that completed construction and began operations of the GCCS and those that are within the 30-month timeline for installation and start-up of a GCCS according to 40 CFR §60.752(b)(2)(ii), or the requirements of 30 TAC Chapter 113, Subchapter D, Division 1.

§113.2404. Standards for Existing Municipal Solid Waste Landfills.

(a) Except as specifically provided otherwise in §§113.2400 - 113.2412 of this title, an owner or operator of an existing municipal solid waste landfill (MSWLF) subject to the requirements of this division shall comply with the applicable provisions specified in 40 CFR Part 60, Subpart Cf, as follows:

(1) 40 CFR §60.31f, relating to Designated Facilities, as amended through August 29, 2016;

(2) 40 CFR §60.32f, relating to Compliance Times, as amended through August 29, 2016;

(3) 40 CFR §60.33f, relating to Emission Guidelines for municipal solid waste landfill emissions, as amended through August 29, 2016;

(4) 40 CFR §60.34f, relating to Operational Standards for collection and control systems, as amended through March 26, 2020;

(5) 40 CFR §60.35f, relating to Test methods and procedures, as amended through August 29, 2016;

(6) 40 CFR §60.36f, relating to Compliance provisions, as amended through March 26, 2020;

(7) 40 CFR §60.37f, relating to Monitoring of operations, as amended through March 26, 2020;

(8) 40 CFR §60.38f, relating to Reporting guidelines, as amended through March 26, 2020;

(9) 40 CFR §60.39f, relating to Recordkeeping guidelines, as amended through March 26, 2020; and

(10) 40 CFR §60.40f, relating to Specifications for active collection systems, as amended through August 29, 2016.

(b) Gas collection and control systems approved by the commission and installed at an MSWLF in compliance with §115.152 of this title (relating to Control Requirements), satisfy the gas collection and control system design requirements of 40 CFR §60.33f(b) and (c) for purposes of this section.

(c) Legacy controlled landfills or landfills in the closed landfill subcategory that have already installed control systems and completed initial or subsequent performance tests may comply with this division using the initial or most recent performance test conducted to comply with 40 CFR Part 60, Subpart WWW, or 30 TAC Chapter 113, Subchapter D, Division 1 of this title.

(d) Legacy controlled landfills shall comply with the requirements of 40 CFR §62.16714(b)(1), as amended through May 21, 2021, in lieu of the requirements of 40 CFR §60.33f(b)(1).

§113.2406. Exemptions, Alternate Emission Standards, and Alternate Compliance Schedules.

(a) A municipal solid waste landfill (MSWLF) meeting the following conditions is not subject to the requirements of this division:

(1) The MSWLF has not accepted waste at any time since October 9, 1993; and

(2) The MSWLF does not have additional design capacity available for future waste deposition, regardless of whether the MSWLF is currently open or closed.

(b) An MSWLF may apply for less stringent emission standards or longer compliance schedules than those otherwise required by this division, provided that the owner or operator demonstrates to the executive director and EPA, the following:

(1) unreasonable cost of control resulting from MSWLF age, location, or basic MSWLF design;

(2) physical impossibility of installing necessary control equipment; or

(3) other factors specific to the MSWLF that make application of a less stringent standard or final compliance time significantly more reasonable.

(c) Owners or operators requesting alternate emission standards or compliance schedules under subsection (b) of this section shall submit requests and supporting documentation to the TCEQ Office of Air, Air Permits Division and provide a copy to the United States Environmental Protection Agency, Region 6.

§113.2408. Federal Operating Permit Requirements.

The owner or operator of an existing municipal solid waste landfill subject to the requirements of this division shall comply with the applicable requirements of 40 CFR §60.31f(c) and (d), and 30 TAC Chapter 122, Federal Operating Permits Program, relating to the requirement to obtain and maintain a federal operating permit.

§113.2410. Initial and Annual Reporting, and Modified Reporting Requirements for Legacy Controlled Landfills.

(a) An owner or operator of a municipal solid waste landfill (MSWLF) subject to the requirements of this division shall comply with the following reporting requirements, except as otherwise specified for legacy controlled landfills in subsections (b) - (d) of this section.

(1) The owner or operator shall submit the initial design capacity report in accordance with 40 CFR Part 60, §60.38f(a), to the executive director within 90 days from the implementation date specified in §113.2412 of this title (relating to Implementation Date and Increments of Progress). Owners or operators that have already submitted an initial design capacity report to EPA to satisfy 40 CFR §62.16724 are not required to submit the report again, unless specifically requested by the executive director.

(2) An owner or operator of an MSWLF with a design capacity equal to or greater than 2.5 million megagrams and 2.5 million cubic meters and subject to the requirements of this division shall also submit the initial non-methane organic compound (NMOC) emission rate report in accordance with 40 CFR §60.38f(c) to the executive director within 90 days from the implementation date specified in §113.2412 of this title. Owners or operators that have already submitted an initial NMOC report to EPA to satisfy 40 CFR §62.16724 are not required to submit the report again, unless specifically requested by the executive director.

(3) An owner or operator of an MSWLF subject to the requirements of this division shall comply with applicable requirements of 40 CFR §60.38f(d) and (e) concerning the submittal of a site-specific gas collection and control system design plan to the executive director. Owners or operators that have already submitted a design plan to EPA to satisfy 40 CFR §62.16724 are not required to submit the design plan again, unless specifically requested by the executive director.

(4) Owners or operators of an MSWLF subject to the requirements of this division shall provide to the executive director an annual emission inventory report of landfill-generated non-methane organic compound (NMOC) emissions. This annual NMOC emission inventory report is not required for an MSWLF with a capacity less than 2.5 million megagrams by mass or 2.5 million cubic meters by volume. This annual NMOC emission inventory report is separate and distinct from any initial or annual NMOC emission rate reports required under 40 CFR §60.38f.

(A) Annual NMOC emission inventory reports required under this paragraph shall include the landfill's uncontrolled and (if equipped with a control system) controlled NMOC emissions in megagrams per year (Mg/yr) for the preceding calendar year. For purposes of these annual emission inventory reports, NMOC emissions will be calculated using the procedures specified in the U.S. EPA's Compilation of Air Pollutant Emissions Factors (AP-42). Note that the use of AP-42 calculations for these annual NMOC emission inventory reports is different from the calculation method that is required for NMOC emission rate reports prepared for purposes of 40 CFR Part 60, Subpart Cf or 40 CFR Part 62, Subpart OOO.

(B) Annual NMOC emission inventory reports required under this paragraph shall be submitted no later than March 31 of each year following the calendar reporting year. These reports shall be submitted using the method designated by the executive director.

(5) This section only addresses certain specific reports for MSWLFs which are subject to this division. Owners or operators of an MSWLF subject to this division shall also comply with any additional reporting requirements specified in 40 CFR §60.38f or elsewhere in 40 CFR Part 60, Subpart Cf, except as otherwise specified for legacy controlled landfills in subsections (b) - (d) of this section.

(b) Owners or operators of legacy controlled landfills are not required to submit the following reports, provided these reports were submitted under 40 CFR Part 60, Subpart WWW, or Chapter 113, §113.2061 (relating to Standard for Air Emissions), on or before June 21, 2021:

(1) Initial design capacity report specified in 40 CFR §60.38f(a);

(2) Initial or subsequent NMOC emission rate report specified in 40 CFR §60.38f(c);

(3) Collection and control system design plan specified in 40 CFR §60.38f(d);

(4) Initial annual report specified in 40 CFR §60.38f(h); and

(5) Initial performance test report specified in 40 CFR §60.38(f)(i).

(c) Owners or operators of legacy controlled landfills that have already submitted an annual report under 40 CFR Part 60, Subpart WWW, or Chapter 113, Division 1, of this title, are required to submit the annual report under this division no later than one year after the most recent annual report was submitted.

(d) Owners or operators of legacy controlled landfills that demonstrate compliance with the emission control requirements of this division using a treatment system as defined in 40 CFR §60.41f must comply with 40 CFR §62.16724(d)(7) as amended through May 21, 2021.

§113.2412. Implementation Date and Increments of Progress.

(a) Upon the effective date of United States Environmental Protection Agency (EPA) approval of the Texas §111(d) state plan for the implementation of 40 Code of Federal Regulations (CFR) Part 60, Subpart Cf (Emission Guidelines and Compliance Times for Municipal Solid Waste Landfills), owners or operators of municipal solid waste landfills (MSWLFs) covered by the applicability provisions of §113.2400(a) of this title (relating to Applicability), must comply with the requirements of this division.

(b) Owners or operators of an MSWLF subject to this division shall comply with all applicable increments of progress specified in 40 CFR Part 62, Subpart OOO, Table 1, as amended through May 21, 2021.

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

Filed with the Office of the Secretary of State on January 12, 2023.

TRD-202300136

Guy Henry
Acting Deputy Director, Environmental Law Division
Texas Commission on Environmental Quality
Earliest possible date of adoption: February 26, 2023
For further information, please call: (512) 239-6295

♦ ♦ ♦

TITLE 31. NATURAL RESOURCES AND CONSERVATION

PART 1. GENERAL LAND OFFICE

CHAPTER 26. COASTAL MANAGEMENT PROGRAM

The General Land Office (GLO) proposes amendments to §§26.3, 26.4, 26.10, 26.13, 26.15, 26.18, 26.21, 26.23 - 26.25, 26.31, and 26.34 in 31 TAC Chapter 26, relating to the Coastal Management Program.

The purpose of the proposed amendments is to update cross references that became outdated as a result of the administrative transfer of rules from 31 TAC Chapter 501 to 31 TAC Chapter 26, effective on December 1, 2022. This rulemaking is necessary because it further implements amendments to the Coastal Coordination Act by Senate Bill 656, 82nd Texas Legislature, which abolished the Coastal Coordination Council and transferred the Council's powers and duties to the GLO.

The GLO proposes amendments to update cross references within the following sections: §26.3, relating to Definitions and Abbreviations; §26.4, relating to Coastal Coordination Advisory Committee; §26.10, relating to Compliance with CMP Goals and Policies; §26.13, relating to Administrative Policies Review; §26.15, relating to Policy for Major Actions; §26.18, relating to Policies for Discharges of Wastewater and Disposal of Waste from Oil and Gas Exploration and Production Activities; §26.23, relating to Policies for Development in Critical Areas; §26.24, relating to Policies for Construction of Waterfront Facilities and Other Structures on Submerged Lands; §26.25, relating to Policies for Dredging and Dredged Material and Placement; §26.31, relating to Policies for Transportation Projects; and §26.34, relating to Policies for Levee and Flood Control Projects.

The proposed amendment to §26.21, relating to Policies for Discharge of Municipal and Industrial Wastewater to Coastal Waters, updates the name of a state agency from Texas Department of Health to Texas Department of State Health Services.

FISCAL AND EMPLOYMENT IMPACTS

Melissa Porter, Deputy Director, Coastal Resources, has determined that for each year of the first five years the proposed amended rules are in effect, there will be no fiscal impacts to state government as a result of enforcing or administering the rules. There are no anticipated fiscal implications for local governments as a result of enforcing or administering the rules.

Ms. Porter has also determined that the proposed rulemaking will not have an adverse economic effect on small or large businesses, micro-businesses, rural communities, or individuals for the first five years that the proposed amended rules are in effect.

Ms. Porter has determined that the proposed rulemaking will not affect a local economy, and the rules will have no adverse local employment impact that requires an impact statement pursuant to Texas Government Code, §2001.022.

PUBLIC BENEFIT

Ms. Porter has determined that for each year of the first five years the proposed amended rules are in effect, the public will benefit from the proposed amended rules because the amended rules will provide more clarity.

GOVERNMENT GROWTH IMPACT STATEMENT

The GLO prepared a Government Growth Impact Statement for the proposed rulemaking. During the first five years the amended rules would be in effect, the rules would not: create or eliminate a government program; create or eliminate any employee positions; require an increase or decrease in future legislative appropriations to the agency; require an increase or decrease in fees paid to the agency; create a new regulation or expand, limit, or repeal an existing regulation; increase or decrease the number of individuals subject to the rule's applicability; or affect the state's economy.

TAKINGS IMPACT ASSESSMENT

The GLO has evaluated the proposed rulemaking in accordance with Texas Government Code, §2007.043(b), and the Attorney General's Private Real Property Rights Preservation Act Guidelines to determine whether a detailed takings impact assessment is required. The proposed rulemaking does not affect private real property in a manner that requires real property owners to be compensated as provided by the Fifth and Fourteenth Amendments to the United States Constitution or Article I, §§17 and 19 of the Texas Constitution. Furthermore, the proposed rulemaking would not affect any private real property in a manner that restricts or limits the owner's right to the property that would otherwise exist in the absence of the rule amendments. The proposed rulemaking will not result in a taking of private property, and there are no adverse impacts on private real property interests.

ENVIRONMENTAL REGULATORY ANALYSIS

The GLO has evaluated the proposed rulemaking action in accordance with Texas Government Code, §2001.0225, and determined that the action does not meet the definition of a "major environmental rule" as defined in the statute. "Major environmental rule" means a rule of which the specific intent is to protect the environment or reduce risks to human health from environmental exposure and that may adversely affect the economy, a sector of the economy, productivity, competition, jobs, the environment, or public health and safety of the state or a sector of the state. The proposed rulemaking is not anticipated to 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 the state or a sector of the state.

PUBLIC COMMENT REQUEST

To comment on the proposed rulemaking, please send written comments to Mr. Walter Talley, Texas Register Liaison, Texas General Land Office, P.O. Box 12873, Austin, Texas 78711, facsimile number (512) 475-1859 or email to walter.talley@glo.texas.gov. Written comments must be received no later than 5:00 p.m., thirty (30) days from the date of publication of this proposal.

SUBCHAPTER A. GENERAL PROVISIONS

31 TAC §26.3, §26.4

The amendments are proposed under Texas Natural Resources Code, Chapter 33, including §33.051, which authorizes the GLO

and the commissioner to perform the duties provided in Chapter 33, Subchapter C; §33.052, which authorizes the GLO and the commissioner to develop, coordinate, and implement a continuing comprehensive CMP; §33.054, which allows the commissioner to review and amend the CMP; and §33.204, which authorizes the commissioner to adopt goals and policies of the CMP by rule.

The proposed amendments are necessary to implement Texas Natural Resources Code, Chapter 33, Subchapters C and F.

§26.3. Definitions and Abbreviations.

(a) The following words, terms, and phrases, when used in this chapter, shall have the following meanings, unless the context clearly indicates otherwise.

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

(5) Coastal zone--The area within the boundary established in §27.1 [~~§503.1~~] of this title (relating to Coastal Management Program Boundary).

(6) - (18) (No change.)

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

§26.4. Coastal Coordination Advisory Committee.

(a) - (e) (No change.)

(f) In the event that a proposed action subject to consistency with the CMP goals and policies presents a significant unresolved consistency dispute, the committee may refer the matter to the commissioner for review pursuant to Chapter 29 [~~Chapter 505~~] (Procedures for State Consistency with Coastal Management Program Goals and Policies) or Chapter 30 [~~Chapter 506~~] (Procedures for Federal Consistency with Coastal Management Program Goals and Policies) of this title.

(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.

Filed with the Office of the Secretary of State on December 10, 2023.

TRD-202300096
Mark Havens
Chief Clerk, Deputy Land Commissioner
General Land Office
Earliest possible date of adoption: February 26, 2023
For further information, please call: (512) 475-1859

♦ ♦ ♦

SUBCHAPTER B. GOALS AND POLICIES

31 TAC §§26.10, 26.13, 26.15, 26.18, 26.21, 26.23 - 26.25, 26.31, 26.34

The amendments are proposed under Texas Natural Resources Code, Chapter 33, including §33.051, which authorizes the GLO and the commissioner to perform the duties provided in Chapter 33, Subchapter C; §33.052, which authorizes the GLO and the commissioner to develop, coordinate, and implement a continuing comprehensive CMP; §33.054, which allows the commissioner to review and amend the CMP; and §33.204, which authorizes the commissioner to adopt goals and policies of the CMP by rule.

The proposed amendments are necessary to implement Texas Natural Resources Code, Chapter 33, Subchapters C and F.

§26.10. Compliance with CMP Goals and Policies.

(a) State agencies, municipalities, and counties identified in this subchapter shall comply with the goals and policies in this subchapter when taking an action listed in §29.11 [~~§505.11~~] of this title (relating to Actions and Rules Subject to the Coastal Management Program) or §29.60 [~~§505.60~~] of this title (relating to Local Government Actions Subject to the Coastal Management Program).

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

§26.13. Administrative Policies.

(a) Agency and subdivision rules and ordinances subject to §26.10 [~~§501.10~~] of this title (relating to Compliance with Goals and Policies) shall:

(1) require applicants to provide information necessary for an agency or subdivision to make an informed decision on a proposed action listed in §29.11 [~~§505.11~~] of this title (relating to Actions and Rules Subject to the Coastal Management Program) or §29.60 [~~§505.60~~] of this title (relating to Local Government Actions Subject to the Coastal Management Program);

(2) identify the monitoring established to ensure that activities authorized by actions listed in §29.11 [~~§505.11~~] of this title [~~(relating to Actions and Rules Subject to the Coastal Management Program)~~] or §29.60 [~~§505.60~~] of this title [~~(relating to Local Government Actions Subject to the Coastal Management Program)~~] comply with all applicable requirements;

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

(b) A threshold for referral adopted by an agency under the provisions of Chapter 29 [~~Chapter 505~~] of this title (relating to [~~Council~~] Procedures for State Consistency with Coastal Management Program Goals and Policies [~~Reviews~~]) [~~of this title~~] shall be set at a level that is reasonably calculated to ensure that actions that may have unique and significant adverse effects on coastal natural resource areas are above the threshold for referral.

§26.15. Policy for Major Actions.

(a) For purposes of this section, "major action" means an individual agency or subdivision action listed in §29.11 [~~§505.11~~] of this title (relating to Actions and Rules Subject to the Coastal Management Program), §30.12 [~~506.12~~] of this title (relating to Federal Listed Activities Subject to CZMA Review) [~~Federal Actions Subject to the Coastal Management Program~~], or §29.60 [~~§505.60~~] of this title (relating to Local Government Actions Subject to the Coastal Management Program), relating to an activity for which a federal environmental impact statement under the National Environmental Policy Act, 42 United States Code Annotated, §4321, et seq is required.

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

§26.18. Policies for Discharges of Wastewater and Disposal of Waste from Oil and Gas Exploration and Production Activities.

(a) (No change.)

(b) Discharge of oil and gas exploration and production wastewater in the coastal zone shall comply with the following policies.

(1) All discharges shall comply with all provisions of surface water quality standards established by the TCEQ under §26.21 [~~§501.21~~] of this title (relating to Policies for Discharge of Municipal and Industrial Wastewater to Coastal Waters).

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

(c) (No change.)

§26.21. Policies for Discharge of Municipal and Industrial Wastewater to Coastal Waters.

(a) - (c) (No change.)

(d) The TCEQ shall consult with the Texas Department of State Health Services when reviewing permit applications for wastewater discharges that may significantly adversely affect oyster reefs.

§26.23. Policies for Development in Critical Areas.

(a) Dredging and construction of structures in, or the discharge of dredged or fill material into, critical areas shall comply with the policies in this section. In implementing this section, cumulative and secondary adverse effects of these activities will be considered.

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

(7) Development in critical areas shall not be authorized if significant degradation of critical areas will occur. Significant degradation occurs if:

(A) the activity will jeopardize the continued existence of species listed as endangered or threatened, or will result in likelihood of the destruction or adverse modification of a habitat determined to be a critical habitat under the Endangered Species Act, 16 United States Code Annotated, §§1531 - 1544;

(B) the activity will cause or contribute, after consideration of dilution and dispersion, to violation of any applicable surface water quality standards established under §26.21 [~~§501.21~~] of this title (relating to Policies for Discharge of Municipal and Industrial Wastewater to Coastal Waters);

(C) the activity violates any applicable toxic effluent standard or prohibition established under §26.21 [~~§501.21~~] of this title;

(D) the activity violates any requirement imposed to protect a marine sanctuary designated under the Marine Protection, Research, and Sanctuaries Act of 1972, 33 United States Code Annotated, Chapter 27; or

(E) taking into account the nature and degree of all identifiable adverse effects, including their persistence, permanence, areal extent, and the degree to which these effects will have been mitigated pursuant to subsections (c) and (d) of this section, the activity will, individually or collectively, cause or contribute to significant adverse effects on:

(i) human health and welfare, including effects on water supplies, plankton, benthos, fish, shellfish, wildlife, and consumption of fish and wildlife;

(ii) the life stages of aquatic life and other wildlife dependent on aquatic ecosystems, including the transfer, concentration, or spread of pollutants or their byproducts beyond the site, or their introduction into an ecosystem, through biological, physical, or chemical processes;

(iii) ecosystem diversity, productivity, and stability, including loss of fish and wildlife habitat or loss of the capacity of a coastal wetland to assimilate nutrients, purify water, or reduce wave energy; or

(iv) generally accepted recreational, aesthetic or economic values of the critical area which are of exceptional character and importance.

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

(d) For any dredging or construction of structures in, or discharge of dredged or fill material into, critical areas that is subject to the requirements of §26.15 [~~§501.15~~] of this title (relating to Policy for Major Actions), data and information on the cumulative and secondary adverse affects of the project need not be produced or evaluated to comply with this section if such data and information is produced and evaluated in compliance with §26.15(b) - (c) [~~§501.15(b) - (c)~~] of this title.

§26.24. Policies for Construction of Waterfront Facilities and Other Structures on Submerged Lands.

(a) Development on submerged lands shall comply with the policies in this section.

(1) - (9) (No change.)

(10) Facilities shall be located at sites which avoid the impoundment and draining of coastal wetlands. If impoundment or draining cannot be avoided, adverse effects to the impounded or drained wetlands shall be mitigated in accordance with the sequencing requirements of §26.23 [~~§501.23~~] of this title (relating to Policies for Development in Critical Areas). To the greatest extent practicable, facilities shall be located at sites at which expansion will not result in development in critical areas.

(11) - (17) (No change.)

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

§26.25. Policies for Dredging and Dredged Material and Placement.

(a) Dredging and the disposal and placement of dredged material shall avoid and otherwise minimize adverse effects to coastal waters, submerged lands, critical areas, coastal shore areas, and Gulf beaches to the greatest extent practicable. The policies of this section are supplemental to any further restrictions or requirements relating to the beach access and use rights of the public. In implementing this section, cumulative and secondary adverse effects of dredging and the disposal and placement of dredged material and the unique characteristics of affected sites shall be considered.

(1) Dredging and dredged material disposal and placement shall not cause or contribute, after consideration of dilution and dispersion, to violation of any applicable surface water quality standards established under §26.21 [~~§501.21~~] of this title (relating to Policies for Discharge of Municipal and Industrial Wastewater to Coastal Waters).

(2) Except as otherwise provided in paragraph (4) of this subsection, adverse effects on critical areas from dredging and dredged material disposal or placement shall be avoided and otherwise minimized, and appropriate and practicable compensatory mitigation shall be required, in accordance with §26.23 [~~§501.23~~] of this title (relating to Policies for Development in Critical Areas).

(3) Except as provided in paragraph (4) of this subsection, dredging and the disposal and placement of dredged material shall not be authorized if:

(A) there is a practicable alternative that would have fewer adverse effects on coastal waters, submerged lands, critical areas, coastal shore areas, and Gulf beaches, so long as that alternative does not have other significant adverse effects;

(B) all appropriate and practicable steps have not been taken to minimize adverse effects on coastal waters, submerged lands, critical areas, coastal shore areas, and Gulf beaches; or

(C) significant degradation of critical areas under §26.23(a)(7)(E) [~~§501.23(a)(7)(E)~~] of this title would result.

(4) A dredging or dredged material disposal or placement project that would be prohibited solely by application of paragraph (3) of this subsection may be allowed if it is determined to be of overriding importance to the public and national interest in light of economic

impacts on navigation and maintenance of commercially navigable waterways.

(b) Adverse effects from dredging and dredged material disposal and placement shall be minimized as required in subsection (a) of this section. Adverse effects can be minimized by employing the techniques in this subsection where appropriate and practicable.

(1) - (7) (No change.)

(8) Adverse effects from new channels and basins can be minimized by locating them at sites:

(A) that ensure adequate flushing and avoid stagnant pockets; or

(B) that will create the fewest practicable adverse effects on CNRAs from additional infrastructure such as roads, bridges, causeways, piers, docks, wharves, transmission line crossings, and ancillary channels reasonably likely to be constructed as a result of the project; or

(C) with the least practicable risk that increased vessel traffic could result in navigation hazards, spills, or other forms of contamination which could adversely affect CNRAs;

(D) provided that, for any dredging of new channels or basins subject to the requirements of §26.15 [~~§501.15~~] of this title (relating to Policy for Major Actions), data and information on minimization of secondary adverse effects need not be produced or evaluated to comply with this paragraph if such data and information is produced and evaluated in compliance with §26.15(b)(1) [~~§501.15(b)(1)~~] of this title.

(c) - (k) (No change.)

§26.31. Policies for Transportation Projects.

(a) Transportation construction projects and maintenance programs within the coastal zone shall comply with the policies in this section.

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

(5) Construction and maintenance of transportation projects shall avoid the impoundment and draining of coastal wetlands. If impoundment or draining cannot be avoided, adverse effects to the impounded or drained wetlands shall be mitigated in accordance with the sequencing requirements of §26.23 [~~§501.23~~] of this title (relating to Policies for Development in Critical Areas).

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

(b) (No change.)

§26.34. Policies for Levee and Flood Control Projects.

(a) Drainage, reclamation, channelization, levee construction or modification, or flood- or floodwater-control infrastructure projects shall be designed, constructed, and maintained to avoid the impoundment and draining of coastal wetlands to the greatest extent practicable. If impoundment or draining of coastal wetlands cannot be avoided, adverse effects to the wetlands shall be mitigated in accordance with the sequencing requirements in §26.23 [~~§501.23~~] of this title (relating to Policies for Development in Critical Areas).

(b) (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 January 10, 2023.

TRD-202300097
Mark Havens
Chief Clerk, Deputy Land Commissioner
General Land Office
Earliest possible date of adoption: February 26, 2023
For further information, please call: (512) 475-1859

CHAPTER 27. COASTAL MANAGEMENT PROGRAM BOUNDARY

31 TAC §27.1

The General Land Office (GLO) proposes an amendment to §27.1 in 31 TAC Chapter 27, relating to the Coastal Management Program Boundary.

The purpose of the proposed amendment is to update a rule reference that became outdated as a result of the administrative transfer of rules from 31 TAC Chapter 503 to 31 TAC Chapter 27, effective on December 1, 2022. This rulemaking is necessary because it further implements amendments to the Coastal Coordination Act by Senate Bill 656, 82nd Texas Legislature, which abolished the Coastal Coordination Council and transferred the Council's powers and duties to the GLO.

The GLO proposes an amendment to update the rule reference labeling the Attached Graphic in §27.1(a). There are no substantive changes to the map in the Attached Graphic, and there are no proposed changes to the text of §27.1.

FISCAL AND EMPLOYMENT IMPACTS

Melissa Porter, Deputy Director, Coastal Resources, has determined that for each year of the first five years the proposed amended rule is in effect, there will be no fiscal impacts to state government as a result of enforcing or administering the rule. There are no anticipated fiscal implications for local governments as a result of enforcing or administering the rule.

Ms. Porter has also determined that the proposed rulemaking will not have an adverse economic effect on small or large businesses, micro-businesses, rural communities, or individuals for the first five years that the proposed amended rule is in effect.

Ms. Porter has determined that the proposed rulemaking will not affect a local economy, and the rule will have no adverse local employment impact that requires an impact statement pursuant to Texas Government Code, §2001.022.

PUBLIC BENEFIT

Ms. Porter has determined that for each year of the first five years the proposed amended rule is in effect, the public will benefit from the proposed amended rule because the amended rule will provide more clarity.

GOVERNMENT GROWTH IMPACT STATEMENT

The GLO prepared a Government Growth Impact Statement for the proposed rulemaking. During the first five years the amended rule would be in effect, the rule would not: create or eliminate a government program; create or eliminate any employee positions; require an increase or decrease in future legislative appropriations to the agency; require an increase or decrease in fees paid to the agency; create a new regulation or expand, limit, or repeal an existing regulation; increase or decrease the number of individuals subject to the rule's applicability; or affect the state's economy.

TAKINGS IMPACT ASSESSMENT

The GLO has evaluated the proposed rulemaking in accordance with Texas Government Code, §2007.043(b), and the Attorney General's Private Real Property Rights Preservation Act Guidelines to determine whether a detailed takings impact assessment is required. The proposed rulemaking does not affect private real property in a manner that requires real property owners to be compensated as provided by the Fifth and Fourteenth Amendments to the United States Constitution or Article I, §§17 and 19 of the Texas Constitution. Furthermore, the proposed rulemaking would not affect any private real property in a manner that restricts or limits the owner's right to the property that would otherwise exist in the absence of the rule amendment. The proposed rulemaking will not result in a taking of private property, and there are no adverse impacts on private real property interests.

ENVIRONMENTAL REGULATORY ANALYSIS

The GLO has evaluated the proposed rulemaking action in accordance with Texas Government Code, §2001.0225, and determined that the action does not meet the definition of a "major environmental rule" as defined in the statute. "Major environmental rule" means a rule of which the specific intent is to protect the environment or reduce risks to human health from environmental exposure and that may adversely affect the economy, a sector of the economy, productivity, competition, jobs, the environment, or public health and safety of the state or a sector of the state. The proposed rulemaking is not anticipated to 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 the state or a sector of the state.

PUBLIC COMMENT REQUEST

To comment on the proposed rulemaking, please send written comments to Mr. Walter Talley, Texas Register Liaison, Texas General Land Office, P.O. Box 12873, Austin, Texas 78711, facsimile number (512) 475-1859 or email to walter.talley@glo.texas.gov. Written comments must be received no later than 5:00 p.m., thirty (30) days from the date of publication of this proposal.

STATUTORY AUTHORITY

The amendment is proposed under Texas Natural Resources Code, Chapter 33, including §33.051, which authorizes the GLO and the commissioner to perform the duties provided in Chapter 33, Subchapter C; §33.052, which authorizes the GLO and the commissioner to develop, coordinate, and implement a continuing comprehensive CMP; and §33.054, which allows the commissioner to review and amend the CMP.

The proposed amendment is necessary to implement Texas Natural Resources Code, Chapter 33, Subchapters C and F.

§27.1. Coastal Management Program Boundary.

(a) General Description of the Coastal Management Program Boundary. The coastal management program boundary delineates the coastal zone. The inland part of the boundary is a modification of the coastal facility designation line, which is the line the State of Texas adopted under the Oil Spill Prevention and Response Act of 1991 (Texas Natural Resources Code, Chapter 40) to describe areas where oil spills are likely to enter coastal waters. Generally, the boundary encompasses the area within Texas lying seaward of the coastal facility designation line. It also includes coastal wetlands landward of the coastal facility designation line. The boundary includes areas within the following Texas counties: Cameron, Willacy, Kenedy, Kleberg, Nueces, San Patricio, Aransas, Refugio, Calhoun, Victoria, Jackson, Matagorda, Brazoria, Galveston, Harris, Chambers, Jefferson, and Orange. The seaward reach of the boundary extends into the Gulf of Mexico to the limit of state title and ownership under the Submerged Lands Management Act (43 United States Code, §§1301 et seq), that is, three marine leagues. The following maps outline the coastal management program boundary.

Figure: 31 TAC §27.1(a)

[~~Figure: 31 TAC §27.1~~]

(b) (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 January 10, 2023.

TRD-202300099
Mark Havens
Chief Clerk, Deputy Land Commissioner
General Land Office
Earliest possible date of adoption: February 26, 2023
For further information, please call: (512) 475-1859

♦ ♦ ♦

CHAPTER 28. PERMITTING ASSISTANCE AND PRELIMINARY CONSISTENCY REVIEW

The General Land Office (GLO) proposes amendments to §§28.2, 28.3, 28.10, 28.11, and 28.20 in 31 TAC Chapter 28, relating to Permitting Assistance and Preliminary Consistency Review.

The purpose of the proposed amendments is to update cross references that became outdated as a result of the administrative transfer of rules from 31 TAC Chapter 504 to 31 TAC Chapter 28, effective on December 1, 2022. The proposed amendments also include minor revisions to ensure that the role of the Permitting Assistance Group conforms with current practice. This proposed rulemaking is necessary because it further implements amendments to the Coastal Coordination Act by Senate Bill 656, 82nd Texas Legislature, which abolished the Coastal Coordination Council and transferred the Council's powers and duties to the GLO.

The GLO proposes amendments to update cross references within the following sections: §28.2, relating to Definitions; §28.11, relating to Permitting Assistance Coordinator; and §28.20, relating to Requests for Preliminary Consistency Review. The proposed amendment to §28.2 includes the alphabetization of the definitions.

The proposed amendment to §28.3, relating to Permitting Assistance Group (PAG), adds a new subsection (d) to conform with current practice by clarifying that the PAG's role may include participation in the planning and development of regional general permits and general permits to support future beach management and nourishment, coastal restoration projects, and the continued development of the Texas Coastal Management Program, as needed.

The proposed amendment to §28.10, relating to Permit Service Center, adds updated terminology, including a clarification that

the Texas Parks and Wildlife Department issues "certificates of location."

FISCAL AND EMPLOYMENT IMPACTS

Melissa Porter, Deputy Director, Coastal Resources, has determined that for each year of the first five years the proposed amended rules are in effect, there will be no fiscal impacts to state government as a result of enforcing or administering the rules. There are no anticipated fiscal implications for local governments as a result of enforcing or administering the rules.

Ms. Porter has also determined that the proposed rulemaking will not have an adverse economic effect on small or large businesses, micro-businesses, rural communities, or individuals for the first five years that the proposed amended rules are in effect.

Ms. Porter has determined that the proposed rulemaking will not affect a local economy, and the rules will have no adverse local employment impact that requires an impact statement pursuant to Texas Government Code, §2001.022.

PUBLIC BENEFIT

Ms. Porter has determined that for each year of the first five years the proposed amended rules are in effect, the public will benefit from the proposed amended rules because the amended rules will provide more clarity and better reflect current practice.

GOVERNMENT GROWTH IMPACT STATEMENT

The GLO prepared a Government Growth Impact Statement for the proposed rulemaking. During the first five years the amended rules would be in effect, the rules would not: create or eliminate a government program; create or eliminate any employee positions; require an increase or decrease in future legislative appropriations to the agency; require an increase or decrease in fees paid to the agency; create a new regulation or expand, limit, or repeal an existing regulation; increase or decrease the number of individuals subject to the rule's applicability; or affect the state's economy.

TAKINGS IMPACT ASSESSMENT

The GLO has evaluated the proposed rulemaking in accordance with Texas Government Code, §2007.043(b), and the Attorney General's Private Real Property Rights Preservation Act Guidelines to determine whether a detailed takings impact assessment is required. The proposed rulemaking does not affect private real property in a manner that requires real property owners to be compensated as provided by the Fifth and Fourteenth Amendments to the United States Constitution or Article I, §§17 and 19 of the Texas Constitution. Furthermore, the proposed rulemaking would not affect any private real property in a manner that restricts or limits the owner's right to the property that would otherwise exist in the absence of the rule amendments. The proposed rulemaking will not result in a taking of private property, and there are no adverse impacts on private real property interests.

ENVIRONMENTAL REGULATORY ANALYSIS

The GLO has evaluated the proposed rulemaking action in accordance with Texas Government Code, §2001.0225, and determined that the action does not meet the definition of a "major environmental rule" as defined in the statute. "Major environmental rule" means a rule of which the specific intent is to protect the environment or reduce risks to human health from environmental exposure and that may adversely affect the economy, a sector of the economy, productivity, competition, jobs, the environment, or public health and safety of the state or a sector of the state. The proposed rulemaking is not anticipated to 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 the state or a sector of the state.

PUBLIC COMMENT REQUEST

To comment on the proposed rulemaking, please send written comments to Mr. Walter Talley, Texas Register Liaison, Texas General Land Office, P.O. Box 12873, Austin, Texas 78711, facsimile number (512) 475-1859, or email to walter.talley@glo.texas.gov. Written comments must be received no later than 5:00 p.m., thirty (30) days from the date of publication of this proposal.

SUBCHAPTER A. GENERAL PROVISIONS

31 TAC §28.2, §28.3

The amendments are proposed under Texas Natural Resources Code, Chapter 33, including, §33.051, which authorizes the GLO and the commissioner to perform the duties provided in Chapter 33, Subchapter C; §33.052, which authorizes the GLO and the commissioner to develop, coordinate, and implement a continuing comprehensive CMP; §33.054, which allows the commissioner to review and amend the CMP; §33.204, which authorizes the commissioner to adopt goals and policies of the CMP by rule; and §33.205, which authorizes the commissioner to establish by rule processes for preliminary consistency review and permitting assistance.

The proposed amendments are necessary to implement Texas Natural Resources Code, Chapter 33, Subchapters C and F.

§28.2. Definitions.

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

(1) Agency of subdivision--Any state agency, department, board, or commission or political subdivision of the state.

(2) Applicant--An individual or small business. In addition, the term includes a city, county, or special district.

(3) ~~(6)~~ CMP goals and policies--The goals and policies set forth in Chapter 26 [~~Chapter 501~~] of this title.

(4) ~~(3)~~ Coastal zone--The area within the CMP boundary established in §27.1 [~~§503.1~~] of this title.

(5) ~~(4)~~ Commissioner--Commissioner of the General Land Office (GLO).

(6) ~~(5)~~ Committee--Coastal Coordination Advisory Committee.

(7) ~~(9)~~ Permit service center (PSC)--The center that administers permitting assistance for activities in the coastal zone. The PSC has an office that serves the Upper Coast and an office that serves the Lower Coast.

(8) ~~(7)~~ Permitting assistance coordinator--The GLO staff member designated by the commissioner.

(9) ~~(8)~~ Permitting assistance group (PAG)--The group composed of representatives of committee member agencies and other interested committee members.

(10) Program boundary--The CMP boundary established in §27.1 [~~§503.1~~] of this title.

(b) (No change.)

§28.3. Permitting Assistance Group.

(a) - (c) (No change.)

(d) The PAG may be convened to assist with the planning and development of regional general permits and general permits to support future beach management and nourishment, coastal restoration projects, and the continued development of the Coastal Management 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.

Filed with the Office of the Secretary of State on January 10, 2023.

TRD-202300100
Mark Havens
Chief Clerk, Deputy Land Commissioner
General Land Office
Earliest possible date of adoption: February 26, 2023
For further information, please call: (512) 475-1859

♦ ♦ ♦

SUBCHAPTER B. PERMITTING ASSISTANCE

31 TAC §28.10, §28.11

The amendments are proposed under Texas Natural Resources Code, Chapter 33, including, §33.051, which authorizes the GLO and the commissioner to perform the duties provided in Chapter 33, Subchapter C; §33.052, which authorizes the GLO and the commissioner to develop, coordinate, and implement a continuing comprehensive CMP; §33.054, which allows the commissioner to review and amend the CMP; §33.204, which authorizes the commissioner to adopt goals and policies of the CMP by rule; and §33.205, which authorizes the commissioner to establish by rule processes for preliminary consistency review and permitting assistance.

The proposed amendments are necessary to implement Texas Natural Resources Code, Chapter 33, Subchapters C and F.

§28.10. Permit Service Center.

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

(c) Agency or subdivision permits and actions:

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

(7) The Texas Parks and Wildlife Department [~~Commission~~] when issuing or approving:

(A) an oyster lease or certificate of location;

(B) a permit for taking, transporting, or possessing threatened or endangered species;

(C) a permit for disturbing marl, sand, shell, or gravel on state-owned land; or

(D) development by a person other than the Texas Parks and Wildlife Department [~~Commission~~] that requires the use or taking of any public land in a state park, wildlife management area, or preserve.

(8) - (10) (No change.)

(d) (No change.)

§28.11. Permitting Assistance Coordinator.

The permitting assistance coordinator will perform the following functions:

(1) Applicant Assistance: Upon the request of an applicant, the permitting assistance coordinator will assist the applicant and monitor the status of the application until the permitting agency or subdivision has all information necessary to decide to issue, condition, or deny the permit. The coordinator will be responsible for providing preapplication assistance, on behalf of the PAG, by performing the services described in §28.12 [~~§504.12~~] of this chapter.

(2) - (5) (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 January 10, 2023.

TRD-202300101
Mark Havens
Chief Clerk, Deputy Land Commissioner
General Land Office
Earliest possible date of adoption: February 26, 2023
For further information, please call: (512) 475-1859

♦ ♦ ♦

SUBCHAPTER C. PRELIMINARY CONSISTENCY REVIEW

31 TAC §28.20

STATUTORY AUTHORITY

The amendments are proposed under Texas Natural Resources Code, Chapter 33, including, §33.051, which authorizes the GLO and the commissioner to perform the duties provided in Chapter 33, Subchapter C; §33.052, which authorizes the GLO and the commissioner to develop, coordinate, and implement a continuing comprehensive CMP; §33.054, which allows the commissioner to review and amend the CMP; §33.204, which authorizes the commissioner to adopt goals and policies of the CMP by rule; and §33.205, which authorizes the commissioner to establish by rule processes for preliminary consistency review and permitting assistance.

The proposed amendments are necessary to implement Texas Natural Resources Code, Chapter 33, Subchapters C and F.

§28.20. Requests for Preliminary Consistency Review.

(a) An agency, subdivision, or applicant seeking a permit or other proposed action listed in §28.10(c) [~~§504.10(c)~~] of this chapter may request a preliminary consistency review.

(b) - (e) (No change.)

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

Filed with the Office of the Secretary of State on January 10, 2023

TRD-202300102

Mark Havens
Chief Clerk, Deputy Land Commissioner
General Land Office
Earliest possible date of adoption: February 26, 2023
For further information, please call: (512) 475-1859

♦ ♦ ♦

CHAPTER 29. PROCEDURES FOR STATE CONSISTENCY WITH COASTAL MANAGEMENT PROGRAM GOALS AND POLICIES

The General Land Office (GLO) proposes amendments to §§29.11, 29.12, 29.20 - 29.26, 29.30 - 29.34, 29.36, 29.42, 29.51, 29.52, 29.60, 29.62 - 29.66, 29.68, and 29.74 in 31 TAC Chapter 29, relating to Procedures for State Consistency with Coastal Management Program Goals and Policies.

The purpose of the proposed amendments is to update cross references that became outdated as a result of the administrative transfer of rules from 31 TAC Chapter 505 to 31 TAC Chapter 29, effective on December 1, 2022. This rulemaking is necessary because it further implements amendments to the Coastal Coordination Act by Senate Bill 656, 82nd Texas Legislature, which abolished the Coastal Coordination Council and transferred the Council's powers and duties to the GLO.

The GLO proposes amendments to update cross references in the following sections: §29.11, relating to Actions and Rules Subject to the Coastal Management Program; §29.12, relating to Definitions; §29.20, relating to Commissioner Review and Certification of Agency Rules and Rule Amendments; §29.21, relating to Effect of Commissioner Certification of Agency Rules and Rule Amendments; §29.22, relating to Consistency Required for New Rules and Rule Amendments Subject to the Coastal Management Program; §29.23, relating to Expedited Certification of Rules and Rule Amendments; §29.24, relating to Pre-Certification Review of Draft Rules and Draft Rule Amendments; §29.25, relating to Revocation of Certification; §29.26, relating to Approval of Thresholds for Referral; §29.30, relating to Agency Consistency Determination; §29.31, relating to Preliminary Consistency Review of Proposed Agency Action; §29.32, relating to Requirements for Referral of a Proposed Agency Action; §29.33, relating to Filing of Request for Referral; §29.34, relating to Referral of a Proposed Agency Action to the Commissioner for Consistency Review; §29.36, relating to Standard of Commissioner Review of a Proposed Agency Action; §29.42, relating to Enforcement after Commissioner Protest of a Proposed Agency Action; §29.51 relating to Request for a Non-Binding Advisory Opinion and Commissioner Action; 29.52, relating to Request for Commissioner Participation in the Development of General Plans; §29.60, relating to Subdivisions Actions Subject to the Coastal Management Program; §29.62, relating to Subdivision Consistency Determinations; §29.63, relating to Preliminary Consistency Review of a Proposed Subdivision Action; §29.64, relating to Requirements for a Referral of a Proposed Subdivision Action; §29.65, relating to Filing of Request for Referral; §29.66, relating to Referral of a Proposed Subdivision Action to the Commissioner for Review; §29.68, relating to Standard of Commissioner Review of a Proposed Subdivision Action; and §29.74, relating to Enforcement after Commissioner Protest of a Proposed Subdivision Action.

The proposed amendments to §29.11(a)(7)(A) adds updated terminology, including a clarification that the Texas Parks and Wildlife Department issues "certificates of location."

FISCAL AND EMPLOYMENT IMPACTS

Melissa Porter, Deputy Director, Coastal Resources, has determined that for each year of the first five years the proposed amended rules are in effect, there will be no fiscal impacts to state government as a result of enforcing or administering the rules. There are no anticipated fiscal implications for local governments as a result of enforcing or administering the rules.

Ms. Porter has also determined that the proposed rulemaking will not have an adverse economic effect on small or large businesses, micro-businesses, rural communities, or individuals for the first five years that the proposed amended rules are in effect.

Ms. Porter has determined that the proposed rulemaking will not affect a local economy, and the rules will have no adverse local employment impact that requires an impact statement pursuant to Texas Government Code, §2001.022.

PUBLIC BENEFIT

Ms. Porter has determined that for each year of the first five years the proposed amended rules are in effect, the public will benefit from the proposed amended rules because the amended rules will provide more clarity and better reflect current practice.

GOVERNMENT GROWTH IMPACT STATEMENT

The GLO prepared a Government Growth Impact Statement for the proposed rulemaking. During the first five years the amended rules would be in effect, the rules would not: create or eliminate a government program; create or eliminate any employee positions; require an increase or decrease in future legislative appropriations to the agency; require an increase or decrease in fees paid to the agency; create a new regulation or expand, limit, or repeal an existing regulation; increase or decrease the number of individuals subject to the rule's applicability; or affect the state's economy.

TAKINGS IMPACT ASSESSMENT

The GLO has evaluated the proposed rulemaking in accordance with Texas Government Code, §2007.043(b), and the Attorney General's Private Real Property Rights Preservation Act Guidelines to determine whether a detailed takings impact assessment is required. The proposed rulemaking does not affect private real property in a manner that requires real property owners to be compensated as provided by the Fifth and Fourteenth Amendments to the United States Constitution or Article I, §§17 and 19 of the Texas Constitution. Furthermore, the proposed rulemaking would not affect any private real property in a manner that restricts or limits the owner's right to the property that would otherwise exist in the absence of the rule amendments. The proposed rulemaking will not result in a taking of private property, and there are no adverse impacts on private real property interests.

ENVIRONMENTAL REGULATORY ANALYSIS

The GLO has evaluated the proposed rulemaking action in accordance with Texas Government Code, §2001.0225, and determined that the action does not meet the definition of a "major environmental rule" as defined in the statute. "Major environmental rule" means a rule of which the specific intent is to protect the environment or reduce risks to human health from environmental exposure and that may adversely affect the economy, a sector

of the economy, productivity, competition, jobs, the environment, or public health and safety of the state or a sector of the state. The proposed rulemaking is not anticipated to 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 the state or a sector of the state.

PUBLIC COMMENT REQUEST

To comment on the proposed rulemaking, please send written comments to Mr. Walter Talley, Texas Register Liaison, Texas General Land Office, P.O. Box 12873, Austin, Texas 78711, facsimile number (512) 475-1859 or email to walter.talley@glo.texas.gov. Written comments must be received no later than 5:00 p.m., thirty (30) days from the date of publication of this proposal.

SUBCHAPTER A. PURPOSE AND SCOPE

31 TAC §29.11, §29.12

The amendments are proposed under Texas Natural Resources Code, Chapter 33, including, §33.051, which authorizes the GLO and the commissioner to perform the duties provided in Chapter 33, Subchapter C; §33.052, which authorizes the GLO and the commissioner to develop, coordinate, and implement a continuing comprehensive CMP; §33.054, which allows the commissioner to review and amend the CMP; §33.204, which authorizes the commissioner to adopt goals and policies of the CMP by rule; and §33.2052, which authorizes the commissioner to establish by rule a process by which an agency may submit rules to the commissioner for review and certification for consistency with the goals and policies of the CMP.

The proposed amendments are necessary to implement Texas Natural Resources Code, Chapter 33, Subchapters C and F.

§29.11. Actions and Rules Subject to the Coastal Management Program.

(a) For purposes of this chapter and Chapter 26 [~~Chapter 501~~] of this title (relating to Coastal Management Program), the following is an exclusive list of proposed individual agency actions that may adversely affect a coastal natural resource area (CNRA) and that therefore must be consistent with the CMP goals and policies:

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

(7) for the Texas Parks and Wildlife Department (TPWD) when issuing or approving:

(A) an oyster lease or certificate of location;

(B) a permit for taking, transporting, or possessing threatened or endangered species;

(C) a permit for disturbing marl, sand, shell, or gravel on state-owned land; or

(D) development by a person other than the TPWD that requires the use or taking of any public land in a state park, wildlife management area or preserve.

(b) For purposes of this chapter and Chapter 26 [~~Chapter 501~~] of this title [~~(relating to Coastal Management Program)~~], the following is an exclusive list of proposed agency rulemaking actions that must be consistent with the CMP goals and policies:

(1) a GLO rule governing the prevention of, response to, or remediation of a coastal oil spill;

(2) TCEQ rules governing air pollutant emissions, on-site sewage disposal systems, or underground storage tanks;

(3) a State Soil and Water Conservation Board rule governing agricultural or silvicultural nonpoint source pollution;

(4) any rule governing an individual action described in subsection (a) of this section, including thresholds for referral.

(c) - (e) (No change.)

§29.12. Definitions.

(a) 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) CMP goals and policies--The goals and policies set forth in Chapter 26 [~~Chapter 501~~] of this title (relating to Coastal Management Program).

(7) Program boundary--The CMP boundary established in §27.1 [~~§503.1~~] of this title (relating to Coastal Management Program Boundary).

(8) Subdivision--A local government or any political subdivision of the state.

(b) (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 January 10, 2023.

TRD-202300103
Mark Havens
Chief Clerk, Deputy Land Commissioner
General Land Office
Earliest possible date of adoption: February 26, 2023
For further information, please call: (512) 475-1859

♦ ♦ ♦

SUBCHAPTER B. COMMISSIONER REVIEW AND CERTIFICATION OF AGENCY RULES

31 TAC §§29.20 - 29.26

The amendments are proposed under Texas Natural Resources Code, Chapter 33, including, §33.051, which authorizes the GLO and the commissioner to perform the duties provided in Chapter 33, Subchapter C; §33.052, which authorizes the GLO and the commissioner to develop, coordinate, and implement a continuing comprehensive CMP; §33.054, which allows the commissioner to review and amend the CMP; §33.204, which authorizes the commissioner to adopt goals and policies of the CMP by rule; and §33.2052, which authorizes the commissioner to establish by rule a process by which an agency may submit rules to the commissioner for review and certification for consistency with the goals and policies of the CMP.

The proposed amendments are necessary to implement Texas Natural Resources Code, Chapter 33, Subchapters C and F.

§29.20 Commissioner Review and Certification of Agency Rules and Rule Amendments

(a) Upon adoption of a rule or amendment to a rule listed in §29.11(b) [~~§505.11(b)~~] of this chapter (relating to Actions and Rules Subject to the Coastal Management Program), an agency may seek

certification from the commissioner that the rule or rule amendment is consistent with the CMP goals and policies by filing a written Request for Certification with the CMP coordinator. The request shall include a copy of the rule or rule amendment for which the agency seeks certification and a reasoned statement supporting the agency's determination that the rule or rule amendment is consistent with the CMP goals and policies.

(b) - (e) (No change.)

§29.21. Effect of Commissioner Certification of Agency Rules and Rule Amendments.

(a) Upon the commissioner's certification of an agency's rules or rule amendments pursuant to §29.20 [~~§505.20~~] of this chapter (relating to Commissioner Review and Certification of Agency Rules and Rule Amendments) or §29.23 [~~§505.23~~] of this chapter (relating to Expedited Certification of Rules and Rule Amendments), the agency's rules are incorporated into the CMP goals and policies, and any threshold for referral approved pursuant to §29.26 [~~§505.26~~] of this chapter (relating to Approval of Thresholds for Referral) that applies to actions under those rules shall become operative and limit the commissioner's authority to review individual actions of the agency, as provided in §29.32 [~~§505.32~~] of this chapter (relating to Requirements for Referral of a Proposed Agency Action).

(b) After an agency's rules are certified and an agency's thresholds are approved, the agency's consistency determination for an action is final and is not subject to referral and review, except as provided by §29.32 [~~§505.32~~] of this chapter [~~(relating to Requirements for Referral of a Proposed Agency Action)~~].

(c) Where commissioner certification of a rule or rule amendment takes place after the effective date of a rule or rule amendment, the provisions of §29.32 [~~§503.32~~] of this chapter [~~(relating to Requirements for Referral of a Proposed Agency Action)~~] will be considered to be in effect to limit commissioner review of an agency action listed in §29.11(a) [~~§505.11(a)~~] of this chapter (relating to Actions and Rules Subject to the Coastal Management Program) provided:

(1) the agency files a request for certification of the rule or rule amendment within seven days of the date of adoption;

(2) the action is undertaken pursuant to the rule or rule amendment for which certification is sought; and

(3) the action was initiated after the rule or rule amendment was adopted and before the commissioner acted on the request for certification.

§29.22. Consistency Required for New Rules and Rule Amendments Subject to the Coastal Management Program.

(a) When proposing to adopt or amend a rule listed in §29.11(b) [~~§505.11(b)~~] of this chapter (relating to Actions and Rules Subject to the Coastal Management Program) an agency shall include in the preamble to the proposed rule as published in the *Texas Register* the following:

(1) a statement that the proposed rule or rule amendment is subject to the Coastal Management Program and must be consistent with all applicable CMP policies;

(2) a reasoned justification explaining the basis upon which the agency concluded the proposed rule is consistent with each applicable CMP policy; and

(3) a request for public comment on the consistency of the proposed rule or rule amendment.

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

§29.23. Expedited Certification of Rules and Rule Amendments.

(a) In accordance with this section, the commissioner may provide expedited certification of a rule or rule amendment. An agency may request and the commissioner may provide expedited certification of an agency's rule or rule amendment only if:

(1) the agency has included in the preamble to the proposed rule or rule amendment published in the *Texas Register* notice that the agency will seek expedited certification upon adoption of the rule;

(2) the agency has filed with the CMP coordinator at the time the rule or rule amendment is proposed a Notice of Intent to Seek Expedited Certification and attached a copy of the proposed rule or rule amendment; and

(3) the agency submitted the draft rule or draft rule amendment to the CMP coordinator for pre-certification review pursuant to §29.24 [~~§505.24~~] of this chapter (relating to Pre-Certification Review of Draft Rules and [~~or~~] Draft Rule Amendments).

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

§29.24. Pre-Certification Review of Draft Rules and Draft Rule Amendments.

(a) Prior to the publication in the *Texas Register* of a proposed rule or amendment to a rule listed in §29.11(b) [~~§505.11(b)~~] of this chapter (relating to Actions and Rules Subject to the Coastal Management Program), an agency may seek pre-certification review by filing a Request for Pre-certification Review with the CMP coordinator. The request shall include a copy of the draft rule or draft rule amendment and any information the agency wishes the commissioner to consider. This request shall allow the commissioner a minimum of 30 days to review and comment on the draft rule or rule amendment.

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

§29.25. Revocation of Certification.

The commissioner may issue a Notice of Program Deficiency if the commissioner finds that the agency has implemented its rules in a manner that is inconsistent with the CMP goals and policies, or has amended certified rules in a manner inconsistent with the CMP goals and policies. The notice shall set forth the specific findings of deficiency, the basis for such findings, and include recommendations to correct the deficiencies within a reasonable period established in the notice. If the agency fails to correct the deficiencies as provided in the notice and within the time allowed, the commissioner may, after notice and opportunity for public comment, revoke certification of the agency's rules. Upon revocation of certification, §29.21 [~~§505.21~~] of this chapter (relating to Effect of Commissioner Certification of Agency Rules and Rule Amendments) shall not apply to limit commissioner review of any agency actions.

§29.26. Approval of Thresholds for Referral.

As applicable, the provisions of §29.20 [~~§505.20~~] of this chapter (relating to Commissioner Review and Certification of Agency Rules and Rule Amendments) or §29.23 [~~§505.23~~] of this chapter (relating to Expedited Certification of Rule and Rule Amendments) shall be applied in requesting and responding to a request for approval of thresholds. Notwithstanding any other provision of this section to the contrary, when applying §29.20 [~~§505.20~~] or §29.23 of this chapter [~~§505.23~~] to thresholds, the term "threshold" or "thresholds" shall be substituted for the term "rule" or "rules" and the term "approval" shall be substituted for the term "certified" or "certification." Thresholds for referral shall be set a level consistent with the standard in §26.13(b) [~~§501.13(b)~~] of this title (relating to Administrative Policies).

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 January 10, 2023.

TRD-202300104
Mark Havens
Chief Clerk, Deputy Land Commissioner
General Land Office
Earliest possible date of adoption: February 26, 2023
For further information, please call: (512) 475-1859

♦ ♦ ♦

SUBCHAPTER C. CONSISTENCY AND COMMISSIONER REVIEW OF PROPOSED STATE AGENCY ACTIONS

31 TAC §§29.30 - 29.34, 29.36, 29.42

The amendments are proposed under Texas Natural Resources Code, Chapter 33, including, §33.051, which authorizes the GLO and the commissioner to perform the duties provided in Chapter 33, Subchapter C; §33.052, which authorizes the GLO and the commissioner to develop, coordinate, and implement a continuing comprehensive CMP; §33.054, which allows the commissioner to review and amend the CMP; §33.204, which authorizes the commissioner to adopt goals and policies of the CMP by rule; and §33.2052, which authorizes the commissioner to establish by rule a process by which an agency may submit rules to the commissioner for review and certification for consistency with the goals and policies of the CMP.

The proposed amendments are necessary to implement Texas Natural Resources Code, Chapter 33, Subchapters C and F.

§29.30. Agency Consistency Determination.

(a) An agency, when proposing an action listed in §29.11(a) [~~§505.11(a)~~] of this chapter (relating to Actions and Rules Subject to the Coastal Management Program) that may adversely affect a coastal natural resource area (CNRA), shall comply with the CMP goals and policies.

(b) - (e) (No change.)

§29.31. Preliminary Consistency Review of a Proposed Agency Action.

(a) An agency or permit applicant may request and receive a preliminary consistency review of any action listed in §29.11(a) [~~§505.11(a)~~] of this chapter (relating to Actions and Rules Subject to the Coastal Management Program) or §29.60 [~~§505.60~~] of this chapter (relating to Subdivision Actions Subject to the Coastal Management Program) prior to the agency's proposed action.

(b) A request for preliminary consistency review shall be submitted and processed pursuant to Chapter 28 [~~Chapter 504~~] of this title (relating to Permitting Assistance and Preliminary Consistency Review).

§29.32. Requirements for Referral of a Proposed Agency Action.

(a) A proposed action of an agency listed in §29.11(a) [~~§505.11(a)~~] of this chapter (relating to Actions and Rules Subject to the Coastal Management Program) may be referred to the commissioner for review to determine consistency with the CMP goals and policies only if:

(1) the agency has proposed the action for which referral is sought;

(2) the consistency determination for the proposed action was contested by:

(A) a committee member or an agency that was a party in a formal hearing under Government Code, Chapter 2001, or in an alternative dispute resolution process; or

(B) a committee member or other person by the filing of written comments with the agency before the action was proposed if the proposed action is one for which a formal hearing under Government Code, Chapter 2001, is not available;

(3) a person described by subsection (a)(2) of this section files a request for referral within ten days of the date the action is proposed alleging a significant unresolved dispute regarding the proposed action's consistency with the CMP goals and policies; and

(4) any three committee members other than the representative of the Texas Sea Grant College Program agree within 13 days of the date the action is proposed that there is a significant unresolved dispute regarding the proposed action's consistency with the CMP goals and policies and the matter is referred to the commissioner for review.

(b) If consistency review thresholds are in effect under §29.26 [~~§505.26~~] of this chapter (relating to Approval of Thresholds for Referral), the commissioner may not review a proposed action for consistency with the CMP goals and policies unless the requirements of subsection (a) of this section are satisfied and:

(1) if the proposed action is one for which a formal hearing under Government Code, Title 10, Subtitle A, Chapter 2001, is available:

(A) the action exceeds the applicable thresholds and the agency's consistency determination was contested in a formal hearing or an alternative dispute resolution process; or

(B) the action does not exceed the applicable thresholds but may directly and adversely affect a critical area, critical dune area, coastal park, wildlife management area or preserve, or Gulf beach and a state agency contested the agency's consistency determination in a formal hearing; or

(2) if the proposed action is one for which a formal hearing under Government Code, Chapter 2001, is not available to contest the agency's determination, the action exceeds the applicable thresholds.

(c) For purposes of this subchapter, an action subject to the contested case provisions of Government Code, Chapter 2001, is proposed when a notice of a decision or order is issued under Government Code, §2001.142.

(d) The commissioner must consider and act on a matter referred under this section before the 26th day after the date the agency or subdivision proposed the action.

§29.33. Filing of Request for Referral.

(a) To seek commissioner review of a proposed agency action listed in §29.11(a) [~~§505.11(a)~~] of this chapter (relating to Actions and Rules Subject to the Coastal Management Program), a person described in §29.32(a)(2) [~~§505.32(a)(2)~~] of this chapter (relating to Requirements for Referral of a Proposed Agency Action) must file a written Request for Referral with the CMP coordinator. The request must be filed no later than ten days after the agency has proposed the action for which consistency review is sought.

(b) The Request for Referral shall include:

(1) the names, addresses, and signatures of all persons joining in the request;

(2) a certificate of service indicating that copies of the request have been provided by hand delivery or certified mail to:

(A) the agency proposing the action for which review is sought;

(B) the applicant, if any, before the agency; and

(C) if the proposed action was the subject of a formal hearing under Government Code, Chapter 2001, all persons who were named as parties to the proceeding or their representatives;

(3) a description of the proposed action for which review is sought indicating the date of the agency's proposed action and a copy of the proposed order, permit, or other official agency decision document;

(4) a statement demonstrating, by reference to the requirements of §29.32 [~~§505.32~~] of this chapter [~~(relating to Requirements for Referral of a Proposed Agency Action)~~], that the proposed action is subject to referral; and

(5) a clear and concise statement of the significant unresolved dispute regarding the proposed action's consistency with the CMP goals and policies, including specific reference to the applicable goals and policies and to the applicable facts in the agency's decision record.

§29.34. Referral of a Proposed Agency Action to the Commissioner for Consistency Review.

(a) Upon receipt of a timely Request for Referral which satisfies the requirements of §29.33 [~~§505.33~~] of this chapter (relating to Filing of Request for Referral), the CMP coordinator shall provide a copy to each committee member.

(b) - (e) (No change.)

§29.36. Standard of Commissioner Review of a Proposed Agency Action.

(a) The only basis on which the commissioner may protest a proposed agency action is that the proposed action is inconsistent with the CMP goals and policies.

(b) Following certification of an agency's rules as consistent with the CMP goals and policies pursuant to Subchapter B of this chapter:

(1) the commissioner shall presume that the agency's consistency determination is valid if it is supported by the agency's findings of fact and conclusions of law;

(2) the burden shall be on the person filing the request for referral to demonstrate that the agency's proposed action is inconsistent with the CMP goals and policies; and

(3) any thresholds for referral approved pursuant to §29.26 [~~§505.26~~] of this chapter (relating to Approval of Thresholds for Referral) shall become operative and limit the commissioner's authority to review individual proposed actions of an agency as provided in §29.32 [~~§505.32~~] of this chapter (relating to Requirements for Referral of a Proposed Agency Action).

§29.42. Enforcement after Commissioner Protest of a Proposed Agency Action.

(a) The agency with jurisdiction over a proposed action shall enforce provisions of the CMP.

(b) If the attorney general issues an opinion under §29.39 [~~§505.39~~] of this chapter (relating to Agency Action After Commissioner Protest) that a proposed agency action is inconsistent with the CMP, the attorney general shall file suit in a district court of Travis County unless otherwise directed by the commissioner.

(c) Notwithstanding the request for an opinion from, or the filing of a suit by the attorney general, the commissioner and the agency may enter into a settlement agreement with regard to the proposed action. If the commissioner and the agency enter into a settlement agreement, the commissioner may rescind the commissioner's request for an opinion from the attorney 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.

Filed with the Office of the Secretary of State on January 10, 2023.

TRD-202300105
Mark Havens
Chief Clerk, Deputy Land Commissioner
General Land Office
Earliest possible date of adoption: February 26, 2023
For further information, please call: (512) 475-1859

♦ ♦ ♦

SUBCHAPTER D. COMMISSIONER ADVISORY OPINIONS ON GENERAL PLANS

31 TAC §29.51, §29.52

The amendments are proposed under Texas Natural Resources Code, Chapter 33, including, §33.051, which authorizes the GLO and the commissioner to perform the duties provided in Chapter 33, Subchapter C; §33.052, which authorizes the GLO and the commissioner to develop, coordinate, and implement a continuing comprehensive CMP; §33.054, which allows the commissioner to review and amend the CMP; §33.204, which authorizes the commissioner to adopt goals and policies of the CMP by rule; and §33.2052, which authorizes the commissioner to establish by rule a process by which an agency may submit rules to the commissioner for review and certification for consistency with the goals and policies of the CMP.

The proposed amendments are necessary to implement Texas Natural Resources Code, Chapter 33, Subchapters C and F.

§29.51. Request for a Non-Binding Advisory Opinion and Commissioner Action.

(a) An agency or subdivision which has produced a general plan described or listed in §29.50 [~~§505.50~~] of this chapter (relating to General Plans) may request a non-binding advisory opinion on the consistency of its general plan.

(b) - (e) (No change.)

§29.52. Request for Commissioner Participation in the Development of General Plans.

(a) An agency or subdivision which is producing a general plan described or listed in §29.50 [~~§505.50~~] of this chapter (relating to General Plans) may request commissioner participation in the development of a plan by submitting a written request to the CMP coordinator. The commissioner shall participate in the plan development according to the schedule of the agency developing the plan.

(b) The commissioner may direct the committee to participate in the development of the plan and make regular reports to the commissioner.

(c) At the request of an agency or subdivision which is producing a general plan described or listed in §29.50 [~~§505.50~~] of this

chapter [(~~relating to General Plans~~)], the commissioner may enter into a memorandum of agreement establishing the manner of commissioner participation in plan development, the criteria to be used in evaluating the plan, criteria to determine the adequacy of alternatives for resolving potential inconsistencies in the plan with the CMP goals and policies, and such other matters as are deemed appropriate by the parties to the agreement.

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

Filed with the Office of the Secretary of State on January 10, 2023.

TRD-202300106
Mark Havens
Chief Clerk, Deputy Land Commissioner
General Land Office
Earliest possible date of adoption: February 26, 2023
For further information, please call: (512) 475-1859

♦ ♦ ♦

SUBCHAPTER E. CONSISTENCY AND COMMISSIONER REVIEW OF LOCAL GOVERNMENT ACTIONS

31 TAC §§29.60, 29.62 - 29.66, 29.68, 29.74

The amendments are proposed under Texas Natural Resources Code, Chapter 33, including, §33.051, which authorizes the GLO and the commissioner to perform the duties provided in Chapter 33, Subchapter C; §33.052, which authorizes the GLO and the commissioner to develop, coordinate, and implement a continuing comprehensive CMP; §33.054, which allows the commissioner to review and amend the CMP; §33.204, which authorizes the commissioner to adopt goals and policies of the CMP by rule; and §33.2052, which authorizes the commissioner to establish by rule a process by which an agency may submit rules to the commissioner for review and certification for consistency with the goals and policies of the CMP.

The proposed amendments are necessary to implement Texas Natural Resources Code, Chapter 33, Subchapters C and F.

§29.60. Subdivision Actions Subject to the Coastal Management Program.

For purposes of this chapter and Chapter 26 [~~Chapter 501~~] of this title (relating to Coastal Management Program), issuance of a dune protection permit or beachfront construction certificate are the only proposed actions by a subdivision that may adversely affect a coastal natural resource area and that therefore must be consistent with the CMP goals and policies provided such actions authorize:

(1) construction activity that is located 200 feet or less landward of the line of vegetation and that results in the disturbance of more than 7,000 square feet of dunes or dune vegetation;

(2) construction activity that results in the disturbance of more than 7,500 cubic yards of dunes;

(3) a coastal shore protection project undertaken on a Gulf beach or 200 feet or less landward of the line of vegetation and that affects more than 500 linear feet of Gulf beach; or

(4) a closure, relocation, or reduction in existing public beach access or public beach access designated in an approved local government beach access plan, other than for a short term.

§29.62. Subdivision Consistency Determinations.

(a) Prior to a proposed action identified in §29.60 [~~§505.60~~] of this title (relating to Subdivision Actions Subject to the Coastal Management Program), a subdivision shall comply with the CMP goals and policies.

(1) For dune protection permits, the subdivision determination made pursuant to §15.4 of this title (relating to Dune Protection Standards) that the proposed activity will not materially weaken any dune, or materially damage any dune vegetation, or reduce the effectiveness of any dune as a means of protection against erosion and high wind and water, shall constitute a determination that such permit is consistent with CMP goals and policies.

(2) For beachfront construction certificates, the subdivision determination made pursuant to §15.5 of this title (relating to Beachfront Construction Standards) that the proposed activity is consistent with the beach access portion of its approved dune protection and beach access plan and does not interfere with, or otherwise restrict, the public's right to use and have access to and from the Gulf beach shall constitute a determination that such permit is consistent with CMP goals and policies.

(b) A subdivision proposing an action listed in §29.60 [~~§505.60~~] of this title [(~~relating to Subdivision Actions Subject to the Coastal Management Program~~)] shall affirm that it has taken into account the CMP goals and policies by issuing a written determination that the proposed action is consistent with program goals and policies.

§29.63. Preliminary Consistency Review of a Proposed Subdivision Action.

(a) Prior to taking final action, a subdivision may request preliminary consistency review for any proposed action listed in §29.60 [~~§505.60~~] of this chapter (relating to Subdivision Actions Subject to the Coastal Management Program).

(b) A subdivision's request for preliminary consistency review shall be submitted and handled in accordance with the provisions of Chapter 28 [~~Chapter 504~~] of this title (relating to Permitting Assistance and Preliminary Consistency Review).

§29.64. Requirements for Referral of a Proposed Subdivision Action.

A proposed subdivision action listed in §29.60 [~~§505.60~~] of this chapter (relating to Subdivision Actions Subject to the Coastal Management Program) may be referred to the commissioner for review to determine consistency with the CMP goals and policies only if:

(1) the subdivision proposed the action for which referral is sought;

(2) the consistency determination for the proposed action was contested by a member of the committee or other person by the filing of written comments with the subdivision;

(3) a person described in paragraph (2) of this section files a request for referral within ten days of the date the action was proposed alleging a significant unresolved dispute regarding the proposed action's consistency with the CMP goals and policies; and

(4) any three committee members other than the representative of the Texas Sea Grant College Program agree within 13 days of the date the action was proposed that there is a significant unresolved dispute regarding the proposed action's consistency with the CMP goals and policies and the matter is referred to the commissioner for review.

§29.65. Filing of Request for Referral.

(a) To seek commissioner review of an action identified in §29.60 [~~§505.60~~] of this chapter (relating to Subdivision Actions Subject to the Coastal Management Program), a member of the committee or other person must file a written Request for Referral with the CMP coordinator. The request must be filed no later than ten days after the subdivision has proposed the action for which consistency review is sought.

(b) The Request for Referral shall include:

(1) the names, addresses, and signatures of all persons joining in the request;

(2) a certificate of service indicating that requestor has provided copies of the request by personal delivery or certified service to:

(A) the subdivision proposing the action for which review is sought; and

(B) the applicant, if other than the subdivision;

(3) a description of the proposed action for which review is sought, indicating the date of the proposed subdivision action, including a copy of the order, permit, or other official subdivision proposal;

(4) a statement demonstrating, by reference to the requirements of §29.64 [~~§505.64~~] of this chapter (relating to Requirements for Referral of a Proposed Subdivision Action [~~Actions~~]), that the proposed action is one subject to referral; and

(5) a clear and concise statement of the proposed action's inconsistencies with the CMP goals and policies, including specific reference to the applicable goals and policies and to the applicable facts in the subdivision's proposal.

§29.66. Referral of a Proposed Subdivision Action to the Commissioner for Review.

(a) Upon receipt of a timely Request for Referral which satisfies the requirements of §29.65 [~~§505.65~~] of this chapter (relating to Filing of Request for Referral), the CMP coordinator shall provide a copy to each member of the committee.

(b) - (e) (No change.)

§29.68. Standard of Commissioner Review of a Proposed Subdivision Action.

(a) The only basis on which the commissioner may protest a proposed subdivision action is that the proposed action is inconsistent with the CMP goals and policies.

(b) Following the GLO's certification of a subdivision's dune protection and beach access plan under §15.3(o) of this title (relating to Administration) as consistent with the CMP goals and policies:

(1) the subdivision's consistency determination is final and is not subject to referral and review, except as provided in §29.64 [~~§505.64~~] of this chapter (relating to Requirements for Referral of a Proposed Subdivision Action [~~Actions~~]); and

(2) the commissioner shall presume that the subdivision's consistency determination is valid, if such determination is documented by the underlying record, and the burden shall be on the person filing the Request for Referral to demonstrate that the subdivision's proposed action is inconsistent with the CMP goals and policies.

§29.74. Enforcement after Commissioner Protest of a Proposed Subdivision Action.

(a) The agency or subdivision with jurisdiction over a proposed action shall enforce the CMP provisions.

(b) If the attorney general issues an opinion pursuant to §29.71 [~~§505.71~~] of this chapter (relating to Subdivision Action After Commissioner Protest) finding that a proposed subdivision action is inconsistent with the CMP and the agency or subdivision fails to implement the commissioner's recommendation, the attorney general shall file suit in a district court of Travis County unless otherwise directed by the commissioner.

(c) Notwithstanding the request for an opinion from, or the filing of a suit by the attorney general, the commissioner and the subdivision may enter into a settlement agreement with regard to the proposed action. If the commissioner and the subdivision enter into a settlement agreement, the commissioner may rescind the commissioner's request for an opinion from the attorney 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.

Filed with the Office of the Secretary of State on January 10, 2023.

TRD-202300107
Mark Havens
Chief Clerk, Deputy Land Commissioner
General Land Office
Earliest possible date of adoption: February 26, 2023
For further information, please call: (512) 475-1859

CHAPTER 30. COUNCIL PROCEDURES FOR FEDERAL CONSISTENCY WITH COASTAL MANAGEMENT PROGRAM GOALS AND PRIORITIES

31 TAC §§30.10 - 30.13, 30.20 - 30.37, 30.40 - 30.45, 30.50 - 30.54

BACKGROUND AND PURPOSE

The General Land Office (GLO) proposes to repeal Chapter 30, Council Procedures for Federal Consistency with Coastal Management Program Goals and Priorities, which includes the repeal of §§30.10 - 30.13, 30.20 - 30.37, 30.40 - 30.45, and 30.50 - 30.54.

The Texas Coastal Management Program (CMP) is based upon the Coastal Coordination Act, Texas Natural Resources Code, Chapter 33, Subchapter F. In 1991, the Coastal Coordination Council (Council) was created for the purpose of developing CMP policy, facilitating interagency coordination, conducting dispute resolution, and overseeing the CMP. The CMP goals and policies are utilized for ensuring state and federal actions are consistent with the CMP. In 2010, the Council was reviewed by the Texas Sunset Advisory Commission. In its review, the Sunset Commission found that the Council had transitioned from developing and implementing the CMP to merely administering it. The Sunset Commission further determined that since the GLO was charged with the primary administrative responsibility for the CMP, the GLO could more efficiently perform the Council's duties. In light of these findings, the Sunset Commission recommended abolishing the Council and transferring the Council's functions to the Commissioner and GLO.

During the 82nd Legislative Session, the Texas Legislature passed Senate Bill 656, abolishing the Council and transferring the duties and powers of the Council to the General Land Office. SB 656 also directed the Commissioner to establish the Coastal Coordination Advisory Committee (Committee). The Committee's membership closely resembles the former Council's membership, as it requires a representative from each of eight state agencies with coastal duties, as well as four public members appointed by the Commissioner to represent coastal priorities.

The purpose of this rulemaking is to repeal and replace the sections in Chapter 30 with proposed new sections, found in a separate rulemaking action, that incorporate changes made by SB 656 and that conform with the Coastal Zone Management Act (CZMA) Federal Consistency regulations in 15 CFR Part 930.

FISCAL AND EMPLOYMENT IMPACTS

Melissa Porter, Deputy Director, Coastal Resources, has determined that for each year of the first five years that the proposed repeals are in effect, there will be no fiscal impacts to state government as a result of enforcing or administering the repeals as proposed. There are no anticipated fiscal implications for local governments as a result of enforcing or administering the repeals as proposed.

Ms. Porter has also determined that the proposed repeals will not have an adverse economic effect on small or large businesses, micro-businesses, rural communities, or individuals for the first five years that the proposed repeals and new section are in effect.

Ms. Porter has determined that the proposed repeals will not affect a local economy, and the repeals as proposed will have no adverse local employment impact that requires an impact statement pursuant to Texas Government Code, §2001.022.

PUBLIC BENEFIT

Ms. Porter has determined that for each year of the first five years the proposed repeals are in effect, the public will benefit from the proposed repeals because the proposed new sections will provide necessary updates and clarifications, increase understanding of the process, and improve the overall efficiency and continued implementation of the CMP.

GOVERNMENT GROWTH IMPACT STATEMENT

The GLO prepared a Government Growth Impact Statement for the proposed repeals. During the first five years the proposed repeals would be in effect, the repeals would: not create or eliminate a government program; not create or eliminate any employee positions; not require an increase or decrease in future legislative appropriations to the agency; not require an increase or decrease in fees paid to the agency; create a new regulation by repealing and replacing existing regulations; not expand or limit an existing regulation but would repeal and replace existing regulations; not increase or decrease the number of individuals subject to the rule's applicability; and not positively or adversely affect the state's economy.

TAKINGS IMPACT ASSESSMENT

The GLO has evaluated the proposed repeals in accordance with Texas Government Code, §2007.043(b), and the Attorney General's Private Real Property Rights Preservation Act Guidelines to determine whether a detailed takings impact assessment is required. The proposed repeals do not affect private real property in a manner that requires real property owners to be compensated as provided by the Fifth and Fourteenth Amendments to the United States Constitution or Article I, §§17 and 19 of the Texas Constitution. Furthermore, the proposed repeals would not affect any private real property in a manner that restricts or limits the owner's right to the property that would otherwise exist in the absence of the rules. The proposed repeals will not result in a taking of private property, and there are no adverse impacts on private real property interests.

ENVIRONMENTAL REGULATORY ANALYSIS

The GLO has evaluated the proposed repeals in accordance with Texas Government Code, §2001.0225, and determined that the action does not meet the definition of a "major environmental rule" as defined in the statute. "Major environmental rule" means a rule of which the specific intent is to protect the environment or reduce risks to human health from environmental exposure and that may adversely affect the economy, a sector of the economy, productivity, competition, jobs, the environment, or public health and safety of the state or a sector of the state. The proposed rulemaking is not anticipated to 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 the state or a sector of the state.

PUBLIC COMMENT REQUEST

To comment on the proposed repeals, please send written comments to Mr. Walter Talley, Texas Register Liaison, Texas General Land Office, P.O. Box 12873, Austin, Texas 78711, facsimile number (512) 475-1859, or email to walter.talley@glo.texas.gov. Written comments must be received no later than 5:00 p.m., thirty (30) days from the date of publication of this proposal.

STATUTORY AUTHORITY

The repeals are proposed under Texas Natural Resources Code, Chapter 33, including §33.051, which authorizes the GLO and the commissioner to perform the duties provided in Chapter 33, Subchapter C; §33.052, which authorizes the GLO and the commissioner to develop, coordinate, and implement a continuing comprehensive CMP; §33.054, which allows the commissioner to review and amend the CMP; and §33.204, which authorizes the commissioner to adopt goals and policies of the CMP by rule.

The proposed repeals are necessary to implement Texas Natural Resources Code, Chapter 33, Subchapters C and F.

§30.10. Purpose and Policy.

§30.11. Definitions.

§30.12. Federal Agency Actions, Federal Agency Activities and Development Projects, and Outer Continental Shelf Plans Subject to the Coastal Management Program.

§30.13. Conditional Concurrence.

§30.20. Consistency Determinations for Federal Agency Activities and Development Projects.

§30.21. Notification of Negative Determinations.

§30.22. General Consistency Determinations for Proposed Federal Agency Activities.

§30.23. Consistency Determinations for Development Projects.

§30.24. Consistency Determinations for Federal Agency Activities Initiated Prior to Federal Approval of the Coastal Management Program.
§30.25. Public Notice and Comment.
§30.26. Referral of Federal Activities.
§30.27. Council Hearing to Review Federal Agency Activities and Availability of Mediation.
§30.28. General Consistency Agreements for Federal Activities; Interagency Coordination Teams for Federal Development Projects.
§30.29. Supplemental Interagency Coordination for Proposed Federal Agency Activities.
§30.30. Consistency Certifications for Federal Agency Actions.
§30.31. Council Assistance.
§30.32. Public Notice and Comment.
§30.33. Referral of Federal Agency Action.
§30.34. Council Hearing to Review a Federal Agency Action.
§30.35. General Concurrence.
§30.36. Supplemental Coordination for Proposed Federal Agency Actions.
§30.37. Remedial Action for Previously Reviewed Federal Agency Actions.
§30.40. Consistency Certifications for Outer Continental Shelf Plans.
§30.41. Public Notice and Comment.
§30.42. Referral of an Outer Continental Shelf Plan.
§30.43. Council Hearing to Review Outer Continental Shelf Plan.
§30.44. Effect of Council Concurrence.
§30.45. Failure to Comply Substantially with an Approved OCS Plan.
§30.50. Notice to the Council of Applications for Federal Assistance.
§30.51. Referral of Applications for Federal Assistance.
§30.52. Council Hearing to Review Applications for Federal Assistance.
§30.53. Supplemental Coordination for Federal Assistance Activities Rule.
§30.54. Remedial Action for Previously Reviewed Federal Assistance Activities.

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 January 10, 2023.

TRD-202300109
Mark Havens
Chief Clerk, Deputy Land Commissioner
General Land Office
Earliest possible date of adoption: February 26, 2023
For further information, please call: (512) 475-1859

♦ ♦ ♦

31 TAC §§30.10 - 30.12, 30.20, 30.30, 30.40, 30.50, 30.60

BACKGROUND AND PURPOSE

The General Land Office (GLO) proposes new Chapter 30, Procedures for Federal Consistency with Coastal Management Program Goals and Policies, which includes proposed new §§30.10 - 30.12, 30.20, 30.30, 30.40, 30.50, and 30.60.

The Texas Coastal Management Program (CMP) is based upon the Coastal Coordination Act, Texas Natural Resources Code, Chapter 33, Subchapter F. In 1991, the Coastal Coordination Council (Council) was created for the purpose of developing CMP policy, facilitating interagency coordination, conducting dispute resolution, and overseeing the CMP. The CMP goals and policies are utilized for ensuring state and federal actions are consistent with the CMP. In 2010, the Council was reviewed by the Texas Sunset Advisory Commission. In its review, the Sunset Commission found that the Council had transitioned from developing and implementing the CMP to merely administering it. The Sunset Commission further determined that since the GLO was charged with the primary administrative responsibility for the CMP, the GLO could more efficiently perform the Council's duties. In light of these findings, the Sunset Commission recommended abolishing the Council and transferring the Council's functions to the Commissioner and GLO.

During the 82nd Legislative Session, the Texas Legislature passed Senate Bill 656, abolishing the Council and transferring the duties and powers of the Council to the General Land Office. SB 656 also directed the Commissioner to establish the Coastal Coordination Advisory Committee (Committee). The Committee's membership closely resembles the former Council's membership, as it requires a representative from each of eight state agencies with coastal duties, as well as four public members appointed by the Commissioner to represent coastal priorities.

The purpose of this rulemaking is to repeal and replace the sections in Chapter 30 with proposed new sections that incorporate changes made by SB 656 and that conform with the Coastal Zone Management Act (CZMA) Federal Consistency regulations in 15 CFR Part 930. Specifically, the proposed new rules further implement SB 656 by removing all references to the abolished Council, reflecting the transfer of the Council's functions and duties to the Commissioner and the GLO, and adding references to the Committee. Additionally, the GLO's federal consistency procedures are required to be consistent with the Federal Consistency regulations in 15 CFR Part 930, promulgated by the National Oceanic and Administrative Administration (NOAA). The proposed new rules closely adhere to the Federal Consistency regulations and adopt the review timeframes for federal agency actions in 15 CFR Part 930.

The proposed new rules also reorganize, streamline, and clarify the GLO's federal consistency review procedures for federal license or permit activities, activities and development projects, outer continental shelf (OCS) plans, and federal assistance to state and local governments. New federal assistance activities have been identified and added for federal consistency review if they occur within the CMP boundary and may adversely affect coastal natural resource areas (CNRAs). These new federal assistance activities are listed according to their federal CFDA numbers. This rulemaking also updates rule references that became outdated as a result of the administrative transfer of rules from 31 TAC Chapter 506 to 31 TAC Chapter 30, effective on December 1, 2022.

The proposed repeals are necessary for the continued implementation of the Coastal Coordination Act, as amended by SB 656, and to ensure the GLO's federal consistency procedures conform to the Federal Consistency regulations in 15 CFR Part 930.

SECTION BY SECTION ANALYSIS

The GLO proposes to repeal §§30.10 - 30.13, 30.20 - 30.37, 30.40 - 30.45, and 30.50 - 30.54, and proposes new sections §§30.10 - 30.12, 30.20, 30.30, 30.40, 30.50, and 30.60, in proposed new Chapter 30 titled "Procedures for Federal Consistency with Coastal Management Program Goals and Policies."

Proposed new §30.10, relating to Purpose and Policy, stipulates that the rules in the Chapter establish a process for federal consistency review, as required by Texas Natural Resources Code, §33.206(d). This new section reflects federal procedures for implementing the federal consistency requirements of the CZMA and provides that federal actions and activities subject to the Texas CMP are consistent with the goals and enforceable policies. The procedures in this Chapter are also intended to allow the Commissioner to identify, address, and resolve federal consistency issues. The new section also stipulates that if any inconsistencies are found between these rules and those of the Federal Consistency regulations in 15 CFR Part 930, the federal regulations control. This new section is necessary to implement SB 656 and to update the rules to conform with the Federal Consistency regulations in 15 CFR Part 930.

Proposed new §30.11, relating to Definitions, sets forth the meanings of key terms used in the Chapter.

Proposed new §30.11(a) adds an interpretive provision clarifying that the defined terms have the meanings set forth in this section unless the context clearly indicates otherwise.

Proposed new §30.11(a)(1) adds a definition for "associated facilities," which means all "proposed facilities: (A) which are specifically designed, located, constructed, operated, adapted, or otherwise used, in full or in major part, to meet the needs of a federal action (e.g., activity, development project, license, permit, or assistance); and (B) without which the federal action, as proposed, could not be conducted." *See* 15 CFR §930.11(d).

Proposed new §30.11(a)(2) adds a definition for "Coastal Coordination Act," which is the short title of Texas Natural Resources Code, Chapter 33, Subchapter F.

Proposed new §30.11(a)(3) adds a definition for "coastal zone," which means the "portion of the coastal area located within the boundaries established by the CMP under Texas Natural Resources Code, §33.2053(k), and described in Chapter 27 of this title (relating to Coastal Management Program Boundary)."

Proposed new §30.11(a)(4) adds a definition for "CMP," which means "Texas Coastal Management Program, which was accepted into the federal Coastal Zone Management Program in 1996 after receiving approval from the federal Office for Coastal Management."

Proposed new §30.11(a)(5) adds a definition for "CMP coordinator," which means the "GLO Coastal Resources staff member designated by the commissioner."

Proposed new §30.11(a)(6) adds a definition for "CMP goals and enforceable policies," which means the "goals and enforceable policies set forth in Chapter 26 of this title."

Proposed new §30.11(a)(7) adds a definition for "Commissioner," which means the "Commissioner of the GLO."

Proposed new §30.11(a)(8) adds a definition for "Committee," which means the "Coastal Coordination Advisory Committee."

Proposed new §30.11(a)(9) adds a definition for "CZMA," which means the "Federal Coastal Zone Management Act of 1972, as amended."

Proposed new §30.11(a)(10) - (16) adds definitions for "development project," "Director," "federal agency," "federal agency activity," "federal assistance," "federal license or permit activity," and "Outer Continental Shelf (OCS) plan," that are consistent with the Federal Consistency Regulations in 15 CFR Part 930.

Proposed new §30.11(a)(17) adds a definition for "program boundary," which means "CMP program boundary established in §27.1 of this title (relating to the Coastal Management Program Boundary)."

Proposed new §30.11(b) adds an interpretive provision clarifying that statutory or regulatory terms or phrases that are not defined in the Chapter retain the meaning provided in the pertinent agency's regulations unless a different meaning is assigned in the applicable regulations under the CZMA.

Proposed new §30.12, relating to Federal Listed Activities Subject to CZMA Review, identifies federal agency actions that are subject to the Federal Consistency regulations set out in 15 CFR Part 930.

Proposed new §30.12(a) states that federal actions within the CMP boundary may adversely affect coastal natural resource areas (CNRAs) within the coastal zone. The list of federal actions that are subject to CZMA federal consistency review by the GLO include federal agency activities, federal license or permit activities, and federal assistance applications.

Proposed new §30.12(a)(1) explains that a consistency determination is required for federal agency activities and development projects by or on behalf of federal agencies that may have reasonably foreseeable effects on CNRAs. The new subsection also states that a consistency determination or negative determination must be submitted to the GLO in accordance with the requirements of the Federal Consistency regulations found at 15 CFR Part 930, subpart C.

Proposed new §30.12(a)(1)(A) - (F) identify federal agencies that must submit consistency determinations or negative determinations to the GLO for specifically listed activities in this section.

Proposed new §30.12(a)(1)(A)(i) and (ii) identify the following United States Department of the Interior activities subject to consistency review: "(i) modifications to the boundaries of the Coastal Barrier Resource System under 16 United States Code Annotated, §3503(c); and (ii) OCS lease sales within the western and central Gulf of Mexico under 43 United States Code Annotated, §1337."

Proposed new §30.12(a)(1)(B) identifies a United States Environmental Protection Agency activity subject to consistency review: "Selection of remedial actions under 42 United States Code Annotated §9604(c)."

Proposed new §30.12(a)(1)(C)(i) - (viii) identify the following United States Army Corps of Engineer activities subject to consistency review: "(i) small river and harbor improvement projects under 33 United States Code Annotated, §577; (ii) water resources development projects under 42 United States Code Annotated, §1962d-5; (iii) small flood control projects under 33 United States Code Annotated, §701s; (iv) small beach erosion control projects under 33 United States Code Annotated, §426g; (v) operation and maintenance of civil works projects under the Code of Federal Regulations, Title 33, Parts 335 and 338; (vi) dredging projects under the Code of Federal Regulations, Title 33, Part 336; (vii) approval for projects for the prevention or mitigation of damages to shore areas attributable to federal navigation projects pursuant to 33 United States Code Annotated, §426i; and (viii) approval for projects for the placement on state beaches of beach-quality sand dredged from federal navigation projects pursuant to 33 United States Code Annotated, §426j."

Proposed new §30.12(a)(1)(D)(i) and (ii) identify the following Federal Emergency Management Agency activities subject to consistency review: "(i) model floodplain ordinances; and (ii) approval of a community's participation in the National Flood Insurance Program (NFIP) under the Code of Federal Regulations, Title 44, Part 59, subpart B."

Proposed new §30.12(a)(1)(E)(i) and (ii) identify the following General Services Administration activities subject to consistency review: "(i) acquisitions under 40 United States Code Annotated, §602 and §603; and (ii) construction under 40 United States Code Annotated, §605."

Proposed new §30.12(a)(1)(F)(i) and (ii) identify the following federal agency activities subject to consistency review: "(i) all other development projects; (ii) and natural resource restoration plans developed pursuant to the Oil Pollution Act of 1990 (33 United States Code Annotated §§2701-2761) and the Comprehensive Environmental Response, Compensation and Liability Act (42 United States Code Annotated §§9601-9675)."

Proposed new §30.12(a)(2), relating to Federal License or Permit Activities, explains that for all proposed activities requiring a federal license or permit, a consistency certification must be submitted to GLO pursuant to the requirements of the Federal Consistency regulations in 15 CFR Part 930, subpart D.

Proposed new §30.12(a)(2)(A) - (F) identify federal agencies and associated licenses and permits that have reasonably foreseeable adverse effects upon CNRAs and require applicants to submit a consistency certification to the GLO if the proposed action occurs in the Texas coastal zone.

Proposed new §30.12(a)(2)(A)(i) - (v) identify the following Environmental Protection Agency activities that are subject to consistency review: "(i) National Pollution Discharge Elimination System (NPDES) permits under 33 United States Code Annotated, §1342; (ii) ocean dumping permits under 33 United States Code Annotated, §1412; (iii) approvals of land disposal of wastes under 42 United States Code Annotated, §6924(d); and (iv) development of total maximum daily loads (TMDLs) and associated federally developed TMDL implementation plans under 33 United States Code Annotated, §1313; and (v) approvals of National Estuary Program Comprehensive Conservation Management Plans under 33 United States Code Annotated, §1330f."

Proposed new §30.12(a)(2)(B)(i) - (v) identify the following United States Army Corps of Engineers activities and Memoranda of Agreement that are subject to consistency review: "(i) ocean dumping permits under 33 United States Code Annotated, §1413; (ii) dredge and fill permits under 33 United States Code Annotated, §1344; (iii) permits under §9 of the River and Harbor Act of 1899, 33 United States Code Annotated, §401; (iv) permits under §10 of the River and Harbor Act of 1899, 33 United States Code Annotated, §403; and (v) Memoranda of Agreement for mitigation banking."

Proposed new §30.12(a)(2)(C)(i) - (iii) identify the following United States Department of Transportation approvals and licenses that are subject to consistency review: "(i) approvals under §7(a) of the Federal-Aid Highway Amendments Act of 1963, 23 United States Code Annotated, §106; (ii) approvals under §502 of the General Bridge Act of 1946, 33 United States Code Annotated, §525; and (iii) deepwater port licenses under 33 United States Code Annotated, §1503."

Proposed new §30.12(a)(2)(D)(i) identifies airport operating certificates for the Federal Aviation Administration under 49 United States Code Annotated, §44702.

Proposed new §30.12(a)(2)(E)(i) - (iii) identify the following Federal Energy Regulatory Commission authorizations that are subject to consistency review: "(i) certificates under §7 of the Natural Gas Act, 15 United States Code Annotated, §717f; (ii) licenses under §4 of the Federal Power Act, 16 United States Code Annotated, §797(e); and (iii) exemptions under §403 of the Public Utility Regulatory Policies Act of 1978, 16 United States Code Annotated, §2705(d)."

Proposed new §30.12(a)(2)(F) identifies Nuclear Regulatory Commission licenses that are subject to consistency review: "Licenses under §103 of the Atomic Energy Act of 1954, 42 United States Code Annotated, §2133."

Proposed new §30.12(a)(3), relating to State and Local Government Applications for Federal Assistance, identifies certain federal assistance for state and local governments activities occurring within the Texas coastal zone that are set out in Title 2 Code of Federal Regulations §200.10, relating to Catalog of Federal Domestic Assistance (CFDA) activities. The proposed new subsection §30.12(a)(3)(A), adds the following Federal Emergency Management Administration (FEMA) CFDA numbers: 97.008 relating to Non-Profit Security Program; 97.029, relating to Flood Mitigation Assistance; 97.036 relating to Disaster Grants - Public Assistance (Presidentially Declared Disasters); 97.039 Hazard Mitigation Grant; 97.041 relating to National Dam Safety Program - Rehabilitation of High Hazard Potential Dams (HHPD); 97.042 relating to Emergency Management Performance Grants; 97.047 relating to BRIC: Building Resilient Infrastructure and Communities; 97.048, relating to Federal Disaster Assistance to Individuals and Households in Presidential Declared Disaster Areas; 97.052 relating to Emergency Operations Center; 97.056 relating to Port Security Grant Program; 97.067 relating to Homeland Security Grant Program; and 97.092, relating to Repetitive Flood Claims. The proposed new subsection §30.12(a)(3)(B), adds CFDA's for Department of Housing and Urban Development (HUD) which include: 14.218, relating to Community Development Block Grants/Entitlement Grants; and 14.239, relating to Home Investment Partnerships Program.

Proposed new §30.12(b), relating to the review of OCS Exploration Plans, and Development and Production Plans, as set out in 43 United States Code, §§1340(c) and 1351, includes "activities that are authorized by the United States Department of the Interior and provides for the review of a federal license or permit activity described in detail in OCS plans, including pipeline activities."

Proposed new §30.12(c), relating to the review of a proposed federal agency activity that is unlisted in subsection (a)(1) of this section, states that the GLO will follow the federal regulations process set out in 15 CFR §930.34(c) and that if the GLO elects to review a proposed federal license or permit activity of a type that is unlisted in subsection (a)(2) of this section the GLO will follow the procedures set out in 15 CFR §930.54.

Proposed new §30.20, relating to Consistency Determinations for Federal Agency Activities and Development Projects, adds a section that details the required information for a consistency determination and the associated federal consistency review process for a federal agency activity or development project.

Proposed new §30.20(a), relating to the Review of a Consistency Determination, sets forth the review standard that the GLO must follow when conducting a consistency review of a federal agency activity or development project as set out in 15 CFR Part 930, subpart C. The new subsection requires a federal agency activity or development project to be consistent with the CMP goals and enforceable policies.

Proposed new §30.20(b), relating to Required Information for a Consistency Determination, identifies the information required for a consistency determination as set out in 15 CFR §930.39. This includes: a detailed description of the activity, its associated facilities, coastal effects, and comprehensive data and information sufficient to support the federal agency's consistency statement. The new subsection also provides that the amount of detail in the evaluation of the enforceable policies, activity description and supporting information is to be commensurate with the expected coastal effects of the activity. Additionally, a federal agency may submit the information to the GLO in any manner that it chooses so long as the requirements in 15 CFR §930.39 are met. The federal agency is also required to provide the consistency determination to the GLO for review no later than ninety (90) days prior to the approval of the activity. The new subsection also requires a statement in the consistency determination indicating whether the proposed activity will be undertaken in a manner consistent to the maximum extent practicable with the enforceable policies of the Texas CMP. This is in conformance with 15 CFR §930.39(a).

Proposed new §30.20(c), relating to Request for Information, explains how GLO staff may request information from a federal agency if the federal agency provides an incomplete consistency determination, the GLO provides notice of the incomplete submission in accordance with the federal regulations, and it is the type of information identified in 15 CFR §930.39(a).

Proposed new §30.20(d), relating to NEPA or other Project documents, describes the types of documents, a federal agency may provide to GLO to sufficiently support the federal agency's consistency determination in accordance with 15 CFR §930.39(a).

Proposed new §30.20(e), relating to Demonstration of Consistency, describes the type of information a federal agency must provide in support of the federal agency's consistency determination. The information is set out in 15 CFR §930.39(a) and this section notes that the federal agency should demonstrate consistency to the maximum extent practicable with the CMP goals and enforceable policies. The demonstration of consistency may rely upon information contained in NEPA documents or other project documents, but if a consistency determination is embedded within a NEPA document, this should be clearly stated and provided to the GLO. The consistency determination should also meet all of the information requirements of 15 CFR §930.39(a) which can include a reference to the findings of the NEPA document.

Proposed new §30.20(f), relating to Public Participation, provides a description of the public notice and comment period for a consistency determination in accordance with 15 CFR §930.42. The new subsection provides that the GLO may issue joint public notices with federal agencies involved with the respective activity or development project. The GLO may also extend the public notice and comment period or schedule a public meeting. The new subsection also provides that the GLO will consider all comments received during the notice period.

Proposed new §30.20(g), relating to Referral to Commissioner, describes the process for referring a matter to the Commissioner for an elevated consistency review. This new subsection states that to refer an issue, at least three committee members must agree that a significant unresolved issue exists regarding consistency with the CMP goals and enforceable policies. If this requirement is met, then at least three committee members must submit a letter or email addressed to the CMP coordinator with a request that the matter be referred to the Commissioner for an elevated consistency review. Any applicable CMP goals and enforceable policies that are unresolved and potential impacts to CNRAs should be addressed in the letter or email. The referral process tracks the requirements in Texas Natural Resources Code, §33.206(e), as amended by SB 656.

Proposed new §30.20(h), relating to Commissioner Review, describes the factors the Commissioner must consider when conducting an elevated consistency review for a federal agency activity or development project. The new subsection states that the Commissioner will consider: (1) oral or written testimony received during the public comment period; (2) applicable CMP goals and enforceable policies; (3) information submitted by the federal agency or applicant; and (4) other relevant information to determine consistency with CMP goals and enforceable policies. This new subsection conforms to the requirements of Texas Natural Resources Code, §33.204(e), as amended by SB 656.

Proposed new §30.20(i), relating to the Review Period, sets the timeframe in which GLO will provide a decision or status update to the federal agency on the consistency determination. Under the new subsection, the GLO will provide a status update to the federal agency in writing within sixty (60) days from the date the consistency determination was deemed administratively complete. If the GLO has not completed its review during this time, the GLO will explain the basis for delay and follow the procedures set out in 15 CFR §930.36(b)(2) if an additional fifteen (15) days for review is necessary. The new subsection further states that a concurrence may be presumed by the federal agency if the matter has not been acted upon by the GLO after sixty (60) days from the date of administrative completeness and the GLO has not requested additional time for review. The sixty (60) day presumption of concurrence is set out in 15 CFR §930.41.

Proposed new §30.20(j), relating to Commissioner Objection, describes the process in which the Commissioner may object to the consistency determination. The new subsection provides that the federal agency will be notified of the objection prior to the time, including any extensions, that the federal agency is entitled to presume the activity's consistency. The Commissioner's objection will follow the requirements provided in 15 CFR §930.43 which set out the required content for an objection.

Proposed new §30.20(k), relating to Mediation, describes how mediation may be sought if the Commissioner objects to the federal agency's consistency determination because it is deemed inconsistent with the CMP goals and enforceable policies. The mediation process is set out in 15 CFR §§930.110 et seq.

Proposed new §30.20(l), relating to Final Approval, describes the time that must pass before a federal agency may make a decision to undertake a proposed federal agency activity subject to CZMA review in §30.12 of this chapter.

Proposed new §30.30, relating to Consistency Certifications for Federal License or Permit Activities, describes the requirements for a consistency certification and the federal consistency

process associated with the review of federal license or permit activities as provided for in 15 CFR Part 930, subpart D.

Proposed new §30.30(a), relating to Review of a Consistency Certification, describes the consistency certification review process for a non-federal applicant for a federal license or permit activity listed under §30.12 of this chapter. This new subsection provides the applicable review standard that the GLO will follow when conducting a consistency certification review of a federal license or permit activity in accordance with 15 CFR Part 930, subpart D. The new subsection also requires a federal license or permit activity listed under §30.12 of this Chapter to be consistent with the CMP goals and enforceable policies.

Proposed new §30.30(b), relating to Required Information for a Consistency Certification, requires an applicant for a federal license or permit activity to submit a consistency certification to the GLO for a consistency review. The consistency certification must be complete and follow the requirements set out in 15 CFR §930.57. This includes the necessary data and information that is required in 15 CFR §930.58 and §30.30(b)(1), (2), (3), and (4) of this Chapter. The applicant must also provide a statement affirming that the "The proposed activity complies with the enforceable policies of Texas' approved coastal management program and will be conducted in a manner consistent with such program" which is in conformance with 15 CFR §930.57(b).

Proposed new §30.30(c), relating to a Request for Necessary Data and Information, states that GLO staff may request necessary data and information from the applicant when it has received an incomplete submission of information, as required by 15 CFR §§930.57 and 930.58. The GLO will send a notice of incomplete submission and may delay the start of the review period if the request for this information is provided within thirty (30) days from the date the consistency certification is received by the GLO.

Proposed new §30.30(d), relating to the Review Period, provides the GLO up to six (6) months to conduct the consistency review and issue a decision on the consistency certification request. The review period is initiated when the required necessary data and information has been received by the GLO. The required necessary data and information is identified in 15 CFR §930.58 and 31 TAC §30.30(b). The GLO cannot require the issuance of state or local permits to begin the consistency review, but the lack of this information may result in an objection based on lack of information because the GLO is unable to complete the consistency review without the identified information.

Proposed new §30.30(e), relating to Mutual Stay Agreement, allows the GLO and applicant to enter into a mutual written agreement with the applicant to stay the CZMA review period in accordance with 15 CFR §930.60(b). The mutual stay agreement provides additional time for the applicant and GLO to resolve any issues before the consistency review period expires. For a stay to be executed, the mutual stay agreement must be entered into before the consistency review period expires. The remaining day count in the federal consistency review period that is available on the date the mutual stay agreement is signed will be available to the GLO for purposes of completing the consistency review after the stay agreement expires.

Proposed new §30.30(f), relating to Permit Assistance, states that the GLO will provide permit assistance and guidance when requested by the applicant in accordance with 15 CFR §930.56.

Proposed new §30.30(g), relating to Consolidation of Federal License or Permit Activities, encourages applicants to consolidate related federal license or permit activities that are identified in §30.12 of this chapter (relating to Listed Federal Activities Subject to CZMA Review) to maximize efficiency and avoid unnecessary delays by reviewing all federal license or permit activities relating to a project at the same time.

Proposed new §30.30(h), relating to Public Participation, describes the public participation process which is in accordance with 15 CFR §930.61. The new subsection states that the GLO may issue joint public notices with the federal permitting or licensing agency. The new subsection also provides that the GLO may extend the public comment period or schedule a public meeting on the consistency certification. Comments received during the comment period will be considered.

Proposed new §30.30(i), relating to Demonstration of Consistency, explains how an applicant should demonstrate that the federal license or permit activity under review is consistent with the CMP goals and enforceable policies. The new subsection allows required state and local permits that have been issued to the applicant to be used by the applicant as evidence to demonstrate consistency with the CMP goals and enforceable policies.

Proposed new §30.30(j), relating to Referral to Commissioner, explains the process for referring a matter to the Commissioner for an elevated consistency review of the consistency certification. To refer a matter, at least three committee members must agree that a significant unresolved issue exists regarding consistency with the CMP goals and enforceable policies. If this requirement is met, then at least three committee members must submit a letter or email addressed to the CMP coordinator with a request that the issue be referred to the Commissioner for an elevated consistency review. Any applicable CMP goals and enforceable policies that are unresolved and potential impacts should be addressed in the letter or email. The referral process is consistent with the requirements in Texas Natural Resources Code, §33.206(e), as amended by SB 656.

Proposed new §30.30(k), relating to Commissioner Review, describes the factors the Commissioner must consider when conducting an elevated consistency review of a consistency certification. The factors that will be considered include: (1) oral or written testimony received during the public comment period; (2) applicable CMP goals and enforceable policies; (3) information submitted by the federal agency or applicant; and (4) other relevant information to determine consistency with CMP goals and enforceable policies. This new subsection conforms to the requirements of Texas Natural Resource Code, §33.204(e), as amended by SB 656.

Proposed new §30.30(l), relating to Presumption of Concurrence, describes when a concurrence may be presumed. Under the new subsection, the GLO will provide a status update in writing within ninety (90) days to the applicant seeking a federal license or permit. If the GLO has not issued a decision within six (6) months from the date the GLO received the complete consistency certification, the applicant may presume a concurrence.

Proposed new §30.30(m), relating to Commissioner Objection, provides that once a matter has been referred to the Commissioner for an elevated consistency review with the goals and enforceable policies of the CMP, the Commissioner may object to the consistency certification in accordance with the requirements in 15 CFR §930.63.

Proposed new §30.30(n), relating to Right of Appeal, provides that if the Commissioner finds that the proposed federal license or permit activity is inconsistent with the CMP goals and en-

forceable policies and objects to the consistency certification, the GLO shall notify the applicant of its appeal rights to the U.S. Secretary of Commerce, and the federal agency shall not authorize the federal license or permit activity, except as provided through the appeal process established in 15 CFR Part 930, subpart H.

Proposed new §30.40(a), relating to Consistency Review of an Outer Continental Shelf (OCS) Exploration, Development, and Production Activities, requires that an authorization from the U.S. Department of the Interior pursuant to the Outer Continental Shelf Lands Act (43 USC §§1331-1356(a)) be consistent with the goals and enforceable policies of the CMP. The GLO shall conform to the requirements and procedures set out in 15 CFR Part 930, subpart E and 43 U.S.C. §§1331 *et seq*.

Proposed new §30.40(b), relating to Consistency Certification of an OCS Plan, requires that any person, as defined at 15 CFR §930.72, submitting any OCS plan to the Secretary of Interior or designee shall provide a copy of the OCS plan and that the consistency certification include a provision affirming "The proposed activities described in detail in this plan shall comply with Texas' approved coastal management program and will be conducted in a manner consistent with the program." The Secretary of the Interior or designee shall provide the plan and consistency certification to the GLO. *See* 15 CFR §930.76.

Proposed new §30.40(c), relating to Request for Information, states that GLO's six (6) month review period on a consistency certification for an OCS plan begins on the date the GLO receives the information required at 15 CFR §930.76, and all the necessary data and information required at 15 CFR §930.58(a). Pursuant to 15 CFR §930.60(a), within thirty (30) days of an incomplete submission, GLO shall inform the person submitting the OCS plan that the GLO six (6) month review period will commence on the date of receipt of the missing consistency certification or necessary data and information. The GLO may waive the requirement that all necessary data and information described in §930.58(a) be submitted before commencement of the State agency's six (6) month consistency review. In the event of such a waiver, the requirements of 15 CFR §930.58(a) must be satisfied prior to the end of the six (6) month consistency review period or the GLO may object to the consistency certification for insufficient information.

Proposed new §30.40(d), relating to Consolidation of Related Authorizations, encourages persons submitting OCS plans to consolidate related federal licenses and permits that are subject to GLO review. This is not required but would allow for a more efficient review and minimize the duplication of effort and unnecessary delays. *See* 15 CFR §930.81.

Proposed new §30.40(e), relating to Public Participation, describes the public notice and comment period in accordance with 15 CFR §930.77. The new subsection provides that the GLO may issue joint public notices with the federal permitting or licensing agency. The new subsection also provides that the GLO may extend the public comment period or schedule a public meeting on the consistency certification. Comments received during the comment period will be considered by the GLO.

Proposed new §30.40(f), relating to Referral to Commissioner, explains the process for referring a matter to the Commissioner for an elevated consistency review of the OCS plan's consistency certification. To refer an issue, at least three committee members must agree that a significant unresolved issue exists regarding the OCS plan's consistency with the CMP goals and enforceable policies. If this requirement is met, then at least three committee members must submit in writing a letter or email addressed to the CMP coordinator with a request that the issue be referred to the Commissioner for an elevated consistency review. Any applicable CMP goals and enforceable policies that are unresolved and potential impacts should be addressed in the letter or email. The referral process conforms to Texas Natural Resources Code, §33.206(e), as amended.

Proposed new §30.40(g), relating to Commissioner Review, describes the factors the Commissioner must consider when conducting an elevated consistency review of an OCS Plan's consistency certification. The factors that will be considered include: (1) oral or written testimony received during the public comment period; (2) applicable CMP goals and enforceable policies; (3) information submitted by the federal agency or person; and (4) other relevant information to determine consistency with CMP goals and enforceable policies. This new subsection follows the requirements of Texas Natural Resources Code, §33.204(e), as amended by SB 656.

Proposed new §30.40(h), relating to Review Period, states that if the GLO has not issued a decision regarding the OCS plan within three months from the date the GLO received the administratively complete consistency certification, then the GLO shall notify the person submitting the plan, Secretary of the Interior, and the Office for Coastal Management (OCM) Director of the status of the review and basis for further delay. *See* 15 CFR §930.78. The GLO's review period is up to six (6) months but if no action is taken by the GLO, a concurrence may be presumed after three (3) months.

Proposed new §30.40(i), relating to Presumption of Concurrence, provides that if the GLO does not act on an OCS plan within three (3) months of the date from when the GLO receives an administratively complete consistency certification, then the GLO's concurrence with the consistency certification shall be conclusively presumed. If the GLO provides a status of review letter within three (3) months and continues its review, a concurrence may be presumed at six (6) months. Additionally, if the GLO issues a concurrence or the action is presumed concurrent, then the person submitting the OCS plan is not required to submit additional consistency certifications to the GLO for the individual federal authorizations that will be required to authorize the activities described in detail in the OCS plan as set out in 15 CFR §930.79.

Proposed new §30.40(j), relating to Commissioner Objection, provides that once a matter has been referred to the Commissioner for an elevated consistency review with CMP goals and enforceable policies, the Commissioner may object to a federal license or permit activity described in detail in the OCS plan's consistency certification as provided for in 15 CFR §930.79. The GLO will notify the person of its appeal rights to the U.S. Secretary of Commerce.

Proposed new §30.50, relating to Consistency Review of Federal Assistance Applications, explains the federal consistency review process for federal assistance applications.

Proposed new §30.50(a), relating to Consistency Review of Federal Assistance, describes the consistency review process for applications for federal assistance to state and local governments for consistency. The GLO shall conform to the requirements and procedures set out in 15 CFR Part 930, subpart F (subpart F).

Proposed new §30.50(b), relating to Federal Assistance Review Materials, provides that the applicant agency must submit the

materials described in subpart F for the GLO to have the necessary information to conduct the federal consistency review. The application for federal assistance should include a brief evaluation of the proposed projects consistency with the CMP goals and policies in accordance with subpart F.

Proposed new §30.50(c), relating to Request for Additional Information, provides that GLO staff may request information from the applicant within fifteen (15) days of receiving the application if required information for the consistency review is incomplete or missing. This information is set out in subpart F. If GLO staff does not request any additional information within the specified timeframe, the application is deemed administratively complete.

Proposed new §30.50(d), relating to Referral to Commissioner, explains the process for referring a matter to the Commissioner for an elevated consistency review. To refer an issue, at least three committee members must agree that a significant unresolved issue exists regarding consistency with the CMP goals and enforceable policies. If this requirement is met, then at least three committee members must also submit in writing a letter or email addressed to the CMP coordinator with a request that the issue be referred to the Commissioner for an elevated consistency review. Any CMP goals and applicable enforceable policies that are unresolved and potential impacts should be addressed in the letter or email. The referral process tracks the requirements in Texas Natural Resources Code, §33.206(e), as amended by SB 656.

Proposed new §30.50(e), relating to Commissioner Review, describes the factors the Commissioner must consider when conducting an elevated consistency review. The factors that will be considered include: (1) applicable CMP goals and enforceable policies; (2) information submitted by the applicant agency; and (3) other relevant information to determine consistency with CMP goals and enforceable policies.

Proposed new §30.50(f), relating to Review Period, describes the review period in which the GLO will provide a decision. Under the new subsection, the GLO will provide a decision within thirty (30) days from the date the application was deemed administratively complete, unless the matter has been elevated to the Commissioner for consistency review. In this instance of an elevated review, the review period will be extended an additional thirty (30) days. *See* subpart F.

Proposed new §30.50(g), relating to Presumption of Concurrence, explains when a concurrence may be presumed. The new subsection states that a concurrence may be presumed thirty (30) days after the date the GLO receives an administratively complete application unless the matter has been elevated to the Commissioner for consistency review in which case a concurrence may be presumed on day sixty (60) if no action is taken.

Proposed new §30.50(h), relating to Commissioner Objection, provides that once a matter has been elevated to the Commissioner for an elevated consistency review with CMP goals and enforceable policies, the Commissioner may object to the federal assistance application as provided for in subpart F and the GLO will notify the applicant of its appeal rights to the U.S. Secretary of Commerce.

Proposed new §30.60, relating to Equivalent Federal and State Actions, sets out the referral thresholds of a proposed activity for state consistency review, and does not allow a state and federal consistency review to occur for the same action.

Proposed new §30.60(a), relating to Below Thresholds, provides that if a proposed activity requiring a state agency or subdivision action falls below thresholds for referral approved under Chapter 29, Subchapter B of this title (relating to Commissioner Certification of State Agency Rules and Approval of Thresholds for Referral) and requires an equivalent federal permit or license under this chapter, the GLO may only determine the state agency or subdivision action's consistency by using the process provided in Chapter 29 of this title (relating to Procedures for State Consistency with Coastal Management Program Goals and Policies). The GLO's determination regarding the consistency of an action under this subsection constitutes the state's determination regarding consistency of the equivalent federal action.

Proposed new §30.60(b), relating to Above Thresholds, states that if an activity requiring a state agency or subdivision action meets the threshold for referring the matter for an elevated consistency review and requires an equivalent federal permit or license, the GLO may determine the consistency of the state agency or subdivision action or the federal license or permit, but not both. Texas Natural Resource Code, §33.206(f), as amended by SB 656.

Proposed new §30.60(c), relating to Equivalent State Action or Federal Action, explains that an action made by the GLO under §30.60(a) and (b) is the state's determination regarding consistency of the equivalent agency or subdivision action or federal action. Texas Natural Resource Code, §33.206(f), as amended by SB 656.

FISCAL AND EMPLOYMENT IMPACTS

Melissa Porter, Deputy Director, Coastal Resources, has determined that for each year of the first five years that the proposed repeals are in effect, there will be no fiscal impacts to state government as a result of enforcing or administering the rules as proposed. There are no anticipated fiscal implications for local governments as a result of enforcing or administering the rules as proposed.

Ms. Porter has also determined that the proposed repeals will not have an adverse economic effect on small or large businesses, micro-businesses, rural communities, or individuals for the first five years that the proposed repeals are in effect.

Ms. Porter has determined that the proposed repeals will not affect a local economy, and the rules as proposed will have no adverse local employment impact that requires an impact statement pursuant to Texas Government Code, §2001.022.

PUBLIC BENEFIT

Ms. Porter has determined that for each year of the first five years the proposed repeals are in effect, the public will benefit from the proposed rules because the proposed new sections will provide necessary updates and clarifications, increase understanding of the process, and improve the overall efficiency and continued implementation of the CMP. Accordingly, the GLO will be able to better administer the CMP for the benefit of all Texans. The proposed new sections significantly streamline the provisions in Chapter 30 by deferring and adopting by reference where possible the CZMA Federal Consistency regulations set out in 15 CFR Part 930. This will enhance the public's understanding of the federal consistency process because the Chapter 30 rules and the CZMA Federal Consistency regulations will be very similar, if not the same, in most instances. This includes adopting the federal consistency review timeframes in 15 CFR Part 930, which will simplify the review process for federal

agency actions and will allow for a better understanding of how the federal consistency process works in relation to coastal issues and the CMP in general.

GOVERNMENT GROWTH IMPACT STATEMENT

The GLO prepared a Government Growth Impact Statement for the proposed repeals. During the first five years the proposed repeals would be in effect, the rules would: not create or eliminate a government program; not create or eliminate any employee positions; not require an increase or decrease in future legislative appropriations to the agency; not require an increase or decrease in fees paid to the agency; create a new regulation by repealing and replacing existing regulations; not expand or limit an existing regulation but would repeal and replace existing regulations; not increase or decrease the number of individuals subject to the rule's applicability; and not positively or adversely affect the state's economy.

TAKINGS IMPACT ASSESSMENT

The GLO has evaluated the proposed repeals in accordance with Texas Government Code, §2007.043(b), and the Attorney General's Private Real Property Rights Preservation Act Guidelines to determine whether a detailed takings impact assessment is required. The proposed repeals do not affect private real property in a manner that requires real property owners to be compensated as provided by the Fifth and Fourteenth Amendments to the United States Constitution or Article I, §§17 and 19 of the Texas Constitution. Furthermore, the proposed repeals would not affect any private real property in a manner that restricts or limits the owner's right to the property that would otherwise exist in the absence of the rules. The proposed repeals will not result in a taking of private property, and there are no adverse impacts on private real property interests.

ENVIRONMENTAL REGULATORY ANALYSIS

The GLO has evaluated the proposed repeals in accordance with Texas Government Code, §2001.0225, and determined that the action does not meet the definition of a "major environmental rule" as defined in the statute. "Major environmental rule" means a rule of which the specific intent is to protect the environment or reduce risks to human health from environmental exposure and that may adversely affect the economy, a sector of the economy, productivity, competition, jobs, the environment, or public health and safety of the state or a sector of the state. The proposed repeals are not anticipated to 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 the state or a sector of the state.

PUBLIC COMMENT REQUEST

To comment on the proposed repeals, please send written comments to Mr. Walter Talley, Texas Register Liaison, Texas General Land Office, P.O. Box 12873, Austin, Texas 78711, facsimile number (512) 475-1859, or email to walter.talley@glo.texas.gov. Written comments must be received no later than 5:00 p.m., thirty (30) days from the date of publication of this proposal.

STATUTORY AUTHORITY

The new sections are proposed under Texas Natural Resources Code, Chapter 33, including §33.051, which authorizes the GLO and the commissioner to perform the duties provided in Chapter 33, Subchapter C; §33.052, which authorizes the GLO and the commissioner to develop, coordinate, and implement a continuing comprehensive CMP; §33.054, which allows the commissioner to review and amend the CMP; and §33.204, which authorizes the commissioner to adopt goals and policies of the CMP by rule.

The proposed new sections are necessary to implement Texas Natural Resources Code, Chapter 33, Subchapters C and F.

§30.10. Purpose and Policy.

The rules in this Chapter establish a process for federal consistency review, as required by Texas Natural Resources Code, §33.206(d) and federal procedures for implementing the federal consistency requirements of the federal Coastal Zone Management Act of 1972 (CZMA) and provides that federal actions and activities subject to the Texas Coastal Management Program (CMP) are consistent with the goals and enforceable policies of the CMP. The procedures in this Chapter are intended to allow the Commissioner of the General Land Office (GLO) to identify, address, and resolve federal consistency issues and provide guidance that if any inconsistencies are found between these rules and those of the CZMA Federal Consistency regulations provided in 15 Code of Federal Regulations (CFR) Part 930, the federal regulations are controlling.

§30.11. Definitions.

(a) The following words, terms, and phrases, when used in this Chapter, shall have the following meanings, unless the context clearly indicates otherwise.

(1) Associated facilities--All proposed facilities:

(A) which are specifically designed, located, constructed, operated, adapted, or otherwise used, in full or in major part, to meet the needs of a federal action (e.g., activity, development project, license, permit, or assistance); and

(B) without which the federal action, as proposed, could not be conducted. See 15 CFR §930.11(d).

(2) Coastal Coordination Act--Texas Natural Resources Code, Chapter 33, Subchapter F.

(3) Coastal Zone--The portion of the coastal area located within the boundaries established by the CMP under Texas Natural Resources Code, §33.2053(k), and described in Chapter 27 of this title (relating to Coastal Management Program Boundary).

(4) CMP--Texas Coastal Management Program, which was accepted into the federal Coastal Zone Management Program in 1996 after receiving approval from the federal Office for Coastal Management. The CMP was implemented on January 10, 1997 and incorporates all federally approved amendments thereafter.

(5) CMP coordinator--The GLO Coastal Resources staff member designated by the commissioner.

(6) CMP goals and enforceable policies--The goals and policies set forth in Chapter 26 of this title.

(7) Commissioner--Commissioner of the GLO.

(8) Committee--Coastal Coordination Advisory Committee.

(9) CZMA--Federal Coastal Zone Management Act of 1972, as amended.

(10) Development project--Federal agency activity involving the planning, construction, modification, or removal of public works, facilities, or other structures, and includes the acquisition, use, or disposal of coastal use or resource. See 15 CFR §930.31(b).

(11) Director--Director of the Office for Coastal Management (OCM), National Ocean Service, NOAA.

(12) Federal agency--Any department, agency, board, commission, council, independent office or similar entity within the executive branch of the federal government, or any wholly owned federal government corporation. See 15 CFR §930.11(j).

(13) Federal agency activity--Any functions performed by or on behalf of a federal agency in the exercise of its statutory responsibilities, including a range of activities where a Federal agency makes a proposal for action initiating an activity or series of activities when coastal effects are reasonably foreseeable, e.g., a Federal agency's proposal to physically alter coastal resources, a plan that is used to direct future agency actions, a proposed rulemaking that alters uses of the coastal zone. The term does not include the issuance of a federal license or permit or the granting of federal assistance to an applicant agency. See 15 CFR §930.31(a).

(14) Federal assistance--Assistance provided under a federal program to a state or local government applicant agency through grant or contractual arrangements, loans, subsidies, guarantees, insurance, or other form of financial aid. See 15 CFR §930.91.

(15) Federal license or permit activity--An activity proposed by a non-federal applicant that requires any federal license, permit, or other authorization that an applicant is required by law to obtain in order to conduct activities affecting any land or water use or natural resource of the coastal zone and that any federal agency is empowered to issue to an applicant. See 15 CFR §930.51(a). An action to renew, amend, or modify an existing license or permit is not subject to review under this Chapter if the action only extends the time period of the existing authorization without authorizing new or additional work or activities, would not increase pollutant loads to coastal waters or result in relocation of a wastewater outfall to a critical area, or is not otherwise directly relevant to the CMP enforceable policies in Chapter 26. See also, 15 CFR §930.51(a).

(16) Outer continental shelf (OCS) plan--Any plan for the exploration or development of, or production from, an area which has been leased under the Outer Continental Shelf Lands Act (43 United States Code Annotated, §§1331-1356), and the regulations under that Act, which is submitted to the Secretary of the Interior or designee following management program approval and which describes in detail activities federal license or permit activities. See 15 CFR §930.73.

(17) Program boundary--CMP program boundary established in §27.1 of this title (relating to the Coastal Management Program Boundary).

(b) Any statutory or regulatory terms or phrases that are not defined in the Chapter retain the meaning provided for in the pertinent agency's regulations unless a different meaning is assigned in the applicable regulations under the CZMA.

§30.12. Federal Listed Activities Subject to CZMA Review.

(a) For purposes of this section, the following federal actions within the CMP boundary may adversely affect coastal natural resource areas (CNRAs) within the coastal zone. This list of federal actions includes federal agency activities, federal license or permit activities, and federal assistance applications that are subject to CZMA federal consistency review by the GLO.

(1) Federal Agency Activities and Development Projects. For all actions proposed by or on behalf of federal agencies that may have reasonably foreseeable effects on CNRAs, a consistency determination or negative determination must be submitted to the GLO pursuant to the requirements of the Federal Consistency regulations found at 15 CFR Part 930, subpart C.

(A) United States Department of the Interior:

(i) modifications to the boundaries of the Coastal Barrier Resource System under 16 United States Code Annotated, §3503(c); and

(ii) OCS lease sales within the western and central Gulf of Mexico under 43 United States Code Annotated, §1337;

(B) United States Environmental Protection Agency. Selection of remedial actions under 42 United States Code Annotated, §9604(c);

(C) United States Army Corps of Engineers:

(i) small river and harbor improvement projects under 33 United States Code Annotated, §577;

(ii) water resources development projects under 42 United States Code Annotated, §1962d-5;

(iii) small flood control projects under 33 United States Code Annotated, §701s;

(iv) small beach erosion control projects under 33 United States Code Annotated, §426g;

(v) operation and maintenance of civil works projects under the Code of Federal Regulations, Title 33, Parts 335 and 338;

(vi) dredging projects under the Code of Federal Regulations, Title 33, Part 336;

(vii) approval for projects for the prevention or mitigation of damages to shore areas attributable to federal navigation projects pursuant to 33 United States Code Annotated, §426i; and

(viii) approval for projects for the placement on state beaches of beach-quality sand dredged from federal navigation projects pursuant to 33 United States Code Annotated, §426j;

(D) Federal Emergency Management Agency:

(i) model floodplain ordinances; and

(ii) approval of a community's participation in the National Flood Insurance Program (NFIP) under the Code of Federal Regulations, Title 44, Part 59, subpart B;

(E) General Services Administration:

(i) acquisitions under 40 United States Code Annotated, §602 and §603; and

(ii) construction under 40 United States Code Annotated, §605;

(F) All federal agencies:

(i) all other development projects; and

(ii) natural resource restoration plans developed pursuant to the Oil Pollution Act of 1990 (33 United States Code Annotated §§2701-2761) and the Comprehensive Environmental Response, Compensation and Liability Act (42 United States Code Annotated §§9601-9675).

(2) Federal license or permit activities. For all actions proposed by an applicant a consistency certification must be submitted to the GLO pursuant to the requirements of the Federal Consistency regulations in 15 CFR Part 930, subpart D.

(A) Environmental Protection Agency:

(i) National Pollution Discharge Elimination System (NPDES) permits under 33 United States Code Annotated, §1342;

(ii) ocean dumping permits under 33 United States Code Annotated, §1412;

(iii) approvals of land disposal of wastes under 42 United States Code Annotated, §6924(d);

(iv) development of total maximum daily loads (TMDLs) and associated federally developed TMDL implementation plans under 33 United States Code Annotated, §1313; and

(v) approvals of National Estuary Program Comprehensive Conservation Management Plans under 33 United States Code Annotated, §1330f;

(B) United States Army Corps of Engineers:

(i) ocean dumping permits under 33 United States Code Annotated, §1413;

(ii) dredge and fill permits under 33 United States Code Annotated, §1344;

(iii) permits under §9 of the River and Harbor Act of 1899, 33 United States Code Annotated, §401;

(iv) permits under §10 of the River and Harbor Act of 1899, 33 United States Code Annotated, §403; and

(v) Memoranda of Agreement for mitigation banking;

(C) United States Department of Transportation:

(i) approvals under §7(a) of the Federal-Aid Highway Amendments Act of 1963, 23 United States Code Annotated, §106;

(ii) approvals under §502 of the General Bridge Act of 1946, 33 United States Code Annotated, §525; and

(iii) Deepwater port licenses under 33 United States Code Annotated, §1503;

(D) Federal Aviation Administration: Airport operating certificates under 49 United States Code Annotated, §44702;

(E) Federal Energy Regulatory Commission:

(i) certificates under §7 of the Natural Gas Act, 15 United States Code Annotated, §717f;

(ii) licenses under §4 of the Federal Power Act, 16 United States Code Annotated, §797(e); and

(iii) exemptions under §403 of the Public Utility Regulatory Policies Act of 1978,16 United States Code Annotated, §2705(d);

(F) Nuclear Regulatory Commission. Licenses under §103 of the Atomic Energy Act of 1954, 42 United States Code Annotated, §2133.

(3) State and Local Government Applications for Federal Assistance. Federal assistance for state and local government activities occurring within the Texas coastal zone:

(A) Federal Emergency Management Agency federal assistance grants for:

(i) 97.008 Non-Profit Security Program for physical security enhancements and other security-related activities to nonprofit organizations that are at high risk of a terrorist attack if outside the original footprint;

(ii) 97.029 Flood Mitigation Assistance (FMA) for flood mitigation projects to reduce or eliminate the long-term risk of flood damage to properties insured under the National Flood Insurance Program (NFIP) are eligible for the FMA program;

(iii) 97.036 Disaster Grants - Public Assistance (Presidentially Declared Disasters) for debris removal, emergency protective measures, and the repair, restoration, reconstruction or replacement of public and eligible private nonprofit facilities or infrastructure damaged or destroyed as the result of federally declared disasters or emergencies;

(iv) 97.039 Hazard Mitigation Grant (Presidentially Declared Disasters - earthquakes, hurricanes, tornados, or wildfires) for construction activities, relocation or demolition of structures, major or minor flood reduction projects, elevation of structures if outside the original footprint;

(v) 97.041 National Dam Safety Program relating to Rehabilitation of High Hazard Potential Dams (HPHD) for construction, repair, removal, and rehabilitation activities to address risk and bring the dams into compliance with state dam regulations;

(vi) 97.042 Emergency Management Performance Grants relating to the review of construction, renovation and infrastructure improvement projects if outside original footprint;

(vii) 97.047 BRIC: Building Resilient Infrastructure and Communities to conduct mitigation activities with a focus on critical services and facilities and large-scale infrastructure;

(viii) 97.048 Federal Disaster Assistance to Individuals and Households in Presidential Declared Disaster Areas for repair, replacement, and permanent or semipermanent housing construction;

(ix) 97.052 Emergency Operations Center (EOC) relating to construction or renovation of a State, local or Tribal government's principal EOC;

(x) 97.056 Port Security Grant Program relating to review of construction and infrastructure improvement project is outside original footprint;

(xi) 97.067 Homeland Security Grant Program relating to physical protective measures such as fences and concrete barriers; and

(xii) 97.092 Repetitive Flood Claims for acquisition of insured structures for the purpose of converting flood-prone land to permanent open space use, elevation of existing structures if outside the original footprint; and minor localized flood reduction projects;

(B) Department of Housing and Urban Development federal assistance grants for:

(i) 14.218 Community Development Block Grants/Entitlement Grants; and

(ii) 14.239 Home Investment Partnerships Program.

(b) OCS Exploration Plans and Development and Production Plans. 43 United States Code, §§1340(c) and 1351. United States Department of the Interior. This includes federal agency actions requiring a license or permit described in detail in OCS plans, including pipeline activities.

(c) In the event the GLO elects to review a proposed federal agency activity of a type that is unlisted in subsection (a)(1) of this section the GLO will follow the federal regulations process set out in 15 CFR §930.34(c). If the GLO elects to review a proposed federal license or permit activity of a type that is unlisted in subsection (a)(2) of this section, the GLO will follow the procedures set out in 15 CFR §930.54.

§30.20. Consistency Determinations for Federal Agency Activities and Development Projects.

(a) Review of a Consistency Determination. When reviewing a federal agency activity or development project for consistency with the goals and enforceable policies of the CMP, the GLO shall follow the requirements and procedures provided in 15 CFR Part 930, subpart C.

(b) Required Information for a Consistency Determination. A federal agency considering the approval of a federal agency activity or development project listed in §30.12 of this chapter (relating to Federal Listed Activities Subject to CZMA Review) shall provide the GLO with a consistency determination that incorporates the information described in 15 CFR §930.39 as early as practicable, but no later than 90 days prior to final approval of the activity. The consistency determination shall include a detailed description of the activity, its associated facilities, and their coastal effects, and comprehensive data and information sufficient to support the federal agency's consistency statement. The amount of detail in the evaluation of the enforceable policies, activity description and supporting information shall be commensurate with the expected coastal effects of the activity. The federal agency may submit the information in any manner it chooses, so long as the requirements of subpart C are satisfied as set out in 15 CFR in §930.39. Additionally, the consistency determination should include a brief statement indicating whether the proposed activity will be undertaken in a manner consistent to the maximum extent practicable with the enforceable policies of the CMP in accordance with 15 CFR §930.39(a).

(c) Request for Information. GLO staff may request information from a federal agency if the federal agency provides an incomplete consistency determination, the GLO notifies the federal applicant in accordance with federal regulations of the incomplete submission, and the requested information is the type of information required for a consistency determination review as identified in 15 CFR §930.39(a).

(d) NEPA or Other Project Documents. A federal agency may provide the GLO with information contained in NEPA documents or other project documents to provide some of the comprehensive data and information sufficient to support the federal agency's consistency determination under 15 CFR §930.39(a).

(e) Demonstration of Consistency. If a federal agency elects to rely on information contained in NEPA documents or other project documents to demonstrate consistency to the maximum extent practicable with the goals and enforceable policies of the CMP, the federal agency should demonstrate how the materials support a finding of consistency of the goals and enforceable policies of the CMP, in accordance with 15 CFR §930.39(a). This section notes that a consistency determination embedded within a NEPA document should meet all of the information requirements of 15 CFR §930.39(a), which can include a reference to the findings of the NEPA document. Federal agencies are not required to file applications for state and local permits and other authorizations, unless required to do so by provisions of federal law other than the CZMA. However, federal agencies are required to demonstrate that the proposed activity is consistent to the maximum extent practicable with the applicable state and local enforceable policies underlying the permits. Where the law authorizes or requires a federal agency to apply for state and local permits and other authorizations, the GLO will consider such applications when determining whether the federal activity or development project is consistent with the enforceable policies underlying the permit or authorization. See 15 CFR §930.39(a).

(f) Public Participation. The GLO shall provide public participation consistent with the provisions of 15 CFR §930.42. The GLO may also issue joint public notices with the federal agency involved. The GLO may extend the public comment period or schedule a public meeting on the consistency determination. Comments received in response to the public notice will be considered.

(g) Referral to Commissioner. To refer a matter to the commissioner for an elevated consistency review, at least three committee members must agree that a significant unresolved issue exists regarding consistency with the CMP goals and enforceable policies. At least three committee members must also submit in writing a letter or email addressed to the CMP coordinator that requests the matter at issue to be referred to the commissioner for an elevated consistency review. The referral letter or email should identify any enforceable policies that are unresolved and address any potential impacts to coastal natural resource areas.

(h) Commissioner Review. Following referral of a federal agency activity or development project to the commissioner for an elevated consistency review, the commissioner shall consider:

(1) oral or written testimony received during the comment period. The commissioner may reasonably limit the length and format of the testimony and the time at which it may be received;

(2) applicable CMP goals and enforceable policies set out in 31 Texas Administrative Code Ch. 26;

(3) information submitted by the federal agency or applicant; and

(4) other relevant information to determine whether the proposed action is consistent with the CMP goals and enforceable policies.

(i) Review Period. The GLO will provide a decision or status update to the federal agency within sixty (60) days from receipt of the administratively complete consistency determination. If the GLO is unable to complete the review of the consistency determination within the initial sixty (60) day review period, the GLO will notify the federal agency in writing of the status of the review, the basis for delay, and the GLO will follow the procedures set out in 15 CFR §930.36(b)(2) if an additional fifteen (15) days for review is necessary. If no action is taken by the GLO after sixty (60) days from the date an administratively complete consistency determination was submitted and additional time is not sought under 15 CFR §930.36(b)(2), the federal agency may presume the GLO's concurrence.

(j) Commissioner Objection. If the commissioner objects to the consistency determination, the federal agency will be notified of the objection by the GLO prior to the time, including any extensions, that the federal agency is entitled to presume the activity's consistency. The content of the commissioner's objection will conform to the requirements set out in 15 CFR §930.43.

(k) Mediation. If the commissioner finds that a proposed activity is inconsistent with the CMP goals and enforceable policies and the federal agency does not modify the activity to achieve consistency with the program, the governor, with the assistance of the commissioner, may seek secretarial mediation or OCM mediation as set out in 15 CFR §§930.110 et seq.

(l) Final Approval. Final federal agency action for a federal agency activity identified in §30.12(a) of this chapter shall not be taken sooner than ninety (90) days from the receipt by the GLO of the consistency determination, unless the federal agency and GLO agree to an alternative period of time or unless the GLO concurs or the concurrence is presumed.

§30.30. Consistency Certifications for Federal License or Permit Activities.

(a) Review of a Consistency Certification. When reviewing a consistency certification submitted by a non-federal applicant for a

federal license or permit activity listed under §30.12 of this chapter (relating to Federal Listed Activities Subject to CZMA Review) the GLO shall conform to the requirements and procedures set out in 15 CFR Part 930, subpart D. The federal license or permit activity must be consistent with the CMP goals and enforceable policies.

(b) Required Information for a Consistency Certification. For review of a federal license or permit activity application, an applicant must submit to the GLO a complete consistency certification in conformance with 15 CFR §930.57 and all necessary data and information described in 15 CFR §930.58 and including the following:

(1) all material relevant to the CMP provided to the federal agency in support of the application;

(2) a detailed description of the proposed activity, its associated facilities, the coastal effects, and any other information relied upon by the applicant to make its certification. Maps, diagrams, and technical data shall be submitted when a written description alone will not adequately describe the proposal. See 15 CFR §930.58;

(3) if a mitigation plan is required, an alternative analysis, habitat characterization, and any required surveys for the license or permit must be submitted; and

(4) the consistency certification must also provide: "The proposed activity complies with enforceable policies of Texas' approved coastal management program and will be conducted in a manner consistent with such program." See 15 CFR §930.57(b).

(c) Request for Necessary Data and Information. If an applicant fails to submit all necessary data and information required by 15 CFR §930.58(a), the GLO shall notify the applicant and the federal agency, within thirty (30) days of receipt of the incomplete submission, that necessary data and information described in 15 CFR §930.58(a) was not received and that the GLO's review period will commence on the date of receipt of the missing necessary data and information, subject to the requirement in paragraph (a) of 15 CFR §930.58 that the applicant has also submitted a consistency certification. The GLO may waive the requirement that all necessary data and information described in 15 CFR §930.58(a) be submitted before commencement of the six (6) month consistency review period. In the event of such a waiver, the requirements of §930.58(a) must be satisfied prior to the end of the six (6) month consistency review period or the GLO may object to the consistency certification for insufficient information. The type of information that may be requested is identified in subsection (b) of this section consistent with the information requirements specified at 15 CFR §930.58(a).

(d) Review Period. To initiate the GLO's six (6) month review period, the necessary data and information that is required by 15 CFR §930.58 and subsection (b) of this section must be provided to the GLO. The GLO cannot require issued state or local permits as necessary data or information to initiate the review period. If at the end of this review period, the applicant has failed to obtain all required state and local permits this may result in a finding by the GLO that it lacks the required information to complete the consistency review and may object for lack of information.

(e) Mutual Stay Agreement. The GLO and the applicant may enter into a mutual written agreement to stay the CZMA review period to allow for resolution of the remaining issues as provided for at 15 CFR §930.60(b).

(f) Permit Assistance. Upon request of the applicant, the GLO will provide guidance and assistance to applicants in conformance with 15 CFR §930.56.

(g) Consolidation of Federal License or Permit Activities. The GLO encourages applicants to consolidate related federal license or permit activities identified in §30.12 of this chapter (relating to Federal Listed Activities Subject to CZMA Review) to assist the GLO in minimizing duplication of effort and unnecessary delays by reviewing all federal license or permit activities relating to a project at the same time.

(h) Public Participation. The GLO shall provide for public participation consistent with the provisions of 15 CFR §930.61. The GLO may issue joint public notices with the federal permitting or licensing agency. The GLO may also extend the public comment period or schedule a public meeting on the consistency certification. Comments received in response to the public notice will be considered.

(i) Demonstration of Consistency. For activities located within the state's jurisdiction that require state or local permits or authorization, the issued permit or authorization is considered evidence that demonstrates consistency with the enforceable policies that the permit or authorization covers. In cases where an applicant relies on draft NEPA documents to satisfy some of the necessary data and information requirements for federal consistency review under subsection C, an applicant should demonstrate how draft NEPA or other project documentation materials support a finding of consistency with the CMP goals and enforceable policies in a written document.

(j) Referral to Commissioner. To refer a matter to the commissioner for an elevated consistency review, at least three committee members must agree that a significant unresolved issue exists regarding consistency with the CMP goals and enforceable policies. At least three committee members must also submit in writing a letter or email addressed to the CMP coordinator that requests the matter at issue to be referred to the commissioner for an elevated consistency review. The referral letter or email should identify any enforceable policies that are unresolved and address any potential impacts.

(k) Commissioner Review. Following referral of a federal activity or development project to the commissioner for an elevated consistency review, the commissioner shall consider:

(1) oral or written testimony received during the comment period and the commissioner may reasonably limit the length and format of the testimony and the time at which it may be received;

(2) applicable CMP goals and enforceable policies;

(3) information submitted by the federal agency or applicant; and

(4) other relevant information to determine whether the proposed action is consistent with the CMP goals and enforceable policies.

(l) Presumption of Concurrence. If the GLO has not issued a decision with respect to a proposed federal license and permit activity within ninety (90) days from the date when the GLO receives an administratively complete consistency certification, then the GLO shall notify the applicant and the federal agency of the status of the review and the basis for further review. If no action is taken by the GLO or the commissioner within six (6) months from the date the GLO received the complete consistency certification, then the action is conclusively presumed to be consistent with the CMP.

(m) Commissioner Objection. Once a matter has been elevated to the commissioner for a consistency review with the CMP goals and enforceable policies, the commissioner may object to the consistency certification as provided for in 15 CFR §930.63(h).

(n) Right of Appeal. If the commissioner finds that the proposed federal license or permit activity is inconsistent with the CMP

enforceable policies and objects to the consistency certification, GLO shall notify the applicant of its appeal rights to the U.S. Secretary of Commerce, and the federal agency shall not authorize the federal license or permit activity, except as provided in the appeals process established in 15 CFR Part 930, subpart H.

§30.40. Consistency Certifications for Outer Continental Shelf (OCS) Exploration, Development, and Production Activities.

(a) Review of a Consistency Certification for an OCS Plan. When reviewing an OCS plan for consistency with the goals and enforceable policies of the CMP, the GLO shall follow the requirements and procedures provided in 15 CFR Part 930, subpart E and 43 USC §§1331-1356(a). The federal regulations, 15 CFR Part 930, subpart E, provide that OCS plans submitted to the U.S. Secretary of the Interior for OCS exploration, development and production, and all associated federal licenses and permits described in detail in such OCS plans, shall be subject to federal consistency review.

(b) Consistency Certification. Any person, as defined at 15 CFR §930.72, submitting any OCS plan to the Secretary of the Interior or designee shall provide a copy of the plan along with a consistency certification that states as follows: "The proposed activities described in detail in this plan comply with Texas' approved coastal management program and will be conducted in a manner consistent with the program." The Secretary of the Interior or designee shall provide the plan and consistency certification to the GLO. See 15 CFR §930.76.

(c) Request for Information. The GLO's six (6) month review period on a consistency certification for an OCS plan begins on the date the GLO receives the information required at 15 CFR §930.76, and all the necessary data and information required at 15 CFR §930.58(a). Pursuant to 15 CFR §930.60(a), within thirty (30) days of an incomplete submission, the GLO shall inform the person submitting the OCS plan that the GLO six (6) month review period will commence on the date of receipt of the missing consistency certification or necessary data and information. The GLO may waive the requirement that all necessary data and information described in 15 CFR §930.58(a) be submitted before commencement of the State agency's six (6) month consistency review. In the event of such a waiver, the requirements of 15 CFR §930.58(a) must be satisfied prior to the end of the six (6) month consistency review period or the GLO may object to the consistency certification for insufficient information.

(d) Consolidation of Related Authorizations. The GLO encourages persons submitting OCS plans to consolidate related federal licenses and permits that are not required to be described in detail in the plan but which are subject to GLO review. This consolidation will minimize duplication of effort and unnecessary delays by providing for review of all licenses and permits relating to an OCS plan at the same time. See 15 CFR §930.81.

(e) Public Participation. The GLO shall provide for public participation consistent with the provisions of 15 CFR §930.77. After the close of the public comment period on the OCS plan's consistency certification, the GLO will consider comments received in response to the public notice. The GLO may extend the public comment period or schedule a public meeting on the consistency certification.

(f) Referral to Commissioner. If three committee members agree there is a significant unresolved issue regarding the OCS Plan's consistency with the CMP goals and enforceable policies relating to any part of the OCS plan, the matter may be referred to the commissioner for an elevated consistency review. To refer the matter to the commissioner, three committee members must submit the request for referral to the CMP coordinator in writing. The CMP coordinator will immediately notify the committee members, applicant, federal agency, and other affected parties that the matter has been elevated for commissioner review. The referral letter or email should identify any enforceable policies that are unresolved and address any potential impacts.

(g) Commissioner Review. The commissioner shall review any part of an OCS plan relating to federal agency actions required to authorize proposed activities described in detail in the OCS plan which any three committee members agree presents a significant unresolved issue regarding consistency with the CMP goals and enforceable policies. Following referral for review, the commissioner shall consider:

(1) oral or written testimony received during the comment period. The commissioner may reasonably limit the length and format of the testimony and the time at which it may be received;

(2) applicable CMP goals and enforceable policies;

(3) information submitted by the federal agency or person; and

(4) other relevant information to determine whether the proposed action is consistent with the CMP goals and enforceable policies.

(h) Review Period. If the GLO has not issued a decision with respect to a matter referred under the provisions of this section, within three (3) months from the date when the GLO received the administratively complete consistency certification, then the GLO staff shall notify the person submitting the plan, the Secretary of the Interior, and the OCM Director of the status of the review and the basis for further delay. See 15 CFR §930.78. The GLO's review period is up to six (6) months but a concurrence may be presumed at three (3) months if GLO has taken no action.

(i) Presumption of Concurrence. If GLO does not act on an OCS plan within three (3) months of the date when the GLO receives an administratively complete consistency certification, then the GLO's concurrence with the consistency certification shall be conclusively presumed. See 15 CFR §930.78. If the GLO provides a status of review letter within three (3) months and continues its review, a concurrence may be presumed at six (6) months. If the GLO issues a concurrence or concurrence is conclusively presumed, then the person submitting the plan shall not be required to submit additional consistency certifications to the GLO for the individual federal authorizations that will be required to authorize the activities described in detail in the OCS plan as set out in 15 CFR §930.79.

(j) Commissioner Objection. If the commissioner objects to a consistency certification related to a federal license or permit activity authorizing an activity described in detail in an OCS plan, the federal agency shall not act on the federal action when it is proposed, except as provided in the appeals process established in the 15 CFR §§930.120 et seq. The contents of the commissioner's objection will conform to the requirements set out in 15 CFR §930.79 and will notify the person of its appeal rights to the U.S. Secretary of Commerce.

§30.50. Consistency Review of Federal Assistance Applications.

(a) Consistency Review of Federal Assistance. When reviewing applications for federal assistance to state and local governments as provided for in §30.12(a)(3) of this chapter for consistency with the enforceable policies of the CMP, the GLO shall conform to the requirements and procedures set out in 15 CFR Part 930, subpart F (subpart F).

(b) Review Materials. For review of federal assistance to state and local governments, the applicant agency must submit to the GLO the materials described in subpart F. The application for federal assistance should include a brief evaluation of the proposed projects consistency with the CMP goals and policies as provided for in subpart F.

(c) Request for Information. If information is needed, the GLO shall request the information within fifteen (15) days from the date the application is received by the GLO. Information that may be requested is identified in subpart F. If information is not requested within the specified timeframe, the application shall be deemed administratively complete.

(d) Referral to Commissioner. To refer a matter to the commissioner for an elevated consistency review, at least three committee members must agree that a significant unresolved issue exists regarding consistency with the CMP goals and enforceable policies. At least three committee members must also submit in writing a letter or email addressed to the CMP coordinator that requests the matter at issue to be referred to the commissioner for an elevated consistency review. The referral letter or email should identify any enforceable policies that are unresolved and address any potential impacts.

(e) Commissioner Review. Following referral of a federal assistance activity to the commissioner for an elevated consistency review, the commissioner shall consider:

(1) applicable CMP goals and enforceable policies set out in 31 TAC Ch. 26;

(2) information submitted by the federal agency or applicant; and

(3) other relevant information to determine whether the proposed action is consistent with the CMP goals and enforceable policies.

(f) Review Period. The GLO will provide a decision to the applicant within thirty (30) days from receipt of the administratively complete federal assistance application unless the matter is referred to the commissioner for an elevated consistency review. If elevated for commissioner review the review period will be extended an additional thirty (30) days. See subpart F.

(g) Presumption of Concurrence. A presumption of concurrence will occur thirty (30) days from the date the GLO deems the federal assistance application is administratively complete unless the matter has been referred to the commissioner for an elevated consistency review, in which case a presumption of concurrence will occur on day sixty (60) if no action is taken.

(h) Commissioner Objection. If the commissioner objects to the federal assistance application, the applicant, federal agency, and Director of the NOAA Office for Coastal Management will be notified of the objection by the GLO. The content of the commissioner's objection will conform to the requirements set out in subpart F and GLO will notify the applicant of its appeal rights to the U.S. Secretary of Commerce.

§30.60. Equivalent Federal and State Actions.

(a) Below Thresholds. If a proposed activity requiring a state agency or subdivision action falls below thresholds for referral approved under Chapter 29, Subchapter B of this title (relating to Commissioner Certification of State Agency Rules and Approval of Thresholds for Referral) and requires an equivalent federal permit or license under this chapter, the GLO may only determine the state agency or subdivision action's consistency by using the process provided in Chapter 29 of this title (relating to Commissioner Procedure for State Consistency with Coastal Management Program Goals and Policies). The GLO's determination regarding the consistency of an action under this subsection constitutes the state's determination regarding consistency of the equivalent federal action.

(b) Above Thresholds. If an activity requiring a state agency or subdivision action is above thresholds and requires an equivalent federal permit or license, the GLO may determine the consistency of the state agency or subdivision action or the federal license or permit but may only conduct either a state or a federal consistency review, not both. Texas Natural Resource Code, §33.206(f), as amended by SB 656.

(c) Equivalent State Action or Federal Action. Determinations regarding the consistency of an action made by the GLO under subsections (a) and (b) of this section constitute the state's determination regarding consistency of the equivalent agency or subdivision action or federal action. Texas Natural Resource Code, §33.206(f), as amended by SB 656.

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 January 10, 2023.

TRD-202300111
Mark Havens
Chief Clerk, Deputy Land Commissioner
General Land Office
Earliest possible date of adoption: February 26, 2023
For further information, please call: (512) 475-1859

♦ ♦ ♦

TITLE 34. PUBLIC FINANCE

PART 1. COMPTROLLER OF PUBLIC ACCOUNTS

CHAPTER 3. TAX ADMINISTRATION
SUBCHAPTER A. GENERAL RULES

34 TAC §3.4

The Comptroller of Public Accounts proposes the repeal of existing §3.4, concerning tax refunds for wages paid to an employee receiving financial assistance.

The comptroller repeals the existing section as the content is out of date and no longer comports with its statutory authority and will propose a new version under the same number and title. The repeal of §3.4 will be effective as of the date the new §3.4 takes effect.

Brad Reynolds, Chief Revenue Estimator, has determined that during the first five years that the proposed rule repeal is in effect, the repeal: will not create or eliminate a government program; will not require the creation or elimination of employee positions; will not require an increase or decrease in future legislative appropriations to the agency; will not require an increase or decrease in fees paid to the agency; will not increase or decrease the number of individuals subject to the rules' applicability; and will not positively or adversely affect this state's economy.

Mr. Reynolds also has determined that the proposed rule repeal would benefit the public by conforming the rule to current statute. This rule is proposed under Tax Code, Title 2, and does not require a statement of fiscal implications for small businesses or rural communities. The proposed rule repeal would have no significant fiscal impact on the state government, units of local government, or individuals. There would be no anticipated significant economic cost to the public.

You may submit comments on the proposal to Jenny Burleson, Director, Tax Policy Division, P.O. Box 13528 Austin, Texas 78711 or to the email address: tp.rule.comments@cpa.texas.gov. The comptroller must receive your comments no later than 30 days from the date of publication of the proposal in the *Texas Register.*

The comptroller proposed the repeal under Tax Code, §111.002 (Comptroller's Rules; Compliance; Forfeiture), which provides the comptroller with the authority to prescribe, adopt, and enforce rules relating to the administration and enforcement of the provisions of Tax Code, Title 2.

This section implements Tax Code §111.109.

§3.4. Tax Refunds for Wages Paid to an Employee Receiving Financial Assistance.

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 January 12, 2023.

TRD-202300146
Jenny Burleson
Director, Tax Policy
Comptroller of Public Accounts
Earliest possible date of adoption: February 26, 2023
For further information, please call: (512) 475-2220

♦ ♦ ♦

34 TAC §3.4

The Comptroller of Public Accounts proposes new §3.4, concerning tax refunds for wages paid to an employee receiving financial assistance. The new section replaces existing §3.4, which the comptroller is repealing. The comptroller has not updated §3.4 since its original implementation in 1995, and the statutory authority for the section has changed. New §3.4 is intended to bring the section in line with the current statute which provides for a tax refund program that is administered in conjunction with the Texas Workforce Commission (TWC). The intent of the program is to encourage the employment of individuals who are receiving federal Aid to Families with Dependent Children.

Tax Code, §111.109 (Tax Refund for Wages Paid to Employee Receiving Aid to Families With Dependent Children) reads in its entirety: "The comptroller shall issue a refund for a tax paid by a person to this state in the amount of a tax refund voucher issued by the Texas Workforce Commission under Subchapter H, Chapter 301, Labor Code, subject to the provisions of that subchapter."

Based on the limited language in the statute, the comptroller proposes new §3.4 to include only information under the purview of the comptroller. Subsection (a) outlines the basics of the program.

Subsection (b) explains the eligibility requirements and procedure for requesting a refund. The employer must first submit their application to the TWC. TWC will certify eligibility of the employer and the maximum allowable refund based on the requirements in the Labor Code. This refund amount is referred to in the statute as "the amount of a tax refund voucher." The rule refers to this generally as the "certified amount" since there is not a separate voucher provided to the comptroller. If an employer is eligible for the refund, TWC provides the certification of eligibility and refund amount to the comptroller who then processes the refund request.

Subsection (c) discusses the limitation on the amount of the refund. The refund may not exceed the lesser of the amount certified by TWC or the net tax paid to the state. In order to determine the net tax paid to the state, the comptroller reviews the tax payments reflected in its systems. As paragraph (c)(1) explains, if the certified amount exceeds the net tax paid to the state, the comptroller may contact the employer to determine if additional Texas tax was paid by the employer on its purchases. If the employer can prove that it paid Texas tax on purchases during the appropriate calendar year, the comptroller will include those payments in the net tax paid by the employer to the state. Paragraph (c)(2) explains that if the certified amount still exceeds the amount of tax paid to the state, the refund request will be granted in part, up to the amount of tax paid, but will also be denied in part. This limitation enforces the statute which allows a refund only for the amount of tax "paid" by an employer.

Brad Reynolds, Chief Revenue Estimator, has determined that during the first five years that the proposed new rule is in effect, the rule: will not create or eliminate a government program; will not require the creation or elimination of employee positions; will not require an increase or decrease in future legislative appropriations to the comptroller; will not require an increase or decrease in fees paid to the comptroller; will not increase or decrease the number of individuals subject to the rules' applicability; and will not positively or adversely affect this state's economy.

Mr. Reynolds also has determined that the proposed new rule would benefit the public by conforming the rule to current statute. This rule is proposed under Tax Code, Title 2, and does not require a statement of fiscal implications for small businesses or rural communities. The proposed new rule would have no significant fiscal impact on the state government, units of local government, or individuals. There would be no anticipated significant economic cost to the public.

You may submit comments on the proposal to Jenny Burleson, Director, Tax Policy Division, P.O. Box 13528 Austin, Texas 78711 or to the email address: tp.rule.comments@cpa.texas.gov. The comptroller must receive your comments no later than 30 days from the date of publication of the proposal in the *Texas Register.*

The comptroller proposes the amendments under Tax Code, §111.002 (Comptroller's Rules; Compliance; Forfeiture), which provides the comptroller with the authority to prescribe, adopt, and enforce rules relating to the administration and enforcement of the provisions of Tax Code, Title 2.

The amendments implement Tax Code, §111.109 (Tax Refund for Wages Paid to Employee Receiving Aid to Families with Dependent Children).

§3.4. Tax Refunds for Wages Paid to an Employee Receiving Financial Assistance.

(a) Tax refund. A person who employs individuals who receive aid to families with dependent children, referred to as "employer" in this section, may apply for a refund of tax paid by the person to this state if the tax is administered by the comptroller and deposited to the credit of the general revenue fund without dedication, as described in Labor Code, §301.102(b).

(b) Eligibility. To be eligible for this refund, an employer must file Texas Workforce Commission (TWC) Form 1098, or any successor

form, with the TWC. The TWC will determine an employer's eligibility based on the requirements of Labor Code, Chapter 301, Subchapter H. For eligible employers, the TWC will certify the maximum allowable refund to the comptroller. After receipt of the certification, the comptroller will process the refund subject to the limitation in subsection (c) of this section.

(c) Limitation. The refund an employer receives for a calendar year is limited to the lesser of the amount certified by the TWC or the amount of net tax paid to this state by the employer, after any other applicable tax credits, in that calendar year.

(1) If the amount certified by the TWC is more than the tax paid by the employer to this state, the comptroller may contact the employer to obtain records regarding Texas tax paid by the employer on purchases during the calendar year at issue. If the employer can prove the payment of additional Texas tax during the calendar year, the comptroller may increase the refund amount.

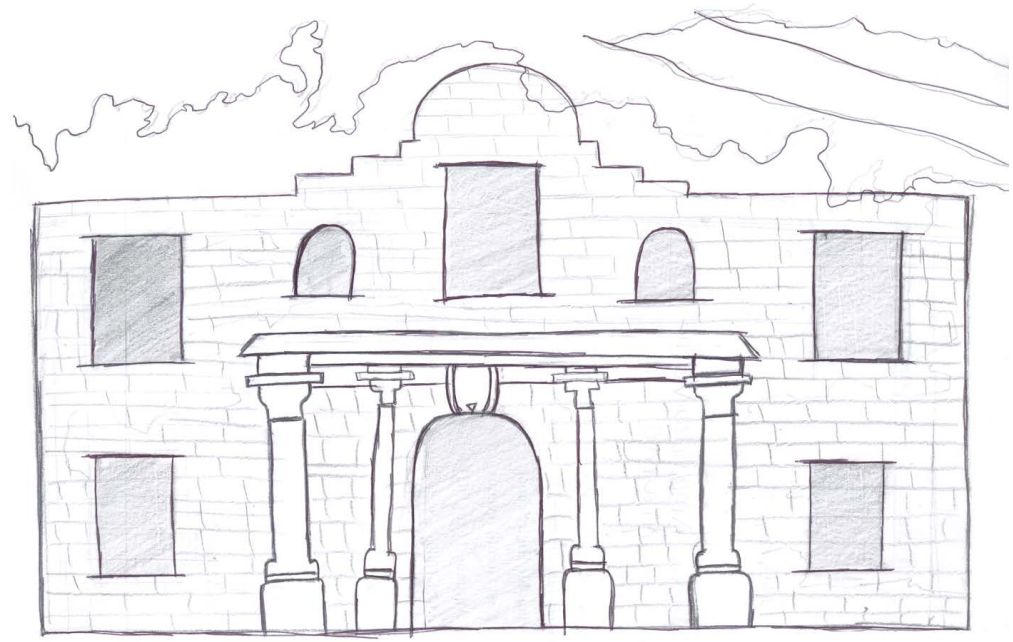
(2) If the amount certified by the TWC is still more than the tax paid by the employer to this state, the comptroller will only grant the refund up to the amount of tax paid to this state. This may result in the refund being granted in part and denied in part.

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 January 12, 2023.

TRD-202300147
Jenny Burleson
Director, Tax Policy
Comptroller of Public Accounts
Earliest possible date of adoption: February 26, 2023
For further information, please call: (512) 475-2220

♦ ♦ ♦



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 10. COMMUNITY DEVELOPMENT

PART 1. TEXAS DEPARTMENT OF HOUSING AND COMMUNITY AFFAIRS

CHAPTER 1. ADMINISTRATION

SUBCHAPTER A. GENERAL POLICIES AND PROCEDURES

10 TAC §1.9

The Texas Department of Housing and Community Affairs withdraws proposed new §1.9, which appeared in the December 2, 2022, issue of the *Texas Register* (47 TexReg 8003).

Filed with the Office of the Secretary of State on January 9, 2023.

TRD-202300059
Bobby Wilkinson
Executive Director
Texas Department of Housing and Community Affairs
Effective date: January 9, 2023
For further information, please call: (512) 475-3959

♦ ♦ ♦

TITLE 22. EXAMINING BOARDS

PART 24. TEXAS BOARD OF VETERINARY MEDICAL EXAMINERS

CHAPTER 571. LICENSING

SUBCHAPTER A. GENERAL

22 TAC §571.18

The Texas Board of Veterinary Medical Examiners withdraws proposed new §571.18, which appeared in the August 12, 2022, issue of the *Texas Register* (47 TexReg 4801).

Filed with the Office of the Secretary of State on January 11, 2023.

TRD-202300131
John Hargis
General Counsel
Texas Board of Veterinary Medical Examiners
Effective date: January 11, 2023
For further information, please call: (512) 305-7565

♦ ♦ ♦

CHAPTER 573. RULES OF PROFESSIONAL CONDUCT

SUBCHAPTER C. RESPONSIBILITIES TO CLIENTS

22 TAC §573.27

The Texas Board of Veterinary Medical Examiners withdraws proposed new §573.27, which appeared in the August 12, 2022, issue of the *Texas Register* (47 TexReg 4801).

Filed with the Office of the Secretary of State on January 11, 2023.

TRD-202300132
John Hargis
General Counsel
Texas Board of Veterinary Medical Examiners
Effective date: January 11, 2023
For further information, please call: (512) 305-7565

♦ ♦ ♦

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 1. GENERAL PROCEDURES

SUBCHAPTER C. MINORITY PURCHASING

4 TAC §§1.71, 1.73 - 1.75, 1.78

The Texas Department of Agriculture (Department) adopts amendments to Texas Administrative Code, Title 4, Part 1, Chapter 1, Subchapter C, §1.71, concerning Statement of Purpose; §1.73, concerning Identification of Historically Underutilized Businesses (HUBs); §1.74, concerning Certification Requirements; §1.75, concerning Outreach; and §1.78, concerning Historically Underutilized Business Program. The amendments to §§1.71, 1.73 - 1.75, and 1.78 are adopted without changes to the proposed text as published in the December 2, 2022, issue of the *Texas Register* (47 TexReg 8001) 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 can be found in the Review of Agency Rules section of the December 2, 2022, issue of the *Texas Register* (47 TexReg 8053).

The amendments to §1.71 consist of nonsubstantive changes to clarify language related to internal references for ease of the reader.

The amendment to §1.73 provides additional information concerning the state agency responsible for establishing the Texas Historically Underutilized Business Certification Directory and makes an editorial change for clarity.

The amendment to §1.74 provides additional information concerning the state agency responsible for certifying historically underutilized businesses and makes an editorial change for clarity.

The amendment to §1.75 provides additional information concerning the state agency responsible for sponsoring forums for historically underutilized businesses and makes an editorial change for clarity.

The amendments to §1.78 provide nonsubstantive edits by updating a legal citation to administrative rules of another state agency adopted by reference.

The Department received no comments regarding the proposed amendments.

The amendments are adopted pursuant to Section 2161.003 of the Texas Government Code, which provides that all state agencies, including the Department, must adopt the rules of the Texas Comptroller of Public Accounts associated with Texas Government Code, Chapter 2161, Subchapters B and C, as their own rules; and Section 12.016 of the Texas Agriculture Code, which authorizes the Department to adopt rules as necessary for the administration of its powers and duties.

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 January 9, 2023.

TRD-202300057
Skyler Shafer
Assistant General Counsel
Texas Department of Agriculture
Effective date: January 29, 2023
Proposal publication date: December 2, 2022
For further information, please call: (512) 936-9360

♦ ♦ ♦

CHAPTER 17. MARKETING AND PROMOTION

SUBCHAPTER D. CERTIFICATION OF FARMERS MARKET

4 TAC §§17.70 - 17.74

The Texas Department of Agriculture (Department) adopts amendments to Texas Administrative Code, Title 4, Part 1, Chapter 17, Subchapter D, §§17.70 - 17.74 related to certification of farmers markets, including definitions of terms used in the subchapter, issuances of certificates, the application process, eligibility and withdrawal of certificates, without changes to the proposed text as published in the December 9, 2022, issue of the *Texas Register* (47 TexReg 8083) 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 can be found in the Review of Agency Rules section of the December 9, 2022, issue of the *Texas Register* (47 TexReg 8130).

The adopted amendments to §17.70 delete an unnecessary definition for the term, "commissioner," as this term is previously defined in 4 Texas Administrative Code §1.1(5) of the Department's rules and reflect a corresponding change to formatting.

The adopted amendments to §17.71 reflects nonsubstantive changes to accurately reflect the current heading of Texas Administrative Code, Part 4, Chapter 17, Subchapter C as "GO TEXAN Certification Mark" and to remove an outdated legal reference.

The adopted amendments to §17.72 provide updated information on the manner in which the Department currently accepts

applications and corresponding processing and expiration dates, as well as clarification regarding the required frequency of submissions of applications and handling of associated fees.

The adopted amendments to §17.73 modify a reference to the Department for consistency with usage throughout its rules and delete unnecessary language.

The adopted amendments to §17.74 make nonsubstantive changes to refer to the Department in a consistent manner throughout its rules and update a cross reference to the Department's rules of practice.

The Department received no comments regarding the proposed amendments.

The amendments are adopted pursuant to Section 12.016 of the Texas Agriculture Code, which authorizes the department to adopt rules as necessary for the administration of its powers and duties, including certification of farmers markets as reflected in Tex. Agric. Code, Section 15.001(1).

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on January 13, 2023.

TRD-202300149
Skyler Shafer
Assistant General Counsel
Texas Department of Agriculture
Effective date: February 2, 2023
Proposal publication date: December 9, 2022
For further information, please call: (512) 936-9360

♦ ♦ ♦

TITLE 10. COMMUNITY DEVELOPMENT

PART 1. TEXAS DEPARTMENT OF HOUSING AND COMMUNITY AFFAIRS

CHAPTER 10. UNIFORM MULTIFAMILY RULES

SUBCHAPTER E. POST AWARD AND ASSET MANAGEMENT REQUIREMENTS

10 TAC §§10.401, 10.403, 10.405 - 10.407

The Texas Department of Housing and Community Affairs (the "Department") adopts with changes the amendment to 10 TAC Chapter 10, Subchapter E, §§10.401, 10.403, 10.405 - 10.407, Post Award and Asset Management Requirements to the proposed text as published in the October 28, 2022, issue of the *Texas Register* (47 TexReg 7162). The rules will be republished. The purpose of the amendment is to make corrections to gain consistency across other sections of rule, correct references, clarify existing language and processes that will ensure accurate processing of post award activities, and to communicate more effectively with multifamily Development Owners regarding their responsibilities after funding or award by the Department.

Tex. Gov't Code §2001.0045(b) does not apply to the amended rule because it was determined that no costs are associated with this action, and therefore no costs warrant being offset. In general, most changes were corrective in nature, intended to gain consistency across other sections of rule, correct rule references, and clarify language or processes to more adequately communicate the language or process. The only substantial change, located in §10.406 Ownership Transfers (§2306.6713), added clarification under §10.406(a) that a transfer involving a deed-in-lieu of foreclosure does not require approval from Executive, and added a requirement that advance notice must be provided to the Department and the tenants prior to finalizing a deed-in-lieu transfer.

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.

1. Mr. Bobby Wilkinson, Executive Director, has determined that, for the first five years the amended rule would be in effect, the amendment does not create or eliminate a government program, but relates to changes to an existing activity, concerning the post award activities of Low Income Housing Tax Credit (LIHTC) and other Department-funded multifamily Developments.

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

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

4. The amendment does not result in an increase in fees paid to the Department or in a substantial decrease in fees paid to the Department.

5. The amendment is not creating a new regulation, but are revisions to provide additional clarification.

6. The amendment will not repeal an existing regulation.

7. The amendment will not increase or decrease the number of individuals subject to the rule's applicability.

8. The amendment 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.

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

2. This amended rule relates to the procedures for the handling of post award and asset management activities of multifamily developments awarded funds through various Department programs. Other than in the case of a small or micro-business that is an owner or a party to one of the Department's properties, no small or micro-businesses are subject to the amended rule. If a small or micro-business is such an owner or participant, the amended rule provides for a more clear, transparent process for doing so and do not result in a negative impact for those small or micro-businesses. There are not likely to be any rural communities subject to the amended rule because this amended rule is applicable only to the owners or operators of properties in the Department's portfolio, not municipalities.

3. The Department has determined that because this amended rule relates only to the process in use for the post award and asset management activities of the Department's portfolio, 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 amendment 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 amended rule as to its possible effects on local economies and has determined that for the first five years the amended rule will be in effect, there will be no economic effect on local employment, because the amended rule only provides for administrative processes required of properties in the Department's portfolio. No program funds are channeled through this amended rule, so no activities under this amended rule would support additional local employment opportunities. Alternatively, the amended rule would also not cause any negative impact on employment. Therefore no local employment impact statement is required to be prepared for the amended rule.

Texas Gov't Code §2001.022(a) states that this "impact statement must describe in detail the probable effect of the rule on employment in each geographic region affected by this rule..." Considering that no impact is expected on a statewide basis, there are also no "probable" effects of the amended 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 amended rule is in effect, the benefit anticipated as a result of the amended sections would be increased clarity and consistency across rule sections. There will not be economic costs to individuals required to comply with the amendment.

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 amended rule is in effect, enforcing or administering the amended rule does not have any foreseeable implications related to costs or revenues of the state or local governments.

SUMMARY OF PUBLIC COMMENTS AND STAFF REASONED RESPONSE. The Department accepted public comment between October 28, 2022, and November 18, 2022. Comments regarding the amended rule were accepted in writing and e-mail with comments received from: (1) Sally Gaskin, President of SGI Ventures, and (2) Roger Arriaga, Executive Director of Texas Affiliation of Affordable Housing Providers (TAAHP). Comments were received on §10.401(a)(6) - 10% Test (Competitive HTC Only) and §10.401(b)(5) - Construction Status Report (All Multifamily Developments).

§10.401 Housing Tax Credit and Tax Exempt Bond Developments

COMMENT SUMMARY: Commenters (1) and (2) recommended that the Fair Housing Training requirement in §10.401(a)(6), that specifies training certificates cannot be older than two years from the date of the submission of the 10% Test documentation, be changed to every five years unless there is a change in the Fair Housing Rule. Commenter (1) stated that the two-year requirement is extremely repetitive and burdensome. Commenter (2) stated that there have been no changes to the Fair Housing Act. The trainings have been the same from year to year, and therefore no significant value is provided by limiting the applicability of a certification earned to two years from the date of submission of the 10% Test documentation. Therefore, they propose to require the certification to be no older than five years from the submission of the 10% Test documentation to eliminate the administrative burden for all applicable parties by creating a more practically applicable parameter.

STAFF RESPONSE: Staff determined that the change cannot be made to the rule because it will create a conflict with 10 TAC Chapter 11 Subchapter D §11.906(d)(1) and (2) concerning Post Bond Closing Documentation Requirements that specifies Fair Housing training certificates must not be older than two years from the date of the submission. Staff also consulted with the Fair Housing Division of the Department and confirmed that no change is recommended to the current requirement in the rules because certified fair housing training providers must include the most up-to-date guidance from HUD. Therefore, new guidance might be missed in some cases if the training is only required in five-year cycles.

COMMENT SUMMARY: Commenter (2) states they disagree with the revision in §10.401(b)(5) regarding the identification of the construction start date on all Third Party construction inspection reports. They state that, due to the limited control they have over what information the third party includes in the reports, they are concerned that requiring this data point after the initial report will create an administrative burden for the owner in navigating the change with the third party construction inspectors and the Department in having to cite inconsequential deficiencies. Therefore, Commenter suggests inserting "(initial submission only)" to the language in §10.401(b)(5) in order to avoid requiring the construction start date to be identified on all subsequent Third Party construction inspection reports.

STAFF RESPONSE: Staff agrees with the Commenter and recommends adoption of the suggested change.

The Board adopted the final order adopting the proposed amendment on January 12, 2023.

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

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

§10.401. Housing Tax Credit and Tax Exempt Bond Developments.

(a) 10% Test (Competitive HTC Only). No later than July 1 of the year following the submission of the Carryover Allocation Agreement or as otherwise specified in the applicable year's Qualified Allocation Plan, documentation must be submitted to the Department verifying that the Development Owner has expended more than 10% of the Development Owner's reasonably expected basis, pursuant to §42(h)(1)(E)(i) and (ii) of the Code and Treasury Regulations, 26 CFR §1.42-6. The Development Owner must submit, in the form prescribed by the Department, documentation evidencing paragraphs (1) - (7) of this subsection, along with all information outlined in the Post Award Activities Manual. Satisfaction of the 10% Test will be contingent upon the submission of the items described in paragraphs (1) - (7) of this subsection as well as all other conditions placed upon the Application in the Commitment. Requests for an extension will be reviewed on a case by case basis as addressed in §10.405(c) of this subchapter and §11.2 of this title, as applicable, and a point deduction evaluation will

be completed in accordance with Tex. Gov't Code §2306.6710(b)(2) and §11.9(g) of this title. Documentation to be submitted for the 10% Test includes:

(1) An Independent Accountant's Report and Taxpayer's Basis Schedule form. The report must be prepared on the accounting firm's letterhead and addressed to the Development Owner or an Affiliate of the Development Owner. The Independent Accountant's Report and Taxpayers Basis Schedule form must be signed by the Development Owner. If, at the time the accountant is reviewing and preparing their report, the accountant has concluded that the taxpayer's reasonably expected basis is different from the amount reflected in the Carryover Allocation agreement, then the accountant's report should reflect the taxpayer's reasonably expected basis as of the time the report is being prepared;

(2) Any conditions of the Commitment or Real Estate Analysis underwriting report due at the time of 10% Test submission;

(3) Evidence that the Development Owner has purchased, transferred, leased, or otherwise has ownership of the Development Site and a current title policy. The Development Site must be identical to the Development Site that was submitted at the time of Application submission. For purposes of this paragraph, any changes to the Development Site acreage between Application and 10% Test must be addressed by written explanation or, as appropriate, in accordance with §10.405 of this subchapter (relating to Amendments and Extensions);

(4) A current survey or plat of the Development Site, prepared and certified by a duly licensed Texas Registered Professional Land Surveyor. The survey or plat must clearly delineate the flood plain boundary lines and show all easements and encroachments;

(5) For New Construction, Reconstruction, and Adaptive Reuse Developments, a certification from a Third Party civil engineer or architect stating that all necessary utilities will be available at the Development Site and that there are no easements, licenses, royalties, or other conditions on or affecting the Development that would materially or adversely impact the ability to acquire, develop, and operate as set forth in the Application. Copies of supporting documents may be required by the Department;

(6) For the Development Owner and on-site or regional property manager, 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 attended and passed at least five hours of Fair Housing training. For architects and engineers, training certificate(s) 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. Certifications required under this paragraph must not be older than two years from the date of submission of the 10% Test Documentation, 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; and

(7) A Certification from the lender and syndicator identifying all known Guarantors. If identified Guarantors have changed from the Guarantors or Principals identified at the time of Application, a non-material amendment may be required in accordance with §10.405 of this subchapter (relating to Amendments and Extensions), and the new Guarantors or Principals must be reviewed in accordance with Chapter 1, Subchapter C of this title (relating to Previous Participation and Executive Award Review and Advisory Committee).

(8) Evidence of submission of the CMTS Filing Agreement pursuant to §10.607(a) of this title (relating to Reporting Requirements).

(b) Construction Status Report (All Multifamily Developments). All multifamily Developments must submit a construction status report. Construction status reports shall be due by the tenth day of the month following each reporting quarter's end (January, April, July, and October) and continue on a quarterly basis until the entire Development is complete as evidenced by one of the following: Certificates of occupancy for each building, the Architect's Certificate(s) of Substantial Completion (AIA Document G704 or equivalent form) for the entire Development, the final Application and Certificate for Payment (AIA Document G702 and G703), or an equivalent form approved for submission by the construction lender and/or investor. For Competitive Housing Tax Credit Developments, the initial report must be submitted no later than October 10th following the year of award (this includes Developments funded with HTC and TDHCA Multifamily Direct Loans), and for Developments awarded under the Department's Multifamily Direct Loan programs only, the initial report must be submitted 90 calendar days after loan closing. For Tax Exempt Bond Developments, the initial construction status report must be submitted as part of the Post Bond Closing Documentation due no later than 60 calendar days following closing on the bonds. The initial report for all multifamily Developments shall consist of the items identified in paragraphs (1) - (6) of this subsection, unless stated otherwise. All subsequent reports shall contain items identified in paragraphs (4) - (6) of this paragraph and must include any changes or amendments to items in paragraphs (1) - (3) if applicable:

(1) The executed partnership agreement with the investor or, for Developments receiving an award only from the Department's Direct Loan Program, other documents setting forth the legal structure and ownership. If identified Guarantors or Principals of a Guarantor entity were not already identified as a Principal of the Owner, Developer, or Guarantor at the time of Application, a non-material amendment must be requested in accordance with §10.405 of this subchapter, and the new Guarantors and all of its Principals, as applicable, must be reviewed in accordance with Chapter 1, Subchapter C of this title (relating to Previous Participation and Executive Award Review and Advisory Committee);

(2) The executed construction contract for the General Contractor, prime subcontractor(s) and Affiliates or Related Party subcontractor(s);

(3) The construction loan agreement. If the loan has not closed, the anticipated closing date must be provided and, upon closing, the agreement must be provided to the Department;

(4) The most recent Application and Certificate for Payment (AIA Document G702 and G703) certified by the Architect of Record (or equivalent form approved for submission by the construction lender and/or investor) for the General Contractor, prime subcontractor(s) and Affiliates or Related Party subcontractor(s);

(5) All Third Party construction inspection reports not previously submitted. If the lender and/or investor does not require third party construction inspection reports, the Development Owner must hire a third party inspector to perform these inspections on a quarterly basis and submit the reports to the Department. Third Party construction inspection reports must include, at a minimum, the date construction started (initial submission only), a discussion of site conditions as of the date of the site visit, current photographs of the construction site and exterior and interior of buildings, an estimated percentage of construction completion as of the date of the site visit, identification of

construction delays and other relevant progress issues, if any, and the anticipated construction completion date; and

(6) Minority Owned Business Report (HTC only) showing the 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 required and further described in Tex. Gov't Code §2306.6734.

(c) LURA Origination.

(1) The Development Owner must request origination of the HTC LURA as directed in the Post Award Activities Manual. The Department will draft a LURA for the Development Owner that will impose the income and rent restrictions identified in the Development's final underwriting report and other representations made in the Application, including but not limited to specific commitments to provide tenant services, to lease to Persons with Disabilities, and/or to provide specific amenities. After origination, the Department executed LURA and all exhibits and addendums will be sent to the Development Owner to execute and record in the real property records for the county in which the Development is located. A copy of the fully executed, recorded LURA must be returned to the Department no later than the end of the first year of the Credit Period. In general, no Housing Tax Credits are allowed to be issued for a building unless there is a properly executed and recorded LURA in effect at the end of the first year of the Credit Period. Nothing in this section negates a Development Owner's responsibility for full compliance with §42(h)(6) of the Code. The Department will not issue IRS Form(s) 8609 until it receives a copy of the fully executed, recorded LURA.

(2) LURAs for Direct Loan awardees will be prepared by the Department's Legal Division and executed at loan closing.

(d) Cost Certification (Competitive and Non-Competitive HTC, and related activities only). The Department conducts a feasibility analysis in accordance with §42(m)(2)(C)(i)(III) of the Code and Chapter 11, Subchapter D of this title (relating to Underwriting and Loan Policy) to make a final determination on the allocation of Housing Tax Credits. For Non-Competitive HTC Developments, the amount of tax credits reflected in the IRS Form(s) 8609 may be greater or less than the amount set forth in the Determination Notice based upon the Department's determination as of each building's placement in service. Any increase of tax credits will only be permitted if it is determined necessary by the Department, as required by §42(m)(2)(D) of the Code through the submission of the Cost Certification package. Increases to the amount of tax credits that exceed 120% of the amount of credits reflected in the Determination Notice must be approved by the Board. Increases to the amount of tax credits that do not exceed 120% of the amount of credits reflected in the Determination Notice may be approved administratively by the Executive Director or designee. All credit increases are subject to the Tax-Exempt Bond Credit Increase Request Fee as described in Chapter 11, Subchapter E of this Part (relating to Fee Schedule, Appeals, and other Provisions). The requirements for cost certification include those identified in paragraphs (1) - (3) of this subsection.

(1) Development Owners must file cost certification documentation no later than January 15 following the first year of the Credit Period, as defined in §42(f)(1) of the Code.

(2) The Department will evaluate the cost certification documentation and notify the Development Owner of any additional required documentation needed to complete the review. The Department reserves the right to request additional documents or certifications as it deems necessary or useful in the determination of the Development's eligibility for a final Housing Tax Credit allocation amount. Any communication issued to the Development Owner pertaining to the cost certification documentation may also be sent to the syndicator.

(3) IRS Form(s) 8609 will not be issued until the conditions as stated in subparagraphs (A) - (G) of this paragraph have been met. The Development Owner has:

(A) Provided evidence that all buildings in the Development have been placed in service by:

(i) December 31 of the year the Commitment was issued;

(ii) December 31 of the second year following the year the Carryover Allocation Agreement was executed; or

(iii) the approved Placed in Service deadline;

(B) Provided a complete final cost certification package in the format prescribed by the Department. As used herein, a complete final cost certification package means a package that meets all of the Department's criteria with all required information and exhibits listed in clauses (i) - (xxxiv) of this subparagraph, and pursuant to the Post Award Activities Manual. If any item on this list is determined to be unclear, deficient, or inconsistent with the cost certification review completed by the Department, a Request for Information (RFI) will be sent to the Development Owner. Requirements include:

(i) Owner's signed and notarized Statement of Certification verifying the CPA firm's licenses and validity, including any restrictions;

(ii) Owner Summary & Organization Charts for the Owner, Developer, and Guarantors;

(iii) Evidence of Qualified Nonprofit or CHDO Participation;

(iv) Certification and evidence of Historically Underutilized Business (HUB) Participation;

(v) Development Team List;

(vi) Development Summary with Architect's Certification;

(vii) Development Change Documentation;

(viii) As Built Survey;

(ix) A copy of the fully executed Closing Statement for each parcel of land and/or buildings purchased and included in the Development;

(x) Development Owner's Title Policy for the Development;

(xi) Title Policy Update;

(xii) Placement in Service;

(xiii) Evidence of Placement in Service;

(xiv) Architect's Certification of Completion Date and Date Ready for Occupancy (for Developments located in areas where Certificates of Occupancy (COs) are not issued by a local government or rehabilitation Developments that cannot provide COs);

(xv) Auditor's Certification of Acquisition/Rehabilitation Placement in Service Election;

(xvi) Independent Auditor's Report;

(xvii) Independent Auditor's Report of Bond Financing;

(xviii) Development Cost Schedule;

(xix) Contractor's Application for Final Payment (G702/G703) for the General Contractor, all prime subcontractors, Affiliated Contractors, and Related Party Contractors;

(xx) Additional Documentation of Offsite Costs;

(xxi) Rent Schedule;

(xxii) Utility Allowances;

(xxiii) Annual Operating Expenses;

(xxiv) 30 Year Rental Housing Operating Pro Forma;

(xxv) Current Operating Statement in the form of a trailing twelve month statement;

(xxvi) Current Rent Roll;

(xxvii) Summary of Sources and Uses of Funds;

(xxviii) Final Limited Partnership Agreement with all amendments and exhibits;

(xxix) All Loan Agreements and Promissory Notes (except for Agreements and Notes issued directly by the Department);

(xxx) Architect's Certification of Accessibility Requirements;

(xxxi) Development Owner Assignment of Individual to Compliance Training;

(xxxii) TDHCA Compliance Training Certificate (not older than two years from the date of cost certification submission);

(xxxiii) TDHCA Final Inspection Clearance Letter or evidence of submitted final inspection request to the Compliance Division (IRS Form(s) 8609 will not be issued without a TDHCA Final Inspection Clearance Letter); and

(xxxiv) Other Documentation as Required, including but not limited to conditions to be satisfied at cost certification as reflected in the Development's latest Underwriting Report;

(C) Informed the Department of and received written approval for all amendments, extensions, and changes in ownership relating to the Development in accordance with §10.405 of this subchapter (relating to Amendments and Extensions) and §10.406 of this subchapter (relating to Ownership Transfers (§2306.6713));

(D) Paid all applicable Department fees, including any past due fees;

(E) Met all conditions noted in the Department underwriting report, Determination Notice, and Commitment;

(F) Corrected all issues of noncompliance, including but not limited to noncompliance status with the LURA (or any other document containing an Extended Low-income Housing Commitment) or the program rules in effect for the subject Development, as described in this chapter. Developments in the corrective action period and/or with any uncorrected issues of noncompliance outside of the corrective action period will not be issued IRS Form(s) 8609s until all events of noncompliance are corrected or otherwise approved by the Executive Director or designee; and

(G) Completed an updated underwriting evaluation in accordance with Chapter 11, Subchapter D of this Part based on the most current information at the time of the review.

§10.403. Review of Annual HOME, HOME-ARP, NSP, TCAP-RF, and National Housing Trust Fund Rents.

(a) Applicability. For participants of the Department's Multifamily HOME, HOME American Rescue Plan (HOME-ARP), and NSP Direct Loan program, where Commitment of Funds occurred on or after August 23, 2013, the Department is required by 24 CFR §92.252(f) and for all National Housing Trust Fund (NHTF) recipients by 24 CFR §93.302(c)(2), to review and approve or disapprove HOME/HOME-ARP/NSP/NHTF rents on an annual basis. The Department is also required by 24 CFR §92.219 and §92.252(d)(2) to approve rents where Multifamily Direct Loan funds (including TCAP-RF) are used as HOME match. Development Owners must submit documentation for the review of HOME/HOME-ARP/NSP/NHTF/TCAP-RF rents by no later than August 1st of each year as further described in the Post Award Activities Manual.

(b) Documentation for Review. The Department will furnish a rent approval request packet for this purpose that will include a request for Development information and an Owner's proposed rent schedule and will require submission of a current rent roll, the most recent 12-month operating statement for the Development, and utility allowance information. The Department may request additional documentation to perform a determination, as needed, including but not limited to annual operating statements, market surveys, or other information related to determining whether rents are sufficient to maintain the financial viability of a project or are in compliance with maximum rent limits.

(c) Review Process. Rents will be approved or disapproved within 30 days of receipt of all items required to be submitted by the Development Owner, and will be issued in the form of a signed letter from the Asset Management Division. Development Owners must keep copies of all approval letters on file at the Development site to be reviewed at the time of Compliance Monitoring reviews.

(d) Compliance. Development Owners for whom this section is applicable are subject to compliance under §10.622 of this chapter (relating to Special Rules Regarding Rents and Limit Violations) and may be subject to penalties under §10.625 of this chapter (relating to Events of Noncompliance). Approval of rents by the Asset Management Division will be limited to a review of the documentation submitted and will not guarantee compliance with the Department's rules or otherwise absolve an Owner of any past, current, or future non-compliance related to Department rules, guidance, Compliance Monitoring visits, or any other rules or guidance to which the Development or its Owner may be subject.

§10.405. Amendments and Extensions.

(a) Amendments to Housing Tax Credit (HTC) Application or Award Prior to Land Use Restriction Agreement (LURA) recording or amendments that do not result in a change to the LURA (§2306.6712). The Department expects the Development Owner to construct or rehabilitate, operate, and own the Development consistent with the representations in the Application. The Department must receive notification of any amendments to the Application. Regardless of development stage, the Board shall re-evaluate a Development that undergoes a material change, as identified in paragraph (3) of this subsection at any time after the initial Board approval of the Development (§2306.6731(b)). The Board may deny an amendment request and subsequently may rescind any Commitment or Determination Notice issued for an Application, and may reallocate the credits to other Applicants on the waiting list.

(1) Requesting an amendment. The Department shall require the Applicant to file a formal, written request for an amendment

to the Application. Such request must include a detailed explanation of the amendment request and other information as determined to be necessary by the Department, and the applicable fee as identified in Chapter 11, Subchapter E of this title (relating to Fee Schedule, Appeals, and other Provisions) in order to be received and processed by the Department. Department staff will evaluate the amendment request to determine if the change would affect an allocation of Housing Tax Credits by changing any item that received points, by significantly affecting the most recent underwriting analysis, or by materially altering the Development as further described in this subsection.

(2) Notification Items. The Department must be notified of the changes described in subparagraphs (A) - (F) of this paragraph. The changes identified are subject to staff agreement based on a review of the amendment request and any additional information or documentation requested. Notification items will be considered satisfied when an acknowledgment of the specific change(s) is received from the Department and include:

(A) Changes to Development Site acreage required by the City or other local governmental authority, or changes resulting from survey discrepancies, as long as such change does not also result in a modification to the residential density of more than 5%;

(B) Minor modifications to the site plan that will not significantly impact development costs, including, but not limited to, relocation or rearrangement of buildings on the site (as long as the number of residential and non-residential buildings remains the same), and movement, addition, or deletion of ingress/egress to the site;

(C) Increases or decreases in net rentable square footage or common areas that do not result in a material amendment under paragraph (4) of this subsection;

(D) Changes in amenities that do not require a change to the recorded LURA and do not negatively impact scoring, including changes to outdated amenities that could be replaced by an amenity with equal benefit to the resident community;

(E) Changes in Developers or Guarantors (notifications for changes in Guarantors that are also the General Contractor or are only providing guaranties during the construction period are not required) with no new Principals (who were not previously checked by Previous Participation review that retain the natural person(s) used to meet the experience requirement in Chapter 11 of this title (relating to Qualified Allocation Plan)); and

(F) Any other amendment not identified in paragraphs (3) and (4) of this subsection.

(3) Non-material amendments. The Executive Director or designee may administratively approve all non-material amendments, including, but not limited to:

(A) Any amendment that is determined by staff to exceed the scope of notification acknowledgement, as identified in paragraph (2) of this subsection but not to rise to a material alteration, as identified in paragraph (4) of this subsection;

(B) Changes in the natural person(s) used to meet the experience requirement in Chapter 11, §11.204(6) of this title provided that an appropriate substitute has been approved by the Multifamily Division prior to receipt of the amendment request (relating to Required Documentation for Application Submission);

(C) Changes in Developers or Guarantors (excluding changes in Guarantors that are also the General Contractor or are only providing guaranties during the construction period) not addressed in §10.405(a)(2)(E). Changes in Developers or Guarantors will be subject to Previous Participation requirements as further described in Chapter 11 of this title and the credit limitation described in §11.4(a) of this title; and

(D) For Exchange Developments only, requests to change elections made on line 8(b) of the IRS Form(s) 8609 to group buildings together into one or more multiple building projects. The request must include an attached statement identifying the buildings in the project. The change to the election may only be made once during the Compliance Period.

(4) Material amendments. Amendments considered material pursuant to this paragraph must be approved by the Board. When an amendment request requires Board approval, the Development Owner must submit the request and all required documentation necessary for staff's review of the request to the Department at least 45 calendar days prior to the Board meeting in which the amendment is anticipated to be considered. Before the 15th day preceding the date of Board action on the amendment, notice of an amendment and the recommendation of the Executive Director and Department staff regarding the amendment will be posted to the Department's website and the Applicant will be notified of the posting (§2306.6717(a)(4)). Material Amendment requests may be denied if the Board determines that the modification proposed in the amendment would materially alter the Development in a negative manner or would have adversely affected the selection of the Application in the Application Round. Material alteration of a Development includes, but is not limited to:

(A) A significant modification of the site plan;

(B) A modification of the number of Units or bedroom mix of Units;

(C) A substantive modification of the scope of tenant services;

(D) A reduction of 3% or more in the square footage of the Units or common areas;

(E) A significant modification of the architectural design of the Development;

(F) A modification of the residential density of at least 5%;

(G) A request to implement a revised election under §42(g) of the Code prior to filing of IRS Form(s) 8609;

(H) Exclusion of any requirements as identified in Chapter 11, Subchapter B of this title (relating to Site and Development Requirements and Restrictions) and Chapter 11, Subchapter C of this title (relating to Application Submission Requirements, Ineligibility Criteria, Board Decisions and Waiver of Rules); or

(I) Any other modification considered material by the staff and therefore required to be presented to the Board as such.

(5) Amendment requests will be denied if the Department finds that the request would have changed the scoring of an Application in the competitive process such that the Application would not have received a funding award or if the need for the proposed modification was reasonably foreseeable or preventable by the Applicant at the time the Application was submitted, unless good cause is found for the approval of the amendment.

(6) This section shall be administered in a manner that is consistent with §42 of the Code. If a Development has any uncorrected issues of noncompliance outside of the corrective action period (other than the provision being amended) or otherwise owes fees to the Department, such non-compliance or outstanding payment must be resolved to the satisfaction of the Department before a request for amendment will be acted upon.

(7) In the event that an Applicant or Developer seeks to be released from the commitment to serve the income level of tenants identified in the Application and Credit Underwriting Analysis Report at the time of award and as approved by the Board, the procedure described in subparagraphs (A) and (B) of this paragraph will apply to the extent such request is not prohibited based on statutory and/or regulatory provisions:

(A) For amendments that involve a reduction in the total number of Low-Income Units, or a reduction in the number of Low-Income Units at any rent or income level, as approved by the Board, evidence noted in either clause (i) or (ii) of this subparagraph must be presented to the Department to support the amendment:

(i) In the event of a request to implement (rent to a household at an income or rent level that exceeds the approved AMI limits established by the minimum election within the Development's Application or LURA) a revised election under §42(g) of the Code prior to an Owner's submission of IRS Form(s) 8609 to the IRS, Owners must submit updated information and exhibits to the Application as required by the Department and all lenders and the syndicator must submit written acknowledgement that they are aware of the changes being requested and confirm any changes in terms as a result of the new election; or

(ii) For all other requests for reductions in the total number of Low-Income Units or reductions in the number of Low-Income Units at any rent or income level, prior to issuance of IRS Form(s) 8609 by the Department, the lender and syndicator must submit written confirmation that the Development is infeasible without the adjustment in Units. The Board may or may not approve the amendment request; however, any affirmative recommendation to the Board is contingent upon concurrence from Department staff that the Unit adjustment is necessary for the continued financial feasibility of the Development; and

(B) If it is determined by the Department that the loss of low-income targeting points would have resulted in the Application not receiving an award in the year of allocation, and the amendment is approved by the Board, the approved amendment will carry a penalty that prohibits the Applicant and all Persons or entities with any ownership interest in the Application (excluding any tax credit purchaser/syndicator), from participation in the Housing Tax Credit Program (for both the Competitive Housing Tax Credit Developments and Tax-Exempt Bond Developments) for 24 months from the time that the amendment is approved.

(b) Amendments to the LURA. Department approval shall be required for any amendment to a LURA in accordance with this section. An amendment request shall be submitted in writing, containing a detailed explanation of the request, the reason the change is necessary, the good cause for the change, financial information related to any financial impact on the Development, information related to whether the necessity of the amendment was reasonably foreseeable at the time of application, and other information as determined to be necessary by the Department, along with any applicable fee as identified in Chapter 11, Subchapter E of this title (relating to Fee Schedule, Appeals, and other Provisions). The Department may order or require the Development Owner to order a Market Study or appraisal at the Development Owner's expense. If a Development has any uncorrected issues of noncompliance outside of the corrective action period (other than the provision being amended) or otherwise owes fees to the Department, such non-compliance or outstanding payment must be resolved to the satisfaction of the Department, before a request for amendment will be acted upon. The Department will not approve changes that would violate state or federal laws including the requirements of §42 of the Code, 24 CFR Part 92 (HOME Final Rule), 24 CFR Part 93 (NHTF Interim Rule), Chapter 1 of this title (relating to Administrative Requirements), Chapter 11 of this title (relating to Qualified Allocation Plan), Chapter 12 of this title (relating to Multifamily Housing Revenue Bond Rules), Chapter 13 of this title (relating to Multifamily Direct Loan Rule), Tex. Gov't Code, Chapter 2306, and the Fair Housing Act. For Tax-Exempt Bond Developments, compliance with their Regulatory Agreement and corresponding bond financing documents. Prior to staff taking a recommendation to the Board for consideration, the procedures described in paragraph (3) of this subsection must be followed.

(1) Non-Material LURA Amendments. The Executive Director or designee may administratively approve all LURA amendments not defined as Material LURA Amendments pursuant to paragraph (2) of this subsection. A non-material LURA amendment may include but is not limited to:

(A) HUB participation removal. Removal of a HUB participation requirement will only be processed as a non-material LURA amendment after the issuance of IRS Form(s) 8609 and requires that the Department find that:

(i) The HUB is requesting removal of its own volition or is being removed as the result of a default under the organizational documents of the Development Owner;

(ii) the participation by the HUB has been substantive and meaningful, or would have been substantive or meaningful had the HUB not defaulted under the organizational documents of the Development Owner, enabling it to realize not only financial benefit but to acquire skills relating to the ownership and operating of affordable housing; and

(iii) where the HUB will be replaced as a general partner or special limited partner that is not a HUB and will sell its ownership interest, an ownership transfer request must be submitted as described in §10.406 of this subchapter;

(B) A change resulting from a Department work out arrangement as recommended by the Department's Asset Management Division;

(C) A change in the Right of First Refusal period as described in amended §2306.6726 of the Tex. Gov't Code;

(D) Where the Board has approved a de minimis modification of the Unit Mix or bedroom mix of Units to increase the Development's accessibility; or

(E) A correction of error.

(2) Material LURA Amendments. Development Owners seeking LURA amendment requests that require Board approval must submit the request and all required documentation necessary for staff's review of the request to the Department at least 45 calendar days prior to the Board meeting at which the amendment is anticipated to be considered. Before the 15th day preceding the date of Board action on the amendment, notice of an amendment and the recommendation of the Executive Director and Department staff regarding the amendment will be posted to the Department's website and the Applicant will be notified of the posting. (§2306.6717(a)(4)). The Board must consider the following material LURA amendments:

(A) Reductions to the number of Low-Income Units;

(B) Changes to the income or rent restrictions;

(C) Changes to the Target Population;

(D) The removal of material participation by a Nonprofit Organization as further described in §10.406 of this subchapter;

(E) The removal of material participation by a HUB prior to filing of IRS Form(s) 8609;

(F) Any amendment that affects a right enforceable by a tenant or other third party under the LURA; or

(G) Any LURA amendment deemed material by the Executive Director.

(3) Prior to staff taking a recommendation to the Board for consideration, the Development Owner must provide notice and hold a public hearing regarding the requested amendment(s) at least 20 business days prior to the scheduled Board meeting where the request will be considered. Development Owners will be required to submit a copy of the notification with the amendment request. If a LURA amendment is requested prior to issuance of IRS Form(s) 8609 by the Department, notification must be provided to the recipients described in subparagraphs (A) - (E) of this paragraph. If an amendment is requested after issuance of IRS Form(s) 8609 by the Department, notification must be provided to the recipients described in subparagraph (A) - (B) of this paragraph. Notifications include:

(A) Each tenant of the Development;

(B) The current lender(s) and investor(s);

(C) The State Senator and State Representative of the districts whose boundaries include the Development Site;

(D) The chief elected official for the municipality (if the Development Site is within a municipality or its extraterritorial jurisdiction); and

(E) The county commissioners of the county in which the Development Site is located (if the Development Site is located outside of a municipality).

(4) Contents of Notification. The notification must include, at a minimum, all of the information described in subparagraphs (A) - (D) of this paragraph:

(A) The Development Owner's name, address and an individual contact name and phone number;

(B) The Development's name, address, and city;

(C) The change(s) requested; and

(D) The date, time and location of the public hearing where the change(s) will be discussed.

(5) Verification of public hearing. Minutes of the public hearing and attendance sheet must be submitted to the Department within three business days after the date of the public hearing.

(6) Approval. Once the LURA Amendment has been approved administratively or by the Board, as applicable, Department staff will provide the Development Owner with a LURA amendment for execution and recording in the county where the Development is located.

(c) HTC Extensions. Extensions must be requested if the original deadline associated with Carryover, the 10% Test (including submission and expenditure deadlines), construction status reports, or cost certification requirements will not be met. Extension requests submitted at least 30 calendar days in advance of the applicable deadline will not be required to submit an extension fee as described in §11.901 of this title. Any extension request submitted fewer than 30 days in advance of the applicable deadline or after the applicable deadline will not be processed unless accompanied by the applicable fee. Extension requests will be approved by the Executive Director or designee, unless, at staff's discretion it warrants Board approval due to extenuating circumstances stated in the request. The extension request must specify a requested extension date and the reason why such an extension is required. If the Development Owner is requesting an extension to the Carryover submission or 10% Test deadline(s), a point deduction evaluation will be completed in accordance with Tex. Gov't Code, §2306.6710(b)(2), and §11.9(g) of this title (relating to Factors Affecting Scoring and Eligibility in current and future Application Rounds). Therefore, the Development Owner must clearly describe in their request for an extension how the need for the extension was beyond the reasonable control of the Applicant/Development Owner and could not have been reasonably anticipated. Carryover extension requests will not be granted an extended deadline later than December 1st of the year the Commitment was issued.

§10.406. Ownership Transfers (§2306.6713).

(a) Ownership Transfer Notification. All multifamily Development Owners must provide written notice and a completed Ownership Transfer packet, if applicable, to the Department at least 45 calendar days prior to any sale, transfer, or exchange of the Development or any portion of or Controlling interest in the Development. Except as otherwise provided herein, the Executive Director's prior written approval of any such transfer is required. The Executive Director may not unreasonably withhold approval of the transfer requested in compliance with this section.

(b) Exceptions. The exceptions to the ownership transfer process in this subsection are applicable.

(1) A Development Owner shall be required to notify the Department but shall not be required to obtain Executive Director approval when the transferee is an Affiliate of the Development Owner with no new Principals or the transferee is a Related Party who does not Control the Development and the transfer is being made for estate planning purposes.

(2) Transfers that are the result of an involuntary removal of the general partner by the investment limited partner do not require advance approval but must be reported to the Department as soon as possible due to the sensitive timing and nature of this decision. In the event the investment limited partner has proposed a new general partner or will permanently replace the general partner, a full Ownership Transfer packet must be submitted.

(3) Changes to the investment limited partner, non-Controlling limited partner, or other non-Controlling partners affiliated with the investment limited partner do not require Executive Director approval. A General Partner's acquisition of the interest of the investment limited partner does not require Executive Director approval, unless some other change in ownership is occurring as part of the same overall transaction.

(4) Changes resulting from foreclosure do not require advance approval but acquiring parties must notify the Department as soon as possible of the revised ownership structure and ownership contact information.

(5) Changes resulting from a deed-in-lieu of foreclosure do not require Executive Director approval. However, advance notification must be provided to both the Department and to the tenants at least 30 days prior to finalizing the transfer. This notification must include information regarding the applicable rent/income requirements post deed in lieu of foreclosure.

(c) General Requirements.

(1) Any new Principal in the ownership of a Development must be eligible under §11.202 of Subchapter C (relating to Ineligible Applicants and Applications). In addition, Persons and Principals will be reviewed in accordance with Chapter 1, Subchapter C of this title

(relating to Previous Participation and Executive Award Review and Advisory Committee).

(2) Changes in Developers or Guarantors must be addressed as non-material amendments to the application under §10.405 of this Subchapter.

(3) To the extent an investment limited partner or its Affiliate assumes a Controlling interest in a Development Owner, such acquisition shall be subject to the Ownership Transfer requirements set forth herein. Principals of the investment limited partner or Affiliate will be considered new Principals and will be reviewed as stated under paragraph (1) of this subsection.

(4) Simultaneous transfer or concurrent offering for sale of the General Partner's and Limited Partner's control and interest will be subject to the Ownership Transfer requirements set forth herein and will trigger a Right of First Refusal, if applicable.

(5) Any initial operating, capitalized operating, or replacement reserves funded with an allocation from the HOME American Rescue Plan (HOME-ARP) and Special Reserves required by the Department must remain with the Development.

(d) Transfer Actions Warranting Debarment. If the Department determines that the transfer, involuntary removal, or replacement was due to a default by the General Partner under the Limited Partnership Agreement, or other detrimental action that put the Development at risk of failure or the Department at risk for financial exposure as a result of non-compliance, staff will refer the matter to the Enforcement Committee for debarment consideration pursuant to §2.401 of this title (relating to Enforcement, Debarment from Participation in Programs Administered by the Department). In addition, a record of transfer involving Principals in new proposed awards will be reported and may be taken into consideration in accordance with Chapter 1, Subchapter C of this title (relating to Previous Participation and Executive Award Review and Advisory Committee), prior to recommending any new financing or allocation of credits.

(e) Transfers Prior to 8609 Issuance or Construction Completion. Prior to the issuance of IRS Form(s) 8609 (for Housing Tax Credits) or the completion of construction (for all Developments funded through other Department programs), an Applicant may request an amendment to its ownership structure to add Principals. The party(ies) reflected in the Application as having Control must remain in the ownership structure and retain Control, unless approved otherwise by the Executive Director. A development sponsor, General Partner or Development Owner may not sell the Development in whole or voluntarily end their Control prior to the issuance of 8609s.

(f) Nonprofit Organizations. If the ownership transfer request is to replace a nonprofit organization within the Development ownership entity, the replacement nonprofit entity must adhere to the requirements in paragraph (1) or (2) of this subsection.

(1) If the LURA requires ownership or material participation in ownership by a Qualified Nonprofit Organization, and the Development received Tax Credits pursuant to §42(h)(5) of the Code, the transferee must be a Qualified Nonprofit Organization that meets the requirements of §42(h)(5) of the Code and Tex. Gov't Code §2306.6706, if applicable, and can demonstrate planned participation in the operation of the Development on a regular, continuous, and substantial basis.

(2) If the LURA requires ownership or material participation in ownership by a nonprofit organization or CHDO, the Development Owner must show that the transferee is a nonprofit organization or CHDO, as applicable, that complies with the LURA. If the transferee has been certified as a CHDO by TDHCA prior to 2016 or has not previously been certified as a CHDO by TDHCA, a new CHDO certification package must be submitted for review. If the transferee was certified as a CHDO by TDHCA after 2016, provided no new federal guidance or rules concerning CHDO have been released and the proposed ownership structure at the time of review meets the requirements in 24 CFR Part 92, the CHDO may instead submit a CHDO Self-Certification form with the Ownership Transfer package.

(3) Exceptions to paragraphs (1) and (2) of this subsection may be made on a case by case basis if the Development (for MFDL) is past its Federal Affordability Period or (for HTC Developments) is past its Compliance Period, was not reported to the IRS as part of the Department's Nonprofit Set Aside in any HTC Award year, and follows the procedures outlined in §10.405(b)(1) - (5) of this subchapter. The Board must find that:

(A) The selling nonprofit is acting of its own volition or is being removed as the result of a default under the organizational documents of the Development Owner;

(B) The participation by the nonprofit was substantive and meaningful during the full term of the Compliance Period but is no longer substantive or meaningful to the operations of the Development; and

(C) The proposed purchaser is an affiliate of the current Owner or otherwise meets the Department's standards for ownership transfers.

(g) Historically Underutilized Business (HUB) Organizations. If a HUB is the general partner or special limited partner of a Development Owner and it determines to sell its ownership interest, after the issuance of IRS Form(s) 8609, the purchaser of that partnership interest or the general or special limited partner is not required to be a HUB as long as the LURA does not require it or the procedure described in §10.405(b)(1) of this chapter (relating to Non-Material LURA Amendments) has been followed and approved. The removal of a HUB requirement prior to filing of IRS Form(s) 8609 is subject to the procedure described in §10.405(b)(2) of this Chapter (relating to Material LURA Amendments).

(h) Documentation Required. A Development Owner must submit documentation requested by the Department to enable the Department to understand fully the facts and circumstances pertaining to the transfer and the effects of approval or denial. Documentation must be submitted as directed in the Post Award Activities Manual, which includes but is not limited to:

(1) A written explanation outlining the reason for the request;

(2) Ownership transfer information, including but not limited to the type of sale, terms of any new financing introduced as a result of the transfer, amount of Development reserves to transfer in the event of a property sale, and the prospective closing date;

(3) Pre and post transfer organizational charts with TINs of each organization down to the level of natural persons in the ownership structure as described in §11.204(13)(B) of Subchapter C of this title (relating to Required Documentation for Application Submission);

(4) A list of the names and contact information for transferees and Related Parties;

(5) Previous Participation information for any new Principal as described in §11.204(13)(C) of this title (relating to Required Documentation for Application Submission);

(6) Agreements among parties associated with the transfer;

(7) Owners Certifications with regard to materials submitted as further described in the Post Award Activities Manual;

(8) Detailed information describing the organizational structure, experience, and financial capacity of any party holding a controlling interest in any Principal or Controlling entity of the prospective Development Owner;

(9) Evidence and certification that the tenants in the Development have been notified in writing of the proposed transfer at least 30 calendar days prior to the date the transfer is approved by the Department. The ownership transfer approval letter will not be issued until this 30-day period has expired; and

(10) Any required exhibits and the list of exhibits related to specific circumstances of transfer or Ownership as detailed in the Post Award Activities Manual.

(i) Once the Department receives all necessary information under this section and as required under the Post Award Activities Manual, staff shall initiate a qualifications review of a transferee, in accordance with Chapter 1, Subchapter C of this title (relating to Previous Participation and Executive Award Review and Advisory Committee), to determine the transferee's past compliance with all aspects of the Department's programs, LURAs and eligibility under this chapter and §11.202 of this title (relating to Ineligible Applicants and Applications).

(j) Credit Limitation. As it relates to the Housing Tax Credit amount further described in §11.4(a) of this title (relating to Tax Credit Request and Award Limits), the credit amount will not be applied in circumstances described in paragraphs (1) and (2) of this subsection:

(1) In cases of transfers in which the syndicator, investor or limited partner is taking over ownership of the Development and not merely replacing the general partner; or

(2) In cases where the general partner is being replaced if the award of credits was made at least five years prior to the transfer request date.

(k) Penalties, Past Due Fees and Underfunded Reserves. The Development Owner must comply with any additional documentation requirements as stated in Subchapter F of this chapter (relating to Compliance Monitoring) and Subchapter G of this chapter (relating to Affirmative Marketing Requirements and Written Policies and Procedures). The Development Owner on record with the Department will be liable for any penalties or fees imposed by the Department (even if such penalty can be attributable to the new Development Owner) unless an ownership transfer has been approved by the Department. In the event a transferring Development has a history of uncorrected UPCS violations, ongoing issues related to keeping housing sanitary, safe, and decent, an account balance below the annual reserve deposit amount as specified in §10.404(a) (relating to Replacement Reserve Accounts), or that appears insufficient to meet capital expenditure needs as indicated by the number or cost of repairs included in a PNA or SCR, the prospective Development Owner may be required to establish and maintain a replacement reserve account or increase the amount of regular deposits to the replacement reserve account by entering into a Reserve Agreement with the Department. The Department may also request a plan and timeline relating to needed repairs or renovations that will be completed by the departing and/or incoming Owner as a condition to approving the Transfer. A PNA or SCR may be requested if one has not already been received under §10.404 of this section (relating to Reserve Accounts).

(l) Ownership Transfer Processing Fee. The ownership transfer request must be accompanied by the corresponding ownership transfer fee as outlined in §11.901 of this title (relating to Fee Schedule).

§10.407. Right of First Refusal.

(a) General. This section applies to Development Owners that agreed to offer a Right of First Refusal (ROFR) to a Qualified Entity or as applicable a Qualified Nonprofit Organization, as memorialized in the applicable LURA. For the purposes of this section, a Qualified Nonprofit Organization also includes an entity 100% owned by a Qualified Nonprofit Organization pursuant to §42(h)(5)(C) of the Code and operated in a similar manner. The purpose of this section is to provide administrative procedures and guidance on the process and valuation of properties under the LURA. All requests for ROFR submitted to the Department, regardless of existing regulations, must adhere to this process.

(1) The Development Owner may market the Property for sale and enter into an agreement to sell the Property to a Qualified Entity, or as applicable a Qualified Nonprofit Organization without going through the ROFR process outlined in this section, unless otherwise restricted or prohibited and only in the following circumstances:

(A) The LURA includes a 90-day ROFR and the Development Owner is selling to a Qualified Nonprofit Organization;

(B) The LURA includes a two-year ROFR and the Development Owner is selling to a Qualified Nonprofit Organization that meets the definition of a Community Housing Development Organization (CHDO) under 24 CFR Part 92, as approved by the Department; or

(C) The LURA includes a 180-day ROFR, and the Development Owner is selling to a Qualified Entity that meets the definition of a CHDO under 24 CFR Part 92, or to an entity that includes a CHDO as one of its controlling members, as approved by the Department, or to the public housing authority or public facility corporation that owns the fee title to the Development Owner's leasehold estate.

(2) A ROFR request must be made in accordance with the LURA for the Development. If there is a conflict between the Development's LURA and this subchapter, every effort will be made to harmonize the provisions. If the conflict cannot be resolved, requirements in the LURA will supersede this subchapter. If there is a conflict between the Development's LURA and Tex. Gov't Code Chapter 2306, every effort will be made to harmonize the provisions. A Development Owner may request a LURA amendment to make the ROFR provisions in the LURA consistent with Tex. Gov't Code Chapter 2306 at any time.

(3) If a LURA includes the ROFR provision, the Development Owner may not request a Preliminary Qualified Contract (if such opportunity is available under the applicable LURA and §10.408 of this Subchapter) until the requirements outlined in this section have been satisfied.

(4) The Department reviews and approves all ownership transfers pursuant to §10.406 of this subchapter. Thus, if a proposed purchaser is identified by the Owner in accordance with paragraph (1) of this subsection or in the ROFR process, the Development Owner and proposed purchaser must complete the ownership transfer process. A Development Owner may not transfer a Development to a Qualified Nonprofit Organization or Qualified Entity that is considered an ineligible entity under the Department's rules. In addition, ownership transfers to a Qualified Entity or as applicable a Qualified Nonprofit Organization pursuant to the ROFR process are subject to Chapter 1, Subchapter C of this title (relating to Previous Participation and Executive Award Review and Advisory Committee).

(5) Satisfying the ROFR requirement does not terminate the LURA or the ongoing application of the ROFR requirement to any subsequent Development Owner.

(6) If there are multiple buildings in the Development, the end of the 15th year of the Compliance Period will be based upon the

date the last building(s) began their credit period(s). For example, if five buildings in the Development began their credit periods in 2007 and one in 2008, the 15th year would be 2022. The ROFR process is triggered upon:

(A) The Development Owner's determination to sell the Development to an entity other than as permitted in paragraph (1) of this subsection; or

(B) The simultaneous transfer or concurrent offering for sale of a General Partner's and limited partner's interest in the Development Owner's ownership structure.

(7) The ROFR process is not triggered if a Development Owner seeks to transfer the Development to a newly formed entity:

(A) That is under common control with the Development Owner; and

(B) The primary purpose of the formation of which is to facilitate the financing of the rehabilitation of the Development using assistance administered through a state financing program.

(8) This section applies only to a Right of First Refusal memorialized in the Department's LURA. This section does not authorize a modification of any other agreement between the Development Owner and a Qualified Nonprofit Organization or Qualified Entity. The enforceability of a contractual agreement between the Development Owner and a Qualified Nonprofit Organization or Qualified Entity may be impacted by the Development Owner's commitments at Application and recorded LURA.

(b) Right of First Refusal Offer Price. There are two general expectations of the ROFR offer price identified in the outstanding LURAs. The descriptions in paragraphs (1) and (2) of this subsection do not alter the requirements or definitions included in the LURA but provide further clarification as applicable:

(1) Fair Market Value is established using either a current appraisal (completed within three months prior to the ROFR request and in accordance with §11.304 of this title (relating to Appraisal Rules and Guidelines)) of the Property or an executed purchase offer that the Development Owner would like to accept. In either case the documentation used to establish Fair Market Value will be part of the ROFR property listing on the Department's website. The purchase offer must contain specific language that the offer is conditioned upon satisfaction of the ROFR requirement. If a subsequent ROFR request is made within six months of the previously approved ROFR posting, the lesser of the prior ROFR posted value or new appraisal/purchase contract amount must be used in establishing Fair Market Value;

(2) Minimum Purchase Price, pursuant to §42(i)(7)(B) of the Code, is the sum of the categories listed in subparagraphs (A) and (B) of this paragraph:

(A) The principal amount of outstanding indebtedness secured by the project (other than indebtedness incurred within the five year period immediately preceding the date of said notice); and

(B) All federal, state, and local taxes incurred or payable by the Development Owner as a consequence of such sale. If the Property has a minimum Applicable Fraction of less than one, the offer must take this into account by multiplying the purchase price by the applicable fraction and the fair market value of the non-Low-Income Units. Documentation submitted to verify the Minimum Purchase Price calculation will be part of the ROFR property listing on the Department's website.

(c) Required Documentation. Upon establishing the ROFR offer price, the ROFR process is the same for all types of LURAs. To proceed with the ROFR request, documentation must be submitted as directed in the Post Award Activities Manual, which includes:

(1) ROFR fee as identified in §11.901 of this title (relating to Fee Schedule);

(2) A notice of intent to the Department;

(3) Certification that the Development Owner has provided, to the best of their knowledge and ability, a notice of intent to all additional required persons and entities in subparagraph (A) of this paragraph and that such notice includes, at a minimum the information in subparagraph (B) of this paragraph;

(A) Copies of the letters or emailed notices provided to all persons and entities listed in clauses (i) to (vi) of this subparagraph as required by this paragraph and applicable to the Development at the time of the submission of the ROFR documentation must be attached to the Certification:

(i) All tenants and tenant organizations, if any, of the Development;

(ii) Mayor of the municipality (if the Development is within a municipality or its extraterritorial jurisdiction);

(iii) All elected members of the Governing Body of the municipality (if the Development Site is within a municipality or its extraterritorial jurisdiction);

(iv) Presiding officer of the Governing Body of the county in which the Development is located;

(v) The local housing authority, if any; and

(vi) All prospective buyers maintained on the Department's list of prospective buyers.

(B) Letters must include, at a minimum, all of the information required in clauses (i) to (vii) of this subparagraph and must not contain any statement that violates Department rules, statute, Code, or federal requirements:

(i) The Development's name, address, city, and county;

(ii) The Development Owner's name, address, individual contact name, phone number, and email address;

(iii) Information about tenants' rights to purchase the Development through the ROFR;

(iv) The length of the ROFR posting period;

(v) The ROFR offer price;

(vi) A physical description of the Development, including the total number of Units and total number of Low-Income Units; and

(vii) Contact information for the Department staff overseeing the Development's ROFR application.

(4) Documentation evidencing any contractual ROFR between the Development Owner and a Qualified Nonprofit Organization or Qualified Entity, along with evidence that such Qualified Nonprofit Organization or Qualified Entity is in good standing in the state of its organization;

(5) Documentation verifying the ROFR offer price of the Property:

(A) If the Development Owner receives an offer to purchase the Property from any buyer other than a Qualified Entity or Qualified Nonprofit Organization that the Development Owner would

like to accept, the Development Owner may execute a sales contract, conditioned upon satisfaction of the ROFR requirement, and submit the executed sales contract to establish fair market value; or

(B) If the Development Owner chooses to establish fair market value using an appraisal, the Development Owner must submit an appraisal of the Property completed during the last three months prior to the date of submission of the ROFR request, establishing a value for the Property in compliance with Chapter 11, Subchapter D of this title (relating to Underwriting and Loan Policy) in effect at the time of the request. The appraisal should take into account the existing and continuing requirements to operate the Property under the LURA and any other restrictions that may exist. Department staff will review all materials within 30 calendar days of receipt. If, after the review, the Department does not agree with the fair market value proposed in the Development Owner's appraisal, the Department may order another appraisal at the Development Owner's expense; or

(C) If the LURA requires valuation through the Minimum Purchase Price calculation, submit documentation verifying the calculation of the Minimum Purchase Price as described in subsection (b)(2) of this section regardless of any existing offer or appraised value;

(6) Description of the Property, including all amenities;

(7) Copies of all documents imposing income, rental and other restrictions (non-TDHCA), if any, applicable to the operation of the Property;

(8) A current title commitment or policy not older than six months prior to the date of submission of the ROFR request or the most recent title policy along with a title endorsement or nothing further certificate not older than six months prior to the date of submission of the ROFR request;

(9) The most recent Physical Needs Assessment, pursuant to Tex. Gov't Code §2306.186(e) conducted by a Third-Party. If the PNA/SCR identifies the need for critical repairs that significantly impact habitability and tenant safety, the identified repairs and replacements must be resolved to the satisfaction of the Department before the Development will be considered eligible to proceed with a Right of First Refusal Request;

(10) Copy of the monthly operating statements, including income statements and balance sheets for the Property for the most recent 12 consecutive months (financial statements should identify amounts held in reserves);

(11) The three most recent consecutive annual operating statements (audited would be preferred);

(12) Detailed set of photographs of the Property, including interior and exterior of representative units and buildings, and the Property's grounds;

(13) Current and complete rent roll for the Property; and

(14) If any portion of the land or improvements is leased for other than residential purposes, copies of the commercial leases.

(d) Posting and offers. Within 30 business days of receipt of all required documentation, the Department will review the submitted documents and notify the Development Owner of any deficiencies. During that time, the Department will notify any Qualified Entity or as applicable any Qualified Nonprofit Organization identified by the Development Owner as having a contractual ROFR of the Development Owner's intent to sell. Once any deficiencies are resolved and the Development Owner and Department come to an agreement on the ROFR offer price of the Property, the Department will list the Property for sale on the Department's website and notify entities registered to the email list maintained by the Department of the availability of the Property at a price as determined under this section. The Department will notify the Development Owner when the Property has been listed. The ROFR posting period commences on the date the Property is posted for sale on the Department's website. During the ROFR posting period, a Qualified Nonprofit Organization or Qualified Entity can submit an offer to purchase as follows:

(1) if the LURA requires a 90 day ROFR posting period with no priority for any particular kind of Qualified Nonprofit Organization or tenant organization, any Qualified Nonprofit Organization or tenant organization may submit an offer to purchase the property; or

(2) If the LURA requires a two year ROFR posting period, a Qualified Nonprofit Organization may submit an offer to purchase the Property as follows:

(A) During the first six months of the ROFR posting period, only a Qualified Nonprofit Organization that is a Community Housing Development Organization (CHDO) under 24 CFR Part 92, or that is 100% owned by a CHDO, as approved by the Department, may submit an offer;

(B) During the next six months of the ROFR posting period, only a Qualified Nonprofit Organization as described by Tex. Gov't Code §2306.6706, or that is 100% owned by Qualified Nonprofit Organization as described by Tex. Gov't Code §2306.6706, or a tenant organization may submit an offer; and

(C) During the final 12 months of the ROFR posting period, any Qualified Nonprofit Organization may submit an offer; or

(3) If the LURA requires a 180-day ROFR posting period, a Qualified Entity may submit an offer to purchase the Property consistent with the subparagraphs of this paragraph.

(A) During the first 60 days of the ROFR posting period, only a Qualified Entity that is:

(i) a CHDO under 24 CFR Part 92, or to an entity that includes a CHDO as one of its controlling members or general partners, as approved by the Department, may submit an offer. In accordance with 24 CFR Part 92, Developments committed HOME CHDO funding on or after August 23, 2013, and still within the Federal Affordability Period must have a CHDO or its wholly owned entity (as applicable) as its only controlling entities and no other entities are eligible;

(ii) if the public housing authority or public facility corporation owns the fee title to the Development Owner's leasehold estate:

(I) a public housing authority; or

(II) a public facility corporation created by a public housing authority under Chapter 303, Local Government Code; or

(iii) controlled by an entity described by either clause (i) or (ii) of this subparagraph.

(B) During the second 60 days of the ROFR posting period, only a Qualified Entity as described by Tex. Gov't Code §2306.6706, or that is controlled by Qualified Entity as described by Tex. Gov't Code §2306.6706, or a tenant organization such may submit an offer.

(C) During the final 60 days of the ROFR posting period, any Qualified Entity may submit an offer.

(4) If the LURA does not specify a required ROFR posting timeframe or is unclear on the required ROFR posting timeframe

and the required ROFR value is determined by the Minimum Purchase Price method, any Development that received a tax credit allocation prior to September 1, 1997, is required to post for a 90-day ROFR period, and any Development that received a tax credit allocation on or after September 1, 1997, and until September 1, 2015, is required to post for a two year ROFR, unless the LURA is amended under §10.405(b), or after September 1, 2015, is required to post for a 180-day ROFR period as described in Tex. Gov't Code, §2306.6726.

(e) Acceptance of offers. A Development Owner may accept or reject any offer received during the ROFR posting period; provided however, that to the extent the LURA gives priority to certain classifications of Qualified Nonprofit Organizations or Qualified Entities to make offers during certain portions of the ROFR posting period, the Development Owner can only negotiate a purchase contract with such classifications of entities during their respective periods. For example, during the CHDO priority period, the Development Owner may only accept an offer from and enter into negotiations with a Qualified Nonprofit Organization or Qualified Entity in that classification. A property may not be transferred under the ROFR process for less than the Minimum Purchase Price, but if the sequential negotiation created by statute yields a higher price, the higher price is permitted.

(f) Satisfaction of ROFR.

(1) A Development Owner that has posted a Property under the ROFR process is deemed to have satisfied the ROFR requirements in the following circumstances:

(A) The Development Owner does not receive any bona fide offers at or above the posted ROFR offer price (or, in the case of a posted minimum purchase price, at the price yielded by the sequential negotiation) from a Qualified Nonprofit Organization or Qualified Entity during the required ROFR posting period;

(B) A bona fide offer from a Qualified Nonprofit Organization or Qualified Entity is received at or above the posted ROFR offer price (or, in the case of a posted minimum purchase price, at the price yielded by the sequential negotiation), the Development Owner accepts the offer, the Qualified Nonprofit Organization or Qualified Entity fails to close the purchase, the failure is determined to not be the fault of the Development Owner, and the Development Owner received no other bona fide offers from a Qualified Nonprofit Organization or Qualified Entity during the required ROFR posting period;

(C) A bona fide offer from a Qualified Nonprofit Organization or Qualified Entity is received at or above the posted ROFR offer price (or, in the case of a posted minimum purchase price, at the price yielded by the sequential negotiation), the Qualified Nonprofit Organization or Qualified Entity is not approved by the Department during the ownership transfer review due to issues identified during the Previous Participation Review process pursuant to Chapter 1, Subchapter C of this title (relating to Previous Participation and Executive Award Review and Advisory Committee), and the Development Owner received no other bona fide offers at or above the posted ROFR offer price (or, in the case of a posted minimum purchase price, at the price yielded by the sequential negotiation) from a Qualified Nonprofit Organization or Qualified Entity during the required ROFR posting period; or

(D) An offer from a Qualified Nonprofit Organization or Qualified Entity is received at a price below the posted ROFR offer price, and the Development Owner received no other bona fide offers from a Qualified Nonprofit Organization or Qualified Entity during the required ROFR posting period at or above the posted ROFR offer price; or

(2) A Development Owner with a LURA that identifies a specific Qualified Nonprofit Organization or Qualified Entity to be the beneficiary of the ROFR will satisfy the ROFR if:

(A) The identified beneficiary is in existence and conducting business;

(B) The Development Owner offers the Development to the identified beneficiary pursuant to the terms of the ROFR;

(C) If the ROFR includes a priority for a certain type of Qualified Entity (such as a CHDO) to have the first opportunity make an offer to acquire the Development, the identified beneficiary meets such classification; and

(D) The identified entity declines to purchase the Development in writing, and such evidence is submitted to and approved by the Department.

(g) Non-Satisfaction of ROFR. A Development Owner that has posted a Property under the ROFR process does not satisfy the ROFR requirements in the following circumstances:

(1) A bona fide offer from a Qualified Nonprofit Organization or Qualified Entity is received at or above the posted ROFR offer price (or, in the case of a posted minimum purchase price, at the price yielded by the sequential negotiation), and the Development Owner does not accept the offer;

(2) The LURA identifies a specific Qualified Nonprofit Organization or Qualified Entity to be the beneficiary of the ROFR, and such entity no longer exists or is no longer conducting business and the Development Owner received other bona fide offers at or above the posted ROFR offer price (or, in the case of a posted minimum purchase price, at the price yielded by the sequential negotiation) from a Qualified Nonprofit Organization or Qualified Entity during the ROFR posting period and fails to accept any of such other offers;

(3) A bona fide offer from a Qualified Nonprofit Organization or Qualified Entity is received at or above the posted ROFR offer price (or, in the case of a posted minimum purchase price, at the price yielded by the sequential negotiation), the Development Owner accepts the offer, the Qualified Nonprofit Organization or Qualified Entity fails to close the purchase, the failure is determined to not be the fault of the Development Owner, the Development Owner received other bona fide offers from a Qualified Nonprofit Organization or Qualified Entity during the ROFR posting period and then fails to accept any of such other offers;

(4) A bona fide offer from a Qualified Nonprofit Organization or Qualified Entity is received at or above the posted ROFR offer price (or, in the case of a posted minimum purchase price, at the price yielded by the sequential negotiation), the Development Owner accepts the offer, the Qualified Nonprofit Organization or Qualified Entity fails to close the purchase, and such failure is determined to be the fault of the Development Owner;

(5) A bona fide offer from a Qualified Nonprofit Organization or Qualified Entity is received at or above the posted ROFR offer price (or, in the case of a posted minimum purchase price, at the price yielded by the sequential negotiation), the Qualified Nonprofit Organization or Qualified Entity is not approved by the Department during the ownership transfer review due to issues identified during the Previous Participation Review process pursuant to Chapter 1, Subchapter C of this title (relating to Previous Participation and Executive Award Review and Advisory Committee), the Development Owner received other bona fide offers from a Qualified Nonprofit Organization or Qualified Entity during the ROFR posting period and fails to accept any of such other offers; or

(6) An offer from a Qualified Nonprofit Organization or Qualified Entity is received at a price below the posted ROFR offer price, the Development Owner received other bona fide offers from a Qualified Nonprofit Organization or Qualified Entity during the ROFR posting period at or above the posted ROFR offer price (or, in the case of a posted minimum purchase price, at the price yielded by the sequential negotiation), and the Development Owner fails to accept any of such offers.

(h) Activities Following ROFR.

(1) If a Development Owner satisfies the ROFR requirement pursuant to subsection (f)(1) - (2) of this section, it may request a Preliminary Qualified Contract (if such opportunity is available under §10.408 of this Subchapter) or proceed with the sale to an entity that is not a Qualified Nonprofit Organization or Qualified Entity at or above the ROFR offer price (or, in the case of a posted minimum purchase price, at the price yielded by the sequential negotiation).

(2) Following notice that the ROFR requirement has been met, if the Development Owner does not post the Property for Qualified Contract in accordance with §10.408 of this Subchapter or sell the Property to an entity that is not a Qualified Nonprofit Organization or Qualified Entity within 24 months of the Department's written indication that the ROFR has been satisfied, the Development Owner must follow the ROFR process for any subsequent transfer.

(3) If the Department determines that the ROFR requirement has not been met during the ROFR posting period, the Owner may not re-post under this provision at a ROFR offer price that is higher than the originally posted ROFR offer price until 24 months has expired from the Department's written indication that the ROFR has not been satisfied. The Development Owner may market the Property for sale and sell the Property to a Qualified Nonprofit Organization or Qualified Entity during this 24 month period in accordance with subsection (a)(1) of this section.

(i) Sale and closing.

(1) Prior to closing a sale of the Property, the Development Owner must obtain Department approval of the transfer through the ownership transfer process in accordance with §10.406 of this Subchapter (relating to Ownership Transfers (§2306.6713)). The request should include, among other required transfer documents outlined in the Post Award Activities Manual, the final sales contract with all amendments.

(2) If the closing price is materially less than the ROFR offering price or the terms and conditions of the sale change materially from what was submitted in the ROFR posting, in the Department's sole determination, the Development Owner must go through the ROFR process again with a revised ROFR offering price equal to the reduced closing price or adjusted terms and conditions based upon the revised terms, before disposing of the Property.

(j) Appeals. A Development Owner may appeal a staff decision in accordance with §11.902 of this title (relating to Appeals Process).

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 January 12, 2023.

TRD-202300141

Bobby Wilkinson
Executive Director
Texas Department of Housing and Community Affairs
Effective date: February 1, 2023
Proposal publication date: October 28, 2022
For further information, please call: (512) 475-3959

♦ ♦ ♦

TITLE 19. EDUCATION

PART 2. TEXAS EDUCATION AGENCY

CHAPTER 61. SCHOOL DISTRICTS
SUBCHAPTER EE. COMMISSIONER'S RULES ON REPORTING CHILD ABUSE OR NEGLECT, INCLUDING TRAFFICKING OF A CHILD

19 TAC §61.1053

The Texas Education Agency (TEA) adopts new §61.1053, concerning reporting child abuse or neglect, including trafficking of a child. The new section is adopted without changes to the proposed text as published in the July 15, 2022 issue of the *Texas Register* (47 TexReg 4049) and will not be republished. The adopted new section implements Senate Bill (SB) 1831 and House Bill (HB) 1540, 87th Texas Legislature, Regular Session, 2021, by specifying signage requirements for posting the offenses of human trafficking on public and private school premises.

REASONED JUSTIFICATION: SB 1831 and HB 1540, 87th Texas Legislature, Regular Session, 2021, added Texas Education Code (TEC), §37.086, requiring TEA to develop rules around signage requirements for posting the penal offenses of human trafficking on public and private school premises.

Adopted new §61.1053 implements statute by specifying the penalties under Texas Penal Code, §20A.02(b-1), that must be included on each warning sign. The adopted new rule also provides definitions and the required locations for warning signs in alignment with TEC, §37.086.

SUMMARY OF COMMENTS AND AGENCY RESPONSES: The public comment period on the proposal began July 15, 2022, and ended August 15, 2022. A public hearing was held on August 10, 2022. Following is a summary of public comments received and agency responses.

Comment: Thirty-six private school administrators commented that the proposed rule should not apply to private schools.

Response: This comment falls outside the scope of the proposed rulemaking and is related to the requirements of statute under TEC, §37.086, as added by SB 1831 and HB 1540, 87th Texas Legislature, Regular Session, 2021.

Comment: A commenter requested that the agency provide schools and districts with the actual signage necessary to meet this requirement.

Response: The agency disagrees. TEA is unable to provide signs; however, the agency is providing templates for the required signage on the TEA website for public and private school use.

Comment: The Texas Association of School Boards (TASB) commented that the proposed rule does little to clarify the

ambiguities in the statute or ease the financial burden placed on school districts. TASB further commented that (1) the agency should provide signs so that school districts experience no fiscal impact; (2) since no funds were appropriated, the agency should exercise discretion permitted in the statute; (3) the rule does not clarify the locations where signs must be posted and results in a massive unfunded mandate; (4) the rule should help clarify where signs are required rather than simply restating what is in the statute; and (5) the rule does not provide approved wording for the sign, which will result in extra expenses for school districts. TASB additionally commented that the proposed rule is flawed because it does not resolve issues with the underlying legislation that are within the agency's authority to resolve through rulemaking, and TASB suggested holding these rules until after the next legislative session, during which the agency can advocate for clarifications to the law and secure funding for all mandatory signs.

Response: The agency disagrees. TEA is unable to provide signs, as the agency was not provided funding to support this aspect of implementation; however, the agency is providing templates for the required signage on the TEA website for public and private school use. Relating to the comments about location, the rule provides information on where the signs are to be posted, while also providing public and private schools with discretion to meet the unique and individual needs and features of their respective campuses. In addition, TEC, §37.086 is very prescriptive regarding the location of the required signage. Finally, TEA is moving forward with the adoption of the rule per the statutory requirements under TEC, §37.086, and will make adjustments to the rule in alignment with any future legislative changes, as necessary.

Comment: The executive director of the Texas Private Schools Association commented in opposition to proposed new §61.1053, stating that TEA's interpretation of the rule to apply to private schools was not the legislative intent; that the impact on private schools is detrimental; and that TEA was to prioritize high crime areas in their distribution of these signs.

Response: The agency disagrees and provides the following clarification. TEA is responsible for implementing the legislation as written in TEC, §37.086, which includes provisions affecting private schools. Therefore, the rule's impact on private schools is outside the scope of the proposed rulemaking. Although TEA had flexibility to prioritize the distribution of signs based on reports of criminal activity, because there were no funds appropriated for that purpose, the agency did not have the ability to print or distribute signs to schools in specific areas with higher reports of crime.

Comment: The Legislative Counsel at the Texas Catholic Conference of Bishops commented in opposition to proposed new §61.1053, stating that the guidance removes parental control and imposes an unfunded mandate on private schools.

Response: The agency disagrees and notes that the comment about parental controls falls outside the scope of the rulemaking process. Regarding the comment that this rule imposes an unfunded mandate, the agency clarifies that TEA did not receive legislative funding for the requirements of this rule and is, therefore, unable to distribute signs or provide funding to support public and private schools with the statutory requirements included in the rule.

STATUTORY AUTHORITY. The new section is adopted under Texas Education Code (TEC), §37.086, as added by Senate Bill 1831 and House Bill 1540, 87th Texas Legislature, Regular Session, 2021, which requires Texas Education Agency to adopt rules regarding the placement, installation, design, size, wording, and maintenance procedures for the warning signs required under TEC, §37.086.

CROSS REFERENCE TO STATUTE. The new section implements Texas Education Code, §37.086.

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 January 13, 2023.

TRD-202300152
Cristina De La Fuente-Valadez
Director, Rulemaking
Texas Education Agency
Effective date: February 2, 2023
Proposal publication date: July 15, 2022
For further information, please call: (512) 475-1497

♦ ♦ ♦

TITLE 26. HEALTH AND HUMAN SERVICES

PART 1. HEALTH AND HUMAN SERVICES COMMISSION

CHAPTER 259. COMMUNITY LIVING ASSISTANCE AND SUPPORT SERVICES (CLASS) PROGRAM AND COMMUNITY FIRST CHOICE (CFC) SERVICES

The Texas Health and Human Services Commission (HHSC) adopts Title 26, Part 1, new Chapter 259, Community Living Assistance and Support Services (CLASS) Program and Community First Choice (CFC) Services, consisting of Subchapters A - J, comprised of §§259.5, 259.7, 259.9, 259.51, 259.53, 259.55, 259.57, 259.59, 259.61, 259.63, 259.65, 259.67, 259.69, 259.71, 259.73, 259.75, 259.77, 259.79, 259.81, 259.83, 259.85, 259.87, 259.89, 259.101, 259.103, 259.151, 259.153, 259.155, 259.157, 259.159, 259.161, 259.163, 259.165, 259.167, 259.169, 259.171, 259.201, 259.203, 259.205, 259.207, 259.209, 259.211, 259.213, 259.215, 259.217, 259.251, 259.253, 259.255, 259.257, 259.259, 259.261, 259.263, 259.265, 259.267, 259.271, 259.273, 259.275, 259.277, 259.279, 259.281, 259.283, 259.285, 259.287, 259.289, 259.301, 259.303, 259.305, 259.307, 259.309, 259.311, 259.313, 259.315, 259.317, 259.319, 259.321, 259.351, 259.353, 259.355, 259.357, 259.359 - 259.361, 259.363, 259.365, 259.367, 259.369, 259.371, 259.373, 259.401, and 259.451.

Sections 259.5, 259.7, 259.51, 259.57, 259.59, 259.61, 259.201, 259.203, 259.205, 259.207, 259.209, 259.211, 259.213, 259.215, 259.289, 259.311, and 259.355 are adopted with changes to the proposed text as published in the September 2, 2022, issue of the *Texas Register* (47 TexReg 5236). These rules will be republished.

Sections 259.9, 259.53, 259.55, 259.63, 259.65, 259.67, 259.69, 259.71, 259.73, 259.75, 259.77, 259.79, 259.81,

259.83, 259.85, 259.87, 259.89, 259.101, 259.103, 259.151, 259.153, 259.155, 259.157, 259.159, 259.161, 259.163, 259.165, 259.167, 259.169, 259.171, 259.217, 259.251, 259.253, 259.255, 259.257, 259.259, 259.261, 259.263, 259.265, 259.267, 259.271, 259.273, 259.275, 259.277, 259.279, 259.281, 259.283, 259.285, 259.287, 259.301, 259.303, 259.305, 259.307, 259.309, 259.313, 259.315, 259.317, 259.319, 259.321, 259.351, 259.353, 259.357, 259.359, 259.360, 259.361, 259.363, 259.365, 259.367, 259.369, 259.371, 259.373, 259.401, and 259.451. are adopted without changes to the proposed text as published in the September 2, 2022, issue of the *Texas Register* (47 TexReg 5236). These rules will not be republished.

BACKGROUND AND JUSTIFICATION

The Community Living Assistance and Support Services (CLASS) Program is a Medicaid waiver program approved by the Centers for Medicare & Medicaid Services (CMS) under §1915(c) of the Social Security Act. This waiver program provides community-based services and supports to eligible individuals as an alternative to services provided in an institutional setting. In the CLASS Program there are two types of program providers. One is the case management agency (CMA) and the other is the direct services agency (DSA).

The adopted rules move the CLASS Program rules from 40 TAC, Chapter 45 to 26 TAC, Chapter 259. The repeal of 40 TAC, Chapter 45, is adopted elsewhere in this issue of the *Texas Register.*

The adopted rules ensure that the CLASS Program complies with the requirements in Title 42, Code of Federal Regulations (42 CFR), Chapter IV, Subchapter C, Part 441, Subpart G, Section 441.301(c)(1) - (5). In 2014, CMS amended this regulation to establish new requirements for Medicaid Home and Community-Based Services (HCBS) waiver programs, including requirements for HCBS program settings and person-centered planning. The deadline for compliance with the requirements in Section 441.301(c)(1) - (5) is March 17, 2023. The adopted rules ensure compliance with these federal requirements for all services available in the CLASS Program.

The adopted rules implement Texas Government Code §531.02161(b)(4) which requires HHSC to ensure that, if cost effective, clinically effective, and allowed by federal law, a Medicaid recipient has the option to receive certain services, including occupational therapy, physical therapy, and speech and language pathology as a telehealth service.

The adopted rules require program providers to submit a translation of non-English documentation submitted to HHSC. The adopted rule helps ensure that HHSC's reviews of documentation are efficient.

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. This provision is adopted to help ensure that providers are able to operate and provide services effectively during a disaster.

COMMENTS

The 31-day comment period ended October 3, 2022.

During the comment period and the public hearing held on September 26, 2022, HHSC received comments regarding the proposed rules from 10 commenters, including Families for Effective Autism Treatment-Houston; Empowered Parent Advocate Bootcamp; LTO Ventures; Texas Association for Home Care & Hospice; Texas Parent to Parent; and one individual. A summary of comments relating to the rules and HHSC's responses follows.

Comment: One commenter requested that proposed §259.57(b) be revised to further define the qualifications of the individual assigned to lead the person-centered planning process, such as including whether the individual is an employee of the agency.

Response: Proposed §259.57(b) requires that a program provider ensure the person-centered planning process is led by an individual. An "individual," as defined in proposed §259.5, is a person seeking to enroll or who is enrolled in the CLASS Program and is not a person employed by the agency. HHSC revised §259.57(b) and (d)(1) to use "the individual" instead of "an individual" for clarity.

Comment: Several commenters requested that proposed §259.59(a)(2)(D) be revised to require that a home and community-based setting allows individuals to receive services in the community to the same degree of access as individuals not receiving Medicaid HCBS, that a setting be selected by the individual among setting options as defined and documented in the person-centered service plan, and that a setting facilitates individual choice regarding services and supports and service providers.

Response: HHSC agrees with the requested changes and revised proposed §259.59(a) to be in compliance with 42 CFR §441.301(c)(4). The revisions include specifying that subsection (a) describes the qualities of a "home and community-based setting." HHSC also revised §259.59(a) to use the term "home and community-based setting." HHSC changed the title of §259.59 from "Requirements for Service Settings" to "Requirements for Home and Community-Based Settings" so that the section title more accurately reflects the contents of the section. Because of the change made in the title of §259.59, HHSC changed the title of Division 2, in Subchapter B, from "ENROLLMENT PROCESS, PERSON-CENTERED SERVICE PLANNING, AND REQUIREMENTS FOR SERVICE SETTINGS" to "ENROLLMENT PROCESS, PERSON-CENTERED SERVICE PLANNING, AND REQUIREMENTS FOR HOME AND COMMUNITY-BASED SETTINGS."

Comment: Several commenters expressed appreciation that HHSC included language in proposed §259.59 regarding settings that are presumed to have the qualities of an institution and a heightened-scrutiny review of those settings conducted by CMS.

Response: HHSC appreciates the commenters' support for the proposed rule.

Comment: A commenter asked how providers will be required to show proof of the oral explanation required in proposed §259.61.

Response: Currently, a program provider may demonstrate the provision of the required oral explanation by documenting that the oral explanation was provided. HHSC did not make changes in response to this comment. HHSC will update the CLASS Provider Manual to clarify that the CMA must document in the service plan that an oral explanation was provided.

Comment: A commenter requested that proposed §259.57(d)(3) regarding "time and location convenient to the individual and the LAR" be revised to protect all parties should the individual choose a time and location that is not appropriate.

Response: HHSC is unclear what the commenter means by "not appropriate." Proposed §259.57(d)(3) is written to comply with 42 CFR §441.301(c)(1)(iii). HHSC declines to make changes in response to the comment because revising §259.57 would require additional information and analysis to ensure continued compliance with 42 CFR §441.301(c)(1)(iii).

Comment: Two commenters expressed concerns that the rates adopted for the CLASS Program 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 methodologies for CLASS Program services are not addressed in this rule project.

Comment: A commenter recommended that more telehealth opportunities be allowed for comprehensive nurse assessments.

Response: HHSC believes that conducting nursing assessments in person, as described in proposed §259.61(h)(3) and proposed §259.75(a)(1)(b), is necessary to ensure the clinical effectiveness of these assessments. Therefore, HHSC declines to make changes in response to the comment.

Comment: A commenter suggested that the requirement for a DSA and CMA to translate non-English documentation to English in proposed §259.321 and §259.373 is not feasible. The commenter stated that many providers do not have extra funds for non-essential processes due to staffing shortages. The commenter requested that alternative methods be discussed with stakeholders prior to implementation and a workgroup be created to come up with a method for implementation.

Response: proposed §259.321 and §259.373 requires a CMA and DSA to provide HHSC a translation of information in English to help ensure that HHSC staff can perform utilization review functions timely, accurately, and efficiently. HHSC believes that it is the DSA's and CMA's responsibility to provide documentation to HHSC that does not require translation by HHSC. HHSC did not make changes in response to the comment.

Comment: A commenter asked when the CMA person-centered planning training, required by proposed §259.309(a)(3), and the DSA training, required by proposed §259.357(a)(2), will be made available by HHSC and if it will be available online with no associated cost to the provider.

Response: HHSC did not make changes in response to this comment. An online comprehensive non-introductory person-centered service planning training, as described in §259.309(a)(3), and HHSC's web-based Introductory Training, as described in §259.357(a)(2), are currently available at: https://www.hhs.texas.gov/services/disability/person-centered-planning/person-centered-planning-waiver-program-providers/person-centered-practices-training-providers

Comment: A commenter agreed with proposed §259.360 which allows physical therapy, occupational therapy, and speech and language pathology be provided as a telehealth service in certain situations.

Response: HHSC appreciates the commenter's support for the proposed rule.

Comment: A commenter agreed with proposed §259.451(f) which allows a registered nurse to complete an annual nursing assessment by videoconferencing in the event of a declaration of disaster.

Response: HHSC appreciates the commenter's support for the proposed rule.

Comment: A commenter requested that proposed §259.451(a)(2) be revised to specify how HHSC will notify program providers of the date that an exception in §259.451 will no longer be used.

Response: HHSC currently uses GovDelivery notices, information letters, and provider alerts to communicate with program providers. However, because methods of communication may change over time, HHSC declines to make changes in response to the comment.

Comment: A commenter requested that individualized skills and socialization be an available service in the CLASS waiver program.

Response: HHSC declines to make changes in response to the comment. The Texas Legislature authorized funding for the provision of individualized skills and socialization to replace the current day habilitation service only in waiver programs where day habilitation is offered: the Home and Community-based Services, Texas Home Living, and Deaf Blind with Multiple Disabilities Programs. Making the requested change would require additional analysis and funding.

In addition to the changes made to the rules in response to comments, HHSC made changes to the rules that are not in response to comments.

In proposed §259.5, HHSC removed the definition of "continued family services" and replaced it with a new definition of "CFS--Continued family services," to establish an acronym for the term for use throughout the chapter. The new definition is different from the proposed definition of "continued family services" because it does not include the eligibility requirements for CFS or the references to §259.215 and §259.217. HHSC replaced these references with a reference to "Subchapter E" for the description of CFS. HHSC added a new subsection (b) in proposed §259.203 with the eligibility requirements for CFS to replace the eligibility requirements in the proposed definition of "continued family services." In addition, HHSC renumbered the definitions.

Because HHSC renumbered the definitions in §259.5, HHSC revised proposed §259.7(d) and proposed §259.61(2)(A)(x)(I) to correct the reference to the definition of "habilitation."

In proposed §259.5, HHSC revised the definition of "support family services" by changing the term to "SFS--Support family services," to establish an acronym for the term for use throughout the chapter and by removing the eligibility requirement to be under 18 years of age to receive SFS and the references to §259.215 and §259.217. The eligibility requirement is removed because this requirement is in proposed §259.203(a). HHSC replaced the references to §259.215 and §259.217 with a reference to "Subchapter E" for the description of SFS.

HHSC revised the definitions of "direct services" and "respite" in proposed §259.5 to replace "continued family services" with the acronym "CFS."

HHSC revised proposed §259.7(c)(20) and (21); proposed §259.51(b)(3); proposed §259.289(a)(1); and proposed §259.355(d)(22) to replace "support family services" and "continued family services" with the acronyms "SFS" and "CFS." HHSC revised proposed §259.61(f) to replace "support family services" with "SFS."

Based on direction from CMS that a group setting in which prevocational services are provided is a provider-owned or controlled setting, HHSC revised proposed §259.59 by adding a new subsection (b) to ensure that these group settings are in compliance with 42 CFR §441.301(c)(4)(vi)(C) - (E). HHSC also added a new subsection (c) to comply with 42 CFR §441.301(c)(4)(vi)(F). Specifically, HHSC added new subsection (b) to proposed §259.59 to require a DSA to ensure that a group setting in which prevocational services are provided (1) allows an individual to control the individual's schedule and activities related to prevocational services; have access to the individual's food at any time; and receive visitors of the individual's choosing at any time; and (2) is physically accessible and free of hazards to an individual to provide that a residence in which SFS or CFS is provided is free of hazards in addition to being physically accessible to help ensure an individual's health and safety in the residence. New subsection (c) was added to proposed §259.59 to require a DSA to notify the case manager and provide specified information to the case manager if the DSA becomes aware that a modification to certain conditions of the setting is needed based on a specific assessed need. In addition, new subsection (c) requires a case manager to, if notified of a needed modification, convene a service planning team meeting to update the individual's individual program plan (IPP) to include certain information, including a description of the specific and individualized assessed need that justifies the modification; a description of any less intrusive methods of meeting the need that were tried but did not work; a description of how data will be routinely collected and reviewed to measure the ongoing effectiveness of the modification; and the individual's or LAR's signature on the IPP evidencing informed consent to the modification. Further, new subsection (c) allows a DSA to implement a modification only after the service planning team updates the IPP as required. HHSC also renumbered the remaining subsections in the section as subsections (d) and (e).

Based on direction from CMS regarding the heightened scrutiny process, HHSC revised proposed §259.59(b), renumbered as subsection (d), to include descriptions of additional settings that are presumed to have the qualities of an institution, including a setting located in a building in which a certified ICF/IID operated by a local intellectual and developmental disability authority (LIDDA) or state supported living center is located but is distinct from the ICF/IID and a setting 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.

Because the term "group setting" is used in §259.59, new subsection (b), HHSC added a definition for this term in §295.5(55). Because the term "LIDDA" is used in §259.59, new subsection (d), HHSC added a definition for this term in §295.5(79). In proposed §259.5(61), renumbered as paragraph (62), HHSC revised the definition of "ICF/IID" to make the definition consistent with its definition in the Home and Community-based Services (HCS) Program rules being adopted in this same issue of the *Texas Register.* In proposed §259.5(103), renumbered as paragraph (105), HHSC revised the definition of "prevocational services" to specify that transportation is provided between the individual's place of residence and a "group setting" instead of "work site" because a work site does not accurately describe the setting in which prevocational services are provided. HHSC also renumbered the definitions in proposed §259.5 and revised references.

Currently there are no individuals in the CLASS Program who receive CFS and SFS. However, CMS informed HHSC that a setting in which CFS or SFS is provided is a provider-controlled residential setting and, therefore, must be in compliance with 42 CFR §441.301(c)(4)(vi). Accordingly, HHSC revised proposed §259.201 and §259.205 to ensure that SFS and CFS settings are in compliance with the federal regulation. Specifically, HHSC revised proposed §259.201 to describe a support family agency and continued family agency because SFS is provided by a support family agency and CFS is provided by a continued family agency. HHSC revised proposed §259.205 to require a case manager to provide certain information to an individual or LAR if the individual is interested in receiving SFS or CFS, including that if the individual or LAR selects SFS or CFS, the individual or LAR will be responsible for paying room and board in accordance with a residential agreement and that if the individual or LAR does not pay room or board as required by a residential agreement, the individual's support family may evict the individual. HHSC also revised proposed §259.205 to require a support family agency or continued family agency to ensure that an individual receiving SFS or CFS has a written residential agreement with the support family and to require that the residential agreement contain certain provisions such as the physical address of the residence; the amount the individual or LAR is paying for room and board; and that the individual may furnish and decorate the individual's bedroom to be consistent with the residential agreement requirements in the HCS Program.

Further, HHSC revised proposed §259.205 to require a support family agency or continued family agency to notify the case manager and provide specified information to the case manager if the agency becomes aware that a modification to the provision in the residential agreement that the individual may furnish and decorate the individual's bedroom is needed based on a specific assessed need of the individual.

HHSC also revised proposed §259.205 to require that an SFS or CFS setting meets certain conditions, including that an individual has the option not to share a bedroom with a roommate; that a lock is installed on the individual's bedroom door at no cost to the individual; that an individual has access to food at any time; and that an individual may have visitors of the individual's choosing at any time. Proposed §259.205 was revised to require a support family agency or continued family agency to notify the case manager and provide specified information to the case manager if the agency becomes aware that a modification to certain conditions of the setting is needed based on a specific assessed need. In addition, HHSC revised proposed §259.205 to require a case manager to, if notified of a needed modification, convene a service planning team meeting to update the individual's IPP to include certain information, including a description of the specific and individualized assessed need that justifies the modification; a description of any less intrusive methods of meeting the need that were tried but did not work; a description of how data will be routinely collected and reviewed to measure the ongoing effectiveness of the modification; and the individual's or LAR's signature on the IPP evidencing informed consent to the modification. Further, HHSC revised proposed §259.205 allow a support family to implement a modification only after the service planning team updates the IPP as required.

HHSC also changed the title of §259.201 from "Contracting Requirements" to "General Requirements" because the contract requirements for a support family agency and continued family agency are in 40 TAC Chapter 49.

HHSC revised the definition of "LAR-Legally authorized representative" in §259.5(76) to add "a representative payee appointed by the Social Security Administration" and "an agent appointed under a power of attorney" as examples of an LAR. This revision was made to be consistent with the definition of "LAR" in the proposed HCS Program rules and because "representative payee" is used in new §259.205(e)(2). HHSC changed the title of §259.205 from "Support Family Agency Functions" to "Residential Agreements, Requirements for Provider-Controlled Residential Settings, and Support Family Agency and Continued Family Agency Functions" so the section title accurately reflects the contents of the section.

HHSC added new subsection (i) in proposed §259.311 to require a CMA to ensure an individual's case manager complies with the requirements in new §259.205(a) - (n).

HHSC changed the title of Subchapter E from "SUPPORT FAMILY SERVICES" to "SUPPORT FAMILY SERVICES AND CONTINUED FAMILY SERVICES" and the title of Subchapter E, Division 2 from "SUPPORT FAMILY AGENCY" to "SUPPORT FAMILY AGENCY AND CONTINUED FAMILY AGENCY." HHSC also revised proposed §§259.203, 259.207, 259.209, 259.211, 259.213, 259.215, 259.289, and 259.355 to ensure that a continued family agency is required to perform the same activities as a support family agency, when applicable, and to replace "support family services" with "SFS."

In proposed §259.211, regarding ongoing support, HHSC removed paragraph (1) that requires compliance with §259.201 because this requirement is addressed in §259.201 and is not a requirement for ongoing support. HHSC also renumbered the remaining paragraphs in §259.211. Because the section is renumbered, HHSC corrected the reference to §259.211 in proposed §259.205(p)(7).

HHSC revised proposed §259.211(5)(A), reformatted as paragraph (4)(A), to require a support family agency or a continued family agency to provide monthly progress notes to the case manager, including monthly summaries of the activities described in §259.217 regarding support family duties, instead of monthly summaries of Community First Choice personal assistance services/habilitation (CFC PAS/HAB) activities. This change is made because an individual receiving CFS or SFS is not eligible to receive CFC PAS/HAB.

SUBCHAPTER A. DEFINITIONS, DESCRIPTION OF SERVICES, AND EXCLUDED SERVICES

26 TAC §§259.5, 259.7, 259.9

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, 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.

§259.5. Definitions.

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

(1) Abuse--

(A) physical abuse;

(B) sexual abuse; or

(C) verbal or emotional abuse.

(2) Actively involved--Significant, ongoing, and supportive involvement with an individual by a person, as determined by the individual, based on the person's:

(A) interactions with the individual;

(B) availability to the individual for assistance or support when needed; and

(C) knowledge of, sensitivity to, and advocacy for the individual's needs, preferences, values, and beliefs.

(3) Adaptive aids--A Community Living Assistance and Support Services (CLASS) Program service that:

(A) enables an individual to retain or increase the ability to perform activities of daily living (ADLs) or perceive, control, or communicate with the environment in which the individual lives; and

(B) meets one of the following criteria:

(i) is an item included in the list of adaptive aids in the *Community Living Assistance and Support Services Provider Manual;* or

(ii) is the repair or maintenance of an item on the list of adaptive aids in the *Community Living Assistance and Support Services Provider Manual* that is not covered by a warranty.

(4) Adaptive behavior--The effectiveness with or degree to which an individual meets the standards of personal independence and social responsibility expected of the individual's age and cultural group as assessed by an adaptive behavior screening assessment.

(5) Adaptive behavior level--The categorization of an individual's functioning level based on a standardized measure of adaptive behavior. There are four adaptive behavior levels ranging from mild limitations in adaptive skills (I) through profound limitations in adaptive skills (IV).

(6) Adaptive behavior screening assessment--A standardized assessment used to determine an individual's adaptive behavior level, and conducted using the current version of one of the following assessment instruments:

(A) American Association of Intellectual and Developmental Disabilities (AAIDD) Adaptive Behavior Scales (ABS);

(B) Inventory for Client and Agency Planning (ICAP);

(C) Scales of Independent Behavior; or

(D) Vineland Adaptive Behavior Scales.

(7) ADLs--Activities of daily living. Basic personal everyday activities, including tasks such as eating, toileting, grooming, dressing, bathing, and transferring.

(8) Agency foster home--This term has the meaning set forth in Texas Human Resources Code §42.002.

(9) Alarm call--A signal transmitted from an individual's Community First Choice emergency response services (CFC ERS) equipment to the CFC ERS response center indicating that the individual needs immediate assistance.

(10) ALF--Assisted living facility. A facility licensed in accordance with Texas Health and Safety Code (THSC), Chapter 247, Assisted Living Facilities.

(11) Alleged perpetrator--A person alleged to have committed an act of abuse, neglect, or exploitation of an individual.

(12) Aquatic therapy--A specialized therapy that involves a low-risk exercise method performed in water to improve an individual's range of motion, flexibility, muscular strengthening and toning, cardiovascular endurance, fitness, and mobility.

(13) Audio-only--An interactive, two-way audio communication platform that only uses sound.

(14) Auditory integration training/auditory enhancement training--A CLASS Program service that provides specialized training to assist an individual to cope with hearing dysfunction or over-sensitivity to certain frequency ranges of sound by facilitating auditory processing skills and exercising the middle ear and auditory nervous system.

(15) Auxiliary aid--A service or device that enables an individual with impaired sensory, manual, or speaking skills to participate in the person-centered planning process. An auxiliary aid includes interpreter services, transcription services, and a text telephone.

(16) Behavior support plan--A comprehensive, individualized written plan based on a current functional behavior assessment that includes specific outcomes and behavioral techniques designed to teach or increase adaptive skills and decrease or eliminate target behaviors.

(17) Behavioral support--A CLASS Program service that provides specialized interventions to assist an individual in increasing adaptive behaviors and replacing or modifying behaviors that prevent or interfere with the individual's inclusion in the community and which consist of the following activities:

(A) conducting a functional behavior assessment;

(B) developing an individualized behavior support plan;

(C) training and consulting with an individual, family member, or other persons involved in the individual's care regarding the implementation of the behavior support plan;

(D) monitoring and evaluating the effectiveness of the behavior support plan;

(E) modifying, as necessary, the behavior support plan based on monitoring and evaluating the plan's effectiveness; and

(F) counseling and educating an individual, family members, or other persons involved in the individual's care about the techniques to use in assisting the individual to control challenging or socially unacceptable behaviors.

(18) Business day--Any day except a Saturday, a Sunday, or a national or state holiday listed in Texas Government Code §662.003(a) or (b).

(19) Calendar day--Any day, including weekends and holidays.

(20) Case management--A CLASS Program service that assists an individual in the following:

(A) assessing the individual's needs;

(B) enrolling into the CLASS Program;

(C) developing the individual's individual plan of care (IPC);

(D) coordinating the provision of CLASS Program services and CFC services;

(E) monitoring the effectiveness of the CLASS Program services and CFC services and the individual's progress toward achieving the outcomes identified for the individual;

(F) revising the individual's IPC, as appropriate;

(G) accessing non-CLASS Program services and non-CFC services;

(H) resolving a crisis that occurs regarding the individual; and

(I) advocating for the individual's needs.

(21) Case manager--A service provider of case management.

(22) Catchment area--As determined by the Texas Health and Human Services Commission (HHSC), a geographic area composed of multiple Texas counties.

(23) CDS option--Consumer directed services option. A service delivery option defined in 40 TAC §41.103 (relating to Definitions).

(24) CFC--Community First Choice.

(25) CFC ERS--CFC emergency response services. A CFC service that provides backup systems and supports used to ensure continuity of services and supports. CFC ERS includes electronic devices and an array of available technology, personal emergency response systems, and other mobile communication devices.

(26) CFC ERS provider--The entity directly providing CFC ERS to an individual, which may be the DSA or a contractor of the DSA.

(27) CFC FMS--CFC financial management services. A CFC service provided to an individual who receives only CFC PAS/HAB through the CDS option.

(28) CFC PAS/HAB--CFC personal assistance services/habilitation. A CFC service:

(A) that consists of:

(i) personal assistance services, which provides assistance to an individual in performing ADLs and instrumental activities of daily living (IADLs) based on the individual's person-centered service plan, including:

(I) non-skilled assistance with the performance of the ADLs and IADLs;

(II) household chores necessary to maintain the home in a clean, sanitary, and safe environment;

(III) escort services, which consist of accompanying and assisting an individual to access services or activities in the community, but do not include transporting an individual; and

(IV) assistance with health-related tasks; and

(ii) habilitation, which provides assistance to an individual in acquiring, retaining, and improving self-help, socialization, and daily living skills and training the individual on ADLs, IADLs, and health-related tasks, including:

(I) self-care;

(II) personal hygiene;

(III) household tasks;

(IV) mobility;

(V) money management;

(VI) community integration, including how to get around in the community;

(VII) use of adaptive equipment;

(VIII) personal decision making;

(IX) reduction of challenging behaviors to allow individuals to accomplish ADLs, IADLs, and health-related tasks; and

(X) self-administration of medication; and

(B) does not include transporting the individual, which means driving the individual from one location to another.

(29) CFC support consultation--A CFC service that provides support consultation to an individual who receives only CFC PAS/HAB through the CDS option.

(30) CFC support management--A CFC service that provides training on how to select, manage, and dismiss an unlicensed service provider of CFC PAS/HAB.

(31) CFR--Code of Federal Regulations.

(32) CFS--Continued family services. A CLASS Program service described in Subchapter E of this chapter (relating to Support Family Services and Continued Family Services).

(33) CLASS Program--The Community Living Assistance and Support Services Program.

(34) CMA--Case management agency. A program provider that has a contract with HHSC to provide case management.

(35) CMS--The Centers for Medicare & Medicaid Services. CMS is the agency within the United States Department of Health and Human Services that administers Medicare and Medicaid programs.

(36) Cognitive rehabilitation therapy--A CLASS Program service that:

(A) assists an individual in learning or relearning cognitive skills that have been lost or altered as a result of damage to brain cells or brain chemistry in order to enable the individual to compensate for lost cognitive functions; and

(B) includes reinforcing, strengthening, or reestablishing previously learned patterns of behavior, or establishing new patterns of cognitive activity or compensatory mechanisms for impaired neurological systems.

(37) Competitive employment--Employment that pays an individual at least the minimum wage if the individual is not self-employed.

(38) Contract--A provisional contract that HHSC enters into in accordance with 40 TAC §49.208 (relating to Provisional Contract Application Approval) that has a term of no more than 3 years, not including any extension agreed to in accordance with 40 TAC §49.208(e) or a standard contract that HHSC enters into in accordance with 40 TAC §49.209 (relating to Standard Contract) that has a term of no more than five years, not including any extension agreed to in accordance with 40 TAC §49.209(d).

(39) Controlling person--A person who:

(A) has an ownership interest in a program provider;

(B) is an officer or director of a corporation that is a program provider;

(C) is a partner in a partnership that is a program provider;

(D) is a member or manager in a limited liability company that is a program provider;

(E) is a trustee or trust manager of a trust that is a program provider; or

(F) because of a personal, familial, or other relationship with a program provider, is in a position of actual control or authority with respect to the program provider, regardless of the person's title.

(40) Denial--An action taken by HHSC that:

(A) rejects an individual's request for enrollment into the CLASS Program;

(B) disallows a CLASS Program service or a CFC service requested on an IPC that was not authorized on the prior IPC; or

(C) disallows a portion of the amount or level of a CLASS Program service or a CFC service requested on an IPC that was not authorized on the prior IPC.

(41) Dental treatment--A CLASS Program service that:

(A) consists of the following:

(i) emergency dental treatments, which are procedures necessary to control bleeding, relieve pain, and eliminate acute infection; operative procedures that are required to prevent the imminent loss of teeth; and treatment of injuries to the teeth or supporting structures;

(ii) routine preventative dental treatments, which are examinations, x-rays, cleanings, sealants, oral prophylaxes, and topical fluoride applications;

(iii) therapeutic dental treatments, which include fillings, scaling, extractions, crowns, pulp therapy for permanent and primary teeth; restoration of carious permanent and primary teeth; maintenance of space; and limited provision of removable prostheses when masticatory function is impaired, when an existing prosthesis is unserviceable, or when aesthetic considerations interfere with employment or social development;

(iv) orthodontic dental treatments, which are procedures that include treatment of retained deciduous teeth; cross-bite therapy; facial accidents involving severe traumatic deviations; cleft palates with gross malocclusion that will benefit from early treatment; and severe, handicapping malocclusions affecting permanent dentition with a minimum score of 26 as measured on the Handicapping Labiolingual Deviation Index; and

(v) dental sedation, which is sedation necessary to perform dental treatment including non-routine anesthesia, (for example, intravenous sedation, general anesthesia, or sedative therapy prior to routine procedures) but not including administration of routine local anesthesia only; and

(B) does not include cosmetic orthodontia.

(42) DFPS--The Texas Department of Family and Protective Services.

(43) Dietary services--A CLASS Program service that provides nutrition services, as defined in Texas Occupations Code §701.002.

(44) Direct services--Includes the following services:

(A) CLASS Program services other than case management, FMS, support consultation, support family services, CFS, and TAS;

(B) CFC PAS/HAB;

(C) CFC ERS; and

(D) CFC support management.

(45) DSA--Direct services agency. A program provider that has a contract with HHSC to provide direct services.

(46) Employment assistance--A CLASS Program service that provides assistance to an individual to help the individual locate competitive employment in the community to the same degree of access as individuals not receiving CLASS Program services.

(47) Enrollment IPC--The first individual plan of care (IPC) for an individual developed before the individual's enrollment into the CLASS Program.

(48) Enrollment IPP--The first individual program plan (IPP) for an individual developed before the individual's enrollment into the CLASS Program in accordance with §259.67 of this chapter (relating to Development of IPPs).

(49) Exploitation--The illegal or improper act or process of using, or attempting to use, an individual or the resources of an individual for monetary or personal benefit, profit, or gain.

(50) FMS--Financial management services. A CLASS Program service that is defined in 40 TAC §41.103 and is provided to an individual participating in the CDS option.

(51) FMSA--Financial management services agency. An entity, as defined in 40 TAC §41.103, that provides FMS.

(52) Former military member--A person who served in the United States Army, Navy, Air Force, Marine Corps, Coast Guard, or Space Force:

(A) who declared and maintained Texas as the person's state of legal residence in the manner provided by the applicable military branch while on active duty; and

(B) who was killed in action or died while in service, or whose active duty otherwise ended.

(53) Functional behavior assessment--An evaluation that is used to determine the underlying function or purpose of an individual's behavior, so an effective behavior support plan can be developed.

(54) Good cause--As determined by HHSC, a reason outside the control of a CFC ERS provider that is an acceptable reason for the CFC ERS provider's failure to comply.

(55) Group setting--A setting, other than an individual's residence, in which more than one individual or other person is receiving pre-vocational services or a similar service.

(56) Habilitation--A CLASS Program service that allows an individual to reside successfully in a community setting by training the individual to acquire, retain, and improve self-help, socialization, and daily living skills or assisting the individual with ADLs. Habilitation services consist of the following:

(A) habilitation training, which is interacting in person with an individual who is awake to train the individual in the following activities:

(i) self-care;

(ii) personal hygiene;

(iii) household tasks;

(iv) mobility;

(v) money management;

(vi) community integration;

(vii) use of adaptive equipment;

(viii) management of caregivers;

(ix) personal decision making;

(x) interpersonal communication;

(xi) reduction of challenging behaviors;

(xii) socialization and the development of relationships;

(xiii) participating in leisure and recreational activities;

(xiv) use of natural supports and typical community services available to the public;

(xv) self-administration of medication; and

(xvi) strategies to restore or compensate for reduced cognitive skills;

(B) habilitation ADLs, which are:

(i) interacting in person with an individual who is awake to assist the individual in the following activities:

(I) self-care;

(II) personal hygiene;

(III) ambulation and mobility;

(IV) money management;

(V) community integration;

(VI) use of adaptive equipment;

(VII) self-administration of medication;

(VIII) reinforce any therapeutic goal of the individual;

(IX) provide transportation to the individual; and

(X) protect the individual's health, safety and security;

(ii) interacting in person or by telephone with an individual or an involved person regarding an incident that directly affects the individual's health or safety; and

(iii) performing one of the following activities that does not involve interacting in person with an individual:

(I) shopping for the individual;

(II) planning or preparing meals for the individual;

(III) housekeeping for the individual;

(IV) procuring or preparing the individual's medication; or

(V) arranging transportation for the individual; and

(C) habilitation delegated, which is tasks delegated by a registered nurse (RN) to a service provider of habilitation in accordance

with 22 TAC Chapter 224 (relating to Delegation of Nursing Tasks By Registered Professional Nurses to Unlicensed Personnel For Clients With Acute Conditions Or In Acute Care Environments) or Chapter 225 (relating to RN Delegation to Unlicensed Personnel and Tasks Not Requiring Delegations In Independent Living Environments For Clients With Stable and Predictable Conditions).

(57) Health-related tasks--Specific tasks related to the needs of an individual that can be delegated or assigned by a licensed health care professional under state law to be performed by a service provider of CFC PAS/HAB. These include:

(A) tasks delegated by a registered nurse (RN);

(B) health maintenance activities, as defined in 22 TAC §225.4 (relating to Definitions), that may not require delegation; and

(C) activities assigned to a service provider of CFC PAS/HAB by a licensed physical therapist, occupational therapist, or speech-language pathologist.

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

(59) Hippotherapy--A specialized therapy that:

(A) involves an individual interacting with and riding on horses;

(B) is designed to improve the balance, coordination, focus, independence, confidence, and motor and social skills of the individual; and

(C) is provided by two service providers at the same time, as described in §259.355(d)(11) of this chapter (relating to Qualifications of DSA Staff Persons).

(60) Hospital--A public or private institution that is licensed or is exempt from licensure in accordance with THSC Chapters 13, 241, 261, or 552.

(61) IADLs--Instrumental activities of daily living. Activities related to living independently in the community, including meal planning and preparation; managing finances; shopping for food, clothing, and other essential items; performing essential household chores; communicating by phone or other media; and traveling around and participating in the community.

(62) ICF/IID--Intermediate care facility for individuals with an intellectual disability or related conditions. An ICF/IID is a facility in which ICF/IID Program Services are provided and that is:

(A) licensed in accordance with THSC Chapter 252; or

(B) certified by HHSC, including a state supported living center.

(63) ICF/IID Program--The Intermediate Care Facilities for Individuals with an Intellectual Disability or Related Conditions Program, which provides Medicaid-funded residential services to individuals with an intellectual disability or related conditions.

(64) ID/RC Assessment--Intellectual Disability/Related Conditions Assessment. An HHSC form used to determine the level of care (LOC) for an individual.

(65) Individual--A person seeking to enroll or who is enrolled in the CLASS Program.

(66) Individual transportation plan--A written plan developed by an individual's service planning team and documented on the HHSC individual transportation plan form. An individual transportation plan describes how transportation as a habilitation activity will be delivered to support an individual's desired goals and outcomes identified in the IPP.

(67) Inpatient chemical dependency treatment facility--A facility licensed in accordance with THSC Chapter 464, Facilities Treating Persons with a Chemical Dependency.

(68) In person or in-person--Within the physical presence of another person. In person or in-person does not include using videoconferencing or a telephone.

(69) Institution for mental diseases--Has the meaning set forth in 42 CFR §435.1010.

(70) Institutional services--Medicaid-funded services provided in a nursing facility or in an ICF/IID.

(71) Intellectual disability--Consistent with THSC §591.003, significantly sub-average general intellectual functioning that is concurrent with deficits in adaptive behavior and originates during the developmental period.

(72) 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 CLASS 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.

(73) IPC cost--Estimated annual cost for CLASS Program services on an IPC.

(74) 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 §259.65(g) of this chapter (relating to Development of an Enrollment IPC), 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 the renewal IPC, as described in §259.77(b) of this chapter (relating to Renewal IPC and Requirement for Authorization to Continue Services).

(75) IPP--Individual program plan. A written plan developed in accordance with §259.67 of this chapter (relating to Development of IPPs) and documented on an HHSC Individual Program Plan form.

(76) 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, 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.

(77) Licensed vocational nurse--A person licensed to provide vocational nursing in accordance with Texas Occupations Code Chapter 301.

(78) Licensed vocational nursing--A CLASS Program service that provides vocational nursing, as defined in Texas Occupations Code §301.002.

(79) LIDDA--Local intellectual and developmental disability authority. An entity designated by the executive commissioner of HHSC, in accordance with THSC §533A.035.

(80) LOC--Level of care. A determination given to an individual as part of the eligibility determination process based on data on the ID/RC Assessment.

(81) Managed care organization--This term has the meaning set forth in Texas Government Code §536.001.

(82) MAO Medicaid--Medical Assistance Only Medicaid. A type of Medicaid by which an individual qualifies financially for Medicaid assistance but does not receive Supplemental Security Income (SSI) benefits.

(83) Massage therapy--A specialized therapy defined in Texas Occupations Code §455.001.

(84) Medicaid--A program administered by CMS and funded jointly by the states and the federal government that pays for health care to eligible groups of low-income people.

(85) 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.

(86) Mental health facility--A facility licensed in accordance with THSC Chapter 577.

(87) MESAV--Medicaid Eligibility Service Authorization Verification. The automated system that contains information regarding an individual's Medicaid eligibility and service authorizations.

(88) Military family member--A person who is the spouse or child, regardless of age, of:

(A) a military member; or

(B) a former military member.

(89) Military member--A member of the United States military serving in the Army, Navy, Air Force, Marine Corps, Coast Guard, or Space Force on active duty who has declared and maintains Texas as the member's state of legal residence in the manner provided by the applicable military branch.

(90) Minor home modifications--A CLASS Program service that:

(A) makes a physical adaptation to an individual's residence that:

(i) is necessary to address the individual's specific needs; and

(ii) enables the individual to function with greater independence in the individual's residence or to control his or her environment; and

(B) meets one of the following criteria:

(i) is included on the list of minor home modifications in the *Community Living Assistance and Support Services Provider Manual;* or

(ii) is the repair or maintenance of a minor home modification purchased through the CLASS Program that:

(I) is needed after one year has elapsed from the date the minor home modification is complete;

(II) is needed for a reason other than the minor home modification was intentionally damaged, as described in §259.285(c) of this chapter (relating to Repair or Replacement of Minor Home Modification); and

(III) is not covered by a warranty.

(91) Music therapy--A specialized therapy that uses musical or rhythmic interventions to restore, maintain, or improve an individual's social or emotional functioning, mental processing, or physical health.

(92) Natural supports--Unpaid persons, including family members, volunteers, neighbors, and friends, who assist and sustain an individual.

(93) Neglect--A negligent act or omission that caused physical or emotional injury or death to an individual or placed an individual at risk of physical or emotional injury or death.

(94) Nursing--One or more of the following CLASS Program services:

(A) licensed vocational nursing;

(B) registered nursing;

(C) specialized licensed vocational nursing; and

(D) specialized registered nursing.

(95) Nursing facility--A facility that is licensed or is exempt from licensure in accordance with THSC Chapter 242.

(96) Occupational therapy--A CLASS Program service that provides occupational therapy, as described in Texas Occupations Code §454.006.

(97) Own home or family home--A residence that is not:

(A) an ICF/IID;

(B) a nursing facility;

(C) an ALF;

(D) a residential child-care facility unless it is an agency foster home;

(E) a hospital;

(F) a mental health facility;

(G) an inpatient chemical dependency treatment facility;

(H) a residential facility operated by the Texas Workforce Commission;

(I) a residential facility operated by the Texas Juvenile Justice Department;

(J) a jail; or

(K) a prison.

(98) PAS/HAB plan--Personal Assistance Services/Habilitation Plan. A written plan developed by an individual's service planning team and documented on the HHSC Personal Assistance Services (PAS)/Habilitation Plan form that describes the type and frequency of CFC PAS/HAB activities to be performed by a service provider.

(99) Person--A corporation, organization, government or governmental subdivision or agency, business trust, estate, trust, partnership, association, natural person, or any other legal entity that can function legally, sue or be sued, and make decisions through agents.

(100) Person-centered planning process--The process described in §259.57 of this chapter (relating to Person-Centered Planning Process).

(101) Physical abuse--Any of the following:

(A) an act or failure to act performed knowingly, recklessly, or intentionally, including incitement to act, that caused physical injury or death to an individual or placed an individual at risk of physical injury or death;

(B) an act of inappropriate or excessive force or corporal punishment, regardless of whether the act results in a physical injury to an individual;

(C) the use of a restraint on an individual not in compliance with federal and state laws, rules, and regulations; or

(D) seclusion.

(102) Physical therapy--A CLASS Program service that provides physical therapy, as defined in Texas Occupations Code §453.001.

(103) Physician--Consistent with §558.2 of this title (relating to Definitions), a person who is:

(A) licensed in Texas to practice medicine or osteopathy in accordance with Texas Occupations Code Chapter 155;

(B) licensed in Arkansas, Louisiana, New Mexico, or Oklahoma to practice medicine, who is the treating physician of an individual, and orders home health or hospice services for the individual in accordance with Texas Occupations Code §151.056(b)(4); or

(C) a commissioned or contract physician or surgeon who serves in the United States uniformed services or Public Health Service, if the person is not engaged in private practice, in accordance with the Texas Occupations Code §151.052(a)(8).

(104) Platform--This term has the meaning set forth in Texas Government Code §531.001(4-d).

(105) Prevocational services--A CLASS Program service that provides services that are not job-task oriented and are provided to an individual whose service planning team does not expect to be employed, without receiving supported employment, within one year after the date prevocational services begin. Prevocational services prepare an individual for competitive employment and consist of:

(A) assessment of vocational skills an individual needs to develop or improve upon;

(B) individual and group instruction regarding barriers to employment;

(C) training in skills:

(i) that are not job-task oriented;

(ii) that are related to goals identified in the individual's IPP for prevocational services;

(iii) that are essential to obtaining and retaining competitive employment, such as the effective use of community resources, transportation, and mobility training; and

(iv) for which an individual is not compensated more than 50 percent of the federal minimum wage or industry standard, whichever is greater;

(D) training in the use of adaptive equipment necessary to obtain and retain competitive employment; and

(E) transportation between the individual's place of residence and a group setting in which prevocational services are provided when other forms of transportation are unavailable or inaccessible.

(106) Program provider--A person that has a contract with HHSC to provide CLASS Program services, excluding an FMSA. In the CLASS Program, there are two types of program providers, a DSA and a CMA.

(107) Public emergency personnel--Personnel of a sheriff's department, police department, emergency medical service, or fire department.

(108) Recreational therapy--A specialized therapy that provides recreational or leisure activities that assist an individual to restore, remediate, or habilitate the individual's level of functioning and independence in life activities; promote health and wellness; and reduce or eliminate the activity limitations caused by an illness or disabling condition.

(109) Reduction--An action taken by HHSC as a result of a review of a revised IPC or renewal IPC that decreases the amount or level of a service authorized by HHSC on the prior IPC.

(110) Registered nursing--A CLASS Program service that provides professional nursing, as defined in Texas Occupations Code §301.002.

(111) Related condition--As defined in 42 CFR §435.1010, a severe and chronic disability that:

(A) is attributed to:

(i) cerebral palsy or epilepsy; or

(ii) any other condition, other than mental illness, found to be closely related to an intellectual disability because the condition results in impairment of general intellectual functioning or adaptive behavior similar to that of individuals with an intellectual disability, and requires treatment or services similar to those required for individuals with an intellectual disability;

(B) is manifested before the individual reaches 22 years of age;

(C) is likely to continue indefinitely; and

(D) results in substantial functional limitation in at least three of the following areas of major life activity:

(i) self-care;

(ii) understanding and use of language;

(iii) learning;

(iv) mobility;

(v) self-direction; and

(vi) capacity for independent living.

(112) Relative--A person related to another person within the fourth degree of consanguinity or within the second degree of affinity. A more detailed explanation of this term is included in the *Community Living Assistance and Support Services Provider Manual.*

(113) Renewal IPC--An IPC developed in accordance with §259.79 of this chapter (relating to Renewal and Revision of an IPC).

(114) Residential child-care facility--The term has the meaning set forth in Texas Human Resources Code §42.002.

(115) Respite--A CLASS Program service that provides temporary assistance and support with an individual's ADLs if the in-

dividual has the same residence as a person who routinely provides the assistance and support to the individual, and the person is temporarily unavailable to provide such assistance and support.

(A) If the person who routinely provides assistance and support, resides with the individual, and is temporarily unavailable to provide assistance and support, is a service provider of transportation as a habilitation activity or CFC PAS/HAB or an employee in the CDS option of transportation as a habilitation activity or CFC PAS/HAB, HHSC does not approve respite unless:

(i) the service provider or employee routinely provides unpaid assistance and support with ADLs to the individual;

(ii) the amount of respite does not exceed the amount of unpaid assistance and support routinely provided; and

(iii) the service provider of respite or employee in the CDS option of respite does not have the same residence as the individual.

(B) If the person who routinely provides assistance and support, resides with the individual, and is temporarily unavailable to provide assistance and support, is a service provider of support family services or CFS, HHSC does not approve respite unless:

(i) for an individual receiving support family services, the individual does not receive respite on the same day the individual receives support family services;

(ii) for an individual receiving CFS, the individual does not receive respite on the same day the individual receives CFS; and

(iii) the service provider of respite or employee in the CDS option of respite does not have the same residence as the individual.

(C) Respite consists of the following:

(i) interacting in person with an individual who is awake to assist the individual in the following activities:

(I) self-care;

(II) personal hygiene;

(III) ambulation and mobility;

(IV) money management;

(V) community integration;

(VI) use of adaptive equipment;

(VII) self-administration of medication;

(VIII) reinforce any therapeutic goal of the individual;

(IX) provide transportation to the individual; and

(X) protect the individual's health, safety, and security;

(ii) interacting in person or by telephone with an individual or an involved person regarding an incident that directly affects the individual's health or safety; and

(iii) performing one of the following activities, which may not involve interacting in person with an individual:

(I) shopping for the individual;

(II) planning or preparing meals for the individual;

(III) housekeeping for the individual;

(IV) procuring or preparing the individual's medication;

(V) arranging transportation for the individual; or

(VI) protecting the individual's health, safety, and security while the individual is asleep.

(116) Responder--A person designated to respond to an alarm call activated by an individual.

(117) Revised IPC--An enrollment IPC or a renewal IPC that is revised during an IPC period in accordance with §259.79 of this chapter to add a new CLASS Program service or CFC service or change the amount of an existing service.

(118) RN--Registered nurse. A person licensed to provide professional nursing in accordance with Texas Occupations Code Chapter 301.

(119) Seclusion--The involuntary placement of an individual alone in an area from which the individual is prevented from leaving.

(120) Service backup plan--A written plan developed in accordance with §259.89 of this chapter (relating to Service Backup Plans) to ensure continuity of critical program services if service delivery is interrupted.

(121) Service planning team--A team consisting of:

(A) the individual;

(B) if applicable, the individual's LAR or actively involved person;

(C) the individual's case manager;

(D) a representative of the DSA;

(E) other persons whose inclusion is requested by the individual, LAR, or actively involved person, including an managed care organization service coordinator, a family member, a friend, and a teacher; and

(F) a person selected by the DSA, with the approval of the individual and LAR, who is:

(i) professionally qualified by certification or licensure and has special training and experience in the diagnosis and habilitation of persons with the individual's related condition; or

(ii) directly involved in the delivery of services and supports to the individual.

(122) Service provider--A person who is an employee or contractor of a DSA who provides a direct service.

(123) Sexual abuse--Any of the following:

(A) sexual exploitation of an individual;

(B) non-consensual or unwelcomed sexual activity with an individual; or

(C) consensual sexual activity between an individual and a service provider, staff person, volunteer, or controlling person, unless a consensual sexual relationship with an adult individual existed before the service provider, staff person, volunteer, or controlling person became a service provider, staff person, volunteer, or controlling person.

(124) Sexual activity--An activity that is sexual in nature, including kissing, hugging, stroking, or fondling with sexual intent.

(125) Sexual exploitation--A pattern, practice, or scheme of conduct against an individual that can reasonably be construed as being for the purposes of sexual arousal or gratification of any person:

(A) which may include sexual contact; and

(B) does not include obtaining information about an individual's sexual history within standard accepted clinical practice.

(126) Specialized licensed vocational nursing--A CLASS Program service that provides licensed vocational nursing to an individual who has a tracheostomy or is dependent on a ventilator.

(127) Specialized registered nursing--A CLASS Program service that provides registered nursing to an individual who has a tracheostomy or is dependent on a ventilator.

(128) Specialized therapies--A CLASS Program service that promotes skills development, maintains skills, decreases inappropriate behaviors, facilitates emotional well-being, creates opportunities for socialization, or improves physical and medical status and consists of:

(A) aquatic therapy;

(B) hippotherapy;

(C) massage therapy;

(D) music therapy;

(E) recreational therapy; and

(F) therapeutic horseback riding.

(129) Speech and language pathology--A CLASS Program service that provides speech-language pathology, as defined in Texas Occupations Code §401.001.

(130) Staff person--A full-time or part-time employee of a program provider.

(131) State supported living center--A state-supported and structured residential facility operated by HHSC to provide to persons with an intellectual disability a variety of services, including medical treatment, specialized therapy, and training in the acquisition of personal, social, and vocational skills, but does not include a community-based facility owned by HHSC.

(132) Store and forward technology--This term has the meaning set forth in Texas Occupations Code §111.001(2).

(133) Support consultation--A CLASS Program service that is defined in 40 TAC §41.103 and may be provided to an individual who chooses to participate in the CDS option.

(134) SFS--Support family services. A CLASS Program service that is described in Subchapter E of this chapter.

(135) Supported employment--A CLASS Program service that provides assistance to sustain competitive employment to an individual who, because of a disability, requires intensive, ongoing support to be self-employed, work from home, or perform in a work setting at which individuals without disabilities are employed.

(136) Synchronous audio-visual--An interactive, two-way audio and video communication platform that:

(A) allows a service to be provided to an individual in real time; and

(B) conforms to the privacy requirements under the Health Insurance Portability and Accountability Act.

(137) System check--A test of the CFC ERS equipment to determine if:

(A) the individual can successfully activate an alarm call; and

(B) the equipment is working properly.

(138) TAC--Texas Administrative Code. A compilation of state agency rules published by the Texas State Secretary of State in accordance with Texas Government Code, Chapter 2002, Subchapter C.

(139) Target behavior--A behavior identified in a behavior support plan for reduction or elimination.

(140) TAS--Transition assistance services. A CLASS Program service provided in accordance with Chapter 272 of this title (related to Transition Assistance Services) to an individual who is receiving institutional services and is eligible for and enrolling into the CLASS Program.

(141) Telehealth services--This term has the meaning set forth in Texas Occupations Code §111.001.

(142) Texas Workforce Commission--The state agency established under Texas Labor Code Chapter 301.

(143) Therapeutic horseback riding--A specialized therapy that:

(A) involves an individual interacting with and riding on horses; and

(B) is designed to improve the balance, coordination, focus, independence, confidence, and motor and social skills of the individual.

(144) THSC--Texas Health and Safety Code. Texas statutes relating to health and safety.

(145) Verbal or emotional abuse--Any act or use of verbal or other communication, including gestures:

(A) to:

(i) harass, intimidate, humiliate, or degrade an individual; or

(ii) threaten an individual with physical or emotional harm; and

(B) that:

(i) results in observable distress or harm to the individual; or

(ii) is of such a serious nature that a reasonable person would consider it harmful or a cause of distress.

(146) Videoconferencing--An interactive, two-way audio and video communication:

(A) used to conduct a meeting between two or more persons who are in different locations; and

(B) that conforms to the privacy requirements under the Health Insurance Portability and Accountability Act.

(147) Volunteer--A person who works for a program provider without compensation, other than reimbursement for actual expenses.

§259.7. Description of the CLASS Program and CFC Option.

(a) The CLASS Program is a Medicaid waiver program approved by CMS and operated by HHSC pursuant to §1915(c) of the Social Security Act. It provides community-based services and supports to an eligible individual as an alternative to the ICF/IID Program. CLASS Program services are intended to:

(1) enhance the individual's integration into the community;

(2) maintain or improve the individual's independent functioning; and

(3) prevent the individual's admission to an institution.

(b) HHSC limits the enrollment in the CLASS Program to the number of individuals approved by CMS or by available funding from the state.

(c) The CLASS Program offers the following services approved by CMS:

(1) adaptive aids;

(2) auditory integration training/auditory enhancement training;

(3) behavioral support;

(4) case management;

(5) cognitive rehabilitation therapy;

(6) dental treatment;

(7) habilitation;

(8) licensed vocational nursing;

(9) minor home modifications;

(10) dietary services;

(11) occupational therapy;

(12) physical therapy;

(13) prevocational services;

(14) registered nursing;

(15) respite, which consists of:

(A) in-home respite; and

(B) out-of-home respite;

(16) speech and language pathology;

(17) specialized licensed vocational nursing;

(18) specialized registered nursing;

(19) specialized therapies, which consist of:

(A) aquatic therapy;

(B) hippotherapy;

(C) massage therapy;

(D) music therapy;

(E) recreational therapy; and

(F) therapeutic horseback riding;

(20) SFS;

(21) CFS;

(22) employment assistance;

(23) supported employment;

(24) TAS; and

(25) if the individual's IPC includes at least one CLASS Program service to be delivered through the CDS option:

(A) FMS; and

(B) support consultation.

(d) A DSA may only provide and bill for habilitation if the activity provided is transportation, as described in §259.5(56)(B)(i)(IX) of this subchapter (relating to Definitions).

(e) CFC is a state plan option governed by 42 CFR, Part 441, Subpart K, regarding Home and Community-Based Attendant Services and Supports State Plan Option (Community First Choice) that provides the following services to individuals:

(1) CFC PAS/HAB;

(2) CFC ERS; and

(3) CFC support management for an individual receiving CFC PAS/HAB.

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 January 10, 2023.

TRD-202300076
Karen Ray
Chief Counsel
Health and Human Services Commission
Effective date: January 30, 2023
Proposal publication date: September 2, 2022
For further information, please call: (512) 438-5077

SUBCHAPTER B. ELIGIBILITY, ENROLLMENT, AND REVIEW

DIVISION 1. ELIGIBILITY AND MAINTENANCE OF THE CLASS INTEREST LIST

26 TAC §259.51, §259.53

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, 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.

§259.51. Eligibility Criteria for CLASS Program Services and CFC Services.

(a) An individual is eligible for CLASS Program services if:

(1) the individual meets the financial eligibility criteria described in Appendix B of the CLASS Program waiver application approved by CMS and available on the HHSC website;

(2) the individual is determined by HHSC to meet the LOC VIII criteria described in §261.239 of this title (relating to ICF/MR Level of Care VIII Criteria);

(3) the individual demonstrates a need for CFC PAS/HAB;

(4) the individual's IPC has an IPC cost for CLASS Program services at or below $114,736.07;

(5) the individual is not enrolled in another waiver program or receiving a service that may not be received if the individual is enrolled in the CLASS Program, as identified in the Mutually Exclusive Services table in Appendix III of the Community Living Assistance and Support Services Provider Manual available on the HHSC website;

(6) the individual resides in the individual's own home or family home; and

(7) the individual requires the provision of:

(A) at least one CLASS Program service per month or a monthly monitoring by a case manager; and

(B) at least one CLASS Program service during an IPC period.

(b) Except as provided in subsection (c) of this section, an individual is eligible for a CFC service under this chapter if the individual:

(1) meets the criteria described in subsection (a) of this section;

(2) requires the provision of the CFC service; and

(3) is not receiving SFS or CFS.

(c) To be eligible for a CFC service under this chapter, an individual receiving MAO Medicaid must, in addition to meeting the eligibility criteria described in subsection (b) of this section, receive a CLASS Program service at least monthly, as required by 42 CFR §441.510(d).

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 January 10, 2023.

TRD-202300077
Karen Ray
Chief Counsel
Health and Human Services Commission
Effective date: January 30, 2023
Proposal publication date: September 2, 2022
For further information, please call: (512) 438-5077

♦ ♦ ♦

DIVISION 2. ENROLLMENT PROCESS, PERSON-CENTERED SERVICE PLANNING, AND REQUIREMENTS FOR HOME AND COMMUNITY-BASED SETTINGS

26 TAC §§259.55, 259.57, 259.59, 259.61, 259.63, 259.65, 259.67, 259.69, 259.71, 259.73

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, 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.

§259.57. Person-Centered Planning Process.

(a) Person-centered planning is a process that empowers an individual to plan the individual's services and supports to achieve desired outcomes.

(b) A program provider must ensure the person-centered planning process is led by the individual to the maximum extent possible. The individual's LAR has a participatory role, as needed and as defined by the individual, unless State law confers decision-making authority to the LAR.

(c) The person-centered planning process must be used to develop an IPP, an HHSC IPP Addendum, a PAS/HAB plan, an enrollment IPC, a renewal IPC, a revised IPC, a service backup plan, and an individual transportation plan.

(d) The person-centered planning process must:

(1) include people chosen by the individual or LAR;

(2) provide the information and support that the individual needs to lead the planning process and make informed choices and decisions;

(3) occur at a time and location convenient to the individual and LAR;

(4) consider the individual's cultural preferences;

(5) provide information in plain language to the individual and in a manner that is accessible to the individual:

(A) through the provision of auxiliary aids and services at no cost to the individual in accordance with the Americans with Disabilities Act and section 504 of the Rehabilitation Act, if the individual requires such aids or services to communicate; and

(B) through the provision of language services at no cost to the individual, including oral interpretation and written translations, if the individual has limited English proficiency;

(6) use strategies for solving conflict or disagreement within the person-centered planning process;

(7) provide information to the individual or LAR to allow the individual or LAR to make informed decisions, including decisions about CLASS Program and CFC services, the settings in which the individual receives a CLASS Program service or a CFC service, and service providers; and

(8) inform the individual or LAR that the individual or LAR may request revisions to an IPP, a PAS/HAB plan, an enrollment IPC, a renewal IPC, a revised IPC, a service backup plan, or an individual transportation plan at any time by communicating the request to the CMA or DSA.

§259.59. Requirements for Home and Community-Based Settings.

(a) A home and community-based setting is a setting in which an individual receives CLASS Program services or CFC services. A home and community-based setting must have all of the following qualities based on the needs of the individual as documented in the individual's person-centered service plan.

(1) A home and community-based setting is integrated in and supports the individual's access to the greater community to the same degree as a person not enrolled in a Medicaid waiver program, including opportunities for the individual to:

(A) seek employment and work in a competitive integrated setting;

(B) engage in community life;

(C) control personal resources; and

(D) receive services in the community.

(2) A home and community-based setting is selected by an individual from among setting options, including non-disability specific settings and an option for a private unit in a setting in which SFS or CFS is provided. The setting options are identified and documented in an individual's IPP and are based on the individual's needs, preferences, and, for settings in which SFS or CFS is provided, resources available for room and board.

(3) A home and community-based setting ensures an individual's rights of privacy, dignity and respect, and freedom from coercion and restraint.

(4) A home and community-based setting optimizes, not regiments, individual initiative, autonomy, and independence in making life choices, including choices regarding daily activities, physical environment, and with whom to interact.

(5) A home and community-based setting facilitates individual choice regarding services and supports, and the service providers who provide the services and supports.

(b) In addition to the requirements in subsection (a) of this section, a DSA must ensure that a group setting in which prevocational services are provided:

(1) allows an individual to:

(A) control the individual's schedule and activities related to prevocational services;

(B) have access to the individual's food at any time; and

(C) receive visitors of the individual's choosing at any time; and

(2) is physically accessible and free of hazards to an individual.

(c) If a DSA becomes aware that a modification to a requirement described in subsection (b)(1) of this section is needed based on a specific assessed need of an individual:

(1) the DSA must:

(A) notify the case manager of the needed modification; and

(B) provide the case manager with the information described in paragraph (2)(A) of this subsection as requested by the case manager; and

(2) the case manager must, if notified by the DSA of a needed modification, convene a service planning team meeting in person or by videoconferencing to update the individual's IPP 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 DSA's assurance that the modification will cause no harm to the individual; and

(3) the DSA may implement the modification after the service planning team updates the IPP as required by paragraph (2) of this subsection.

(d) Except as provided in subsection (e) of this section, a program provider must ensure that CLASS Program services and CFC services are 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 certified ICF/IID operated by a LIDDA or state supported living center is located but is distinct from the ICF/IID;

(2) is located in a building on the grounds of, or immediately adjacent to a certified ICF/IID operated by a LIDDA or state supported living center;

(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 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) A program provider may provide a CLASS Program service or a CFC service 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.

§259.61. Process for Enrollment of an Individual.

(a) After HHSC notifies a CMA, as described in §259.55(c) of this division (relating to Written Offer of CLASS Program Services), that an individual selected the CMA, the CMA must assign a case manager to perform the following functions as soon as possible, but no later than 14 calendar days after HHSC's notification:

(1) verify that the individual resides in the catchment area for which the individual's selected CMA and DSA have a contract;

(2) conduct an initial in-person visit in the individual's residence with the individual and LAR or actively involved person at a time convenient to the individual and LAR to:

(A) provide an oral and written explanation of the following to the individual and LAR or actively involved person:

(i) CLASS Program services, including TAS if the individual is receiving institutional services;

(ii) CFC services;

(iii) the mandatory participation requirements of an individual described in §259.103 of this chapter (relating to Mandatory Participation Requirements of an Individual);

(iv) the CDS option described in §259.71 of this division (relating to CDS Option);

(v) the right to request a fair hearing in accordance with §259.101 of this chapter (relating to Individual's Right to a Fair Hearing);

(vi) that the individual, LAR, or actively involved person may report an allegation of abuse, neglect, or exploitation to DFPS by calling the toll-free telephone number at 1-800-252-5400;

(vii) the process by which the individual, LAR, or actively involved person may file a complaint regarding case management as required by 40 TAC §49.309 (relating to Complaint Process);

(viii) that the HHSC Office of the Ombudsman toll-free telephone number at 1-877-787-8999 may be used to file a complaint regarding the CMA;

(ix) voter registration, if the individual is 18 years of age or older;

(x) that, while the individual is staying at a location outside the catchment area in which the individual resides but within the state of Texas for a period of no more than 60 consecutive days, the individual and LAR or actively involved person may request that the DSA provide:

(I) transportation as a habilitation activity, as described in §259.5(56)(B)(i)(IX) of this subchapter (relating to Definitions);

(II) out-of-home respite in a camp described in §259.361(b)(2)(D) of this chapter (relating to Respite and Dental Treatment);

(III) adaptive aids;

(IV) nursing; and

(V) CFC PAS/HAB;

(xi) the use of electronic visit verification, as required by 1 TAC Chapter 354, Subchapter O; and

(xii) how to contact the individual's case manager; and

(B) use the HHSC Understanding Program Eligibility - CLASS/DBMD form to provide an oral and written explanation to the individual or LAR, and obtain the individual's or LAR's signature and date on the form, to acknowledge understanding of:

(i) the eligibility requirements for:

(I) CLASS Program services, as described in §259.51(a) of this subchapter (relating to Eligibility Criteria for CLASS Program Services and CFC Services);

(II) CFC services for individuals who do not receive MAO Medicaid, as described in §259.51(b) of this subchapter; and

(III) CFC services for individuals who receive MAO Medicaid, as described in §259.51(c) of this subchapter;

(ii) the reasons CLASS Program services and CFC services may be suspended, as described in §259.157 of this chapter (relating to Suspension of CLASS Program Services or CFC Services); and

(iii) that CLASS Program services and CFC services may be terminated as described in §§259.161, 259.163, 259.165, and 259.167 of this chapter (relating to Termination of CLASS Program Services and CFC Services With Advance Notice for Reasons Other Than Non-compliance with Mandatory Participation Requirements; Termination of CLASS Program Services and CFC Services With Advance Notice Because of Non-compliance With Mandatory Participation Requirements; Termination of CLASS Program Services and CFC Services Without Advance Notice for Reasons Other Than Behavior Causing Immediate Jeopardy; and Termination of CLASS Program Services and CFC Services Without Advance Notice Because of Behavior Causing Immediate Jeopardy); and

(C) educate the individual, LAR, and actively involved person about protecting the individual from abuse, neglect, and exploitation; and

(3) give the individual or LAR the HHSC Waiver Program Verification of Freedom of Choice form to document the individual's or LAR's choice regarding the CLASS Program or the ICF/IID Program.

(b) A CMA must:

(1) as soon as possible, but no later than two business days after the case manager's initial in-person visit required by subsection (a)(2) of this section:

(A) collect the information necessary for the CMA and DSA to process the individual's request for enrollment into the CLASS Program in accordance with the *Community Living Assistance and Support Services Provider Manual;* and

(B) provide the individual's selected DSA with the information collected in accordance with subparagraph (A) of this paragraph;

(2) assist the individual or LAR in completing and submitting an application for Medicaid financial eligibility, as required by §259.103(1) of this chapter; and

(3) ensure that the case manager documents in the individual's record the progress toward completing a Medicaid application and enrolling into the CLASS Program.

(c) If an individual or LAR does not submit a Medicaid application to HHSC within 30 calendar days after the case manager's initial in-person visit, as required by §259.103(1) of this chapter, but is making good faith efforts to complete the application, the CMA:

(1) may extend, in 30-calendar day increments, the time frame in which the application must be submitted to HHSC, except as provided in paragraph (2) of this subsection;

(2) must not grant an extension that results in a time period of more than 365 calendar days from the date of the case manager's initial in-person visit; and

(3) must ensure that the case manager documents each extension in the individual's record.

(d) If an individual or LAR does not submit a Medicaid application to HHSC within 30 calendar days after the case manager's initial in-person visit, as required by §259.103(1) of this chapter, and is not making good faith efforts to complete the application, a CMA must re-

quest, in writing, that HHSC withdraw the offer of enrollment made to the individual in accordance with §259.55(d)(2) of this division.

(e) If a DSA serving the catchment area in which an individual resides is not willing to provide CLASS Program services or CFC services to the individual because the DSA has determined that it cannot ensure the individual's health and safety, the CMA must provide to HHSC, in writing, the specific reasons the DSA has determined that it cannot ensure the individual's health and safety.

(f) During the initial in-person visit described in subsection (a)(1) of the section, the case manager must determine whether an individual meets the following criteria:

(1) the individual is being discharged from a nursing facility or an ICF/IID;

(2) the individual has not previously received TAS;

(3) the individual's proposed enrollment IPC will not include SFS; and

(4) the individual anticipates needing TAS.

(g) If a case manager determines that an individual meets the criteria described in subsection (f) of this section, the case manager must:

(1) provide the individual or LAR with a list of TAS providers in the catchment area in which the individual will reside;

(2) complete, with the individual or LAR, the HHSC Transition Assistance Services (TAS) Assessment and Authorization form found on the HHSC website in accordance with the form's instructions, which includes:

(A) identifying the items and services described in §272.5(e) of this title (relating to Service Description) that the individual needs;

(B) estimating the monetary amount for the items and services identified on the form, which must be within the service limit described in §259.73(a)(4) of this division (relating to Service Limits); and

(C) documenting the individual's or LAR's choice of TAS provider;

(3) submit the completed form to HHSC for authorization;

(4) if HHSC authorizes the form, send the form to the TAS provider chosen by the individual or LAR; and

(5) include TAS and the monetary amount authorized by HHSC on the individual's proposed enrollment IPC.

(h) A DSA must ensure that the following functions are performed during an in-person visit in the individual's residence at a time convenient to the individual and LAR as soon as possible, but no later than 14 calendar days after the CMA provides information to the DSA as required by subsection (b)(1)(B) of this section:

(1) a DSA staff person must:

(A) inform the individual and LAR or actively involved person, orally and in writing:

(i) that the individual, LAR, or actively involved person may report an allegation of abuse, neglect, or exploitation to DFPS by calling the toll-free telephone number at 1-800-252-5400;

(ii) the process by which the individual, LAR, or actively involved person may file a complaint regarding CLASS Program services or CFC services provided by the DSA as required by 40 TAC §49.309; and

(iii) that the HHSC Complaint and Incident Intake toll-free telephone number at 1-800-458-9858 may be used to file a complaint regarding the DSA; and

(B) educate the individual and LAR or actively involved person about protecting the individual from abuse, neglect, and exploitation;

(2) an appropriate professional must complete an adaptive behavior screening assessment in accordance with the assessment instructions; and

(3) an RN, in accordance with the Community Living Assistance and Support Services Provider Manual, must complete:

(A) a nursing assessment, using the HHSC CLASS/DBMD Nursing Assessment form;

(B) the HHSC Related Conditions Eligibility Screening Instrument form; and

(C) the ID/RC Assessment.

(i) A DSA must:

(1) ensure that the primary diagnosis of the individual documented on the ID/RC Assessment is approved by a physician;

(2) submit the following documentation to HHSC for HHSC's determination of whether the individual meets the LOC VIII criteria required by §259.51(a)(2) of this subchapter:

(A) the completed adaptive behavior screening assessment;

(B) the completed HHSC Related Conditions Eligibility Screening Instrument form; and

(C) the completed ID/RC Assessment; and

(3) send the completed HHSC CLASS/DBMD Nursing Assessment form described in subsection (h)(3)(A) of this section to the CMA.

(j) In accordance with §259.63(a)(1) of this division (relating to Determination by HHSC of Whether an Individual Meets LOC VIII Criteria), HHSC reviews the documentation described in subsection (i)(2) of this section.

(k) If a DSA receives written notice from HHSC in accordance with §259.63(c)(1) of this division that an individual meets the LOC VIII criteria, the DSA must notify the individual's CMA of HHSC's decision as soon as possible, but no later than one business day after receiving the notice from HHSC.

(l) If HHSC determines that an individual does not meet the LOC VIII criteria, HHSC sends written notice of the denial of the individual's request for enrollment into the CLASS Program:

(1) to the individual or LAR in accordance with §259.153(b) of this chapter (relating to Denial of a Request for Enrollment into the CLASS Program); and

(2) to the individual's DSA and CMA in accordance with §259.63(d) of this division.

(m) If a CMA receives notice from a DSA, as described in subsection (k) of this section, that HHSC determined that an individual meets the LOC VIII criteria, the case manager must:

(1) ensure that the service planning team meets in person or by videoconferencing to develop:

(A) a proposed enrollment IPC, a PAS/HAB plan, IPPs, and an HHSC IPP Addendum form for the individual in accordance with §259.65 of this division (relating to Development of an Enrollment IPC); and

(B) an individual transportation plan, if transportation as a habilitation activity or as an adaptive aid is included on the proposed enrollment IPC; and

(2) submit the documents described in paragraph (1) of this subsection to HHSC for review in accordance with §259.65 of this division.

(n) HHSC reviews a proposed enrollment IPC in accordance with §259.69 of this division (relating to HHSC's Review of a Proposed Enrollment IPC) to determine if:

(1) the proposed enrollment IPC has an IPC cost at or below the amount in §259.51(a)(4) of this subchapter; and

(2) the CLASS Program services and CFC services specified in the proposed enrollment IPC meet the requirements described in §259.65(a)(1)(E)(iii) or (iv) and §259.65(b) of this division.

(o) A CMA and DSA must not provide a CLASS Program service or CFC service to an individual before HHSC notifies the CMA, in accordance with §259.69(c)(1) of this division, that the individual's request for enrollment into the CLASS Program has been approved. If a CMA or DSA provides CLASS Program services or CFC services to an individual before the effective date of the individual's enrollment IPC authorized by HHSC, HHSC does not reimburse the CMA or DSA for those services.

(p) If HHSC notifies a CMA in accordance with §259.69(c)(1) of this division that an individual's request for enrollment is approved:

(1) the CMA must ensure the case manager complies with §259.69(c)(2) of this division; and

(2) the CMA and DSA must comply with §259.69(g) of this division.

(q) If HHSC notifies a CMA in accordance with §259.69(e) of this division that an individual's request for enrollment into the CLASS Program is approved, but action is being taken by HHSC to deny a CLASS Program service or CFC service and modify the proposed enrollment IPC:

(1) the CMA must comply with §259.69(f) of this division; and

(2) the CMA and DSA must comply with §259.69(g) of this division.

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 January 10, 2023.

TRD-202300078
Karen Ray
Chief Counsel
Health and Human Services Commission
Effective date: January 30, 2023
Proposal publication date: September 2, 2022
For further information, please call: (512) 438-5077

♦ ♦ ♦

DIVISION 3. REVIEWS

26 TAC §§259.75, 259.77, 259.79, 259.81, 259.83, 259.85, 259.87

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, 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.

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 January 10, 2023.

TRD-202300079
Karen Ray
Chief Counsel
Health and Human Services Commission
Effective date: January 30, 2023
Proposal publication date: September 2, 2022
For further information, please call: (512) 438-5077

♦ ♦ ♦

DIVISION 4. SERVICE BACKUP PLANS

26 TAC §259.89

STATUTORY AUTHORITY

The new section is authorized by Texas Government Code §531.0055, which provides that the Executive Commissioner of HHSC shall adopt rules for the operation and provision of services by the health and human services agencies, and Texas Human Resources Code §32.021, which authorizes the Executive Commissioner of HHSC to adopt rules necessary 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 January 10, 2023.

TRD-202300080
Karen Ray
Chief Counsel
Health and Human Services Commission
Effective date: January 30, 2023
Proposal publication date: September 2, 2022
For further information, please call: (512) 438-5077

♦ ♦ ♦

SUBCHAPTER C. RIGHTS AND RESPONSIBILITIES OF AN INDIVIDUAL

26 TAC §259.101, §259.103

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, 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.

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 January 10, 2023.

TRD-202300081
Karen Ray
Chief Counsel
Health and Human Services Commission
Effective date: January 30, 2023
Proposal publication date: September 2, 2022
For further information, please call: (512) 438-5077

♦ ♦ ♦

SUBCHAPTER D. TRANSFER, DENIAL, SUSPENSION, REDUCTION, AND TERMINATION OF SERVICES

26 TAC §§259.151, 259.153, 259.155, 259.157, 259.159, 259.161, 259.163, 259.165, 259.167, 259.169, 259.171

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, 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.

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 January 10, 2023.

TRD-202300083
Karen Ray
Chief Counsel
Health and Human Services Commission
Effective date: January 30, 2023
Proposal publication date: September 2, 2022
For further information, please call: (512) 438-5077

♦ ♦ ♦

SUBCHAPTER E. SUPPORT FAMILY SERVICES AND CONTINUED FAMILY SERVICES

DIVISION 1. INTRODUCTION

26 TAC §259.201, §259.203

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, 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.

§259.201. General Requirements.

In this subchapter:

(1) a support family agency is the entity that contracts with HHSC to provide SFS in accordance with 40 TAC Chapter 49 (relating to Contracting for Community Services); and

(2) a continued family agency is the entity that contracts with HHSC to provide CFS in accordance with 40 TAC Chapter 49.

§259.203. Eligibility.

(a) To receive SFS, an individual must be under 18 years of age.

(b) To receive CFS, an individual must:

(1) be 18 years of age or older;

(2) reside with a support family; and

(3) receive SFS immediately before receiving CFS.

(c) An individual who receives SFS or CFS must not receive:

(1) CFC PAS/HAB;

(2) CFC ERS; or

(3) transportation as a habilitation activity or as an adaptive aid.

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 January 10, 2023.

TRD-202300084
Karen Ray
Chief Counsel
Health and Human Services Commission
Effective date: January 30, 2023
Proposal publication date: September 2, 2022
For further information, please call: (512) 438-5077

♦ ♦ ♦

DIVISION 2. SUPPORT FAMILY AGENCY AND CONTINUED FAMILY AGENCY

26 TAC §§259.205, 259.207, 259.209, 259.211, 259.213

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, 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.

§259.205. Residential Agreements, Requirements for Provider-Controlled Residential Settings, and Support Family Agency and Continued Family Agency Functions.

(a) During a service planning team meeting to develop an enrollment, a revised, or a renewal IPC and IPP, a case manager must inform an individual or LAR of the following if the individual is interested in receiving SFS or CFS:

(1) that if the individual or LAR selects SFS or CFS, the individual or LAR will be responsible for paying room and board in accordance with a residential agreement described in subsections (b) and (c) of this section;

(2) that if the individual or LAR does not pay room or board as required by a residential agreement, the individual's support family may evict the individual in accordance with the residential agreement and state law; and

(3) that if the individual is evicted by a support family and the individual or LAR has not paid the delinquent room or board, HHSC will deny the individual SFS or CFS until the individual or LAR pays the delinquent room or board.

(b) An individual's support family agency or continued family agency must ensure that an individual receiving SFS or CFS has a written residential agreement with the support family.

(c) The residential agreement required by subsection (b) of this section must include:

(1) the physical address of the residence;

(2) the name of the individual;

(3) the name of the support family;

(4) the beginning date of the residential agreement;

(5) the date the residential agreement expires;

(6) a provision that:

(A) the support family and the individual or LAR agree that the residential agreement is a "lease," as defined in Texas Property Code Chapter 92 and that they are subject to state law governing residential tenancies, including Texas Property Code Chapters 24, 91, and 92 and Texas Rules of Civil Procedure Rule 510; and

(B) to the extent allowed by law, in the event of a conflict or inconsistency between any provision of the residential agreement and any provision of state statutory law, including Texas Property Code Chapters 91 and 92, the provision in the residential agreement governs;

(C) the individual or LAR is not waiving any right or remedy provided to tenants under state law, including the Texas Fair Housing Act in Texas Property Code Chapter 301, and is not agreeing to any notice period that is shorter than the notice period to which tenants are entitled under state law;

(D) allows the individual or LAR to terminate the residential agreement before its expiration date without any obligation under the residential agreement except an obligation that accrued before the date of termination, if the individual permanently moves from the residence for any reason, including transferring to a different support family agency or continued family agency;

(E) the support family agrees to refund to the individual or LAR an amount for room and board paid to the support family for the days that the individual was away from the residence because the individual permanently moved from the residence using the following formula to determine the daily amount for room and board (the monthly amount for room and board divided by the number of days in the month);

(F) the individual may furnish and decorate the individual's bedroom;

(G) the support family agrees to be responsible for all repairs to the residence of the support family, including the support family's real property or personal property, resulting from normal wear and tear, as defined in Texas Property Code §92.001;

(H) that allows eviction of the individual only if:

(i) the individual or LAR fails to pay room or board, which does not include any late fee; or

(ii) the individual's CLASS Program services are terminated;

(I) the support family will, before giving the individual or LAR a notice to vacate, give the individual or LAR a notice of proposed eviction that allows the individual or LAR at least 60 calendar days to pay the delinquent room or board;

(J) if the individual or LAR pays the delinquent room or board within the period required by subparagraph (I) of this paragraph, the support family will not give the individual or LAR a notice to vacate or otherwise proceed to evict the individual; and

(K) the support family will not accelerate the entire balance of the unpaid room or board owed under the remainder of the term of the residential agreement if the individual or LAR violates the residential agreement and the violation does not result in an eviction;

(7) the amount the individual or LAR is paying for room and board;

(8) the day of the month that the amount for room and board is due, which will not be before the day of the month that an individual receives a primary source of income, such as supplemental security income and social security disability insurance;

(9) the amount of a late fee, if any, which may be charged only once per month and will not exceed 10 percent of the amount for room and board, that the support family may charge the individual or LAR if room and board is not paid by the third day after it is due;

(10) the signature of the support family; and

(11) the signature of the individual or the LAR.

(d) A support family must:

(1) give the individual or LAR at least three calendar days to review, request changes, and sign the residential agreement;

(2) ensure the residential agreement is fully executed before the individual begins living in a residence in which SFS or CFS is provided, except that an individual may begin living in one of these residences before a residential agreement is fully executed in the event of an emergency;

(3) if an individual begins living in a residence in which SFS or CFS is provided before a residential agreement is fully executed because of an emergency, as allowed by paragraph (2) of this subsection:

(A) document the details of the emergency; and

(B) ensure the residential agreement is fully executed within seven calendar days after the individual begins living in the residence; and

(4) provide one copy of the residential agreement to the individual or LAR within three business days after the date the residential agreement is fully executed.

(e) If a support family agency or continued family agency becomes aware that a modification to the provision in the residential agreement that the individual may furnish and decorate the individual's bedroom is needed based on a specific assessed need of the individual, the support family agency or continued family agency must:

(1) notify the case manager of the needed modification; and

(2) provide the case manager with the information described in subsection (n) of this section as requested by the case manager.

(f) If an individual or LAR is delinquent in payment of room or board and the support family wants to evict the individual, the support family agency or continued family agency must:

(1) notify the case manager that the individual or LAR is delinquent in the payment of room or board under the residential agreement and that the support family wants to evict the individual;

(2) after providing the notification required by paragraph (1) of this subsection, meet with the individual or LAR, including the representative payee if one has been appointed by the Social Security Administration, and the case manager to discuss the alleged non-payment of room or board and options to prevent an eviction; and

(3) if the support family intends to proceed to evict the individual at the meeting required by paragraph (2) of this subsection:

(A) give the individual or LAR a written notice of proposed eviction that allows the individual or LAR at least 60 calendar days to pay the delinquent room or board; and

(B) provide the case manager with a copy of the written notice of proposed eviction.

(g) If an individual or LAR pays the delinquent room or board within the period required by subsection (f)(3) of this section, the support family must not give the individual or LAR a notice to vacate or otherwise proceed to evict the individual.

(h) If an individual or LAR does not pay the delinquent room or board within the period required by subsection (f)(3) of this section, the support family agency or continued family agency:

(1) must report the failure to pay to one of the following, as appropriate:

(A) the Social Security Administration;

(B) the probate court that appointed the individual's guardian; or

(C) DFPS as an allegation of the LAR's exploitation or neglect of the individual;

(2) must meet with the individual or LAR and the case manager to discuss alternative living settings for the individual; and

(3) if the support family wants to proceed to evict the individual, the support family must:

(A) give the individual or LAR a written notice to vacate the residence in accordance with the residential agreement and state law; and

(B) send a copy of the written notice described in subparagraph (A) of this paragraph to the individual's case manager within one business day after the individual or LAR is given the notice.

(i) If an individual is evicted by a support family and the individual or LAR has not paid the delinquent room or board, the case manager must convene a meeting or meetings to update the IPC and IPP as described in §259.79(c) or (d) of this chapter (relating to Renewal and Revision of an IPC). If the individual or LAR wants to keep SFS or CFS on the individual's IPC, the case manager must inform the individual or LAR at the meeting or meetings that HHSC will deny CFS and SFS, if included on the individual's IPC, until the individual pays the delinquent room or board.

(j) If a support family evicts an individual who has an LAR and the LAR fails to arrange an alternative living setting for the individual, the support family agency or continued family agency must report the LAR's failure to DFPS as neglect of the individual and notify the case manager that such a report was made.

(k) If an individual pays the delinquent room or board, a support family agency or continued family agency must, within one business day after the payment, notify the individual's case manager that the individual is no longer delinquent.

(l) In each residence in which a support family agency provides SFS or a continued family agency provides CFS, the support family agency or the continued family agency must ensure that, except as provided in subsection (m) of this section:

(1) an individual has privacy in the individual's bedroom;

(2) an individual has the option not to share a bedroom with a roommate;

(3) an individual sharing a bedroom has a choice of roommates;

(4) a lock is installed on the individual's bedroom door at no cost to the individual and that:

(A) the lock is operable by the individual; and

(B) only the individual, a roommate of the individual, and the support family has keys to the individual's bedroom door;

(5) an individual can furnish and decorate the individual's bedroom;

(6) while in the residence, an individual has the freedom and support:

(A) to control the individual's schedule and activities that are not part of the implementation plan; and

(B) to have access to food at any time;

(7) an individual may have visitors of the individual's choosing at any time; and

(8) the residence is physically accessible and free of hazards to the individual.

(m) If a support family agency or continued family agency becomes aware that a modification to a requirement described in subsection (l)(1) - (7) of this section is needed based on a specific assessed need of an individual, the support family agency or continued family agency must:

(1) notify the case manager of the needed modification; and

(2) provide the case manager with the information described in subsection (n) of this section as requested by the case manager.

(n) A case manager must, if notified in accordance with subsection (e)(1) or (m)(1) of this section, convene a service planning team meeting to update the individual's IPP 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 support family agency or continued family agency's assurance that the modification will cause the individual no harm.

(o) After the service planning team updates the IPP as required by subsection (n) of this section, the support family may implement the modification.

(p) A support family agency or a continued family agency must provide ongoing recruitment, support, training, and monitoring of SFS or CFS, including:

(1) ensuring that a support family is available to serve an eligible individual;

(2) helping an individual transition from institutional services to SFS;

(3) supporting an individual living with a support family to prevent placement breakdown or admission to an institution;

(4) providing an alternative support family when an individual's placement with a support family is no longer available or appropriate;

(5) establishing a safe and permanent placement for an individual as approved by the service planning team;

(6) training the support family to provide the SFS or CFS the service planning team assigns and as documented on the individual's IPC and IPP; and

(7) monitoring and reporting to the case manager about the individual's placement, as often as needed but at least monthly, as described in §259.211(4) of this division (relating to Ongoing Support) and §259.213 of this division (relating to Monthly Monitoring).

§259.207. Pre-Placement Activities.

(a) After receiving a referral from an individual's case manager for SFS or CFS, a support family agency or continued family agency must:

(1) meet with the individual and LAR;

(2) identify the SFS or CFS individual needs;

(3) obtain any evaluations, written records, or other necessary information about the individual;

(4) determine the criteria for a support family that will meet the specific needs of the individual;

(5) locate a support family; and

(6) keep the case manager informed of placement progress.

(b) Before placement, a support family agency or continued family agency must:

(1) ensure that a support family is verified by a child-placing agency licensed by HHSC;

(2) provide orientation, to the support family on the SFS or CFS the support family agency or continued family agency identified the individual will need;

(3) introduce the individual and LAR to the support family in person; and

(4) obtain the LAR's agreement to the placement.

(c) A support family agency or a continued family agency must facilitate the completion of written agreements and authorizations between the individual's LAR, the support family, and the support family agency or continued family agency. The written documents must include:

(1) designation of who will participate in decisions about services, including any necessary delegation of authority for decisions by the LAR;

(2) a description of how visits between the individual and the LAR will be arranged;

(3) designation of who has the authority to make health care decisions for the individual, such as consenting to medical treatment, including any necessary delegation of this authority by the person with the legal responsibility to make health care decisions;

(4) preferences agreed upon for:

(A) religious issues;

(B) cultural practices;

(C) problem resolution processes; and

(D) the type and amount of involvement by the LAR;

(5) plans for routine and emergency communication and information exchange, including both oral and written communication; and

(6) documentation of the financial responsibilities of all parties.

§259.209. Placement.

After completion of the authorizations and agreements described in §259.207(c) of this division (relating to Pre-Placement Activities), a support family, an LAR, and the support family agency or continued family agency must:

(1) participate in the service planning team meeting described in §259.65(a)(1) of this chapter (relating to Development of an Enrollment IPC) in which the service planning team:

(A) develops a transition plan;

(B) includes SFS or CFS on the proposed enrollment IPC; and

(C) develops an IPP for SFS or CFS;

(2) provide copies of the agreements and authorizations listed in §259.207(c) of this division to the case manager;

(3) train the support family to provide SFS or CFS as described on the IPP; and

(4) assume the responsibility for moving the individual and the individual's possessions into the support family home.

§259.211. Ongoing Support.

After an individual is placed with a support family, a support family agency or continued family agency must:

(1) provide the support family with information on how to contact the support family agency or continued family agency staff at any time;

(2) ensure accurate documentation of service delivery in accordance with the IPC and IPP;

(3) assist the support family and the individual in accessing school and preschool services;

(4) provide monthly progress notes to the case manager, including monthly summaries of:

(A) the activities described in §259.217 of this division (relating to Support Family Duties);

(B) socialization activities;

(C) the use of non-waiver services; and

(D) other services included on the IPP;

(5) provide additional training to the support family as identified by the service planning team;

(6) participate in the service planning team meetings as requested by the case manager, the LAR, the support family agency, or the DSA; and

(7) provide to the case manager documentation of any changes to the agreements or authorizations described in §259.207(c) of this division (relating to Pre-Placement Activities) within seven calendar days after the change occurs.

§259.213. Monthly Monitoring.

(a) A support family agency or continued family agency must visit a support family's home at least once a month to determine if:

(1) placement remains beneficial to the individual;

(2) the environment remains healthy and safe; and

(3) the rights of the individual are being protected.

(b) To ensure that the individual's rights are being protected, during a visit described in subsection (a) of this section, a support family agency or continued family agency must determine if:

(1) there is no evidence of abuse, neglect, or exploitation of the individual;

(2) the individual participates in community functions;

(3) the individual has adequate personal belongings; and

(4) there are no restrictions on the individual's personal property, including money.

(c) A support family agency or continued family agency must document each monthly visit, including verification of each item listed in subsections (a) and (b) of this section, and submit the documentation to the case manager no later than seven calendar days after the visit.

(d) A support family agency or continued family agency must inform the case manager of any changes needed to an individual's IPP no later than five calendar days after the date the support family agency or continued family agency became aware of the need for a change.

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 January 10, 2023.

TRD-202300085
Karen Ray
Chief Counsel
Health and Human Services Commission
Effective date: January 30, 2023
Proposal publication date: September 2, 2022
For further information, please call: (512) 438-5077

♦ ♦ ♦

DIVISION 3. SUPPORT FAMILIES

26 TAC §259.215, §259.217

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, 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.

§259.215. Support Family Requirements.

(a) A support family must be:

(1) an agency foster home verified by a child-placing agency licensed by HHSC; and

(2) a contractor of the support family agency or continued family agency who places an individual with the support family.

(b) A support family must not provide services to more than three unrelated individuals at any one time in their home.

(c) A support family must ensure that:

(1) an individual participates in age-appropriate community activities; and

(2) the support family home environment is healthy and safe for the individual.

(d) A support family must provide services in a residence that the support family owns or leases. The residence must be a typical residence in a neighborhood and meet the needs of an individual and LAR.

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 January 10, 2023.

TRD-202300086
Karen Ray
Chief Counsel
Health and Human Services Commission
Effective date: January 30, 2023
Proposal publication date: September 2, 2022
For further information, please call: (512) 438-5077

♦ ♦ ♦

SUBCHAPTER F. ADAPTIVE AIDS, MINOR HOME MODIFICATIONS, AND CFC ERS

DIVISION 1. ADAPTIVE AIDS

26 TAC §§259.251, 259.253, 259.255, 259.257, 259.259, 259.261, 259.263, 259.265, 259.267

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, 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.

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 January 10, 2023.

TRD-202300087
Karen Ray
Chief Counsel
Health and Human Services Commission
Effective date: January 30, 2023
Proposal publication date: September 2, 2022
For further information, please call: (512) 438-5077

♦ ♦ ♦

DIVISION 2. MINOR HOME MODIFICATIONS

26 TAC §§259.271, 259.273, 259.275, 259.277, 259.279, 259.281, 259.283, 259.285, 259.287

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, 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.

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 January 10, 2023.

TRD-202300088
Karen Ray
Chief Counsel
Health and Human Services Commission
Effective date: January 30, 2023
Proposal publication date: September 2, 2022
For further information, please call: (512) 438-5077

♦ ♦ ♦

DIVISION 3. CFC ERS

26 TAC §259.289

STATUTORY AUTHORITY

The new section is authorized by Texas Government Code §531.0055, which provides that the Executive Commissioner of HHSC shall adopt rules for the operation and provision of services by the health and human services agencies, and Texas Human Resources Code §32.021, which authorizes the Executive Commissioner of HHSC to adopt rules necessary for the proper and efficient operation of the Medicaid program.

§259.289. CFC ERS.

(a) Eligibility for CFC ERS. A DSA must ensure that CFC ERS is provided only to an individual:

(1) who is not receiving SFS or CFS; and

(2) who:

(A) lives alone, who is alone for significant parts of the day, or has no regular caregiver for extended periods of time; and

(B) would otherwise require extensive routine supervision.

(b) Installing equipment.

(1) A DSA must ensure that CFC ERS equipment is installed no later than 14 business days after one of the following dates, whichever is later:

(A) the date HHSC approves the proposed IPC that includes CFC ERS; or

(B) the effective date of the individual's IPC as determined by the service planning team.

(2) At the time CFC ERS equipment is installed, a DSA must ensure that:

(A) the equipment is installed in accordance with the manufacturer's installation instructions;

(B) an initial test of the equipment is made;

(C) the equipment has an alternate power source in the event of a power failure;

(D) the individual is trained on the use of the equipment, including:

(i) demonstrating how the equipment works; and

(ii) having the individual activate an alarm call;

(E) an explanation is given to the individual that the individual must:

(i) participate in a system check each month; and

(ii) contact the CFC ERS provider if:

(I) the individual's telephone number or address changes; or

(II) one or more of the individual's responders change; and

(F) the individual is informed that a responder, in response to an alarm call, may forcibly enter the individual's home if necessary.

(3) A DSA must ensure that the date and time of the CFC ERS equipment installation and compliance with the requirements in

paragraphs (1) and (2) of this subsection are documented in the individual's record.

(c) Securing responders. A DSA must ensure that, on or before the date CFC ERS equipment is installed:

(1) an attempt is made to obtain from an individual, the names and telephone numbers of at least two responders, such as a relative or neighbor;

(2) public emergency personnel:

(A) is designated as a second responder if the individual provides the name of only one responder; or

(B) is designated as the sole responder if the individual does not provide the names of any responders; and

(3) the name and telephone number of each responder is documented in the individual's record.

(d) Conducting a system check.

(1) At least once during each calendar month a DSA must ensure that a system check is conducted on a date and time agreed to by an individual.

(2) A DSA must ensure that the date, time, and result of the system check is documented in the individual's record.

(3) If, as a result of the system check:

(A) the equipment is working properly but the individual is unable to successfully activate an alarm call, the DSA must ensure that a request is made of the case manager to convene a service planning team meeting to determine if CFC ERS meets the individual's needs; or

(B) the equipment is not working properly, the DSA must ensure that, no later than three calendar days after the date of the system check, the equipment is repaired or replaced.

(e) Failing to complete a system check. If a system check is not conducted in accordance with subsection (d)(1) of this section, a DSA must ensure that:

(1) the failure to comply is because of good cause; and

(2) the good cause is documented in an individual's record.

(f) Alarm call.

(1) A DSA must ensure that an alarm call is responded to 24 hours a day, seven days a week.

(2) A DSA must ensure that, if an alarm call is made, a CFC ERS provider:

(A) within 60 seconds of the alarm call, attempts to contact an individual to determine if an emergency exists;

(B) immediately contacts a responder, if as a result of attempting to contact the individual:

(i) the CFC ERS provider confirms there is an emergency; or

(ii) the CFC ERS provider is unable to communicate with the individual; and

(C) documents the following information in the individual's record when the information becomes available:

(i) the name of the individual;

(ii) the date and time of the alarm call, recorded in hours, minutes, and seconds;

(iii) the response time, recorded in seconds;

(iv) the time the individual is called in response to the alarm call, recorded in hours, minutes, and seconds;

(v) the name of the contacted responder, if applicable;

(vi) a brief description of the reason for the alarm call; and

(vii) if the reason for the alarm call is an emergency, a statement of how the emergency was resolved.

(3) If an alarm call results in a responder being dispatched to an individual's home for an emergency, the DSA must ensure that:

(A) the case manager receives written notice of the alarm call within one business day after the date of the alarm call;

(B) if the CFC ERS provider is a contracted provider, the DSA receives written notice from the contracted provider within one business day after the alarm call; and

(C) the written notices required by subparagraphs (A) and (B) of this paragraph are maintained in the individual's record.

(g) Equipment failure.

(1) A DSA must ensure that, if an equipment failure occurs, other than during a system check required by subsection (d)(1) of this section:

(A) the individual is informed of the equipment failure; and

(B) the equipment is replaced within one business day after the failure becomes known by the CFC ERS provider.

(2) If an individual is not informed of the equipment failure or the equipment is not replaced in compliance with paragraph (1) of this subsection, a DSA must:

(A) determine whether the failure to inform the individual or replace the equipment was because of good cause; and

(B) as soon as possible, ensure that the individual is informed of the equipment failure and the equipment is replaced.

(h) Low battery.

(1) A DSA must ensure that, if the ERS equipment registers five or more "low battery" signals in a 72-hour period:

(A) a visit to an individual's home is made to conduct a system check no later than five business days after the low battery signals occur; and

(B) if the battery is defective, the battery is replaced during the visit.

(2) If a system check or battery replacement is not made in accordance with paragraph (1) of this subsection, a DSA must:

(A) determine whether the failure to conduct a system check or replace a defective battery was because of good cause; and

(B) as soon as possible, conduct a system check and replace a defective battery.

(i) Documenting equipment failure or low battery. A DSA must ensure that the following information is documented in an individual's record:

(1) the date the equipment failure or low battery signal became known by the CFC ERS provider;

(2) the equipment or subscriber number;

(3) a description of the problem;

(4) the date the equipment or battery was repaired or replaced; and

(5) the good cause for failure to comply with subsections (g)(2)(A) and (h)(2)(A) 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 January 10, 2023.

TRD-202300089
Karen Ray
Chief Counsel
Health and Human Services Commission
Effective date: January 30, 2023
Proposal publication date: September 2, 2022
For further information, please call: (512) 438-5077

♦ ♦ ♦

SUBCHAPTER G. ADDITIONAL CMA REQUIREMENTS

26 TAC §§259.301, 259.303, 259.305, 259.307, 259.309, 259.311, 259.313, 259.315, 259.317, 259.319, 259.321

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, 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.

§259.311. CMA Service Delivery.

(a) A CMA must ensure that:

(1) a full-time case manager is assigned to provide case management to no more than 50 individuals at one time;

(2) a part-time case manager is assigned to provide case management to no more than 25 individuals at one time; and

(3) for a month in which a case manager does not meet with an individual or LAR as required by §259.79(a) of this chapter (relating to Renewal and Revision of an IPC), the case manager has an in-person or telephone contact with the individual or LAR or other persons acting on behalf of the individual, such as an advocate or family member, to provide case management.

(b) In determining the number of individuals to which a case manager will be assigned, a CMA must consider:

(1) the intensity of an individual's needs;

(2) the frequency and duration of contacts the case manager will need to make with the individual; and

(3) the amount of travel time involved in making such contacts.

(c) A CMA must have:

(1) an adequate number of case managers available to ensure the provision of case management to an individual at all times; and

(2) a written process that ensures that case managers are or can readily become familiar with individuals to whom they are not ordinarily assigned but to whom they may be required to provide case management.

(d) A CMA must ensure that a case manager participates as a member of an individual's service planning team and uses the person-centered planning process when developing or revising required documentation in accordance with this chapter and the *Community Living Assistance and Support Services Provider Manual.*

(e) A CMA must ensure that case management is provided to an individual in accordance with the individual's IPC.

(f) A CMA must submit an IPC to HHSC within the time periods required by §259.65 of this chapter (relating to Development of an Enrollment IPC) and §259.79(g)(2)(A) and (g)(3)(A) of this chapter to ensure that a DSA receives reimbursement for the provision of CLASS Program services and CFC services.

(g) A CMA must follow the process for requesting authorization to purchase dental treatment, as described in the *Community Living Assistance and Support Services Provider Manual.*

(h) If an individual may need cognitive rehabilitation therapy, a case manager must assist the individual in obtaining, in accordance with the Medicaid State Plan, a neurobehavioral or neuropsychological assessment and plan of care from a qualified professional as a non-CLASS Program service.

(i) A CMA must ensure that an individual's case manager complies with §259.205 of this chapter (relating to Residential Agreements, Requirements for Provider-Controlled Residential Settings, and Support Family Agency and Continued Family Agency Functions).

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 January 10, 2023.

TRD-202300090
Karen Ray
Chief Counsel
Health and Human Services Commission
Effective date: January 30, 2023
Proposal publication date: September 2, 2022
For further information, please call: (512) 438-5077

♦ ♦ ♦

SUBCHAPTER H. ADDITIONAL DSA REQUIREMENTS

26 TAC §§259.351, 259.353, 259.355, 259.357, 259.359 - 259.361, 259.363, 259.365, 259.367, 259.369, 259.371, 259.373

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, 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.

§259.355. Qualifications of DSA Staff Persons.

(a) A DSA must ensure that a staff person meets the requirements of this section.

(b) A service provider for a direct service must meet the qualifications in this subsection and in subsection (d) of this section.

(1) A service provider for a direct service:

(A) must be at least 18 years of age; and

(B) except as provided by paragraphs (2) and (3) of this subsection, may not be a relative or guardian of the individual to whom the service provider is providing the direct service.

(2) A service provider of transportation as a habilitation activity, prevocational services, respite, employment assistance, supported employment, or CFC PAS/HAB may be a relative or guardian of the individual unless prohibited by subsection (d)(21) of this section.

(3) A service provider of minor home modifications may be a relative or guardian of the individual.

(c) A DSA must have a full-time or part-time program director who:

(1) manages and oversees the DSA's operations including the provision of CLASS Program services and CFC services to individuals enrolled with the DSA and has:

(A) a bachelor's degree in a health and human services field and two years' work experience in the delivery of services and supports to persons with related conditions or similar disabilities; or

(B) one of the following:

(i) a high school diploma and four years' work experience in the delivery of services and supports to persons with related conditions or similar disabilities; or

(ii) a high school equivalency certificate issued in accordance with the law of the issuing state and four years' work experience in the delivery of services and supports to persons with related conditions or similar disabilities;

(2) is at least 18 years of age;

(3) is an employee of the DSA; and

(4) is not a relative of an individual being served by the DSA.

(d) A DSA must ensure that CLASS Program services and CFC services are provided by qualified service providers in accordance with this subsection.

(1) A service provider of registered nursing and of specialized registered nursing must be an RN.

(2) A service provider of licensed vocational nursing and of specialized licensed vocational nursing must be a licensed vocational nurse.

(3) A service provider of occupational therapy must be an occupational therapist or an occupational therapy assistant licensed in accordance with Texas Occupations Code Chapter 454.

(4) A service provider of physical therapy must be a physical therapist or physical therapist assistant licensed in accordance with Texas Occupations Code Chapter 453.

(5) A service provider of speech and language pathology must be a speech-language pathologist or a licensed assistant in speech-language pathology licensed in accordance with Texas Occupations Code Chapter 401.

(6) A service provider of auditory integration training/auditory enhancement training must be an audiologist or a licensed assistant in audiology licensed in accordance with Texas Occupations Code Chapter 401.

(7) A service provider of dental treatment must be a person licensed to practice dentistry, dental surgery, or dental hygiene in accordance with Texas Occupations Code Chapter 256.

(8) A service provider of dietary services must be a dietician licensed in accordance with Texas Occupations Code Chapter 701.

(9) A service provider of massage therapy must be a massage therapist licensed in accordance with Texas Occupations Code Chapter 455.

(10) A service provider of therapeutic horseback riding must be a person certified by the Professional Association of Therapeutic Horsemanship International as a therapeutic riding instructor.

(11) Hippotherapy must be provided by the following two service providers:

(A) a service provider who is certified by the Professional Association of Therapeutic Horsemanship International as a therapeutic riding instructor; and

(B) a service provider who is:

(i) an occupational therapist licensed in accordance with Texas Occupations Code Chapter 454;

(ii) an occupational therapy assistant licensed in accordance with Texas Occupations Code Chapter 454;

(iii) a physical therapist licensed in accordance with Texas Occupations Code Chapter 453; or

(iv) a physical therapist assistant licensed in accordance with Texas Occupations Code Chapter 453.

(12) A service provider of recreational therapy must be a person:

(A) who holds a credential as a certified therapeutic recreation specialist awarded by the National Council of Therapeutic Recreation Certification; or

(B) who is certified as a therapeutic recreation specialist by the Consortium for Therapeutic Recreation/Activities Certification, Inc.

(13) A service provider of music therapy is a person who holds a credential as a board certified music therapist awarded by the Certification Board for Music Therapists.

(14) A service provider of aquatic therapy must:

(A) be:

(i) a massage therapist licensed in accordance with Texas Occupations Code Chapter 455;

(ii) a person who holds a credential as a certified therapeutic recreation specialist awarded by the National Council of Therapeutic Recreation Certification; or

(iii) a person who is certified as a therapeutic recreation specialist by the Consortium for Therapeutic Recreation/Activities Certification, Inc.; and

(B) hold a certificate of completion of the "Basic Water Rescue" course from the American Red Cross or be certified by the American Red Cross as a lifeguard.

(15) A service provider of behavioral support must:

(A) be one of the following:

(i) a psychologist licensed in accordance with Texas Occupations Code Chapter 501;

(ii) a provisional license holder licensed in accordance with Texas Occupations Code Chapter 501;

(iii) a psychological associate licensed in accordance with Texas Occupations Code Chapter 501;

(iv) a clinical social worker licensed in accordance with Texas Occupations Code Chapter 505;

(v) a licensed professional counselor licensed in accordance with Texas Occupations Code Chapter 503; or

(vi) a behavior analyst certified by the Behavior Analyst Certification Board, Inc.; and

(B) have received training in behavioral support or have experience in providing behavioral support.

(16) A service provider of cognitive rehabilitation therapy must be:

(A) a psychologist licensed in accordance with Texas Occupations Code Chapter 501;

(B) a speech-language pathologist licensed in accordance with Texas Occupations Code Chapter 401; or

(C) an occupational therapist licensed in accordance with Texas Occupations Code Chapter 454.

(17) A service provider of prevocational services must have:

(A) a bachelor's degree in a health and human services field, and two years' work experience in the delivery of services and supports to persons with related conditions or similar disabilities; or

(B) one of the following:

(i) a high school diploma and four years' work experience in the delivery of services and supports to persons with related conditions or similar disabilities; or

(ii) a high school equivalency certificate issued in accordance with the law of the issuing state and four years' work experience in the delivery of services and supports to persons with related conditions or similar disabilities.

(18) A service provider of employment assistance and a service provider of supported employment must have:

(A) a bachelor's degree in rehabilitation, business, marketing, or a related human services field with six months of paid or unpaid experience providing services to people with disabilities;

(B) an associate's degree in rehabilitation, business, marketing, or a related human services field with one year of paid or unpaid experience providing services to people with disabilities; or

(C) a high school diploma or a certificate recognized by a state as the equivalent of a high school diploma, with two years of paid or unpaid experience providing services to people with disabilities.

(19) Documentation of the experience required by paragraph (18) of this subsection must include:

(A) for paid experience, a written statement from a person who paid for the service or supervised the provision of the service; and

(B) for unpaid experience, a written statement from a person who has personal knowledge of the experience.

(20) A service provider of transportation as a habilitation activity or respite who is hired on or after July 1, 2015 must have:

(A) a high school diploma;

(B) a certificate recognized by a state as the equivalent of a high school diploma; or

(C) both of the following:

(i) a successfully completed written competency-based assessment demonstrating the service provider's ability to assist with ADLs and IADLs required for the individual to whom the service provider will provide transportation as a habilitation activity or respite; and

(ii) at least three written personal references from persons who are not relatives of the service provider that evidence the service provider's ability to provide a safe and healthy environment for the individual.

(21) A service provider of transportation as a habilitation activity, prevocational services, respite, employment assistance, supported employment, or CFC PAS/HAB may not be:

(A) the parent of the individual if the individual is under 18 years of age; or

(B) the spouse of the individual.

(22) A service provider of SFS or CFS must meet the requirements described in §259.215(a) of this chapter (relating to Support Family Requirements).

(23) A service provider of CFC PAS/HAB must:

(A) have:

(i) a high school diploma;

(ii) a certificate recognized by a state as the equivalent of a high school diploma; or

(iii) both of the following:

(I) a successfully completed written competency-based assessment demonstrating the service provider's ability to perform CFC PAS/HAB tasks, including an ability to perform CFC PAS/HAB tasks required for the individual to whom the service provider will provide CFC PAS/HAB; and

(II) at least three written personal references from persons not related by blood that evidence the service provider's ability to provide a safe and healthy environment for the individual; and

(B) meet any other qualifications requested by the individual or LAR based on the individual's needs and preferences.

(e) A DSA may not contract with or employ a service provider who is employed by or contracting with a CMA to provide case management to an individual served by the DSA.

(f) A DSA must ensure that a staff person who transports an individual in a vehicle has:

(1) a current Texas driver's license; and

(2) vehicle liability insurance in accordance with 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 January 10, 2023.

TRD-202300091
Karen Ray
Chief Counsel
Health and Human Services Commission
Effective date: January 30, 2023
Proposal publication date: September 2, 2022
For further information, please call: (512) 438-5077

♦ ♦ ♦

SUBCHAPTER I. FISCAL MONITORING

26 TAC §259.401

STATUTORY AUTHORITY

The new section is authorized by Texas Government Code §531.0055, which provides that the Executive Commissioner of HHSC shall adopt rules for the operation and provision of services by the health and human services agencies, and Texas Human Resources Code §32.021, which authorizes the Executive Commissioner of HHSC to adopt rules necessary 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 January 10, 2023.

TRD-202300093
Karen Ray
Chief Counsel
Health and Human Services Commission
Effective date: January 30, 2023
Proposal publication date: September 2, 2022
For further information, please call: (512) 438-5077

♦ ♦ ♦

SUBCHAPTER J. DECLARATION OF DISASTER

26 TAC §259.451

STATUTORY AUTHORITY

The new section is authorized by Texas Government Code §531.0055, which provides that the Executive Commissioner of HHSC shall adopt rules for the operation and provision of services by the health and human services agencies, and Texas Human Resources Code §32.021, which authorizes the Executive Commissioner of HHSC to adopt rules necessary 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 January 10, 2023.

TRD-202300094
Karen Ray
Chief Counsel
Health and Human Services Commission
Effective date: January 30, 2023
Proposal publication date: September 2, 2022
For further information, please call: (512) 438-5077

♦ ♦ ♦

TITLE 34. PUBLIC FINANCE

PART 1. COMPTROLLER OF PUBLIC ACCOUNTS

CHAPTER 3. TAX ADMINISTRATION

SUBCHAPTER O. STATE AND LOCAL SALES AND USE TAXES

34 TAC §3.334

The Comptroller of Public Accounts adopts amendments to §3.334, concerning local sales and use taxes, with changes to the proposed text as published in the September 23, 2022, issue of the *Texas Register* (47 TexReg 6158). The rule will be republished.

Procedural Background.

The comptroller originally published a notice of proposed rulemaking in the January 3, 2020, issue of the *Texas Register* (45 TexReg 98). After publication, the comptroller extended the 30-day public comment period to 90 days. In addition, the comptroller held a public hearing on February 4, 2020. The comptroller scrutinized the comments, made some changes, and rejected others. The comptroller published a final rule in the May 22, 2020, issue of the *Texas Register* (45 TexReg 3499).

The Cities of Round Rock, Coppell, DeSoto, Humble, Carrollton, and Farmers Branch filed a lawsuit challenging the validity of the comptroller's interpretation and application of the statutory term "place of business." The litigation has been consolidated and is pending in Cause No. D-1-GN-21-003198, *City of Coppell, Texas, et al. v. Glenn Hegar,* in the 201st District Court of Travis County Texas.

The district court found that the comptroller failed to substantially comply with one or more of the procedural requirements for the notice of proposed rule (Government Code, §2001.024) when the comptroller proposed §3.334(b)(5). The court remanded §3.334(b)(5) to give the comptroller the opportunity to either revise or readopt it through established procedure. Accordingly, on September 23, 2022, the comptroller published a notice of proposed rule amendment that revised §3.334(b)(5) and other portions of the rule, with an explanation to augment the explanations in the notice of proposed rulemaking published on January 3, 2020, and the order adopting amendments to §3.334 published on May 22, 2020 (47 TexReg 6158).

The comptroller also held a public hearing on October 17, 2022.

Amendments.

The comptroller adopts the proposed amendment to subsection (a)(9):

"(9) Fulfill--To complete an order by transferring possession of a taxable item to a purchaser, or to ship or deliver a taxable item to a location designated by the purchaser. The term does not include receiving or tracking an order, determining shipping costs, managing inventory, or other activities that do not involve the transfer, shipment, or delivery of a taxable item to the purchaser or to a location designated by the purchaser."

The amendment is intended to make the language more consistent with Tax Code, §321.203(c-1). The comptroller received no comments regarding this proposed amendment.

The comptroller adopts the proposed amendment to the definition of "place of business of the seller" in subsection (a)(16), with the addition of the word "usually" (italicized in the preamble to show the change from the proposed rule):

"(16) Place of business of the seller - general definition--A place of business of the seller must be an established outlet, office, or location operated by a seller for the purpose of receiving orders for taxable items from persons other than employees, independent contractors, and natural persons affiliated with the seller. An "established outlet, office, or location" *usually* requires staffing by one or more sales personnel. The term does not include a computer server, Internet protocol address, domain name, website, or software application. The "purpose" element of the definition may be established by proof that sales personnel of the seller receive three or more orders for taxable items at the facility during the calendar year. ..."

The comptroller adds the word "usually" to clarify that the presence of sales personnel is not an absolute requirement, but rather, an important factor that will often determine whether an outlet, office, or location is a "place of business." The comptroller received comments regarding subsection (a)(16) during the public comment period; however, the comptroller disagrees with the objections to the amendment and rejects the suggested alternative language.

The comptroller adopts the proposed amendment to subsection (b)(1)(A) regarding distribution centers, manufacturing plants, storage yards, warehouses, or similar facilities. The amendment adds the sentence: "Forwarding previously received orders to the facility for fulfilment does not make the facility a place of business." The comptroller received comments regarding subsection (b)(1)(A) during the public comment period; however, the comptroller does not agree to make any further revisions.

The comptroller adopts the proposed amendment to subsection (b)(4):

"(4) An order that is received by a salesperson who is not at a place of business of the seller when the salesperson receives the order is treated as being received at the location from which the salesperson operates. Examples include orders that a salesperson receives by mail, telephone, including Voice over Internet Protocol and cellular phone calls, facsimile, and email while traveling. The location from which the salesperson operates is the principal fixed location where the salesperson conducts work-related activities. The location from which a salesperson operates will be a place of business of the seller only if the location meets the definition of a "place of business of a seller" in subsection (a)(16) of this section on its own, without regard to the orders imputed to that location by this paragraph."

The comptroller adopts the proposed amendment to subsection (b)(5) with revised examples and additional examples (italicized in the preamble to show the change from the proposed rule):

"(5) *A facility without sales personnel is usually not a "place of business of the seller." A vending machine is not "an established outlet, office, or location," and does not constitute a "place of business of the seller." Instead, a vending machine sale is treated as a sale by an itinerant vendor. See subsections (a)(10) and (c)(6). However, a walk-in retail outlet with a stock of goods available for immediate purchase through a cashier-less point of sale terminal at the outlet would be "an established outlet, office, or location" so as to constitute a "place of business of the seller" even though sales personnel are not required for every sale. A computer that operates an automated shopping cart software program is not "an established outlet, office, or location," and does not constitute a "place of business of the seller." A computer that operates an automated telephone ordering system is not "an established outlet, office, or location," and does not constitute a "place of business of the seller."*

The new text adds additional examples in response to the comments received by the comptroller; however, the comptroller otherwise declines to make any other revisions to subsection (b)(5).

The comptroller makes minor, nonsubstantive changes to subsection (c) by replacing the phrase "in this state" with "in Texas."

The comptroller adopts the proposed amendment to subsection (c)(2)(B)(ii):

"(ii) Order not fulfilled in Texas. When an order is received by a seller at a location that is not a place of business of the seller in Texas, and is fulfilled from a location outside of Texas, the sale is not consummated in Texas. However, a use is consummated at the first point in Texas where the item is stored, used, or consumed after the interstate transit has ceased. A taxable item delivered to a point in Texas is presumed to be for storage, use, or consumption at that point until the contrary is established. Local use tax should be collected as provided in subsection (d) of this section. Except as provided in subsection (i)(3) of this section, a remote seller required to collect state use tax under §3.286(b)(2) of this title must also collect local use tax."

The amendment makes the language more consistent with Tax Code, §321.205(c). The comptroller received no comments regarding this proposed amendment.

Summary of the comments.

The comptroller received oral or written comments from the following persons:

1. Jim Harrison, Assistant Finance Director, City of Bellaire (for)
2. Oscar Trevino, Mayor, City of North Richland Hills (for)
3. Steve Eggleston, City Manager, City of Andrews (for)
4. Blake Margolis, Mayor, City of Rowlett (for)
5. David Billings, Mayor, City of Fate (for)
6. Annie Spillman, Director, NFIB (against)
7. Bruce Bryan, Bryan Technical Services (against)
8. Casey Swanson, Swanson Construction Systems, LLC (against)
9. Brad and Charlie Williams, Omahas Surplus (against)

10. Kathryn Albin, Vice President, Albin Exterminating, Inc. (against)

11. Sunni Petty, Owner, Petty Family Floors (against)

12. Lisa Harrington, CEO & Founder, Abiding Strategy (against)

13. Joe Cruz, Chair, Collin County GOP Precinct 198 (against)

14. Larry Sanders (against)

15. Leenell Roach, President, Allied Compliance Services (against)

16. Curtis Wilcott, Owner, Barnes Sign Company (against)

17. Ruben Jacobo II, Superman Electric (against)

18. Liz Branigan, Mayor, City of Liberty Hill (against)

19. Carrell P. Bearden, President, Texas Motor Sports (against)

20. Stan Treider, Treider Hardware & Supply (against)

21. John Schroeder, Mayor, City of Georgetown (against)

22. D'Ann Swain, J&D Parts, LLC (against)

23. Wes Mays, Mayor, City of Coppell (against)

24. Steve Babick, Mayor, and Andrew Palacios, Mayor Pro Tem, City of Carrollton (against)

25. Craig Morgan, Mayor, City of Round Rock (against)

26. Steve Sheets, City Attorney, City of Round Rock (against)

27. Texas State Representatives Senfronia Thompson and Tom Craddock (against)

28. Jim Harris, Attorney, CASTLE (against)

29. Robert Deuell (against)

30. Bill Lindley, Town Administrator, Town of Highland Park (requested that the comptroller assess the fiscal impact of the rule on the Town; commented that a loss of sales tax may require an increase in its property tax rate triggering a vote of the citizens under Senate Bill 2, 86th Legislature, 2019; and stated that if the comptroller prevails in the rule amendment, the legislature should allow cities to amend property tax rates without the burden of Senate Bill 2)

31. Ray Wilson, Legislative Staff, Senator Bryan Hughes Office (forwarded a comment from Gregg County Judge Bill Stout expressing his concerns on the rule amendments effect on county revenue sources in addition to the effects of Senate Bill 2)

32. Jane Gray, Owner, The Paperback Shop (commented that states to which her business ships orders could benefit from sales tax money which creates problems for local governments in Texas and leaves Texas with less funds to support government infrastructure and that small businesses will face undue burdens of time and resources from having to pay tax to other states)

33. Brian Pannell, North America Tax Director, Dell Inc. (requested that the rule amendments in subsections (b)(4) and (b)(5) be changed because they conflict with the statute and because they create an overwhelming burden on Texas sellers wishing to fully comply with the rule and provide unclear application guidance)

34. John Kroll, Partner, HMWK (suggested that the comptroller solely adopt language necessary to implement House Bills 1525 and 2153, 86th Legislature, 2019, because the rule amendment is not supported by statute and is not needed to implement the recent legislation, and the policy issues are better left to the legislature)

35. David Bristol, Mayor, Town of Prosper (commented that the Town understands that the amendment could help curb abusive Chapter 380 agreements that concentrate and redistribute local sales tax from across the state to a limited number of local jurisdictions in exchange for significant rebates to corporations, but advocate for retaining historical origin-based sourcing)

36. Kyle Kasner, Managing Member, Texas City Services (requested definitions for the terms "retailer's agent," "order received," "salesperson," and "sales office"; requested that the comptroller address the "one place of business" reporting requirement for e-commerce businesses using third-party fulfillment services, and commented on purported significant costs to businesses, local governments, and the comptroller for implementation)

37. TJ Gilmore, Mayor, City of Lewisville (requested that the comptroller perform a study on the potential impacts of the rule amendment that addresses creating a competitive disadvantage for economic development and the estimated revenue loss associated with the rule amendment; addresses the impacts of current and emerging technology; and addresses causing unwarranted economic hardship for certain cities, including Lewisville)

38. John Christian, Director - Controversy Resolution, Ryan LLC (commented that the rule amendment improperly conflates "receipt" of an order with communicating, transmitting, or routing an order through a computer server, software program, or automated telephone ordering system thereby improperly sourcing local sales tax without regard to where the seller actually "received" the order by accessing and accepting it)

39. Dan Butcher, Clark Hill (requested that the rule amendment except sales subject to economic development agreements entered into prior to the effective date of the rule for the remaining term of those agreements)

Summary of the Factual Bases for the Rule.

In 2018, the United States Supreme Court decision in *South Dakota v. Wayfair,* Inc., 138 S. Ct. 2080 (June 21, 2018) expanded the states' authority to impose use tax collection obligations on sellers, even if the sellers have no physical presence in a jurisdiction. The rule expands the local tax collection obligations of such sellers.

In 2019, the legislature adopted sales and use tax legislation regarding remote sellers and marketplace sellers. House Bill 1525 and House Bill 2153. The rule incorporates these new provisions.

Over the years, the comptroller issued interpretations that were not adequately articulated in the rule. In addition, the comptroller received inquiries regarding the tax treatment of various business structures that were not adequately addressed in the rule. The rule more explicitly addresses these matters in the revisions to the definition of "place of business of the seller" in subsection (a)(16), and the application of that definition in subsections (b)(1), (b)(4), and (b)(5).

The factual bases for the specific revisions are stated in the concise statement of reasons for and against, and in the reasons why the comptroller disagrees with party submissions and proposals.

Concise Statement of Reasons For and Against.

Pursuant to Government Code, §2001.030, Mr. Harris requested a concise statement of the principal reasons for and against the adoption of the rule and an agency statement of its reasons for overruling the considerations urged against adoption. This concise summary is followed by a more detailed explanation.

The comments against adoption of the rule focused on the comptroller's definition of "place of business" in subsection (a)(16) and its application in subsections (b)(1), (b)(4), and (b)(5). The commenters' principal reasons against adoption were:

The rule is inconsistent with the comptroller's prior interpretations.

There is no legitimate reason to justify changing the rule.

The rule is inconsistent with the statute.

The comptroller misinterpreted the legislative history.

The comptroller misinterpreted or disregarded its own precedent.

The rule will create confusion.

A fulfillment warehouse is inherently a "place of business."

The rule will have a negative fiscal impact on individual jurisdictions and in the aggregate.

The proposed rule will increase compliance costs, particularly for small businesses.

The comptroller should study the economic impact before changing the rule.

The proposed rule will impair economic development agreements and will place Texas at a competitive disadvantage.

The rule conflicts with the Internet Tax Freedom Act.

The commenters supporting adoption of the rule expressed the need to address businesses that have been organized to channel local sales tax revenue to select cities in exchange for agreements with the cities to share tax revenue, at the expense of other cities.

The comptroller's principal reason for adoption is that the rule accurately states the intent of the legislature and more clearly states the comptroller's interpretation of the statutes. For this reason, the comptroller is moving forward with adoption.

Under the statutory language, not every business location is a "place of business of the retailer," and the legislature could not have intended that a computer server or software program would be "an established outlet, office, or location operated by the retailer or the retailer's agent or employee." Instead, the statutory language contemplates a facility with sales personnel who are authorized to receive orders. That is why the statute requires each "place of business" to have a sales tax permit.

This interpretation is supported by the legislative history of the 1979 statute that adopted the definition of "place of business," and the subsequent 1981 legislation. The legislature intended to reverse the result of the *Dunigan Tool* litigation, in which the court had found that a fulfillment warehouse was a place of business. The comptroller articulated this interpretation in a 1985 hearing decision and applied the reasoning in subsequent rulings. Consistent with the legislative history, the legislative intent, and comptroller precedent, the rule recognizes that a fulfillment warehouse is not automatically a "place of business of the retailer."

The rule does not prevent economic development agreements between cities and fulfillment warehouses. The statute allows local tax to be sourced to the fulfillment location, provided that the fulfillment location is a "place of business." The only effect of the rule is to more clearly state the requirements for a fulfillment warehouse to be a "place of business."

Some commenters stated that the rule does not fully recognize that a "single place of business" in the state is entitled to source all local sales tax to that location. Under that interpretation, a business could set up a subsidiary with a single place of business and source all local sales tax to that location, even if the location had no involvement with the transactions. The comptroller declined to follow that interpretation when it amended the rule in 2014, and it carries forward the amendment into the current rule.

The comptroller also received comments that the rule will prevent small businesses from sourcing all sales to their single places of business. However, a small business may continue to source its sales to its single place of business if the order is received at that location, the order is fulfilled at that location, or the order is delivered to the customer at that location.

The potential conflict between the commenters and the other comments disputing the legislative intent, legislative history, and comptroller precedent are all reasons for the rulemaking. The comptroller's interpretation needs to be clearly stated in the rule. If the interpretation is disputed, it can then be challenged in court.

Many of the commenters for and against the rule based their comments on whether their jurisdictions will gain or lose tax revenue. As will be explained, the comptroller does not have enough data on the business operations of each business to quantify the effect on each jurisdiction. However, the existence of revenue winners and losers does not affect the validity of the rule. The validity of the rule depends on whether the rule is a proper interpretation of the statute.

Similarly, many taxpayers commented that compliance with the rule will be harder than their current practice. However, difficulty of compliance does not affect the validity of the rule. The validity of the rule depends on whether the rule is a proper interpretation of the statute.

Finally, the rule does not violate the Internet Tax Freedom Act because it does not discriminate against the Internet.

Reasons Why the Comptroller Disagrees With Party Submissions and Proposals.

The comptroller disagrees with the parties' submissions and proposals for the following reasons:

The amended rule is not shifting from origin sourcing to destination sourcing.

Some comments mistakenly alleged that the proposed rule would result in a wholesale policy change from origin sourcing to destination sourcing. There cannot be a wholesale change because the consummation statutes have never been origin-based. From 1979 to the present, there have been four sourcing possibilities. Local taxes may be sourced to the point where the order was received, the point from which the order was shipped or delivered, the point to which the order was shipped or delivered, or the first point in the state where the item is stored, used, or consumed. See 66th Legislature, 1979, Ch. 624; Tax Code, §321.203 and §321.205. Even the expression "origin" sourcing is something of a misnomer, since local taxes

have never been based on the point where a product was designed, developed, or manufactured.

Explanation of the definition of "place of business of the seller."

The rule uses "place of business of the seller," while the statute uses "place of business of the retailer." See Tax Code, §321.002(3)(A). Either term can be used because the terms "seller" and "retailer" are synonymous for sales and use tax purposes. See Tax Code, §151.008. However, use of the term "retailer" could be confusing. In ordinary usage, the term might exclude wholesalers. But, for sales and use tax, the term "retailer" is statutorily defined to include both retailers and wholesalers. Tax Code, §151.008. Therefore, to avoid potential confusion, the rule uses "place of business of the seller."

The definition of "place of business of the seller" in subsection (a)(16) comes into play in determining where a local sale or use is consummated. The location of the consummation can be affected by whether an order is received at a "place of business of the seller" in Texas and whether the seller ships or delivers the item from a "place of business of the seller" in Texas.

The first sentence of subsection (a)(16) states: "A place of business of the seller must be an established outlet, office, or location operated by a seller for the purpose of receiving orders for taxable items from persons other than employees, independent contractors, and natural persons affiliated with the seller." This definition tracks the statutory definition, but adds a qualifier from the prior rule, which would allow a facility to make in-house courtesy sales without becoming a place of business.

In the *City of Webster* litigation, the court of appeals stated: "we do not determine whether a place of business must be 'an established outlet, office, or location operated by the retailer or the retailer's agent or employee,' see *id.,* as appellees do not raise this issue." *Combs v. City of Webster,* 311 S.W.3d 85, 96 at n. 7 (Tex. App.-Austin 2009, pet. denied). The first sentence of the definition is worded in the imperative to clearly answer that unanswered question. The comptroller interprets the statute to mean that a place of business of the seller must be an established outlet, office, or location operated by a seller for the purpose of receiving orders for taxable items.

Some commenters asserted that a "place of business" does not have to be operated for the purpose of receiving orders for taxable items. According to the comments submitted by Mr. Harris:

"The statutory definition of 'place of business,' Tax Code, §321.002(3)(A), describes five different place of business categories: established outlets; established offices; established locations operated by the retailer or the retailer's agent or employee for the purpose of receiving orders for taxable items; any location at which three or more orders are received by the retailer during a calendar year; and warehouses, storage yards, or manufacturing plants that receive three or more orders in a calendar year. Tax Code, §321.002(a)(3)(A). The first two categories need not have as a purpose receipt of orders and do not need to receive orders to be a place of business."

Mr. Harris further commented that the function of an "established office" is "business." This interpretation would mean that any facility operated by a seller for a business purpose would be a "place of business" -- executive offices, administrative offices, research and development laboratories, maintenance facilities, vehicle garages, etc. The comptroller rejects this interpretation as unreasonable. The 1979 legislation, which adopted the definition of "place of business," required each "place of business" to have a sales tax permit. See 66th Legislature, 1979, Ch. 624, §3. That requirement is now in Tax Code, §321.303. It is unreasonable to think that the legislature intended that a maintenance facility would be required to have a sales tax permit. A more reasonable interpretation is that a "place of business," whether it is an outlet, office, or location, "must be operated by a seller for the purpose of receiving orders for taxable items," as the rule requires.

Mr. Harris' interpretation may be incompatible with the commenters who claim the right to source all their sales to their "single place of business." If every taxpayer facility with a business purpose is in fact a "place of business," many of these commenters may have multiple places of businesses.

Commenters also alleged that there is no reason for the comptroller to amend its rule. But the alternative interpretation proposed by Mr. Harris, regarding the application of the "purpose" requirement, illustrates the need. The adopted rule provides a clearer statement of the comptroller's interpretation, which can be challenged in court by those who disagree.

Mr. Kroll commented on the portion of the definition of "place of business" that excludes orders from "employees, independent contractors, and natural persons affiliated with the seller." He commented that the language seemed to contradict the statutory language and would impact captive purchasing companies. The comptroller disagrees. The language has been in the rule since 2014. It allows a facility to make in-house courtesy sales to workers at the facility without the facility becoming a place of business. Courtesy sales to workers are insufficient to conclude that a facility was established for the purpose of receiving orders. And, the exclusion of staff purchases from a facility should not affect the purchase of items for that facility by a captive purchasing company.

The second sentence of the definition of "place of business of the seller" in subsection (a)(16) states: "An 'established outlet, office, or location' usually requires staffing by one or more sales personnel."

The comptroller adds the word "usually" to clarify that the presence of sales personnel is not an absolute requirement, but rather, an important factor that will often determine whether an outlet, office, or location is a "place of business." In subsequent subsections of the rule, the comptroller describes some examples.

Commenters observed that the statutory definition of "place of business" does not mention sales personnel. However, an agency rule need not be limited to parroting the words of the statute. The courts have said that a rule may not impose additional burdens, conditions, or restrictions in excess of or inconsistent with the relevant statutory provisions. *State Office of Pub. Util. Counsel v. Pub. Util. Comm'n of Tex.,* 131 S.W.3d 314, 321 (Tex. App.-Austin 2004, pet. denied). The implication of that statement is that a rule may impose additional burdens, conditions, or restrictions that are consistent with the relevant statutory provisions. E.g., *id.* at 342 (court approved "formulaic means" not specified in the statute). Previous tax cases have approved comptroller rules that articulated requirements that were not explicitly stated in the statute. *Perry Homes v. Strayhorn,* 108 S.W.3d 444, 448 (Tex. App.-Austin 2003, no pet.); *DuPont Photomasks, Inc. v. Strayhorn,* 219 S.W.3d 414, 422 (Tex. App.-Austin 2006, pet. denied).

In this case, the comptroller is adding the sales personnel language to provide an objective criterion for buyers, sellers, and

auditors to consider. Does a facility have sales personnel? If it does, it is likely a "place of business" -- an established outlet, office, or location operated by a seller for the purpose of receiving orders for taxable items. If the facility does not have sales personnel, it is likely not a "place of business."

Mr. Kasner and Mr. Kroll commented that the rule does not define "sales personnel." While the comptroller understands the desire for definite definitions, there are too many variables in the business world surrounding this term. Therefore, the comptroller declines to define the term. The comptroller expects that in many situations, it will be clear that a facility has sales personnel, and in other situations, it will be clear that a facility does not have sales personnel. In those instances where it is clear, the reference to sales personnel will be a good rule-of-thumb, and in the remaining instances, the rule will be no more uncertain than the statute.

The statute uses 82 words to define "place of business of the retailer":

"'Place of business of the retailer' means an established outlet, office, or location operated by the retailer or the retailer's agent or employee for the purpose of receiving orders for taxable items and includes any location at which three or more orders are received by the retailer during a calendar year. A warehouse, storage yard, or manufacturing plant is not a 'place of business of the retailer' unless at least three orders are received by the retailer during the calendar year at the warehouse, storage yard, or manufacturing plant."

The definition is narrower than the ordinary meaning of the phrase "place of business." The definition includes the concept of receiving orders for taxable items, which excludes locations ordinarily considered to be places of business, such as executive offices. Additionally, a location is not a "place of business" simply because it receives orders. If that were the case, the legislature could have defined the phrase with those very few words, which can be counted on one hand.

Ultimately, the statutory test is a combination of elements -- whether a facility is an established outlet, office, or location operated by a seller for the purpose of receiving orders for taxable items. The statutory references to an "established outlet, office, or location," operation "by the retailer or the retailer's agent or employee," and "receiving orders for taxable items" all suggest that the presence of sales personnel is a reasonable criterion for evaluating whether a facility is a "place of business."

The reference to sales personnel is also consistent with the general objectives of the local tax statute. "It is a fundamental principle of statutory construction and indeed of language itself that words' meanings cannot be determined in isolation but must be drawn from the context in which they are used." *TGS-NOPEC Geophysical Co. v. Combs,* 340 S.W.3d 432, 441 (Tex. 2011). The context for the "place of business" definition is not limited to the consummation statutes. It also extends to the sales tax permit requirement. The requirement of a sales tax permit for each "place of business" suggests that presence of sales personnel is a reasonable factor to consider.

The reference to sales personnel is also supported by legislative history. The Texas legislature added the definition of "place of business of the retailer" in 1979. Senate Bill 582, 66th Legislature, 1979, Ch. 624, Art. 1, §3. Mr. Harris commented: "Nothing in those documents suggests even remotely that the definition was intended to require the presence of sales personnel at a place of business." The comptroller disagrees.

During the 1979 session of the legislature, a House Study Group analysis stated that the "bill is necessary to protect the state from possible consequences of the pending court suits." The analysis specifically referenced "Dunigan Tool and Supply v. Bullock" as one of those suits. The analysis is available at the Legislative Reference Library website at https://lrl.texas.gov/scanned/hroBillAnalyses/66-0/SB582.pdf.

In the *Dunigan* litigation, sales personnel took orders that were forwarded to pipe storage facilities where the orders were fulfilled. The district court and the court of appeals sourced the transactions to the pipe storage facilities even though the facilities had no sales personnel. *Bullock v. Dunigan Tool & Supply Co.,* 588 S.W.2d 633 (Tex. Civ. App. - Austin, Sept. 6, 1979, writ ref'd n.r.e.).

The 1979 House Study Group bill analysis states that the bill was intended to protect the state from the consequences of the *Dunnigan* litigation. Thus, the legislative intent was that a fulfillment warehouse without sales personnel would not be a "place of business."

Mr. Harris commented that the "mentions of salesmen in the opinion were purely incidental." But the legislature did not think so. In a subsequent October 2, 1980, Interim Report of the House Ways and Means Committee, the committee considered whether to allow the recently adopted statutory definition of "place of business" to expire. The committee described the consequence: "The location of sale would no longer be tied to permitted outlets, salesmen's locations, or sales offices." Interim Report at 20. The references to salesmen's locations and sales offices were not incidental. They confirm the comptroller's interpretation that the presence of sales personnel is relevant to determine whether a location is a "place of business." "Location" was intended to mean "salesmen's locations" and "office" was intended to mean "sales office."

In the subsequent legislative session, the legislature did not allow the "place of business" definition to expire, and instead, made it permanent. House Bill 1838, 67th Legislature, 1979, Ch. 838, §1. The 1979 definition and its legislative history remain in place today.

Several commenters asserted that the comptroller has never before stated that the presence of sales personnel should be a factor in determining whether a location was an established "place of business." The comptroller rejects the suggestion that the agency cannot adopt a rule unless the content of the rule has been previously published by the agency. Moreover, the reference to sales personnel is a logical extension of prior comptroller statements, including statements regarding fulfillment warehouses and computer servers.

The comptroller's treatment of fulfillment warehouses goes as far back as Comptroller's Decision No. 15,654 (1985), which stated (emphasis added):

"But it seems to the administrative law judge that the legislature was amending the law if not entirely in reaction to the then-pending case of *Bullock v. Dunigan Tool & Supply Co.,* 588 S.W.2d 633 (Tex. Civ. App.-Texarkana, writ ref'd n.r.e.), at least partly in reaction to that case. And if that be so, then the legislature did not want warehousing and storage facilities (many of which are outside city limits) to be the places where sales were consummated for local sales tax purposes unless orders were actually received there by personnel working there, but wanted the office location out of which the *salesman* operated to be the place where the sales were consummated."

The 2014 version of §3.334 (39 TexReg 9597 at 9605) (STAR Accession No. 201501004R) discussed fulfillment warehouses:

"(2) Distribution centers, manufacturing plants, storage yards, warehouses, and similar facilities.

(A) A distribution center, manufacturing plant, storage yard, warehouse, or similar facility operated by a seller at which the seller receives three or more orders for taxable items during the calendar year is a place of business.

(B) If a salesperson who receives three or more orders for taxable items within a calendar year is assigned to work from, or to work at, a distribution center, manufacturing plant, storage yard, warehouse, or similar facility operated by a seller, then the facility is a place of business.

(C) If a location that is a place of business of the seller, such as a sales office, is in the same building as a distribution center, manufacturing plant, storage yard, warehouse, or similar facility operated by a seller, then the entire facility is a place of business of the seller."

In 2016, STAR Accession No. 201606995L (June 1, 2016) also discussed fulfillment warehouses:

"The warehouse from which the person ships those items is not a place of business, unless the warehouse separately qualifies as a place of business."

And, in 2019, STAR Accession No. 201906015L (June 13, 2019) discussed fulfillment warehouses:

"Scenario One: Taxpayer Retailer operates fulfillment centers in Texas that are not open to the public. ... When an order is received at a location that is not a place or business and is fulfilled in Texas at a location that is not a place of business, the sale is consummated at the location in Texas to which the order is shipped. See Rule 3.334(h)(3)(D). For Scenario One, local sales and use tax is due based on the location where the order is delivered."

Each of these documents, which the comptroller indexed and made available for public inspection on its State Tax Automated Research (STAR) System, is consistent with the statement in the rule that an established outlet, office, or location usually requires staffing by one or more sales personnel.

Representative Senfronia Thompson, Representative Tom Craddick, and former Senator Robert Deuell commented that the rule changes the intention or language of the 2009 legislative amendment to the local tax consummation statutes. However, the 2009 legislation did not alter the language at issue or change the comptroller's existing interpretation of that language. See Acts 81st, Legislature, 2009, Ch. 1360, Sec. 4, effective September 1, 2009.

The third sentence in the definition of "place of business" in subsection (a)(16) states: "The term does not include a computer server, Internet protocol address, domain name, website, or software application." This sentence is consistent with the concept that a "place of business" usually requires the presence of personnel to receive the order. Even a broad, every-day usage of the term "place of business" does not include computer servers, Internet protocol addresses, and websites. Many sellers house their computer servers at a co-location facility or rent computer server space at a managed hosting site. An ordinary person would not consider the physical locations of these computer servers to be places of business of the seller. Similarly, an ordinary person would not perceive an Internet protocol address, a domain name, or a website as an "established outlet, office, or location" so as to constitute a place of business in ordinary usage. And, in this statutory context, which is narrower than ordinary usage, the comptroller has concluded that the legislature could not have intended that the receipt of an order by an automated mechanical device would make the device an "established outlet, office or location operated by the retailer."

While the discussion of computer servers was added to the rule in 2020, the comptroller previously advised taxpayers that the location of the server does not create a "place of business" for purposes of the local tax collection and that orders placed on a website or though applications and processed and routed by servers are not "received at" a place of business. See STAR Accession Nos. 200510723L (October 6, 2005), 200605592L (May 17, 2006), and 201906015L (June 13, 2019).

Each of these documents, which the comptroller indexed and made available for public inspection on its STAR System, is consistent with the language in the rule that an established outlet, office, or location usually requires staffing by one or more sales personnel.

In addition to being a reasonable interpretation of the statute and consistent with precedent, the comptroller's interpretation that computer servers and the software applications that run on the servers are not places of business, is a practical interpretation that will facilitate uniformity and ease of administration for taxpayers and auditors. Website orders can be received at multiple physical addresses - any locations that have Internet access. A website order is sent to an Internet protocol (IP) address. An IP address is not a permanent physical address. It is a series of numbers assigned to a device, such as a computer server. Websites may use dynamic IP addresses that are assigned by the network upon connection and that change over time. The public IP address of a website may simply be routing orders to different, private IP addresses. Load balancers may change the IP addresses that communicate with customers. Conversely, multiple websites may be hosted at a single IP address.

The computer server receiving an order may belong to the seller or it may belong to a third party. The computer server may be situated on the seller's premises, it may be situated at a co-location facility operated by a third party, or it may be situated at a web hosting facility operated by a third party. The computer server may be one of multiple servers that serve the same website from different physical addresses as part of a cloud distribution network. The computer server may route the order to multiple other servers for load balancing purposes. Conversely, a single computer server may serve multiple websites. Also, the seller may or may not know the physical address of the server receiving the order. The physical locations of computer servers that receive website orders are often random, variable, and uncertain. The best way to treat computer servers consistently and coherently is to uniformly recognize that they are not "established" places of business of the seller.

The fourth sentence of the definition of "place of business of the seller" in subsection (a)(16) states: "The 'purpose' element of the definition may be established by proof that sales personnel of the seller received three or more orders for taxable items at the facility during the calendar year." Mr. Harris takes issue with this sentence based on the *City of Webster* opinion, which states that "a location at which a retailer received three or more orders during a calendar year can be a place of business even without separate evidence that it is a location established 'for the purpose of' receiving orders for taxable items." See *Combs v. City*

of Webster, 311 S.W.3d 85, 96 (Tex. App.-Austin 2009, pet. denied). The comptroller does not understand the conflict. If the "purpose" element of the definition may be established by proof that sales personnel of the seller received three or more orders for taxable items at the facility during the calendar year, as stated in the rule, then a location at which a retailer received three or more orders during a calendar year can be a place of business even without separate evidence that it is a location established "for the purpose of" receiving orders for taxable items, as stated in the *City of Webster* opinion.

In conclusion, regarding the definition of "place of business of the seller," the comptroller is under no illusions that the definition will eliminate all ambiguities. In many instances, the determination of whether or not particular facilities have "sales personnel" will have to be made on a case-by-case basis. But in many instances, it will be clear. And, the rule also makes clear that mere hardware installations are not "places of business of the seller." To that extent, the rule will help taxpayers understand how the comptroller interprets and intends to apply the statute.

Fulfillment warehouses and similar facilities.

The comptroller amends subsection (b)(1)(A) regarding distribution centers, manufacturing plants, storage yards, warehouses, or similar facilities to add the sentence: "The forwarding of previously received orders to the facility for fulfilment does not make the facility a place of business."

Subsection (b)(1)(A) is an application of the definition of "place of business of the seller" in subsection (a)(16). The explanation of subsection (a)(16) is also applicable to subsection (b)(1)(A).

The comptroller has expressed this interpretation many times. See Comptroller's Decision No. 15,654 (1985); former §3.334 (2014); STAR Accession No. 201606995L (June 1, 2016); and STAR Accession No. 201906015L (June 13, 2019). These rulings are all indexed and searchable on the comptroller's STAR System. However, it appears that some commenters were unaware of the rulings, or they are interpreting the rulings differently, or they disagree with the rulings. Therefore, the comptroller believes it is appropriate to add an explicit sentence to the rule so that the comptroller's interpretation will be clear and can be challenged in court by those who disagree.

Mr. Harris has advanced a contrary explanation regarding fulfillment warehouses that has superficial appeal: a warehouse cannot fulfill an order unless the warehouse has "received" the order; therefore, a fulfillment warehouse is inherently and automatically a "place of business." In the abstract, this argument may seem like a reasonable interpretation of the word "received." But not in context. When the words of the lengthy statutory definition are considered, and when the legislative history is considered, the legislature intended the opposite - a fulfillment warehouse is not automatically a "place of business" simply because orders have to be forwarded to the warehouse for fulfillment.

To be clear, a fulfillment warehouse can be a "place of business." The legislature set a low threshold of three orders for taxable items at the facility during the calendar year. However, a fulfillment warehouse is not automatically a "place of business" simply because it fulfills orders that have been previously received at other locations.

Mr. Harris also attached a report of Amit Basu, from which Mr. Harris concluded that website orders are received just once - at a fulfillment center. The comptroller draws a different conclusion. Mr. Basu states with regard to a typical website order: "Once payment and inventory is confirmed, shipment information for the order is transmitted from the eCommerce software program to a computer or terminal at the Seller's fulfilment center." There are typically two computers at two locations. The computer with the eCommerce software program communicates with customer to receive the order, accepts payment from the customer, and communicates confirmation to the customer. That is the location where the order is "received" for purposes of the consummation statutes, not the computer or terminal at the seller's fulfillment center.

An order that is received by a salesperson who is not at a place of business of the seller.

The comptroller amends subsections (b)(4) for stylistic reasons and to more fully state the comptroller's application of the definition of place of business of the seller from subsection (a)(16), particularly with regard to modern methods of communication.

The first sentence of subsection (b)(4) provides that an order that is received by a salesperson who is not at a place of business of the seller when the salesperson receives the order is treated as being received at the location from which the salesperson operates.

The second sentence of subsection (b)(4) expands upon a former subsection for traveling salespersons to specifically address orders that a salesperson receives by mail, telephone, including Voice over Internet Protocol, and cellular phone calls, facsimile, and email while traveling.

The third sentence of subsection (b)(4) states that the location from which the salesperson operates is the principal fixed location from which the salesperson conducts work-related activities. And, the fourth sentence connects subsection (b)(4) to the definition of "place of business of the seller" in subsection (a)(16).

Mr. Kroll commented that subsection (b)(4) "no longer imputes the order to the place of business where the employee is assigned, and that the new policy does not accurately or easily reflect the mobile workforce of today." Mr. Pannell commented that subsection (b)(4) deviates from Tax Code, §321.203(d)(2) and "effectively changes sourcing rules for salespersons who are assigned to regional places of business but do their principal work-related activities at other locations."

Tax Code, §321.203(d) does not impute an order to the location where a salesperson is "assigned." Instead, the statute provides that in certain circumstances, an order may be imputed to the "place of business from which the retailer's agent or employee who took the order operates." And, although an order may be imputed to a place of business of the retailer if the agent or employee operates out of that place of business, the statute does not mandate that an agent or employee be assigned to, or operate out of, a place of business. If an agent or employee does not operate out of a place of business, Tax Code, §321.203(d) has no application.

Prior to the 2020 amendment, the rule did not define the location from which a salesperson operates. The third sentence of subsection (b)(4) now provides in part: "The location from which the salesperson operates is the principal fixed location from which the salesperson conducts work-related activities..." A physical connection between the salesperson and the place of business is a reasonable interpretation of the location from which a salesperson operates. And, it would be unreasonable to allow a vendor to source sales to a place of business by merely "assigning"

a salesperson to that location in the absence of any physical connection.

The final sentence of subsection (b)(4) clarifies that the principal fixed location from which the salesperson conducts work-related activities may or may not be a place of business of the seller, depending upon whether the location meets the definitional requirements of subsection (a)(16). For example, if an entrepreneur conducts sales operations from the entrepreneur's residence, the entrepreneur will be operating out of a place of business of the seller. But if a person performs contract telemarketing from the person's residence, the person will not be operating out of a place of business of the seller because the residence is not "operated by the seller," as required by subsection (a)(16).

An order that is not received by a salesperson.

Subsection (b)(5) provides that a facility without sales personnel is usually not a place of business of the seller. The remainder of the subsection provides examples of the principle.

Subsection (b)(5) is an application of the definition of "place of business of the seller" in subsection (a)(16). The explanation of subsection (a)(16) is also applicable to subsection (b)(5).

The examples in subsection (b)(5) illustrate the concepts in subsection (a)(16). A vending machine is set up for the purpose of receiving orders and has inventory to fulfill the order. However, the comptroller has long held that a person who sells items through vending machines is an itinerant vendor. See STAR Accession No. 200111617L (November 15, 2001); December 5, 2014, issue of the *Texas Register* (39 TexReg 9597) (former §3.334(a)(10)). The vending machine is not an "established outlet, office, or location," even though it may be set up for the purpose of receiving orders.

Mr. Harris and Mr. Kasner noted that there are now cashier-less stores that essentially operate as large vending machines. This example illustrates the difficulty of articulating hard and fast rules that fit every situation. Common sense would say that a vending machine on a street corner is not an "established outlet, office, or location," but a stocked walk-in store operated by the vendor is. Usually, a walk-in store with merchandise will have some sales personnel, even if many of the sales are automated. So, subsection (b)(5) rule comports with common sense. But, the subsection concedes that there could be some atypical situations, such as a fully automated walk-in store with no sales personnel onsite.

Common sense also says that a computer that operates an automated shopping cart software program is not an "established outlet, office, or location." Subsection (b)(5) lists this situation as an example that does not constitute a "place of business."

And, common sense says that an automated telephone ordering system is not an "established outlet, office, or location." Subsection (b)(5) lists this situation as an example that does not constitute a "place of business."

Single place of business.

Mr. Kasner and Mr. Sheets commented that the rule should address the "single place of business" reporting requirement in Tax Code, §321.203(b). The rule addresses Tax Code, §321.203(b) in subsection (c), where it states: "The following rules, taken from Tax Code, §321.203 and §323.203, apply to all sellers engaged in business in this state, regardless of whether they have no place of business in Texas, a single place of business in Texas, or multiple places of business in the state." This statement in subsection (c) does not represent a change in policy because prior versions of the rule contained similar statements. See the December 5, 2014 issue of the *Texas Register* (39 TexReg 9597 at 9606); the January 1, 2016 issue of the *Texas Register* (41 TexReg 260 at 265) (former §3.334(h)(3)).

Tax Code, §321.203(b) describes the consummation principles for a seller that has only one place of business in the state. In the comptroller's view, those principles are consistent with the treatment of other sellers and do not require special treatment in the rule. Tax Code, §321.203 as a whole establishes a hierarchy among places of business involved in a transaction. If an order is fulfilled from a place of business of the seller in Texas, the sale is consummated at that location even if the order is received at another place of business in Texas (except for orders received in person). Conversely, an order is consummated at the place of business of the seller in Texas where it is received only if the order was not fulfilled from a place of business in Texas (except for orders received in person). Adopted subsection (c) reflects this hierarchy.

The statutory provision in Tax Code, §321.203(b), for a seller with a single place of business in Texas, is a recognition that the hierarchy is not required in that circumstance. The outcome will be the same regardless of whether the order is received, fulfilled, or received and fulfilled from that place of business, and regardless of whether the order is placed at that location in person - the sale will be consummated at that place of business.

Mr. Sheets commented that "the Texas Tax Code allows those retailers with only one place of business to consummate all sales at that location." Several rules of statutory construction are applicable in determining what the Tax Code allows. The Code Construction Act presumes that a just and reasonable result is intended. Government Code, §311.021. Also, the Act presumes that compliance with the United States Constitution and Texas Constitution is intended. *Id.* In the tax arena, as elsewhere, the United States Constitution requires due process. "Due process centrally concerns the fundamental fairness of governmental activity." *Quill v. North Dakota,* 504 U.S. 298, 312 (1992). "Compliance with the Clause's demands 'requires some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax'." *N. Carolina Dep't of Revenue v. The Kimberley Rice Kaestner 1992 Family Tr.,* 139 S. Ct. 2213, 2220 (2019), quoting *Quill,* 504 U.S. at 306.

Therefore, Tax Code, §321.203(b) cannot be interpreted to mean that all sales are consummated at the seller's single place of business in Texas, even if that place of business did not receive the order from the customer, did not fulfill the order to the customer, and did not serve as the location where the order was delivered to the customer. Mr. Kasner commented that many businesses now use third parties to warehouse, manage, and fulfill their products. Suppose a reseller with a single place of business in City A has a website hosted by a provider in City B that receives an order from a customer in City C. The order is then fulfilled from a third-party manufacturer's warehouse in City D and shipped to the customer in City C. To make the customer in City C pay local sales tax to City A, a jurisdiction that had no relation to the customer or the transaction, would be an unreasonable and possibly unconstitutional reading of the statute. The comptroller concludes that the legislature could not have intended that result.

Mr. Sheets, on behalf of the City of Round Rock, proposed to add specific references to Tax Code, §321.203(b) in the rule.

The comptroller declines to make the proposed revisions for the reasons stated in the preceding paragraphs. The City of Round Rock is challenging the comptroller's interpretation in the pending litigation. Again, it is appropriate to state the comptroller's interpretation in the rule so that those who disagree may challenge the interpretation in court.

The meaning of "receive."

Mr. Kasner commented that the comptroller should adopt a definition of "receive." The comptroller declined to adopt a definition in 2014, and the comptroller declines to adopt a definition now. The legislature left the term undefined, and so will the comptroller.

Mr. Christian's comments referred to a 2006 letter ruling in which the analyst stated that Internet orders are considered "received" when they are "accessed and accepted" by the taxpayer. This statement in the letter ruling does not constitute a rule. The statement in the letter ruling also illustrates the difficulty of articulating a definition. Such a definition would add two new, non-statutory words that are indefinite and also undefined - "accessed" and "accepted." And, these new words are conceptually different than the word "received."

The adopted rule does address the two circumstances that have been most prominently debated - automated website orders and fulfillment warehouses. Subsection (b) of the adopted rule articulates the comptroller's interpretation that an automated website "receives" the order, and a fulfillment warehouse does not "receive" the order when it is forwarded from the website to the warehouse. The comptroller's rationale was discussed in previous sections of this preamble.

Mr. Basu's report states that businesses typically use third-party web hosting services. He analogizes the service to a mailbox, but the service is more than that. The computer server does not just receive the order like a mailbox receives an order - a non-interactive, one-time, one-way communication from the customer. The computer also processes the order, accepts payment for the order, and sends a confirmation to the customer. While all of these interactions with the customer may not be necessary to constitute "receipt" of the order from the customer, surely the totality of the interactions do. So, the comptroller's interpretation, as reflected in subsection (b), is that the computer server receives the order, but the server is not a "place of business" because a server is not an "established outlet, office, or location operated by the retailer or the retailer's agent or employee for the purposes of receiving orders for taxable items."

And, an order received by a fully automated website cannot be "received" a second time by the fulfillment warehouse. As previously stated, when the words of the lengthy statutory definition are considered in context, and when the legislative history is considered, the legislature intended the opposite - a fulfillment warehouse is not automatically a "place of business" simply because orders have to be forwarded to the warehouse for fulfillment.

Mr. Sheets commented that the comptroller should remove the emphasis on how an order is "received." The comptroller disagrees with the characterization. The emphasis is not on how an order is received. As explained in the preceding paragraphs, the emphasis is on where the order is received and whether the facility that receives the order is a "place of business."

Retailer's agent.

Mr. Kasner commented that the comptroller should adopt a definition of "retailer's agent." The comptroller declines. The legislature did not define the term and gave no indication that the term should have any meaning other than the well-established legal meaning.

Internet.

Mr. Sheets proposed that the comptroller add a definition of the term "Internet." The comptroller declines. As a stand-alone term, the word "Internet" is used only once, in the definition of "remote seller" in subsection (a)(18), where it is used to illustrate a nonexclusive example of media through which orders may be solicited.

Fiscal impact on local governments.

The notice of the proposed amendments to the rule discussed the potential fiscal impact on cities. That discussion acknowledged that there could be some impact, but that the impact could not be quantified. The discussion will not be repeated here.

The comptroller received comments similar to those from the previous rulemaking. Many of the commenters for and against the rule base their comments on whether their jurisdictions will gain or lose tax revenue. Several cities have commented that they will lose millions of dollars in local tax revenue. The comptroller cannot verify those claims because the cities have not shared their data with the comptroller.

As will be explained, the comptroller does not have enough data on the business operations of each business within a jurisdiction to quantify the effect on each jurisdiction. However, the existence of winners and losers does not affect the validity of the rule. The validity of the rule depends on whether the rule is a proper interpretation of the statute.

The Civic Economics organization commented that the comptroller must provide meaningful data and analysis. Mr. Lindley and Mr. Gilmore similarly commented that the comptroller should conduct a study. The comptroller is not withholding data. Aggregate, nonconfidential local tax data is available on the comptroller's website. Individual taxpayer data that the comptroller cannot produce due to the confidentiality statute is insufficient to perform the analyses requested by the commenters.

Mr. Sheets suggested that the comptroller could simply review the 3,607 entries from the comptroller's economic development agreement website to see which of those agreements involve retailers whose locations within the various cities generate significant sales tax. However, that information would be insufficient. The mere fact that a retailer reports significant sales tax receipts to a local jurisdiction does not prove that the retailer is incorrectly reporting or that the retailer would change its reporting as a result of the rule. That determination would also require an understanding of the business operations of the retailer in order to determine the location or locations where the orders were received, the location or locations where the orders were fulfilled, and whether each location was or was not a "place of business." The comptroller would then have to know where and by which manner each order was received. The comptroller would then have to compare that information with how the retailer has been reporting local tax on each transaction, identify the circumstances, if any, that would require the retailer to change its methods of reporting as a result of the rule, and determine the dollar value for each transaction. The comptroller does not have sufficient information on the individual taxpayers or the taxpayers in the aggregate to make this determination.

For example, a company with an economic development agreement may be sourcing local sales tax to a jurisdiction where one of its warehouses is fulfilling the orders. Since 1985, the comp-

troller's interpretation has been that a fulfillment warehouse is not automatically a "place of business," but it may be. To be a "place of business," the company must receive at least three orders during the calendar year at the warehouse. By sourcing local sales tax to the warehouse location, the company is representing to the comptroller that the warehouse is a "place of business" that has received three or more orders. The representation may be correct. It may not be correct. The comptroller does not know unless an error is discovered during the course of an audit. Without that knowledge, the comptroller cannot say whether the company would or would not change its reporting as a result of the rule's explicit statement of the comptroller's existing policy in the rule. This same type of inquiry would have to be made for every reporting location in the state.

Mr. Kasner commented that the proposed rule will "have some amount of loss, likely in the hundreds of millions to Texas localities just due to the sheer volume of outside taxing cities Texans {sic} and their businesses." Mr. Kasner did not provide his calculation. But in the previous rulemaking, Mr. Kasner claimed that "almost $200,000,000 ($200MM) would be lost due to shipment to destinations outside Texas." However, there will be no loss as a result of the rule because shipments to destinations outside Texas are exempt from state and local sales tax. See Tax Code, §151.330(a) (Interstate Shipments, Common Carriers, and Services Across State Line) and §321.208 (State Exemptions Applicable).

Mr. Sheets also commented that there would be a loss of city tax revenue paid by rural citizens: "Given how large and rural Texas is, with many unincorporated areas where citizens live outside any city limits, there are hundreds of thousands, if not millions, of Texas citizens who will no longer be subject to local sales tax for items delivered to their homes, if those sales are made from Texas retailers over the Internet through a shopping cart website if a salesperson does not receive the order."

The comptroller rejects the premise that there are multitudes of rural Texans that will "no longer be subject to local sales tax." First, the premise inaccurately assumes that all rural Texans are currently subject to local city sales taxes. In many instances, they are not. For example, marketplace sales are consummated at the customer location. If the customer is in a rural jurisdiction that does not impose sales tax, no sales tax is due under the statute, under the former rule, or under the amended rule. Second, the premise inaccurately assumes that there will be a change in those instances in which local city sales tax is collected from rural citizens. But the rule does not change the statute. For example, if an order is fulfilled from a place of business of the seller in a city, local sales tax will continue to be due based on that location under the statute, under the former rule, and under the adopted rule.

Nevertheless, it is conceivable that the clarifications in the adopted rule will cause some vendors to recognize their noncompliance and change their reporting methods. If most buyers live within local taxing jurisdictions, a revenue loss to one local government will often, but not always, be a revenue gain to others. An aggregate revenue loss, if any, cannot be reliably determined for the same reason that the revenue gain or loss to individual jurisdictions cannot be reliably determined - the comptroller does not have enough data on the business operations of each business to identify and quantify the transactions that might be affected.

Finally, the validity of the rule does not turn on whether there will or will not be a revenue loss or gain to cities or whether it is fair or unfair to charge city sales tax to rural customers. The validity of the rule turns on whether it is an accurate application of the local tax statutes.

Economic development agreements.

The comptroller received several comments regarding economic development agreements, including a request to grandfather them. The rule does not prevent economic development agreements between cities and fulfillment warehouses. The statute allows local tax to be sourced to the fulfillment location, provided that the fulfillment location is a "place of business." The only effect of the rule is to more clearly state the requirements for a fulfillment warehouse to be a "place of business." Accordingly, the comptroller will not adopt any additional special provisions for economic development agreements.

Compliance costs.

A number of commenters stated that the rule will increase compliance costs. The statements in the preamble to the proposed rule are responsive to the comments and will not be repeated here.

For many, compliance will not change. The Civics Economics organization commented that the rule "impacts only a small portion of total retail sales (again, an unknown portion)." As explained in the preceding section, the portion is unknown because it would require an understanding of the business operations of each business and how that business was reporting local tax.

It is possible that some commenters, particularly those who alleged that the rule completely changes sourcing from origin to destination, are under the misapprehension that the rule will require them to change their reporting methods. For example, a pizza restaurant, or any other kind of retail store that takes website orders for home delivery, will still source its sales to the restaurant or retail store location where the orders are fulfilled for delivery.

Nevertheless, the rule may cause some vendors, small or large, to realize that they are noncompliant. If the vendors come into compliance by changing from single-location reporting to multiple-location reporting, their compliance burden may increase. And if vendors change from multiple-location reporting to single-location reporting, their compliance burden may diminish.

The Internet Tax Freedom Act.

Mr. Harris commented that the rule violates the Internet Tax Freedom Act. The comptroller disagrees. Neither the consummation statutes nor the adopted rule discriminates based on whether the Internet is used. They differentiate based on whether an order is received at a "place of business" or fulfilled at a "place of business," which does not turn on the use of the Internet. An email order received by a salesperson would be received at a "place of business" even though the Internet was used to transmit the communication. An order received by an automated computer shopping cart would not be received at a "place of business," not because the Internet was used, but because a computer shopping cart is not an "established outlet, office, or location." The determination is based on criteria other than the use of the Internet. For example, the Internet plays no role in the determination that an automated telephone ordering system is not a "place of business."

Furthermore, the rule itself does not discriminate against the Internet. Suppose an order is received by a fully automated website and fulfilled from a warehouse without sales personnel. Un-

der the rule, sale tax would be due in the destination city. Under Mr. Harris' interpretation, sales tax would be due in the fulfillment city. But the tax amount depends on the tax rate in each city. If the destination city tax rate is higher, the consumer would pay more tax under the rule. But if the destination city tax rate is lower, the consumer would pay less tax under the rule. Thus, the comptroller's interpretations - that a computer that operates an automated shopping cart software program is not a "place of business," and that a fulfillment warehouse is not automatically a "place of business" - does not discriminate against the Internet.

Statutory Authority.

The comptroller adopts the amendments under Tax Code, §111.002 (Comptroller's Rules; Compliance; Forfeiture), §321.306 (Comptroller's Rules), §322.203 (Comptroller's Rules), and §323.306 (Comptroller's Rules). These provisions authorize the comptroller to adopt reasonable rules that are consistent with the Tax Code for administration, collection, reporting, and enforcement.

The amendments implement Tax Code, §151.0595 (Single Local Tax Rate for Remote Sellers); Tax Code, Chapter 321, Subchapters A, B, C, D, and F; Tax Code, Chapter 322; Tax Code, Chapter 323.

§3.334. Local Sales and Use Taxes.

(a) Definitions. The following words and terms, when used in this section, shall have the following meanings, unless the context clearly indicates otherwise.

(1) Cable system--The system through which a cable service provider delivers cable television or bundled cable service, as those terms are defined in §3.313 of this title (relating to Cable Television Service and Bundled Cable Service).

(2) City--An incorporated city, municipality, town, or village.

(3) City sales and use tax--The tax authorized under Tax Code, §321.101(a), including the additional municipal sales and use tax authorized under Tax Code, §321.101(b), the municipal sales and use tax for street maintenance authorized under Tax Code, §327.003, the Type A Development Corporation sales and use tax authorized under Local Government Code, §504.251, the Type B Development Corporation sales and use tax authorized under Local Government Code, §505.251, a sports and community venue project sales and use tax adopted by a city under Local Government Code, §334.081, and a municipal development corporation sales and use tax adopted by a city under Local Government Code, §379A.081. The term does not include the fire control, prevention, and emergency medical services district sales and use tax authorized under Tax Code, §321.106, or the municipal crime control and prevention district sales and use tax authorized under Tax Code, §321.108.

(4) Comptroller's website--The comptroller's website concerning local taxes located at: https://comptroller.texas.gov/taxes/sales/.

(5) County sales and use tax--The tax authorized under Tax Code, §323.101, including a sports and community venue project sales and use tax adopted by a county under Local Government Code, §334.081. The term does not include the county health services sales and use tax authorized under Tax Code, §324.021, the county landfill and criminal detention center sales and use tax authorized under Tax Code, §325.021, or the crime control and prevention district sales and use tax authorized under Tax Code, §323.105.

(6) Drop shipment--A transaction in which an order is received by a seller at one location, but the item purchased is shipped by the seller from another location, or is shipped by the seller's third-party supplier, directly to a location designated by the purchaser.

(7) Engaged in business--This term has the meaning given in §3.286 of this title (relating to Seller's and Purchaser's Responsibilities).

(8) Extraterritorial jurisdiction-An unincorporated area that is contiguous to the corporate boundaries of a city as defined in Local Government Code, §42.021.

(9) Fulfill--To complete an order by transferring possession of a taxable item to a purchaser, or to ship or deliver a taxable item to a location designated by the purchaser. The term does not include receiving or tracking an order, determining shipping costs, managing inventory, or other activities that do not involve the transfer, shipment, or delivery of a taxable item to the purchaser or a location designated by the purchaser.

(10) Itinerant vendor--A seller who travels to various locations for the purpose of receiving orders and making sales of taxable items and who has no place of business in this state. A person who sells items through vending machines is also an itinerant vendor. A salesperson that operates out of a place of business in this state is not an itinerant vendor.

(11) Kiosk--A small stand-alone area or structure:

(A) that is used solely to display merchandise or to submit orders for taxable items from a data entry device, or both;

(B) that is located entirely within a location that is a place of business of another seller, such as a department store or shopping mall; and

(C) at which taxable items are not available for immediate delivery to a purchaser.

(12) Local taxes--Sales and use taxes imposed by any local taxing jurisdiction.

(13) Local taxing jurisdiction--Any of the following:

(A) a city that imposes sales and use tax as provided under paragraph (3) of this subsection;

(B) a county that imposes sales and use tax as provided under paragraph (5) of this subsection;

(C) a special purpose district created under the Special District Local Laws Code or other provisions of Texas law that is authorized to impose sales and use tax by the Tax Code or other provisions of Texas law and as governed by the provisions of Tax Code, Chapters 321 or 323 and other provisions of Texas law; or

(D) a transit authority that imposes sales and use tax as authorized by Transportation Code, Chapters, 451, 452, 453, 457, or 460 and governed by the provisions of Tax Code, Chapter, 322.

(14) Marketplace provider--This term has the meaning given in §3.286 of this title.

(15) Order placed in person--An order placed by a purchaser with the seller while physically present at the seller's place of business regardless of how the seller subsequently enters the order.

(16) Place of business of the seller - general definition--A place of business of the seller must be an established outlet, office, or location operated by a seller for the purpose of receiving orders for taxable items from persons other than employees, independent contractors, and natural persons affiliated with the seller. An "established

outlet, office, or location" usually requires staffing by one or more sales personnel. The term does not include a computer server, Internet protocol address, domain name, website, or software application. The "purpose" element of the definition may be established by proof that the sales personnel of the seller receive three or more orders for taxable items at the facility during the calendar year. Additional criteria for determining when a location is a place of business of the seller are provided in subsection (b) of this section for distribution centers, manufacturing plants, storage yards, warehouses and similar facilities; kiosks; and purchasing offices. An outlet, office, facility, or any location that contracts with a retail or commercial business to process for that business invoices, purchase orders, bills of lading, or other equivalent records onto which sales tax is added, including an office operated for the purpose of buying and selling taxable goods to be used or consumed by the retail or commercial business, is not a place of business of the seller if the comptroller determines that the outlet, office, facility, or location functions or exists to avoid the tax legally due under Tax Code, Chapters 321, 322, and 323 or exists solely to rebate a portion of the tax imposed by those chapters to the contracting business. An outlet, office, facility, or location does not exist to avoid the tax legally due under Tax Code, Chapters 321, 322, and 323 or solely to rebate a portion of the tax imposed by those chapters if the outlet, office, facility, or location provides significant business services, beyond processing invoices, to the contracting business, including logistics management, purchasing, inventory control, or other vital business services.

(17) Purchasing office--An outlet, office, facility, or any location that contracts with a retail or commercial business to process for that business invoices, purchase orders, bills of lading, or other equivalent records onto which sales tax is added, including an office operated for the purpose of buying and selling taxable goods to be used or consumed by the retail or commercial business.

(18) Remote Seller--As defined in §3.286 of this title, a remote seller is a seller engaged in business in this state whose only activity in the state is:

(A) engaging in regular or systematic solicitation of sales of taxable items in this state by the distribution of catalogs, periodicals, advertising flyers, or other advertising, by means of print, radio, or television media, or by mail, telegraphy, telephone, computer data base, cable, optic, microwave, or other communication system for the purpose of effecting sales of taxable items; or

(B) soliciting orders for taxable items by mail or through other media including the Internet or other media that may be developed in the future.

(19) Seller--This term has the meaning given in §3.286 of this title and also refers to any agent or employee of the seller.

(20) Special purpose district--A local governmental entity authorized by the Texas legislature for a specific purpose, such as crime control, a local library, emergency services, county health services, or a county landfill and criminal detention center.

(21) Storage--This term has the meaning given in §3.346 of this title (relating to Use Tax).

(22) Temporary place of business of the seller--A location operated by a seller for a limited period of time for the purpose of selling and receiving orders for taxable items and where the seller has inventory available for immediate delivery to a purchaser. For example, a person who rents a booth at a weekend craft fair or art show to sell and take orders for jewelry, or a person who maintains a facility at a job site to rent tools and equipment to a contractor during the construction of real property, has established a temporary place of business. A temporary place of business of the seller includes a sale outside of a distribution center, manufacturing plant, storage yard, warehouse, or similar facility of the seller in a parking lot or similar space sharing the same physical address as the facility but not within the walls of the facility.

(23) Transit authority--A metropolitan rapid transit authority (MTA), advanced transportation district (ATD), regional or subregional transportation authority (RTA), city transit department (CTD), county transit authority (CTA), regional mobility authority (RMA) or coordinated county transportation authority created under Transportation Code, Chapters 370, 451, 452, 453, 457, or 460.

(24) Two percent cap--A reference to the general rule that, except as otherwise provided by Texas law and as explained in this section, a seller cannot collect, and a purchaser is not obligated to pay, more than 2.0% of the sales price of a taxable item in total local sales and use taxes for all local taxing jurisdictions.

(25) Use--This term has the meaning given in §3.346 of this title.

(26) Use tax--A tax imposed on the storage, use or other consumption of a taxable item in this state.

(b) Determining the place of business of a seller.

(1) Distribution centers, manufacturing plants, storage yards, warehouses, and similar facilities.

(A) A distribution center, manufacturing plant, storage yard, warehouse, or similar facility operated by a seller for the purpose of selling taxable items where sales personnel of the seller receive three or more orders for taxable items during the calendar year from persons other than employees, independent contractors, and natural persons affiliated with the seller is a place of business of the seller. Forwarding previously received orders to the facility for fulfilment does not make the facility a place of business.

(B) If a location that is a place of business of the seller, such as a sales office, is in the same building as a distribution center, manufacturing plant, storage yard, warehouse, or similar facility operated by a seller, then the entire facility is a place of business of the seller.

(2) Kiosks. A kiosk is not a place of business of the seller for the purpose of determining where a sale is consummated for local tax purposes. A seller who owns or operates a kiosk in Texas is, however, engaged in business in this state as provided in §3.286 of this title.

(3) Purchasing offices.

(A) A purchasing office is not a place of business of the seller if the purchasing office exists solely to rebate a portion of the local sales and use tax imposed by Tax Code, Chapters 321, 322, or 323 to a business with which it contracts; or if the purchasing office functions or exists to avoid the tax legally due under Tax Code, Chapters 321, 322, or 323. A purchasing office does not exist solely to rebate a portion of the local sales and use tax or to avoid the tax legally due under Tax Code, Chapters 321, 322, or 323 if the purchasing office provides significant business services to the contracting business beyond processing invoices, including logistics management, purchasing, inventory control, or other vital business services.

(B) In making a determination under subparagraph (A) of this paragraph, as to whether a purchasing office provides significant business services to the contracting business beyond processing invoices, the comptroller will compare the total value of the other business services to the value of processing invoices. If the total value of the other business services, including logistics management, purchasing, inventory control, or other vital business services, is less than the

value of the service to process invoices, then the purchasing office will be presumed not to be a place of business of the seller.

(C) If the comptroller determines that a purchasing office is not a place of business of the seller, the sale of any taxable item is deemed to be consummated at the place of business of the seller from whom the purchasing office purchased the taxable item for resale and local sales and use taxes are due according to the following rules.

(i) When taxable items are purchased from a Texas seller, local sales taxes are due based on the location of the seller's place of business where the sale is deemed to be consummated, as determined in accordance with subsection (c) of this section.

(ii) When the sale of a taxable item is deemed to be consummated at a location outside of this state, local use tax is due based on the location where the items are first stored, used or consumed by the entity that contracted with the purchasing office in accordance with subsection (d) of this section.

(4) An order that is received by a salesperson who is not at a place of business of the seller when the salesperson receives the order is treated as being received at the location from which the salesperson operates. Examples include orders that a salesperson receives by mail, telephone, including Voice over Internet Protocol and cellular phone calls, facsimile, and email while traveling. The location from which the salesperson operates is the principal fixed location where the salesperson conducts work-related activities. The location from which a salesperson operates will be a place of business of the seller only if the location meets the definition of a "place of business of a seller" in subsection (a)(16) of this section on its own, without regard to the orders imputed to that location by this paragraph.

(5) A facility without sales personnel is usually not a "place of business of the seller." A vending machine is not "an established outlet, office, or location," and does not constitute a "place of business of the seller." Instead, a vending machine sale is treated as a sale by an itinerant vendor. See subsections (a)(10) and (c)(6) of this section. However, a walk-in retail outlet with a stock of goods available for immediate purchase through a cashier-less point of sale terminal at the outlet would be "an established outlet, office, or location" so as to constitute a "place of business of the seller" even though sales personnel are not required for every sale. A computer that operates an automated shopping cart software program is not an established outlet, office, or location," and does not constitute a "place of business of the seller." A computer that operates an automated telephone ordering system is not "an established outlet, office, or location," and does not constitute a "place of business of the seller."

(c) Local sales tax - Consummation of sale - determining the local taxing jurisdictions to which sales tax is due. Except for the special rules applicable to remote sellers in subsection (i)(3) of this section, direct payment permit purchases in subsection (j) of this section, and certain taxable items, including taxable items sold by a marketplace provider, as provided in subsection (k) of this section, each sale of a taxable item is consummated at the location indicated by the provisions of this subsection. The following rules, taken from Tax Code, §321.203 and §323.203, apply to all sellers engaged in business in Texas, regardless of whether they have no place of business in Texas, a single place of business in Texas, or multiple places of business in Texas.

(1) Consummation of sale - order received at a place of business of the seller in Texas.

(A) Order placed in person. Except as provided by paragraph (3) of this subsection, when an order for a taxable item is placed in person at a seller's place of business in Texas, including at a temporary place of business of the seller in Texas, the sale of that item is consummated at that place of business of the seller, regardless of the location where the order is fulfilled.

(B) Order not placed in person.

(i) Order fulfilled at a place of business of the seller in Texas. When an order is received at a place of business of the seller in Texas and is fulfilled at a place of business of the seller in Texas, the sale is consummated at the place of business where the order is fulfilled.

(ii) Order not fulfilled at a place of business of the seller in Texas. When an order is received at a place of business of the seller in Texas and is fulfilled at a location that is not a place of business of the seller in Texas, the sale is consummated at the place of business where the order is received.

(2) Consummation of sale - order not received at a place of business of the seller in Texas.

(A) Order fulfilled at a place of business of the seller in Texas. When an order is received at a location that is not a place of business of the seller in Texas or is received outside of Texas, and is fulfilled from a place of business of the seller in Texas, the sale is consummated at the place of business where the order is fulfilled.

(B) Order not fulfilled from a place of business of the seller in Texas.

(i) Order fulfilled in Texas. When an order is received at a location that is not a place of business of the seller in Texas and is fulfilled from a location in Texas that is not a place of business of the seller, the sale is consummated at the location in Texas to which the order is shipped or delivered, or at which the purchaser of the item takes possession.

(ii) Order not fulfilled in Texas. When an order is received by a seller at a location that is not a place of business of the seller in Texas, and is fulfilled from a location outside of Texas, the sale is not consummated in Texas. However, a use is consummated at the first point in Texas where the item is stored, used, or consumed after the interstate transit has ceased. A taxable item delivered to a point in Texas is presumed to be for storage, use, or consumption at that point until the contrary is established. Local use tax should be collected as provided in subsection (d) of this section. Except as provided in subsection (i)(3) of this section, a remote seller required to collect state use tax under §3.286(b)(2) of this title must also collect local use tax.

(3) Exception for qualifying economic development agreements entered into before January 1, 2009, pursuant to Tax Code, §321.203(c-4) - (c-5) or §323.203(c-4) - (c-5). This paragraph is effective until September 1, 2024. If applicable, the local sales tax due on the sale of a taxable item is based on the location of the qualifying warehouse, which is a place of business of the seller, from which the item is shipped or delivered or at which the purchaser of the item takes possession.

(4) Local sales taxes are due to each local taxing jurisdiction with sales tax in effect where the sale is consummated. Local use tax may also be due if the total amount of local sales taxes due does not reach the two percent cap, and the item purchased is shipped or delivered to a location in one or more different local taxing jurisdictions, as provided in subsection (d) of this section.

(5) Multiple special purpose district taxes, multiple transit authority sales taxes, or a combination of the two may apply to a single transaction. If the sale of a taxable item is consummated at a location within the boundaries of multiple special purpose districts or transit authorities, local sales tax is owed to each of the jurisdictions in effect at that location. For example, a place of business of the seller located in the city of San Antonio is within the boundaries of both the San Antonio

Advanced Transportation District and the San Antonio Metropolitan Transit Authority, and the seller is required to collect sales tax for both transit authorities. Similarly, a place of business of the seller in Flower Mound is located within the boundaries of two special purpose districts, the Flower Mound Crime Control District and the Flower Mound Fire Control District, and the seller is responsible for collecting sales tax for both special purpose districts.

(6) Itinerant vendors; vending machines.

(A) Itinerant vendors. Sales made by itinerant vendors are consummated at, and itinerant vendors must collect sales tax based upon, the location where the item is delivered or at which the purchaser of the item takes possession. Itinerant vendors do not have any responsibility to collect use tax.

(B) Vending machines. Sales of taxable items made from a vending machine are consummated at the location of the vending machine. See §3.293 of this title (relating to Food; Food Products; Meals; Food Service) for more information about vending machine sales.

(d) Local use tax. The provisions addressing the imposition of state use tax in §3.346 of this title also apply to the imposition of local use tax. For example, consistent with §3.346(e) of this title, all taxable items that are shipped or delivered to a location in this state that is within the boundaries of a local taxing jurisdiction are presumed to have been purchased for use in that local taxing jurisdiction as well as presumed to have been purchased for use in the state.

(1) General rules.

(A) When local use taxes are due in addition to local sales taxes as provided by subsection (c) of this section, all applicable use taxes must be collected or accrued in the following order until the two percent cap is reached: city, county, special purpose district, and transit authority. If more than one special purpose district use tax is due, all such taxes are to be collected or accrued before any transit authority use tax is collected or accrued. See subparagraphs (D) and (E) of this paragraph.

(B) If a local use tax cannot be collected or accrued at its full rate without exceeding the two percent cap, the seller cannot collect it, or any portion of it, and the purchaser is not responsible for accruing it.

(C) If a seller collects a local sales tax on an item, or a purchaser accrues a local sales tax on an item, a use tax for the same type of jurisdiction is not due on the same item. For example, after a city sales tax has been collected or accrued for an item, no use tax is due to that same or a different city on that item, but use tax may be due to a county, special purpose district, or transit authority. Similarly, if one or more special purpose district sales taxes have been collected or accrued for an item, no special purpose district use tax is due on that item, and if one or more transit authority sales taxes have been collected or accrued for an item, no transit authority use tax is due on that item.

(D) Collection or accrual of use tax for multiple special purpose districts. If more than one special purpose district use tax is in effect at the location where use of an item occurs, the special purpose district taxes are due in the order of their effective dates, beginning with the earliest effective date, until the two percent cap is met. The effective dates of all special purpose district taxes are available on the comptroller's website. However, if the collection or accrual of use tax for the district with the earliest effective date would exceed the two percent cap, the tax for that district is not due and the seller or purchaser should determine, following the criteria in subparagraphs (A) - (C) of this paragraph, whether use tax is due for the district that next became effective.

(i) If the competing special purpose district taxes became effective on the same date, the special purpose district taxes are due in the order of the earliest date for which the election in which the district residents authorized the imposition of sales and use tax by the district was held.

(ii) If the elections to impose the local taxes were held on the same date, the special purpose district taxes are due in the order of the earliest date for which the enabling legislation under which each district was created became effective.

(E) Collection or accrual of use tax for multiple transit authorities. If more than one transit authority use tax is in effect at the location where use of an item occurs, and the two percent cap has not been met, the transit authority taxes are due in the order of their effective dates, beginning with the earliest effective date, until the two percent cap is met. The effective dates of all transit authority taxes are available on the comptroller's website. However, if the collection or accrual of use tax for the authority with the earliest effective date would exceed the two percent cap, the tax for that authority is not due and the seller or purchaser should determine, following the criteria in subparagraphs (A) - (D) of this paragraph, whether use tax is due for the authority that next became effective.

(i) If the competing transit authorities became effective on the same date, the transit authority taxes are due in the order of the earliest date for which the election in which the authority residents authorized the imposition of sales and use tax by the authority was held.

(ii) If the elections to impose local taxes were held on the same date, the transit authority use taxes are due in the order of the earliest date for which the enabling legislation under which each authority was created became effective.

(2) General use tax rules applied to specific situations. The following fact patterns explain how local use tax is to be collected or accrued and remitted to the comptroller based on, and subject to, the general rules in paragraph (1) of this subsection.

(A) Sale consummated outside the state, item delivered from outside the state or from a location in Texas that is not operated by the seller - local use tax due. Except as provided in subsection (i)(3) of this section, if a sale is consummated outside of this state according to the provisions of subsection (c) of this section, and the item purchased is either shipped or delivered to a location in this state as designated by the purchaser from a location outside of the state, or if the order is drop shipped directly to the purchaser from a third-party supplier, local use tax is owed based upon the location in this state to which the order is shipped or delivered or at which the purchaser of the item takes possession. The seller is responsible for collecting the local use tax due on the sale. If the seller does not collect the local use taxes due on the sale, the purchaser is responsible for accruing such taxes and remitting them directly to the comptroller according to the provisions in paragraph (1) of this subsection. For example, if an order for a taxable item is received by a seller at a location outside of Texas, and the order is shipped to the purchaser from a location outside of the state, local use tax is due based upon the location to which the order is shipped or delivered or at which the purchaser of the item takes possession.

(B) Sale consummated in Texas outside a local taxing jurisdiction, item delivered into one or more local taxing jurisdictions - local use tax due. If a sale is consummated at a location in Texas that is outside of the boundaries of any local taxing jurisdiction according to the provisions of subsection (c) of this section, and the order is shipped or delivered to the purchaser at a location in this state that is within the boundaries of one or more local taxing jurisdictions, local use tax is due based on the location to which the items are shipped or delivered or at which the purchaser of the item takes possession. The seller is

responsible for collecting the local use taxes due on the sale, regardless of the location of the seller in Texas. If the seller fails to collect any local use taxes due, the purchaser is responsible for accruing such taxes and remitting them directly to the comptroller.

(C) Sale consummated in any local taxing jurisdictions imposing less than 2.0% in total local taxes - local sales taxes and use taxes due. If a sale is consummated at a location in Texas where the total local sales tax rate imposed by the taxing jurisdictions in effect at that location does not equal 2.0% according to the provisions of subsection (c) of this section, and the item is shipped or delivered to the purchaser at a location in this state that is inside the boundaries of a different local taxing jurisdiction, additional local use tax may be due based on the location to which the order is shipped or delivered or at which the purchaser of the item takes possession, subject to the two percent cap. The seller is responsible for collecting any additional local use taxes due on the sale, regardless of the location of the seller in Texas. See subsection (i) of this section. If the seller fails to collect the additional local use taxes due, the purchaser is responsible for accruing such taxes and remitting them directly to the comptroller.

(i) Example one - if an order is received in person at a place of business of the seller, such that the sale is consummated at the location where the order is received as provided under subsection (c)(1)(A) of this section, and the local sales tax due on the sale does not meet the two percent cap, additional local use taxes are due based on the location to which the order is shipped or delivered or at which the purchaser of the item takes possession, subject to the provisions in paragraph (1) of this subsection.

(ii) Example two - if a seller receives an order for a taxable item at a seller's place of business in Texas, and the seller ships or delivers the item from an out-of-state location to a location in this state as designated by the purchaser, local sales tax is due based upon the location of the place of business of the seller where the order is received. If the local sales tax due on the item does not meet the two percent cap, use taxes, subject to the provisions in paragraph (1) of this subsection, are due based upon the location where the items are shipped or delivered or at which the purchaser of the item takes possession.

(e) Effect of other law.

(1) Tax Code, Title 2, Subtitles A (General Provisions) and B (Enforcement and Collection), Tax Code, Chapter 141 (Multistate Tax Compact) and Tax Code, Chapter 151 (Limited Sales, Excise, and Use Tax) apply to transactions involving local taxes. Related sections of this title and comptroller rulings shall also apply with respect to local taxes. This includes authorities such as court cases and federal law that affect whether an item is taxable or is excluded or exempt from taxation.

(2) Permits, exemption certificates, and resale certificates required by Tax Code, Chapter 151, shall also satisfy the requirements for collecting and remitting local taxes, unless otherwise indicated by this section or other sections of this title. For example, see subsection (n) of this section concerning prior contract exemptions.

(3) Any provisions in this section or other sections of this title related to a seller's responsibilities for collecting and remitting local taxes to the comptroller shall also apply to a purchaser if the seller does not collect local taxes that are due. The comptroller may proceed against the seller or purchaser for the local tax owed by either.

(f) Tax rates. Except as otherwise provided by law, no local governmental entity may adopt or increase a sales and use tax if, as a result of the adoption or increase of the tax, the combined rate of all sales and use taxes imposed by local taxing jurisdictions having territory in the local governmental entity would exceed 2.0% at any location within the boundaries of the local governmental entity's jurisdiction. The following are the local tax rates that may be adopted.

(1) Cities. Cities may impose sales and use tax at a rate of up to 2.0%.

(2) Counties. Counties may impose sales and use tax at rates ranging from 0.5% to 1.5%.

(3) Special purpose districts. Special purpose districts may impose sales and use tax at rates ranging from 0.125% to 2.0%.

(4) Transit authorities. Transit authorities may impose sales and use tax at rates ranging from 0.25% to 1.0%.

(g) Jurisdictional boundaries, combined areas, and city tax imposed through strategic partnership agreements.

(1) Jurisdictional boundaries.

(A) City boundaries. City taxing jurisdictional boundaries cannot overlap one another and a city cannot impose a sales and use tax in an area that is already within the jurisdiction of another city.

(B) County boundaries. County tax applies to all locations within that county.

(C) Special purpose district and transit authority boundaries. Special purpose districts and transit authorities may cross or share boundaries with other local taxing jurisdictions and may encompass, in whole or in part, other local taxing jurisdictions, including cities and counties. A geographic location or address in this state may lie within the boundaries of more than one special purpose district or more than one transit authority.

(D) Extraterritorial jurisdictions. Except as otherwise provided by paragraph (3) of this subsection concerning strategic partnership agreements and subsection (l)(5) of this section concerning the City of El Paso and Fort Bliss, city sales and use tax does not apply to taxable sales that are consummated outside the boundaries of the city, including sales made in a city's extraterritorial jurisdiction. However, an extraterritorial jurisdiction may lie within the boundaries of a special purpose district, transit authority, county, or any combination of the three, and the sales and use taxes for those jurisdictions would apply to those sales.

(2) Combined areas. A combined area is an area where the boundaries of a city overlap the boundaries of one or more other local taxing jurisdictions as a result of an annexation of additional territory by the city, and where, as the result of the imposition of the city tax in the area in addition to the local taxes imposed by the existing taxing jurisdictions, the combined local tax rate would exceed 2.0%. The comptroller shall make accommodations to maintain a 2.0% rate in any combined area by distributing the 2.0% tax revenue generated in these combined areas to the local taxing jurisdictions located in the combined areas as provided in Tax Code, §321.102 or Health and Safety Code, §775.0754. Combined areas are identified on the comptroller's website. Sellers engaged in transactions on which local sales or use taxes are due in a combined area, or persons who must self-accrue and remit tax directly to the comptroller, must use the combined area local code when reporting the tax rather than the codes for the individual city, county, special purpose districts, or transit authorities that make up the combined area.

(3) City tax imposed through strategic partnership agreements.

(A) The governing bodies of a district, as defined in Local Government Code, §43.0751, and a city may enter into a limited-purpose annexation agreement known as a strategic partnership agreement. Under this agreement, the city may impose sales and use

tax within all or part of the boundaries of a district. Areas within a district that are annexed for this limited purpose are treated as though they are within the boundaries of the city for purposes of city sales and use tax.

(B) Counties, transit authorities, and special purpose districts may not enter into strategic partnership agreements. Sales and use taxes imposed by those taxing jurisdictions do not apply in the limited-purpose annexed area as part of a strategic partnership agreement between a city and an authorized district. However, a county, special purpose district, or transit authority sales and use tax, or any combination of these three types of taxes, may apply at locations included in a strategic partnership agreement between a city and an authorized district if the tax is imposed in that area by the applicable jurisdiction as allowed under its own controlling authorities.

(C) Prior to September 1, 2011, the term "district" was defined in Local Government Code, §43.0751 as a municipal utility district or a water control and improvement district. The definition was amended effective September 1, 2011, to mean a conservation and reclamation district operating under Water Code, Chapter 49.

(h) Places of business of the seller and job sites crossed by local taxing jurisdiction boundaries.

(1) Places of business of the seller crossed by local taxing jurisdiction boundaries. If a place of business of the seller is crossed by one or more local taxing jurisdiction boundaries so that a portion of the place of business of the seller is located within a taxing jurisdiction and the remainder of the place of business of the seller lies outside of the taxing jurisdiction, tax is due to the local taxing jurisdictions in which the sales office is located. If there is no sales office, sales tax is due to the local taxing jurisdictions in which any cash registers are located.

(2) Job sites.

(A) Residential repair and remodeling; new construction of an improvement to realty. When a contractor is improving real property under a separated contract, and the job site is crossed by the boundaries of one or more local taxing jurisdictions, the local taxes due on any separately stated charges for taxable items incorporated into the real property must be allocated to the local taxing jurisdictions based on the total square footage of the real property improvement located within each jurisdiction, including the square footage of any standalone structures that are part of the construction, repair, or remodeling project. For more information about tax due on materials used at residential and new construction job sites, refer to §3.291 of this title (relating to Contractors).

(B) Nonresidential real property repair and improvement. When taxable services are performed to repair, remodel, or restore nonresidential real property, including a pipeline, transmission line, or parking lot, that is crossed by the boundaries of one or more local taxing jurisdictions, the local taxes due on the taxable services, including materials and any other charges connected to the services performed, must be allocated among the local taxing jurisdictions based upon the total mileage or square footage, as appropriate, of the repair, remodeling, or restoration project located in each jurisdiction. For more information about tax due on materials used at nonresidential real property repair and remodeling job sites, refer to §3.357 of this title (relating to Nonresidential Real Property Repair, Remodeling, and Restoration; Real Property Maintenance).

(i) Sellers' and purchasers' responsibilities for collecting or accruing local taxes.

(1) Sale consummated in Texas; seller responsible for collecting local sales taxes and applicable local use taxes. When a sale of a taxable item is consummated at a location in Texas as provided by subsection (c) of this section, the seller must collect each local sales tax in effect at the location. If the total rate of local sales tax due on the sale does not reach the two percent cap, and the seller ships or delivers the item into another local taxing jurisdiction, then the seller is required to collect additional local use taxes due, if any, based on the location to which the item is shipped or delivered or at which the purchaser of the item takes possession, regardless of the location of the seller in Texas. For more information regarding local use taxes, refer to subsection (d) of this section.

(2) Out-of-state sale; seller engaged in business in Texas. Except as provided in paragraph (3) of this subsection, when a sale is not consummated in Texas, a seller who is engaged in business in this state is required to collect and remit local use taxes due, if any, on orders of taxable items shipped or delivered at the direction of the purchaser into a local taxing jurisdiction in this state based upon the location in this state to which the item is shipped or delivered or at which the purchaser of the item takes possession as provided in subsection (d) of this section.

(3) Local use tax rate for remote sellers.

(A) A remote seller required to collect and remit one or more local use taxes in connection with a sale of a taxable item must compute the amount using:

(i) the combined tax rate of all applicable local use taxes based on the location to which the item is shipped or delivered or at which the purchaser of the item takes possession; or

(ii) at the remote seller's election, the single local use tax rate published in the *Texas Register*.

(B) A remote seller that is storing tangible personal property in Texas to be used for fulfillment at a facility of a marketplace provider that has certified that it will assume the rights and duties of a seller with respect to the tangible personal property, as provided for in §3.286 of this title, may elect the single local use tax rate under subparagraph (A)(ii) of this paragraph.

(C) Notice to the comptroller of election and revocation of election.

(i) Before using the single local use tax rate, a remote seller must notify the comptroller of its election using a form prescribed by the comptroller. A remote seller may also notify the comptroller of the election on its use tax permit application form. The remote seller must use the single local use tax rate for all of its sales of taxable items until the election is revoked as provided in clause (ii) of this subparagraph.

(ii) A remote seller may revoke its election by filing a form prescribed by the comptroller. If the comptroller receives the notice by October 1, the revocation will be effective January 1 of the following year. If the comptroller receives the notice after October 1, the revocation will be effective January 1 of the year after the following year. For example, a remote seller must notify the comptroller by October 1, 2020, for the revocation to be effective January 1, 2021. If the comptroller receives the revocation on November 1, 2020, the revocation will be effective January 1, 2022.

(D) Single local use tax rate.

(i) The single local use tax rate in effect for the period beginning October 1, 2019, and ending December 31, 2019, is 1.75%.

(ii) The single local use tax rate in effect for the period beginning January 1, 2020, and ending December 31, 2020, is 1.75%.

(E) Annual publication of single local use tax rate. Before the beginning of a calendar year, the comptroller will publish notice of the single local use tax rate in the *Texas Register* that will be in effect for that calendar year.

(F) Calculating the single local use tax rate. The single local use tax rate effective in a calendar year is equal to the estimated average rate of local sales and use taxes imposed in this state during the preceding state fiscal year. As soon as practicable after the end of a state fiscal year, the comptroller must determine the estimated average rate of local sales and use taxes imposed in this state during the preceding state fiscal year by:

(i) dividing the total amount of net local sales and use taxes remitted to the comptroller during the state fiscal year by the total amount of net state sales and use tax remitted to the comptroller during the state fiscal year;

(ii) multiplying the amount computed under clause (i) of this subparagraph by the rate provided in Tax Code, §151.051; and

(iii) rounding the amount computed under clause (ii) of this subparagraph to the nearest .0025.

(G) Direct refund. A purchaser may request a refund based on local use taxes paid in a calendar year for the difference between the single local use tax rate paid by the purchaser and the amount the purchaser would have paid based on the combined tax rate for all applicable local use taxes. Notwithstanding the refund requirements under §3.325(a)(1) of this title (relating to Refunds and Payments Under Protest), a non-permitted purchaser may request a refund directly from the comptroller for the tax paid in the previous calendar year, no earlier than January 1 of the following calendar year within the statute of limitation under Tax Code, 111.104 (Refunds).

(H) Marketplace providers. Notwithstanding subparagraph (A) of this paragraph, marketplace providers may not use the single local use tax rate and must compute the amount of local use tax to collect and remit using the combined tax rate of all applicable local use taxes.

(4) Purchaser responsible for accruing and remitting local taxes if seller fails to collect.

(A) If a seller does not collect the state sales tax, any applicable local sales taxes, or both, on a sale of a taxable item that is consummated in Texas, then the purchaser is responsible for filing a return and paying the tax. The local sales taxes due are based on the location in this state where the sale is consummated as provided in subsection (c) of this section.

(B) A purchaser who buys an item for use in Texas from a seller who does not collect the state use tax, any applicable local use taxes, or both, is responsible for filing a return and paying the tax. The local use taxes due are based on the location where the item is first stored, used, or consumed by the purchaser.

(C) For more information about how to report and pay use tax directly to the comptroller, see §3.286 of this title.

(5) Local tax is due on the sales price of a taxable item, as defined in Tax Code, §151.007, in the report period in which the taxable item is purchased or the period in which the taxable item is first stored, used, or otherwise consumed in a local taxing jurisdiction.

(6) A purchaser is not liable for additional local use tax if the purchaser pays local use tax using the rate elected by an eligible remote seller according to paragraph (3) of this subsection. The remote seller must be identified on the comptroller's website as electing to use the single local use tax rate. A purchaser must verify that the remote seller is listed on the comptroller's website. If the remote seller is not listed on the comptroller's website, the purchaser will be liable for additional use tax due in accordance to paragraph (4) of this subsection.

(j) Items purchased under a direct payment permit.

(1) When taxable items are purchased under a direct payment permit, local use tax is due based upon the location where the permit holder first stores the taxable items, except that if the taxable items are not stored, then local use tax is due based upon the location where the taxable items are first used or otherwise consumed by the permit holder.

(2) If, in a local taxing jurisdiction, storage facilities contain taxable items purchased under a direct payment exemption certificate and at the time of storage it is not known whether the taxable items will be used in Texas, then the taxpayer may elect to report the use tax either when the taxable items are first stored in Texas or are first removed from inventory for use in Texas, as long as use tax is reported in a consistent manner. See also §3.288(i) of this title (relating to Direct Payment Procedures and Qualifications) and §3.346(g) of this title.

(3) If local use tax is paid on stored items that are subsequently removed from Texas before they are used, the tax may be recovered in accordance with the refund and credit provisions of §3.325 of this title and §3.338 of this title (relating to Multistate Tax Credits and Allowance of Credit for Tax Paid to Suppliers).

(k) Special rules for certain taxable goods and services. Sales of the following taxable goods and services are consummated at, and local tax is due based upon, the location indicated in this subsection.

(1) Amusement services. Local tax is due based upon the location where the performance or event occurs. For more information on amusement services, refer to §3.298 of this title (relating to Amusement Services).

(2) Cable services. When a service provider uses a cable system to provide cable television or bundled cable services to customers, local tax is due as provided for in §3.313 of this title. When a service provider uses a satellite system to provide cable services to customers, no local tax is due on the service in accordance with the Telecommunications Act of 1996, §602.

(3) Florists. Local sales tax is due on all taxable items sold by a florist based upon the location where the order is received, regardless of where or by whom delivery is made. Local use tax is not due on deliveries of taxable items sold by florists. For example, if the place of business of the florist where an order is taken is not within the boundaries of any local taxing jurisdiction, no local sales tax is due on the item and no local use tax is due regardless of the location of delivery. If a Texas florist delivers an order in a local taxing jurisdiction at the instruction of an unrelated florist, and if the unrelated florist did not take the order within the boundaries of a local taxing jurisdiction, local use tax is not due on the delivery. For more information about florists' sales and use tax obligations, refer to §3.307 of this title (relating to Florists).

(4) Landline telecommunications services. Local taxes due on landline telecommunications services are based upon the location of the device from which the call or other transmission originates. If the seller cannot determine where the call or transmission originates, local taxes due are based on the address to which the service is billed. For more information, refer to §3.344 of this title (relating to Telecommunications Services).

(5) Marketplace provider sales. Local taxes are due on sales of taxable items through a marketplace provider based on the lo-

cation in this state to which the item is shipped or delivered or at which the purchaser takes possession. For more information, refer to §3.286 of this title.

(6) Mobile telecommunications services. Local taxes due on mobile telecommunications services are based upon the location of the customer's place of primary use as defined in §3.344(a)(8) of this title, and local taxes are to be collected as indicated in §3.344(h) of this title.

(7) Motor vehicle parking and storage. Local taxes are due based on the location of the space or facility where the vehicle is parked. For more information, refer to §3.315 of this title (relating to Motor Vehicle Parking and Storage).

(8) Natural gas and electricity. Any local city and special purpose taxes due are based upon the location where the natural gas or electricity is delivered to the purchaser. As explained in subsection (l)(1) of this section, residential use of natural gas and electricity is exempt from all county sales and use taxes and all transit authority sales and use taxes, most special purpose district sales and use taxes, and many city sales and use taxes. A list of the cities and special purpose districts that do impose, and those that are eligible to impose, local sales and use tax on residential use of natural gas and electricity is available on the comptroller's website. For more information, also refer to §3.295 of this title (relating to Natural Gas and Electricity).

(9) Nonresidential real property repair and remodeling services. Local taxes are due on services to remodel, repair, or restore nonresidential real property based on the location of the job site where the remodeling, repair, or restoration is performed. See also subsection (h)(2)(B) of this section and §3.357 of this title.

(10) Residential real property repair and remodeling and new construction of a real property improvement performed under a separated contract. When a contractor constructs a new improvement to realty pursuant to a separated contract or improves residential real property pursuant to a separated contract, the sale is consummated at the job site at which the contractor incorporates taxable items into the customer's real property. See also subsection (h)(2)(A) of this section and §3.291 of this title.

(11) Waste collection services. Local taxes are due on garbage or other solid waste collection or removal services based on the location at which the waste is collected or from which the waste is removed. For more information, refer to §3.356 of this title (relating to Real Property Service).

(l) Special exemptions and provisions applicable to individual jurisdictions.

(1) Residential use of natural gas and electricity.

(A) Mandatory exemptions from local sales and use tax. Residential use of natural gas and electricity is exempt from most local sales and use taxes. Counties, transit authorities, and most special purpose districts are not authorized to impose sales and use tax on the residential use of natural gas and electricity. Pursuant to Tax Code, §321.105, any city that adopted a local sales and use tax effective October 1, 1979, or later is prohibited from imposing tax on the residential use of natural gas and electricity. See §3.295 of this title.

(B) Imposition of tax allowed in certain cities. Cities that adopted local sales tax prior to October 1, 1979, may, in accordance with the provisions in Tax Code, §321.105, choose to repeal the exemption for residential use of natural gas and electricity. The comptroller's website provides a list of cities that impose tax on the residential use of natural gas and electricity, as well as a list of those cities that do not currently impose the tax, but are eligible to do so.

(C) Effective January 1, 2010, a fire control, prevention, and emergency medical services district organized under Local Government Code, Chapter 344 that imposes sales tax under Tax Code, §321.106, or a crime control and prevention district organized under Local Government Code, Chapter 363 that imposes sales tax under Tax Code, §321.108, that is located in all or part of a municipality that imposes a tax on the residential use of natural gas and electricity as provided under Tax Code, §321.105 may impose tax on residential use of natural gas and electricity at locations within the district. A list of the special purpose districts that impose tax on residential use of natural gas and electricity and those districts eligible to impose the tax that do not currently do so is available on the comptroller's website.

(2) Telecommunication services. Telecommunications services are exempt from all local sales taxes unless the governing body of a city, county, transit authority, or special purpose district votes to impose sales tax on these services. However, since 1999, under Tax Code, §322.109(d), transit authorities created under Transportation Code, Chapter 451 cannot repeal the exemption unless the repeal is first approved by the governing body of each city that created the local taxing jurisdiction. The local sales tax is limited to telecommunications services occurring between locations within Texas. See §3.344 of this title. The comptroller's website provides a list of local taxing jurisdictions that impose tax on telecommunications services.

(3) Emergency services districts.

(A) Authority to exclude territory from imposition of emergency services district sales and use tax. Pursuant to the provisions of Health and Safety Code, §775.0751(c-1), an emergency services district wishing to enact a sales and use tax may exclude from the election called to authorize the tax any territory in the district where the sales and use tax is then at 2.0%. The tax, if authorized by the voters eligible to vote on the enactment of the tax, then applies only in the portions of the district included in the election. The tax does not apply to sales made in the excluded territories in the district and sellers in the excluded territories should continue to collect local sales and use taxes for the local taxing jurisdictions in effect at the time of the election under which the district sales and use tax was authorized as applicable.

(B) Consolidation of districts resulting in sales tax sub-districts. Pursuant to the provisions of Health and Safety Code, §775.018(f), if the territory of a district proposed under Health and Safety Code, Chapter 775 overlaps with the boundaries of another district created under that chapter, the commissioners court of each county and boards of the counties in which the districts are located may choose to create a consolidated district in the overlapping territory. If two districts that want to consolidate under Health and Safety Code, §775.024 have different sales and use tax rates, the territory of the former districts located within the consolidated area will be designated as sub-districts and the sales tax rate within each sub-district will continue to be imposed at the rate the tax was imposed by the former district that each sub-district was part of prior to the consolidation.

(4) East Aldine Management District.

(A) Special sales and use tax zones within district; separate sales and use tax rate. As set out in Special District Local Laws Code, §3817.154(e) and (f), the East Aldine Management District board may create special sales and use tax zones within the boundaries of the District and, with voter approval, enact a special sales and use tax rate in each zone that is different from the sales and use tax rate imposed in the rest of the district.

(B) Exemptions from special zone sales and use tax. The sale, production, distribution, lease, or rental of; and the use, storage, or other consumption within a special sales and use tax zone of; a taxable item sold, leased, or rented by the entities identified in clauses

(i) - (vi) of this subparagraph are exempt from the special zone sales and use tax. State and all other applicable local taxes apply unless otherwise exempted by law. The special zone sales and use tax exemption applies to:

(i) a retail electric provider as defined by Utilities Code, §31.002;

(ii) an electric utility or a power generation company as defined by Utilities Code, §31.002;

(iii) a gas utility as defined by Utilities Code, §101.003 or §121.001, or a person who owns pipelines used for transportation or sale of oil or gas or a product or constituent of oil or gas;

(iv) a person who owns pipelines used for the transportation or sale of carbon dioxide;

(v) a telecommunications provider as defined by Utilities Code, §51.002; or

(vi) a cable service provider or video service provider as defined by Utilities Code, §66.002.

(5) Imposition of city sales tax and transit tax on certain military installations; El Paso and Fort Bliss. Pursuant to Tax Code, §321.1045 (Imposition of Sales and Use Tax in Certain Federal Military Installations), for purposes of the local sales and use tax imposed under Tax Code, Chapter 321, the city of El Paso includes the area within the boundaries of Fort Bliss to the extent it is in the city's extraterritorial jurisdiction. However, the El Paso transit authority does not include Fort Bliss. See Transportation Code, §453.051 concerning the Creation of Transit Departments.

(m) Restrictions on local sales tax rebates and other economic incentives. Pursuant to Local Government Code, §501.161, Section 4A and 4B development corporations may not offer to provide economic incentives, such as local sales tax rebates authorized under Local Government Code, Chapters 380 or 381, to persons whose business consists primarily of purchasing taxable items using resale certificates and then reselling those same items to a related party. A related party means a person or entity which owns at least 80% of the business enterprise to which sales and use taxes would be rebated as part of an economic incentive.

(n) Prior contract exemptions. The provisions of §3.319 of this title (relating to Prior Contracts) concerning definitions and exclusions apply to prior contract exemptions.

(1) Certain contracts and bids exempt. No local taxes are due on the sale, use, storage, or other consumption in this state of taxable items used:

(A) for the performance of a written contract executed prior to the effective date of any local tax if the contract may not be modified because of the tax; or

(B) pursuant to the obligation of a bid or bids submitted prior to the effective date of any local tax if the bid or bids and contract entered into pursuant thereto are at a fixed price and not subject to withdrawal, change, or modification because of the tax.

(2) Annexations. Any annexation of territory into an existing local taxing jurisdiction is also a basis for claiming the exemption provided by this subsection.

(3) Local taxing jurisdiction rate increase; partial exemption for certain contracts and bids. When an existing local taxing jurisdiction raises its sales and use tax rate, the additional amount of tax that would be due as a result of the rate increase is not due on the sale, use, storage, or other consumption in this state of taxable items used:

(A) for the performance of a written contract executed prior to the effective date of the tax rate increase if the contract may not be modified because of the tax; or

(B) pursuant to the obligation of a bid or bids submitted prior to the effective date of the tax rate increase if the bid or bids and contract entered into pursuant thereto are at a fixed price and not subject to withdrawal, change, or modification because of the tax.

(4) Three-year statute of limitations.

(A) The exemption in paragraph (1) of this subsection and the partial exemption in paragraph (3) of this subsection have no effect after three years from the date the adoption or increase of the tax takes effect in the local taxing jurisdiction.

(B) The provisions of §3.319 of this title apply to this subsection to the extent they are consistent.

(C) Leases. Any renewal or exercise of an option to extend the time of a lease or rental contract under the exemptions provided by this subsection shall be deemed to be a new contract and no exemption will apply.

(5) Records. Persons claiming the exemption provided by this subsection must maintain records which can be verified by the comptroller or the exemption will be lost.

(6) Exemption certificate. An identification number is required on the prior contract exemption certificates furnished to sellers. The identification number should be the person's 11-digit Texas taxpayer number or federal employer's identification (FEI) number.

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 January 10, 2023.

TRD-202300113
Jenny Burleson
Director, Tax Policy Division
Comptroller of Public Accounts
Effective date: January 30, 2023
Proposal publication date: September 23, 2022
For further information, please call: (512) 475-2220

TITLE 40. SOCIAL SERVICES AND ASSISTANCE

PART 1. DEPARTMENT OF AGING AND DISABILITY SERVICES

CHAPTER 45. COMMUNITY LIVING ASSISTANCE AND SUPPORT SERVICES AND COMMUNITY FIRST CHOICE (CFC) SERVICES

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 §§45.101 - 45.105, 45.201, 45.202, 45.211 - 45.218, 45.221 - 45.227, 45.231, 45.301, 45.302, 45.401 - 45.410, 45.503, 45.505, 45.521 - 45.525, 45.531, 45.533, 45.601 - 45.609, 45.611 - 45.619, 45.621, 45.701 - 45.709, 45.801 - 45.811, and 45.902 in Texas Administrative Code Title 40 (40 TAC), Part 1, Chapter 45, related to the Community Living Assistance and Support Services and Community First Choice (CFC) Services.

The repeal of §§45.101 - 45.105, 45.201, 45.202, 45.211 - 45.218, 45.221 - 45.227, 45.231, 45.301, 45.302, 45.401 - 45.410, 45.503, 45.505, 45.521 - 45.525, 45.531, 45.533, 45.601 - 45.609, 45.611 - 45.619, 45.621, 45.701 - 45.709, 45.801 - 45.811, and 45.902 is adopted without changes to the proposed text as published in the September 2, 2022, issue of the *Texas Register* (47 TexReg 5301). These rules will not be republished.

BACKGROUND AND JUSTIFICATION

The adoption repeals all of the rules in 40 TAC Chapter 45 for the Community Living Assistance and Support Services (CLASS) Program authorized under §1915(c) of the Social Security Act. HHSC is adopting new rules regarding the CLASS Program in 26 TAC Chapter 259 elsewhere in this issue of the *Texas Register.*

COMMENTS

The 31-day comment period ended October 3, 2022.

During this period and the public hearing held on September 26, 2022, HHSC did not receive any comments regarding the proposed repeal.

SUBCHAPTER A. GENERAL PROVISIONS

40 TAC §§45.101 - 45.105

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 system; 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, including the CLASS 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 January 10, 2023.

TRD-202300060

Karen Ray

Chief Counsel

Department of Aging and Disability Services

Effective date: January 30, 2023

Proposal publication date: September 2, 2022

For further information, please call: (512) 438-5077

♦ ♦ ♦

SUBCHAPTER B. ELIGIBILITY, ENROLLMENT, AND REVIEW

DIVISION 1. ELIGIBILITY AND MAINTENANCE OF INTEREST LIST

40 TAC §45.201, §45.202

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 system; 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, including the CLASS 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 January 10, 2023.

TRD-202300061

Karen Ray

Chief Counsel

Department of Aging and Disability Services

Effective date: January 30, 2023

Proposal publication date: September 2, 2022

For further information, please call: (512) 438-5077

♦ ♦ ♦

DIVISION 2. ENROLLMENT PROCESS

40 TAC §§45.211 - 45.218

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 system; 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, including the CLASS 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 January 10, 2023.

TRD-202300062

Karen Ray
Chief Counsel
Department of Aging and Disability Services
Effective date: January 30, 2023
Proposal publication date: September 2, 2022
For further information, please call: (512) 438-5077

♦ ♦ ♦

DIVISION 3. REVIEWS

40 TAC §§45.221 - 45.227

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 system; 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, including the CLASS 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 January 10, 2023.

TRD-202300063
Karen Ray
Chief Counsel
Department of Aging and Disability Services
Effective date: January 30, 2023
Proposal publication date: September 2, 2022
For further information, please call: (512) 438-5077

♦ ♦ ♦

DIVISION 4. SERVICE BACKUP PLANS

40 TAC §45.231

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 system; 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, including the CLASS 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 January 10, 2023.

TRD-202300064
Karen Ray
Chief Counsel
Department of Aging and Disability Services
Effective date: January 30, 2023
Proposal publication date: September 2, 2022
For further information, please call: (512) 438-5077

♦ ♦ ♦

SUBCHAPTER C. RIGHTS AND RESPONSIBILITIES OF AN INDIVIDUAL

40 TAC §45.301, §45.302

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 system; 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, including the CLASS 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 January 10, 2023.

TRD-202300065
Karen Ray
Chief Counsel
Department of Aging and Disability Services
Effective date: January 30, 2023
Proposal publication date: September 2, 2022
For further information, please call: (512) 438-5077

♦ ♦ ♦

SUBCHAPTER D. TRANSFER, DENIAL, SUSPENSION, REDUCTION, AND TERMINATION OF SERVICES

40 TAC §§45.401 - 45.410

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 system; 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, including the CLASS 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 January 10, 2023.

TRD-202300066

Karen Ray
Chief Counsel
Department of Aging and Disability Services
Effective date: January 30, 2023
Proposal publication date: September 2, 2022
For further information, please call: (512) 438-5077

♦ ♦ ♦

SUBCHAPTER E. SUPPORT FAMILY SERVICES
DIVISION 1. INTRODUCTION

40 TAC §45.503, §45.505

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 system; 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, including the CLASS 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 January 10, 2023.

TRD-202300067
Karen Ray
Chief Counsel
Department of Aging and Disability Services
Effective date: January 30, 2023
Proposal publication date: September 2, 2022
For further information, please call: (512) 438-5077

♦ ♦ ♦

DIVISION 2. SUPPORT FAMILY AGENCY

40 TAC §§45.521 - 45.525

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 system; 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, including the CLASS 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 January 10, 2023.

TRD-202300068
Karen Ray
Chief Counsel
Department of Aging and Disability Services
Effective date: January 30, 2023
Proposal publication date: September 2, 2022
For further information, please call: (512) 438-5077

♦ ♦ ♦

DIVISION 3. SUPPORT FAMILIES

40 TAC §45.531, §45.533

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 system; 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, including the CLASS 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 January 10, 2023.

TRD-202300069
Karen Ray
Chief Counsel
Department of Aging and Disability Services
Effective date: January 30, 2023
Proposal publication date: September 2, 2022
For further information, please call: (512) 438-5077

♦ ♦ ♦

SUBCHAPTER F. ADAPTIVE AIDS AND MINOR HOME MODIFICATIONS
DIVISION 1. ADAPTIVE AIDS

40 TAC §§45.601 - 45.609

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 system; 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, including the CLASS 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 January 10, 2023.

TRD-202300070

Karen Ray
Chief Counsel
Department of Aging and Disability Services
Effective date: January 30, 2023
Proposal publication date: September 2, 2022
For further information, please call: (512) 438-5077

♦ ♦ ♦

DIVISION 2. MINOR HOME MODIFICATIONS

40 TAC §§45.611 - 45.619

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 system; 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, including the CLASS 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 January 10, 2023.

TRD-202300071
Karen Ray
Chief Counsel
Department of Aging and Disability Services
Effective date: January 30, 2023
Proposal publication date: September 2, 2022
For further information, please call: (512) 438-5077

♦ ♦ ♦

DIVISION 3. CFC ERS

40 TAC §45.621

STATUTORY AUTHORITY

The repeal is authorized by Texas Government Code §531.0055, which provides that the Executive Commissioner of HHSC shall adopt rules for the operation and provision of services by the health and human services system; 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, including the CLASS 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 January 10, 2023.

TRD-202300072
Karen Ray
Chief Counsel
Department of Aging and Disability Services
Effective date: January 30, 2023
Proposal publication date: September 2, 2022
For further information, please call: (512) 438-5077

♦ ♦ ♦

SUBCHAPTER G. ADDITIONAL CMA REQUIREMENTS

40 TAC §§45.701 - 45.709

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 system; Texas HumanResources Code §32.021, which authorizes the Executive Commissioner of HHSC to adopt rules necessary for the proper and efficient operation of the Medicaid program, including the CLASS 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 January 10, 2023.

TRD-202300073
Karen Ray
Chief Counsel
Department of Aging and Disability Services
Effective date: January 30, 2023
Proposal publication date: September 2, 2022
For further information, please call: (512) 438-5077

♦ ♦ ♦

SUBCHAPTER H. ADDITIONAL DSA REQUIREMENTS

40 TAC §§45.801 - 45.811

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 system; 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, including the CLASS 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 January 10, 2023.

TRD-202300074

Karen Ray
Chief Counsel
Department of Aging and Disability Services
Effective date: January 30, 2023
Proposal publication date: September 2, 2022
For further information, please call: (512) 438-5077

♦ ♦ ♦

SUBCHAPTER I. FISCAL MONITORING

40 TAC §45.902

STATUTORY AUTHORITY

The repeal is authorized by Texas Government Code §531.0055, which provides that the Executive Commissioner of HHSC shall adopt rules for the operation and provision of services by the health and human services system; 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, including the CLASS 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 January 10, 2023.

TRD-202300075
Karen Ray
Chief Counsel
Department of Aging and Disability Services
Effective date: January 30, 2023
Proposal publication date: September 2, 2022
For further information, please call: (512) 438-5077

♦ ♦ ♦


Texas

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 Department of Housing and Community Affairs

Title 10, Part 1

The Texas Department of Housing and Community Affairs (the Department) files this notice of rule review for 10 TAC Chapter 10, Uniform Multifamily Rules, Subchapter F, Compliance Monitoring, §10.603, Notices to the Internal Revenue Service (HTC Developments during the Compliance Period) and §10.620, Monitoring for Non-Profit Participation, HUB, or CHDO Participation. The purpose of the proposed action is to conduct a rule review in accordance with Tex. Gov't Code §2001.039, which requires a state agency to review its rules every four years.

At this time, the Department has determined that there continues to be a need for this rule, which is to have a rule in effect that provides how and when notice to the Internal Revenue Service on IRS Form 8823 will occur. The Department has also determined that no changes to this rule as currently in effect are necessary. This rule proposed for readoption will be noted in the *Texas Register's* Review of Agency Rules section without publication of the text.

REQUEST FOR PUBLIC COMMENT. All comments or questions in response to this notice of rule review may be submitted in writing from January 27, 2023, through February 27, 2023. Written comments may be submitted to Brooke Boston, Texas Department of Housing and Community Affairs, P.O. Box 13941, Austin, Texas 78711-3941, or by email to bboston@tdhca.state.tx.us. ALL COMMENTS MUST BE RECEIVED BY 5:00 p.m. Austin local time, February 27, 2023.

TRD-202300140
Bobby Wilkinson
Executive Director
Texas Department of Housing and Community Affairs
Filed: January 12, 2023

♦ ♦ ♦

The Texas Department of Housing and Community Affairs (the Department) files this notice of rule review for 10 TAC Chapter 29, Texas Single Family Neighborhood Stabilization Program Rule. The purpose of the proposed action is to conduct a rule review in accordance with Tex. Gov't Code §2001.039, which requires a state agency to review its rules every four years.

At this time, the Department has determined that there continues to be a need for this rule, which is to have rules in effect that govern the activities of the Neighborhood Stabilization Program (NSP) single family activities. The Department has also determined that no changes to this rule as currently in effect are necessary. This rule proposed for readoption will be noted in the *Texas Register's* Review of Agency Rules section without publication of the text.

REQUEST FOR PUBLIC COMMENT. All comments or questions in response to this notice of rule review may be submitted in writing from January 27, 2023, through February 27, 2023. Written comments may be submitted to Brooke Boston, Texas Department of Housing and Community Affairs, P.O. Box 13941, Austin, Texas 78711-3941, or by email to bboston@tdhca.state.tx.us. ALL COMMENTS MUST BE RECEIVED BY 5:00 p.m. Austin local time, February 27, 2023.

TRD-202300139
Bobby Wilkinson
Executive Director
Texas Department of Housing and Community Affairs
Filed: January 12, 2023

♦ ♦ ♦

Texas Higher Education Coordinating Board

Title 19, Part 1

The Texas Higher Education Coordinating Board (THECB) proposes the review of Texas Administrative Code (TAC), Title 19, Part 1, Chapter 1, Subchapter C, Standards of Conduct, pursuant to Texas Government Code §2001.039.

This review is conducted as required by law, which states that state agencies must assess whether the initial reasons for adopting a rule continue to exist every four years. As required by statute, THECB will accept comments as to whether TAC, Chapter 1, Subchapter C, should continue.

Comments on the review may be submitted to Nichole Bunker-Henderson, General Counsel, P.O. Box 12788, Austin, Texas 78711-2788, or via email at Nichole.Bunker-Henderson@highered.texas.gov. Comments will be accepted for 30 days following publication of this notice in the *Texas Register.*

The text of the rule section being reviewed will not be published, but may be found in TAC, Title 19, Part 1, Chapter 1, Subchapter C.

TRD-202300155
Nichole Bunker-Henderson
General Counsel
Texas Higher Education Coordinating Board
Filed: January 13, 2023

♦ ♦ ♦

Texas Education Agency

Title 19, Part 2

Texas Education Agency (TEA) proposes the review of 19 TAC Chapter 75, Curriculum, Subchapter AA, Commissioner's Rules Concerning Driver Education Standards of Operation for Public Schools, Education Service Centers, and Colleges or Universities; and Subchapter BB, Commissioner's Rules Concerning Provisions for Career and Technical Education, pursuant to Texas Government Code, §2001.039.

As required by Texas Government Code, §2001.039, TEA will accept comments as to whether the reasons for adopting Chapter 75, Subchapters AA and BB, continue to exist.

The public comment period on the review begins January 27, 2023, and ends February 27, 2023. A form for submitting public comments on the proposed rule review is available on the TEA website at https://tea.texas.gov/about-tea/laws-and-rules/commissioner-rules-tac/commissioner-of-education-rule-review.

TRD-202300182
Cristina De La Fuente-Valadez
Director, Rulemaking
Texas Education Agency
Filed: January 18, 2023

♦ ♦ ♦

Texas Education Agency (TEA) proposes the review of 19 TAC Chapter 129, Student Attendance, Subchapter AA, Commissioner's Rules; and Subchapter BB, Commissioner's Rules Concerning Truancy, pursuant to Texas Government Code, §2001.039.

As required by Texas Government Code, §2001.039, TEA will accept comments as to whether the reasons for adopting Chapter 129, Subchapters AA and BB, continue to exist.

The public comment period on the review begins January 27, 2023, and ends February 27, 2023. A form for submitting public comments on the proposed rule review is available on the TEA website at https://tea.texas.gov/about-tea/laws-and-rules/commissioner-rules-tac/commissioner-of-education-rule-review.

TRD-202300183
Cristina De La Fuente-Valadez
Director, Rulemaking
Texas Education Agency
Filed: January 18, 2023

♦ ♦ ♦

Texas Education Agency (TEA) proposes the review of 19 TAC Chapter 157, Hearings and Appeals, Subchapter AA, General Provisions for Hearings Before the Commissioner of Education; Subchapter BB, Specific Appeals to the Commissioner; Subchapter CC, Hearings of Appeals Arising Under Federal Law and Regulation; and Subchapter DD, Hearings Conducted by Independent Hearing Examiners, pursuant to Texas Government Code, §2001.039.

As required by Texas Government Code, §2001.039, TEA will accept comments as to whether the reasons for adopting Chapter 157, Subchapters AA-DD, continue to exist.

The public comment period on the review begins January 27, 2023, and ends February 27, 2023. A form for submitting public comments on the proposed rule review is available on the TEA website at https://tea.texas.gov/about-tea/laws-and-rules/commissioner-rules-tac/commissioner-of-education-rule-review.

TRD-202300184
Cristina De La Fuente-Valadez
Director, Rulemaking
Texas Education Agency
Filed: January 18, 2023

♦ ♦ ♦

Adopted Rule Reviews

State Board for Educator Certification

Title 19, Part 7

The State Board for Educator Certification (SBEC) adopts the review of Title 19, Texas Administrative Code (TAC), Chapter 233, Categories of Classroom Teaching Certificates, pursuant to the Texas Government Code (TGC), §2001.039. The SBEC proposed the review of 19 TAC Chapter 233 in the October 28, 2022, issue of the *Texas Register* (47 TexReg 7307).

Relating to the review of 19 TAC Chapter 233, the SBEC finds that the reasons for the adoption continue to exist and readopts the rules. The following provides summaries of public comments received on the proposal.

Comment: One individual commented in opposition to the proposed review of Chapter 233, Categories of Classroom Teaching Certificates, stating that creating categories of classroom teachers will make it harder to fill teacher positions due to limits on teacher certifications.

Response: The SBEC disagrees. This comment is outside the scope of the proposed rule review, which determines whether a rule should continue to exist. Moreover, the SBEC disagrees because the categories of classroom certificates identify the content areas, grade levels, or special populations the holder may teach to ensure that teachers are appropriately trained and qualified to meet the differing educational needs of different student populations.

Comment: One individual commented neither in support nor against the proposed review of Chapter 233, Categories of Classroom Teaching Certificates, asking whether the rule pertains to their role as an English as a second language (ESL) aide/paraprofessional.

Response: The SBEC disagrees. This comment is outside the scope of the proposed rule review, which determines whether a rule should continue to exist. Texas Education Agency staff contacted the individual to inform that these rules do not apply to their role as an ESL aide/paraprofessional as the rules are only for those who have their SBEC-issued standard classroom teacher certificate.

Comment: One individual commented neither in support nor against the proposed review of Chapter 233, Categories of Classroom Teaching Certificates, stating that there should be a tighter regulatory enforcement focus on charter schools to help administrators.

Response: The SBEC disagrees. This comment is outside the scope of the proposed rule review, which determines if a rule should continue to exist. The SBEC does not have jurisdiction over charter schools, only over certified educators.

This concludes the review of 19 TAC Chapter 233.

TRD-202300196
Cristina De La Fuente-Valadez
Director, Rulemaking
State Board for Educator Certification
Filed: January 18, 2023

♦ ♦ ♦

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: 19 TAC §22.49(b)

Area of Study	Average Annual Earnings (five years after graduation)	Reasonable Monthly Student Loan Payment (based on a 10-year repayment at an average 5% interest)	Reasonable Student Debt to Income Ratio	Maximum Amount of Student Loan Debt Used in College Access Loan Calculation
Agriculture and natural resources	$53,000	$442	10%	$50,350
Architecture and engineering	$83,228	$694	10%	$79,067
Arts	$45,210	$377	10%	$42,950
Biological and life sciences	$48,827	$407	10%	$46,386
Business	$59,123	$493	10%	$56,167
Communications and journalism	$49,098	$409	10%	$46,643
Computers, statistics, and mathematics	$68,246	$569	10%	$64,833
Education	$49,127	$409	10%	$46,671
Health	$60,398	$503	10%	$57,378
Humanities and liberal arts	$47,418	$395	10%	$45,047
Industrial arts, consumer services, and recreation	$49,907	$416	10%	$47,412
Law, public policy, and social work	$45,476	$379	10%	$43,202
Physical sciences	$59,588	$497	10%	$56,609
Psychology or undeclared major	$42,960	$358	10%	$40,812
Social sciences	$50,274	$419	10%	$47,760

Figure: 31 TAC §27.1(a)

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.

Coastal Bend Workforce Development Board

Request for Applications for Professional Development Trainers to Provide Training to Child Care Providers (RFA No. 23-02)

Workforce Solutions Coastal Bend

Workforce Solutions Coastal Bend (WFSCB) is soliciting applications from qualified firms or individuals to provide specialized professional development training to the Coastal Bend region's child care providers on an as needed basis. Training topics will include early childhood education and business management. Applications will be accepted through Friday, August 11, 2023, at 4:00 p.m.

The RFA will be available on Monday, January 23, 2023, at 2:00 p.m. Central Time and can be accessed on our website at: www.workforcesolutionscb.org or by contacting Esther Velazquez at (361) 885-3013 or esther.velazquez@workforcesolutionscb.org.

Applications may be submitted via email to esther.velazquez@workforcesolutionscb.org or may be hand delivered or mailed to: Workforce Solutions Coastal Bend, 400 Mann Street, Suite 800, Corpus Christi, Texas 78401.

Workforce Solutions Coastal Bend is an Equal Opportunity Employer/Program. Auxiliary aids and services are available upon request to individuals with disabilities. Relay Texas: (800) 735-2989 (TDD) and (800) 735-2988 or 7-1-1 (Voice). Historically Underutilized Businesses (HUBs) are encouraged to apply.

TRD-202300138
Esther Velzquez
Contract and Procurement Specialist
Coastal Bend Workforce Development Board
Filed: January 12, 2023

♦ ♦ ♦

Comptroller of Public Accounts

Certification of the Average Closing Price of Gas and Oil - December 2022

The Comptroller of Public Accounts, administering agency for the collection of the Oil Production Tax, has determined, as required by Tax Code, §202.058, that the average taxable price of oil for reporting period December 2022 is $56.44 per barrel for the three-month period beginning on September 1, 2022, and ending November 30, 2022. Therefore, pursuant to Tax Code, §202.058, oil produced during the month of December 2022, from a qualified low-producing oil lease, is not eligible for credit on the oil production tax imposed by Tax Code, Chapter 202.

The Comptroller of Public Accounts, administering agency for the collection of the Natural Gas Production Tax, has determined, as required by Tax Code, §201.059, that the average taxable price of gas for reporting period December 2022 is $4.48 per mcf for the three-month period beginning on September 1, 2022, and ending November 30, 2022. Therefore, pursuant to Tax Code, §201.059, gas produced during the month of December 2022, from a qualified low-producing well, is not eligible for credit on the natural gas production tax imposed by Tax Code, Chapter 201.

The Comptroller of Public Accounts, administering agency for the collection of the Franchise Tax, has determined, as required by Tax Code, §171.1011(s), that the average closing price of West Texas Intermediate crude oil for the month of December 2022 is $76.52 per barrel. Therefore, pursuant to Tax Code, §171.1011(r), a taxable entity shall not exclude total revenue received from oil produced during the month of December 2022, from a qualified low-producing oil well.

The Comptroller of Public Accounts, administering agency for the collection of the Franchise Tax, has determined, as required by Tax Code, §171.1011(s), that the average closing price of gas for the month of December 2022 is $5.77 per MMBtu. Therefore, pursuant to Tax Code, §171.1011(r), a taxable entity shall not exclude total revenue received from gas produced during the month of December 2022, from a qualified low-producing gas well.

Inquiries should be submitted to Jenny Burleson, Director, Tax Policy Division, P.O. Box 13528, Austin, Texas 78711-3528.

Issued in Austin, Texas, on January 13, 2023.

TRD-202300168
Jenny Burleson
Director, Tax Policy
Comptroller of Public Accounts
Filed: January 13, 2023

♦ ♦ ♦

Concho Valley Workforce Development Board

Concho Valley Workforce Development Board Strategic Plan-Public Notice

PUBLIC NOTICE

Concho Valley Workforce Development Board has posted a draft of its modified strategic plan on its website. Concho Valley Workforce Development Board Plan Program years 2021-2024. The website to review the modified plan is: www.cvworkforce.org

Response is due by 5:00 p.m. CST, February 22, 2023, with any questions or concerns. Public comments on the plan should be submitted to ysanchez@cvworkforce.org by February 22nd, 2023.

TRD-202300130
Leigh Heath
Human Resource Manager-Liaison
Concho Valley Workforce Development Board
Filed: January 11, 2023

♦ ♦ ♦

Office of the 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, 303.009 and 304.003, Texas Finance Code.

The weekly ceiling as prescribed by §303.003 and §303.009 for the period of 01/23/23 - 01/29/23 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 01/23/23 - 01/29/23 is 18% for Commercial over $250,000.

The judgment ceiling as prescribed by §304.003 for the period of 02/01/23 - 02/28/23 is 7.50% for Consumer/Agricultural/Commercial credit through $250,000.

The judgment ceiling as prescribed by §304.003 for the period of 02/01/23 - 02/28/23 is 7.50% for Commercial over $250,000.

[1] Credit for personal, family or household use.

[2] Credit for business, commercial, investment or other similar purpose.

TRD-202300179
Leslie L. Pettijohn
Commissioner
Office of the Consumer Credit Commissioner
Filed: January 18, 2023

♦ ♦ ♦

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 **February 28, 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 **February 28, 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: 13123 WEST HARDY, L.P.; DOCKET NUMBER: 2022-0916-PWS-E; IDENTIFIER: RN102684602; LOCATION: Houston, Harris County; TYPE OF FACILITY: public water supply; RULE VIOLATED: 30 TAC §290.41(c)(3)(A), by failing to submit well completion data for review and approval prior to placing the facility's well into service; PENALTY: $500; ENFORCEMENT COORDINATOR: Amanda Conner, (512) 239-2521; REGIONAL OFFICE: 5425 Polk Street, Suite H, Houston, Texas 77023-1452, (713) 767-3500.

(2) COMPANY: ACME BRICK COMPANY; DOCKET NUMBER: 2021-0350-AIR-E; IDENTIFIER: RN100225184; LOCATION: Millsap, Parker County; TYPE OF FACILITY: brick and structural clay tile manufacturing plant; RULES VIOLATED: 30 TAC §116.115(b)(2)(F) and (c) and §122.143(4), New Source Review Permit Number 25937, Special Conditions Number 1, Federal Operating Permit Number O1597, General Terms and Conditions and Special Terms and Conditions Number 10, and Texas Health and Safety Code, §382.085(b), by failing to comply with the maximum allowable emissions rate; PENALTY: $6,900; ENFORCEMENT COORDINATOR: Amanda Diaz, (713) 422-8912; REGIONAL OFFICE: 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(3) COMPANY: City of Crockett; DOCKET NUMBER: 2021-0768-MWD-E; IDENTIFIER: RN101609675; LOCATION: Crockett, Houston County; TYPE OF FACILITY: wastewater treatment facility; RULES VIOLATED: 30 TAC §305.125(1), TWC, §26.121(a)(1), and Texas Pollutant Discharge Elimination System Permit Number WQ0010154002, Effluent Limitations and Monitoring Requirements Numbers 1 and 3, by failing to comply with permitted effluent limitations; PENALTY: $18,750; SUPPLEMENTAL ENVIRONMENTAL PROJECT OFFSET AMOUNT: $15,000; ENFORCEMENT COORDINATOR: Ellen Ojeda, (512) 239-2581; REGIONAL OFFICE: 3870 Eastex Freeway, Beaumont, Texas 77703-1830, (409) 898-3838.

(4) COMPANY: MONTALBA WATER SUPPLY CORPORATION; DOCKET NUMBER: 2022-1260-UTL-E; IDENTIFIER: RN101261576; LOCATION: Montalba, Anderson County; TYPE OF FACILITY: retail public utility, exempt utility, or provider or conveyor of potable or raw water service that furnishes 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: $510; ENFORCEMENT COORDINATOR: Nick Lohret, (512) 239-4495; REGIONAL OFFICE: 2916 Teague Drive, Tyler, Texas 75701-3734, (903) 535-5100.

(5) COMPANY: Southwest Harris County Municipal Utility District 1; DOCKET NUMBER: 2022-0171-PWS-E; IDENTIFIER: RN102697539; LOCATION: Missouri City, Harris County; TYPE OF FACILITY: public water supply; RULES VIOLATED: 30 TAC §290.45(b)(1)(D)(iv) and (f)(7) and Texas Health and Safety Code (THSC), §341.0315(c), by failing to provide an elevated storage capacity of 100 gallons per connection or a pressure tank capacity of 20 gallons per connection; 30 TAC §290.45(f)(3) and THSC, §341.0315(c), by failing to provide a water purchase contract that authorizes the maximum rate at which water may be drafted on a daily and hourly basis or a uniform purchase rate for the contract period; and 30 TAC §290.45(f)(5) and THSC, §341.0315(c), by failing to provide a water purchase contract that authorizes a maximum hourly purchase rate plus an actual service pump capacity of at least 2.0 gallons per minute (gpm) per connection or provide at least 1,000 gpm and be able to meet peak hourly demands, whichever is less, for systems under direct pressure; PENALTY: $2,425; ENFORCEMENT COORDINATOR: Nick Lohret, (512) 239-4495; REGIONAL OFFICE: 5425 Polk Street, Suite H, Houston, Texas 77023-1452, (713) 767-3500.

(6) COMPANY: TEXAS WATER SYSTEMS, INCORPORATED; DOCKET NUMBER: 2022-1319-UTL-E; IDENTIFIER: RN101376952; LOCATION: Ore City, Upshur County; TYPE OF FACILITY: retail public utility, exempt utility, or provider or conveyor of potable or raw water service that furnishes 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: $1,020; ENFORCEMENT COORDINATOR: Nick Lohret, (512) 239-4495; REGIONAL OFFICE: 2916 Teague Drive, Tyler, Texas 75701-3734, (903) 535-5100.

(7) COMPANY: TEXAS WATER SYSTEMS, INCORPORATED; DOCKET NUMBER: 2022-1321-UTL-E; IDENTIFIER: RN101210292; LOCATION: Gilmer, Upshur County; TYPE OF FACILITY: retail public utility, exempt utility, or provider or conveyor of potable or raw water service that furnishes 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: $1,240; ENFORCEMENT COORDINATOR: Nick Lohret, (512) 239-4495; REGIONAL OFFICE: 2916 Teague Drive, Tyler, Texas 75701-3734, (903) 535-5100.

(8) COMPANY: TEXAS WATER SYSTEMS, INCORPORATED; DOCKET NUMBER: 2022-1322-UTL-E; IDENTIFIER: RN101182475; LOCATION: Rosewood, Upshur County; TYPE OF FACILITY: retail public utility, exempt utility, or provider or conveyor of potable or raw water service that furnishes 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: $1,020; ENFORCEMENT COORDINATOR: Nick Lohret, (512) 239-4495; REGIONAL OFFICE: 2916 Teague Drive, Tyler, Texas 75701-3734, (903) 535-5100.

(9) COMPANY: Undine Texas Environmental, LLC; DOCKET NUMBER: 2021-0871-IWD-E; IDENTIFIER: RN102060126; LOCATION: Houston, Harris County; TYPE OF FACILITY: industrial and domestic wastewater facility; RULES VIOLATED: 30 TAC §305.125(1), TWC, §26.121(a)(1), and Texas Pollutant Discharge Elimination System Permit Number WQ0003792000, Effluent Limitations and Monitoring Requirements Number 1, by failing to comply with permitted effluent limitations; PENALTY: $37,050; ENFORCEMENT COORDINATOR: Ellen Ojeda, (512) 755-6327; REGIONAL OFFICE: 5425 Polk Street, Suite H, Houston, Texas 77023-1452, (713) 767-3500.

(10) COMPANY: XTO Energy Incorporated; DOCKET NUMBER: 2020-0960-AIR-E; IDENTIFIER: RN102554243; LOCATION: Denver City, Gaines County; TYPE OF FACILITY: natural gas compressor station; RULES VIOLATED: 30 TAC §106.4(a)(1)(B) and §106.6(b), Permit by Rule Registration Number 113906, and Texas Health and Safety Code, §382.085(b), by failing to comply with all representations with regard to construction plans, operating procedures, and maximum emission rates in any certified registration; PENALTY: $129,375; SUPPLEMENTAL ENVIRONMENTAL PROJECT OFFSET AMOUNT: $51,750; ENFORCEMENT COORDINATOR: Amanda Diaz, (713) 422-8912; REGIONAL OFFICE: 9900 West IH-20, Suite 100, Midland, Texas 79706, (432) 570-1359.

TRD-202300172
Gitanjali Yadav
Deputy Director, Litigation
Texas Commission on Environmental Quality
Filed: January 17, 2023

♦ ♦ ♦

Enforcement Orders

An agreed order was adopted regarding Big Diamond, LLC dba Corner Store 1028, Docket No. 2018-1762-PST-E on January 17, 2023, assessing $6,874 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.

TRD-202300207
Laurie Gharis
Chief Clerk
Texas Commission on Environmental Quality
Filed: January 18, 2023

♦ ♦ ♦

Notice of District Petition

Notice issued January 18, 2023

TCEQ Internal Control No. D-06212022-045; Cibolo Creek Municipal Authority of Bexar, Comal, and Guadalupe Counties (the "Authority") filed an application with the Texas Commission on Environmental Quality (TCEQ) for authority to levy impact fees of $2,200 per equivalent single-family connection for new connections to the wastewater treatment and collection systems within the North Side Basin service area and $2,300 per equivalent single-family connection for new connections to the wastewater treatment system within the South Side Basin service area of the Authority. The Authority files this application under the authority of Chapter 395 of the Local Government Code, 30 Texas Administrative Code Chapter 293, and the procedural rules of the TCEQ. The purpose of impact fees is to generate revenue to recover the costs of capital improvements or facility expansions made necessary by and attributable to serving new development in the Authority's service areas. At the direction of the Authority, a registered engineer has prepared a capital improvements plan for the system that identifies the capital improvements or facility expansions and their costs for which the impact fees will be assessed. The impact fee application and supporting information are available for inspection and copying during regular business hours in the Districts Section of the Water Supply Division, Third Floor of Building F (in the TCEQ Park 35 Office Complex located between Yager and Braker lanes on North IH-35), 12100 Park 35 Circle, Austin, Texas 78753. A copy of the impact fee application and supporting information, as well as the capital improvements plan, is available for inspection and copying at the Authority's office during regular business hours.

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-202300202
Laurie Gharis
Chief Clerk
Texas Commission on Environmental Quality
Filed: January 18, 2023

♦ ♦ ♦

Notice of District Petition

Notice issued January 18, 2023

TCEQ Internal Control No. D-09262022-049 White Oaks Ranch Land, LP, (Petitioner) filed a petition for creation of White Oaks Municipal Utility District of Denton County (District) with the Texas Commission on Environmental Quality (TCEQ). The petition was filed pursuant to Article XVI, §59 and Article III, §52 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 amended 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 no lienholders on the property to be included in the proposed District; (3) the proposed District will contain approximately 378.944 acres located within Denton County, Texas; and (4) all of the land within the proposed District is outside of the corporate limits and extraterritorial jurisdiction of any municipality and is located in Denton County. The amended 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) to collect, transport, process, dispose of and control domestic, and commercial wastes; (3) to gather, conduct, divert, abate, amend and control local storm water or other local harmful excesses of water in the District; (4) to design, acquire, construct, finance, improve, operate, and maintain macadamized, graveled, or paved roads and turnpikes, or improvements in aid of those roads; (5) and to 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 $82,630,000 ($65,150,000 for water, wastewater, and drainage plus $17,480,000 for roads).

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-202300203
Laurie Gharis
Chief Clerk
Texas Commission on Environmental Quality
Filed: January 18, 2023

♦ ♦ ♦

Notice of District Petition

Notice issued January 18, 2023

TCEQ Internal Control No. D-09222022-043; Bahamas Laguna Azure, LLC, a Wyoming limited liability corporation, ("Petitioner") filed a petition for creation of Rockwall County Municipal Utility District No. 11 (District) with the Texas Commission on Environmental Quality (TCEQ). The petition was filed pursuant to Article XVI, Section 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 is the owner of a majority of the assessed value of the land to be included in the proposed District; (2) there is one lienholder on the property to be included in the proposed District, and the lienholder has given written consent to the creation petition; (3) the proposed District will contain approximately 430.45 acres, located within Rockwall County, Texas; (4) the proposed District is entirely within the extraterritorial jurisdiction of the City of Royse City, Texas; and (5) although the City of Royse City (City) has not consented to creation of the District, the Petitioner has satisfied the requirements of Texas Water Code Section 54.016(b) and (c) and Texas Local Government Code Section 42.042, so that the authorization for inclusion of the land in the proposed District may be assumed pursuant to the cited statutes. The petition further states that the proposed District will construct, maintain, and operate a waterworks system including the purchase and sale of water for domestic and commercial purposes; to construct, maintain and operate a sanitary sewer collection, treatment and disposal system, for domestic and commercial purposes; to construct, install, maintain, purchase and operate drainage and roadway facilities

and improvements; and to construct, install, operate, purchase and maintain facilities, systems, plants and enterprises of such additional facilities as shall be consonant with the purposes for which the District is organized. According to the petition, a preliminary investigation has been made to determine the cost of the project, and it is estimated by the Petitioner, from the information available at this time, that the cost of said project will be approximately $55,440,000.

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-202300204
Laurie Gharis
Chief Clerk
Texas Commission on Environmental Quality
Filed: January 18, 2023

♦ ♦ ♦

Notice of District Petition

Notice issued January 18, 2023

TCEQ Internal Control No. D-11292022-043; Victor D. Turley and Alexis H. Turley, ("Petitioners") filed a petition for creation of Two Chimneys Municipal Utility District (District) with the Texas Commission on Environmental Quality (TCEQ). The petition was filed pursuant to Article XVI, Section 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 are the owners of a majority of the assessed 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 205.630 acres, located within Bell County, Texas; and (4) proposed District is not within the corporate limits or extraterritorial jurisdiction of any city, town or village in Texas. The petition further states that the proposed District will (1) purchase, design, construct, acquire, maintain, own, operate, repair, improve and extend 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, and (4) purchase, acquire, construct, improve, own, operate, repair, and extend such facilities, including roads, plants, systems and enterprises of such additional facilities as shall be consonant with all the purposes for which the 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, from the information available at this time, that the cost of said project will be approximately $24,200,000.

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-202300205
Laurie Gharis
Chief Clerk
Texas Commission on Environmental Quality
Filed: January 18, 2023

♦ ♦ ♦

Notice of Hearing FM 2920 Land Company, Ltd.
SOAH Docket No. 582-23-09206 TCEQ Docket No. 2022-0939-MWD Permit No. WQ0015977001

APPLICATION.

FM 2920 Land Company, Ltd., 2000 West Parkwood Avenue, Friendswood, Texas 77546, has applied to the Texas Commission on Environmental Quality (TCEQ) for new Texas Pollutant Discharge Elimination System (TPDES) Permit No. WQ0015977001, to authorize the discharge of treated domestic wastewater at a daily average flow not to exceed 120,000 gallons per day.

The facility will be located on Farm-to-Market Road 2920 approximately 550 feet east of the intersection of Farm-to-Market Road 2920 and Three Pines Drive, in Harris County, Texas 77447. The treated effluent will be discharged to a man-made ditch, thence to Spring Creek in Segment No. 1008 of the San Jacinto River Basin. The unclassified receiving water uses are minimal aquatic life use for the man-made ditch and high aquatic life use for Spring Creek. The designated uses for Segment No. 1008 are primary contact recreation, public water supply, and high aquatic life use.

In accordance with 30 Texas Administrative Code §307.5 and the TCEQ implementation procedures (June 2010) for the Texas Surface Water Quality Standards, 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 Spring 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=-95.743055%2C30.079722&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. The permit application, Executive Director's preliminary decision, and draft permit are available for viewing and copying at Northwest Branch Library, 11355 Regency Green Drive, Cypress, Texas.

CONTESTED CASE HEARING.

Considering directives to protect public health, the State Office of Administrative Hearings (SOAH) will conduct a preliminary hearing via Zoom videoconference. A Zoom meeting is a secure, free meeting held over the internet that allows video, audio, or audio/video conferencing.

10:00 a.m. - February 28, 2023

To join the Zoom meeting via computer:

https://soah-texas.zoomgov.com/

Meeting ID: 160 756 2357

Password: TCEQ926

or

To join the Zoom meeting via telephone:

(669) 254-5252 or (646) 828-7666

Meeting ID: 160 756 2357

Password: 5443219

Visit the SOAH website for registration at: http://www.soah.texas.gov/

or call SOAH at (512) 475-4993.

The purpose of a preliminary hearing is to establish jurisdiction, name the parties, establish a procedural schedule for the remainder of the proceeding, and to address other matters as determined by the judge. The evidentiary hearing phase of the proceeding, which will occur at a later date, will be similar to a civil trial in state district court. The hearing will address the disputed issues of fact identified in the TCEQ order concerning this application issued on September 15, 2022. In addition to these issues, the judge may consider additional issues if certain factors are met.

The hearing will be conducted in accordance with Chapter 2001, Texas Government Code; Chapter 26, Texas Water Code; and the procedural rules of the TCEQ and SOAH, including 30 TAC Chapter 80 and 1 TAC Chapter 155. The hearing will be held unless all timely hearing requests have been withdrawn or denied.

To request to be a party, you must attend the hearing and show you would be adversely affected by the application in a way not common to members of the general public. Any person may attend the hearing and request to be a party. Only persons named as parties may participate at the hearing.

In accordance with 1 Texas Administrative Code §155.401(a), Notice of Hearing, "Parties that are not represented by an attorney may obtain information regarding contested case hearings on the public website of the State Office of Administrative Hearings at www.soah.texas.gov, or in printed format upon request to SOAH."

INFORMATION.

If you need more information about the hearing process for this application, please call the Public Education Program, toll free, at (800) 687-4040. General information about the TCEQ can be found at our web site at www.tceq.texas.gov.

Further information may also be obtained from the FM 2920 Land Company, Ltd. at the address stated above or by calling Mr. Phi Nguyen, P.E., Senior Project Engineer, Ward, Getz & Associates, at (713) 489-9568.

Persons with disabilities who need special accommodations at the hearing should call the SOAH Docketing Department at (512) 475-4993, at least one week prior to the hearing.

Issued: January 18, 2023

TRD-202300208
Laurie Gharis
Chief Clerk
Texas Commission on Environmental Quality
Filed: January 18, 2023

♦ ♦ ♦

Notice of Opportunity to Comment on Agreed 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 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 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 **February 28, 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 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 February 28, 2023.** The designated attorneys are available to discuss the AOs and/or the comment procedure at the listed phone numbers; however, TWC, §7.075, provides that comments on an AO shall be submitted to the commission in **writing.**

(1) COMPANY: Martin Rechnitzer, Guardian of the Person and Estate of Emmette Kelly; DOCKET NUMBER: 2019-1685-MSW-E; TCEQ ID NUMBER: RN110869344; LOCATION: 7612 Luce Lane, Mansfield, Johnson County; TYPE OF FACILITY: property; RULE VIOLATED: 30 TAC §330.15(a) and (c), by causing, suffering, allowing, or permitting, the unauthorized disposal of municipal solid waste; PENALTY: $3,750; STAFF ATTORNEY: Barrett Hollingsworth, Litigation, MC 175, (512) 239-0657; REGIONAL OFFICE: Dallas-Fort Worth Regional Office, 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(2) COMPANY: Michell Griggs; DOCKET NUMBER: 2021-1247-MSW-E; TCEQ ID NUMBER: RN111230710; LOCATION: 719 Bradley Street, Anton, Hockley County; TYPE OF FACILITY: unauthorized municipal solid waste (MSW) disposal site; RULE VIOLATED: 30 TAC §330.15(a) and (c), by causing, suffering, allowing, or permitting the unauthorized disposal of MSW; PENALTY: $3,937; STAFF ATTORNEY: Marilyn Norrod, Litigation, MC 175, (512) 239-5916; REGIONAL OFFICE: Lubbock Regional Office, 5012 50th Street, Suite 100, Lubbock, Texas 79414-3426, (806) 796-7092.

(3) COMPANY: Roy Dawkins dba Shady Meadows Mobile Home Park; DOCKET NUMBER: 2021-1353-PWS-E; TCEQ ID NUMBER: RN110777687; LOCATION: 760 West Farm-to-Market Road 78, Cibolo, Guadalupe County; TYPE OF FACILITY: public water system; RULES VIOLATED: 30 TAC §290.110(e)(4)(A) and (f)(3), by failing to submit a Disinfection Level Quarterly Operating Report to the executive director (ED) by the tenth day of the month following the end of each quarter; 30 TAC §290.117(c)(2)(A), (h), and (i)(1), by failing to collect lead and copper tap samples at the required ten sample sites, have the samples analyzed, and report the results to the ED; and 30 TAC §290.117(e)(2), (h), and (i)(3), by failing to conduct water quality parameter sampling at each of the facility's entry points and the required distribution sample sites, have the samples analyzed, and report the results to the ED; PENALTY: $8,080; STAFF ATTORNEY: Jennifer Peltier, Litigation, MC 175, (512) 239-0544; REGIONAL OFFICE: San Antonio Regional Office, 14250 Judson Road, San Antonio, Texas 78233-4480, (210) 490-3096.

(4) COMPANY: SAI DS-BUCKNER INC dba Bengal Food Store; DOCKET NUMBER: 2022-0013-PST-E; TCEQ ID NUMBER: RN101565653; LOCATION: 3003 South Buckner Boulevard, Dallas, Dallas County; TYPE OF FACILITY: underground storage tank (UST) system and a convenience store with retail sales of gasoline; RULES VIOLATED: TWC, §26.3475(c)(1) and 30 TAC §334.50(b)(1)(A), by failing to monitor the USTs for releases in a manner which will detect a release at a frequency of at least once every 30 days; PENALTY: $3,375; STAFF ATTORNEY: Marilyn Norrod, Litigation, MC 175, (512) 239-5916; REGIONAL OFFICE: Dallas-Fort Worth Regional Office, 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(5) COMPANY: Sparkle Sign Company, Inc.; DOCKET NUMBER: 2021-0275-PWS-E; TCEQ ID NUMBER: RN101228047; LOCATION: 7938A Wright Road, Houston, Harris County; TYPE OF FACILITY: public water system; RULES VIOLATED: 30 TAC §290.41(c)(3)(K), by failing to seal the wellhead by a gasket or sealing compound and provide a well casing vent for the well that is covered with a 16-mesh or finer corrosion-resistant screen, facing downward, elevated and located so as to minimize the drawing of contaminants into the well; 30 TAC §290.41(c)(3)(M), by failing to provide a suitable sampling tap on the discharge pipe of the facility's well pump prior to any treatment; and Texas Health and Safety Code, §341.0351 and 30 TAC §290.39(j), by failing to notify the executive director prior to making any significant change or addition to the system's production, treatment, storage, pressure maintenance, or distribution facilities; PENALTY: $150; STAFF ATTORNEY: William Hogan, Litigation, MC 175, (512) 239-5918; REGIONAL OFFICE: Houston Regional Office, 5425 Polk Street, Suite H, Houston, Texas 77023-1452, (713) 767-3500.

TRD-202300150
Gitanjali Yadav
Deputy Director, Litigation
Texas Commission on Environmental Quality
Filed: January 13, 2023

♦ ♦ ♦

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 **February 28, 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 February 28, 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 DO shall be submitted to the commission in **writing.**

(1) COMPANY: Chris Rodriguez dba Rodriguez Tires & Wheels; DOCKET NUMBER: 2021-1104-MSW-E; TCEQ ID NUMBER: RN106300619; LOCATION: 517 Highway 71 West, Bastrop, Bastrop County; TYPE OF FACILITY: scrap tire generator; RULE VIOLATED: 30 TAC §328.56(c), by failing to use manifests, work orders, invoices, or other records to document the removal and management of all scrap tires generated at the facility; PENALTY: $1,250; STAFF ATTORNEY: Jennifer Peltier, Litigation, MC 175, (512) 239-0544; REGIONAL OFFICE: Austin Regional Office, 12100 Park 35 Circle, Building A, Room 179, Austin, Texas 78753, (512) 339-2929.

(2) COMPANY: MAPLE WATER SUPPLY CORPORATION; DOCKET NUMBER: 2020-1470-PWS-E; TCEQ ID NUMBER: RN101458156; LOCATION: 3198 Farm-to-Market Road 596 near Maple, Bailey County; TYPE OF FACILITY: public water supply; RULES VIOLATED: 30 TAC §290.110(e)(4)(A) and (f)(3), by failing to submit a Disinfection Level Quarterly Operating Report to the executive director (ED) by the tenth day of the month following the end of each quarter for the fourth quarter of 2019 through the second quarter of 2020; TCEQ Agreed Order Docket Number 2018-0017-PWS-E, Ordering Provision Number 2.a.vii., by failing to collect lead and copper tap samples at the required five sample sites, have the samples analyzed, and report the results to the ED for the January 1, 2015 - December 31, 2017 monitoring period; TCEQ Agreed Order Docket Number 2018-0017-PWS-E, Ordering Provision Numbers 2.a.i. and 2.a.iv., by failing to collect, within 24 hours of notification of the routine distribution total coliform-positive sample on January 27, 2015, at least one raw groundwater source *Escherichia coli* (E. coli) (or other approved fecal indicator) sample from each groundwater source in use at the time the distribution coliform-positive samples were collected, and did not provide public notification and submit copy of the notification to the ED regarding the failure to collect a raw groundwater source E. coli sample during the month of January 2015; TCEQ Agreed Order Docket Number 2018-0017-PWS-E, Ordering Provision Number 2.a.iv., by failing to provide public notification and submit a copy of the public notification to the ED regarding the failure to conduct routine coliform monitoring during the month of June 2015; TWC, §5.702 and 30 TAC §291.76, by failing to pay regulatory assessment fees for the TCEQ Public Utility Account regarding Certificate of Convenience and Necessity Number 11377 for calendar years 2017 - 2019; and TWC, §5.702 and 30 TAC §290.51(a)(6), by failing to pay annual Public Health Service fees and/or any associated late fees for TCEQ Financial Administration Account Number 90090011 for Fiscal Years 2018 - 2020; PENALTY: $4,224; STAFF ATTORNEY: Taylor Pearson, Litigation, MC 175, (512) 239-5937; REGIONAL OFFICE: Lubbock Regional Office, 5012 50th Street, Suite 100, Lubbock, Texas 79414-3426, (806) 796-7092.

(3) COMPANY: NAMOR Holdings LLC; DOCKET NUMBER: 2020-0417-MSW-E; TCEQ ID NUMBER: RN101559912; LOCATION: 4601 West Houston Street, Suite B near Sherman, Grayson County; TYPE OF FACILITY: unauthorized municipal solid waste (MSW) disposal site; RULE VIOLATED: 30 TAC §330.15(a) and (c), by causing, suffering, allowing, or permitting the unauthorized disposal of MSW; PENALTY: $12,000; STAFF ATTORNEY: Megan L. Grace, Litigation, MC 175, (512) 239-3334; REGIONAL OFFICE: Dallas-Fort Worth Regional Office, 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

TRD-202300151
Gitanjali Yadav
Deputy Director, Litigation
Texas Commission on Environmental Quality
Filed: January 13, 2023

♦ ♦ ♦

Notice of Public Hearing on Proposed Revisions to 30 TAC Chapter 5

The Texas Commission on Environmental Quality (commission) will conduct a public hearing to receive testimony regarding proposed revisions to 30 Texas Administrative Code (TAC) Chapter 5, Advisory Committees and Groups, §5.3 and §5.15, under the requirements of Texas Health and Safety Code (THSC), §363.062(f) and Texas Government Code, Chapter 2001, Subchapter B.

The proposed rulemaking would add and amend rules in 30 TAC Chapter 5 to specify the dates on which various advisory committees are abolished to conform with Texas Government Code (TGC), Chapter 2110.

Announcement of Hearing

The commission will hold a hybrid virtual and in-person public hearing on this proposal in Austin on February 27, 2023, at 2:00 p.m. in Building D, Room 191 at the commission's central office located at 12100 Park 35 Circle. The hearing is structured for the receipt of oral or written comments by interested persons. Individuals may present oral statements when called upon in order of registration. Open discussion will not be permitted during the hearing; however, commission staff members will be available to discuss the proposal 30 minutes prior to the hearing.

Individuals who plan to attend the hearing virtually and want to provide oral comments and/or want their attendance on record must register by Thursday, February 23, 2023. To register for the hearing, please email Rules@tceq.texas.gov and provide the following information: your name, your affiliation, your email address, your phone number, and whether or not you plan to provide oral comments during the hearing. Instructions for participating in the hearing will be sent on Friday, February 24, 2023, to those who register for the hearing.

For the public who do not wish to provide oral comments but would like to view the hearing may do so at no cost at:

https://teams.microsoft.com/l/meetup-join/19%3ameeting_ZmMyZTk0ZTAtM2YwOC00OWZkLWI4NTEtNjVhNjhjZDg5OGY0%40thread.v2/0?context=%7b%22Tid%22%3a%22871a83a4-a1ce-4b7a-8156-3bcd93a08fba%22%2c%22Oid%22%3a%22e74a40ea-69d4-469d-a8ef-06f2c9ac2a80%22%2c%22IsBroadcastMeeting%22%3atrue%7d

Persons who have special communication or other accommodation needs who are planning to attend the hearing should contact Sandy Wong, Office of Legal Services at (512) 239-1802 or 1-800-RELAY-TX (TDD). Requests should be made as far in advance as possible.

Submittal of Comments

Written comments may be submitted to Gwen Ricco, MC 205, Office of Legal Services, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087, or faxed to fax4808@tceq.texas.gov. Electronic comments may be submitted at:

https://tceq.commentinput.com/. File size restrictions may apply to comments being submitted via the TCEQ Public Comment system. All comments should reference Rule Project Number 2023-006-005-LS. The comment period closes on February 28, 2023. Please choose one of the methods provided to submit your written comments.

Copies of the proposed rulemaking can be obtained from the commission's website at https://www.tceq.texas.gov/rules/propose_adopt.html. For further information, please contact Don Redmond, Environmental Law Division, at (512) 239-0612.

TRD-202300134
Guy Henry
Acting Deputy Director, Environmental Law Division
Texas Commission on Environmental Quality
Filed: January 12, 2023

♦ ♦ ♦

Notice of Public Hearing on Proposed Revisions to 30 TAC Chapter 113 and to the State Plan

The Texas Commission on Environmental Quality (commission) will conduct a public hearing to receive testimony regarding proposed revisions to 30 Texas Administrative Code (TAC) Chapter 113, Standards of Performance for Hazardous Air Pollutants and for Designated Facilities and Pollutants, Subchapter D, Designated Facilities and Pollutants, Division 1, §113.2069; proposed new Division 6; and proposed revisions to the Federal Clean Air Act (FCAA), §111(d) State Plan for municipal solid waste (MSW) landfills under the requirements of Texas Health and Safety Code, §382.017; Texas Government Code, Chapter 2001, Subchapter B; and 40 Code of Federal Regulations (CFR) §60.23, concerning adoption and submittal of state plans.

The proposed rulemaking would revise Chapter 113 to implement updated federal emission guidelines for existing MSW landfills. The proposed changes to the rules and the §111(d) State Plan would allow TCEQ to administer and enforce these guidelines after federal approval. Currently, existing MSW landfills are required to comply with a federal plan administered by the U.S Environmental Protection Agency (EPA). The proposed revisions to the §111(d) State Plan are required under the FCAA, §111 and the emission guidelines for MSW landfills contained in 40 CFR Part 60 Subpart Cf. States must adopt and submit to the EPA for approval a state plan to implement and enforce the emission guidelines.

The commission will hold a hybrid in-person and virtual public hearing on this proposal in Austin on February 23, 2023, at 10:00 a.m. in Building D, Room 191, at the commission's central office located at 12100 Park 35 Circle. The hearing is structured for the receipt of oral or written comments by interested persons. Individuals may present oral statements when called upon in order of registration. Open discussion will not be permitted during the hearing; however, commission staff members will be available to discuss the proposal 30 minutes prior to the hearing.

Individuals who plan to attend the hearing virtually and want to provide oral comments and/or want their attendance on record must register by Tuesday, February 21, 2023. To register for the hearing, please email *Rules@tceq.texas.gov* and provide the following information: your name, your affiliation, your email address, your phone number, and whether or not you plan to provide oral comments during the hearing. Instructions for participating in the hearing will be sent on Wednesday, February 22, 2023, to those who register for the hearing.

Members of the public who do not wish to provide oral comments but would like to view the hearing virtually may do so at no cost at: https://teams.microsoft.com/l/meetup-join/19%3ameeting_MzRjOGJmNTktODQxNy00MWY2LWE1MTAtODk0ZTY4MTllYTg4%40thread.v2/0?context=%7b%22Tid%22%3a%22871a83a4-a1ce-4b7a-8156-3bcd93a08fba%22%2c%22Oid%22%3a%22e74a-40ea-69d4-469d-a8ef-06f2c9ac2a80%22%2c%22IsBroadcastMeeting%22%3atrue%7d

Persons who have special communication or other accommodation needs who are planning to attend the hearing should contact Sandy Wong, Office of Legal Services at (512) 239-1802 or 1-800-RELAY-TX (TDD). The hearing will be conducted in English. Language interpretation services may be requested. Requests should be made as far in advance as possible.

Written comments may be submitted to Cecilia Mena, MC 205, Office of Legal Services, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087, or faxed to *fax4808@tceq.texas.gov.* Electronic comments may be submitted through the TCEQ Public Comments system at: *https://tceq.commentinput.com/comment/search.* File size restrictions may apply to comments being submitted electronically. All comments should reference Rule Project Number 2017-014-113-AI. The comment period closes February 28, 2023. Copies of the proposed rulemaking and revisions to the State Plan can be obtained from the commission's website at *https://www.tceq.texas.gov/rules/propose_adopt.html.* For further information, please contact Michael Wilhoit, Air Permits Division, at (512) 239-1222.

TRD-202300137
Guy Henry
Acting Deputy Director, Environmental Law Division
Texas Commission on Environmental Quality
Filed: January 12, 2023

♦ ♦ ♦

Notice of Public Meeting for TPDES Permit for Industrial Wastewater Renewal Permit No. WQ0005019000

APPLICATION. Corpus Christi Polymers LLC, 7001 Joe Fulton International Trade Corridor, Corpus Christi, Texas 78409, which proposes to operate Corpus Christi Polymers Plant, a plastic resins manufacturing facility, has applied to the Texas Commission on Environmental Quality (TCEQ) for a renewal of Texas Pollutant Discharge Elimination System (TPDES) Permit No. WQ0005019000, which authorizes the discharge of reverse osmosis reject water, filter backwash, previously monitored effluents [process wastewater, utility wastewater, fire system (testing and flushing) water, and stormwater from Internal Outfall 101; and treated domestic wastewater from Internal Outfall 201], fire system (testing and flushing) water, utility wastewaters, and stormwater at a daily average flow not to exceed 38,500,000 gallons per day via Outfall 001. The TCEQ received this application on December 1, 2021.

The facility is located at 7001 Joe Fulton International Trade Corridor, in the City of Corpus Christi, Nueces County, Texas 78409. 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=-97.495277%2C27.831111&level=12.

The effluent is discharged directly to Corpus Christi Inner Harbor in Segment No. 2484 of the Bays and Estuaries. The designated uses for Segment No. 2484 are non-contact recreation and intermediate aquatic life use.

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.

The TCEQ Executive Director reviewed this action for consistency with the Texas Coastal Management Program (CMP) goals and policies in accordance with the regulations of the General Land Office and has determined that the action is consistent with the applicable CMP goals and policies.

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:

Thursday, February 23, 2023 at 7:00 p.m.

Holiday Inn Corpus Christi Airport & Convention Center

5549 Leopard St.

Corpus Christi, Texas 78408

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 Owen R. Hopkins Public Library - Corpus Christi Public Library, 3202 McKinzie Road, Corpus Christi, Texas. Further information may also be obtained from Corpus Christi Polymers LLC at the address stated above or by calling Ms. Shannon Parham, Environmental Engineer, at (361) 558-3942.

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: January 17, 2023

TRD-202300199
Laurie Gharis
Chief Clerk
Texas Commission on Environmental Quality
Filed: January 18, 2023

♦ ♦ ♦

Notice of Water Quality Application

The following notice was issued on January 17, 2023:

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

Consideration of the application by **Kuiper Dairy, LLC** for a minor amendment of Texas Pollutant Discharge Elimination System (TPDES) Permit No. WQ0003199000, for a Concentrated Animal Feeding Operation (CAFO), to authorize the applicant to decrease the acreage of LMU #2 from 75 to 73 acres in order to install an aerobic digester and the associated separation equipment in the production area; and decrease the acreage of Land Management Unit (LMU) #3 from 25 to 21 acres to add three wells: Wells #18, #19 and #20. The drainage areas for the retention control structures (RCSs) were reconfigured due to the removal of pens, and the RCSs design calculations were revised. The total land application area will decrease from 395 to 389 acres. The required capacity for RCS #1 will decrease from 66.78 to 58.99 acre-feet and the Treatment Lagoon from 13.86 to 12.40 acre-feet. The authorized maximum capacity of 5,000 head total dairy cattle, of which 3,100 head are milking cows, and the list of alternative crops and yield goals will not change. The facility is located at 5040 County Road 209, Hico in Erath County, Texas.

TRD-202300201
Laurie Gharis
Chief Clerk
Texas Commission on Environmental Quality
Filed: January 18, 2023

♦ ♦ ♦

Notice of Water Quality Application

The following notice was issued on January 18, 2023:

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

Meyer Ranch Municipal Utility District of Comal County, has applied for a minor amendment to the Texas Pollutant Discharge Elimination System Permit No. WQ0015314001 to authorize the addition of an interim permit phase with a daily average flow not to exceed 300,000 gallons per day. The existing permit authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 390,000 gallons per day. The facility is located at 1941 South Cranes Mill Road, in Comal County, Texas 78132.

TRD-202300206
Laurie Gharis
Chief Clerk
Texas Commission on Environmental Quality
Filed: January 18, 2023

♦ ♦ ♦

Texas Facilities Commission

Request for Proposals (RFP) #303-3-20748 Greenville

The Texas Facilities Commission (TFC), on behalf of the Texas Department of Public Safety (DPS) announces the issuance of Request for Proposals (RFP) 303-3-20748. TFC seeks a five (5) or ten (10) year lease of approximately 2,699 square feet of usable office space and 195 square feet of outdoor lounge area within the city limits of Greenville, Texas.

The deadline for questions is February 13, 2023, and the deadline for proposals is March 7, 2023, at 3:00 p.m. The award date is April 20, 2023. TFC reserves the right to accept or reject any or all proposals submitted. TFC is under no legal or other obligation to execute a lease on the basis of this notice or the distribution of an RFP. Neither this notice nor the RFP commits TFC to pay for any costs incurred prior to the award of a grant.

Parties interested in submitting a proposal may obtain information by contacting Heather Goll at heather.goll@tfc.texas.gov. A copy of the RFP may be downloaded from the Electronic State Business Daily at https://www.txsmartbuy.com/esbddetails/view/303-3-20748.

TRD-202300167
Rico Gamino
Director of Procurement
Texas Facilities Commission
Filed: January 13, 2023

♦ ♦ ♦

Texas Health and Human Services Commission

Notice of Stakeholder Engagement Meetings for Medicaid Payment Rates

MEETINGS.

The Texas Health and Human Services Commission (HHSC) will conduct stakeholder engagement meetings on February 16, 2023, to receive comments on Medicaid payment rate topics that may potentially be addressed at the upcoming May 2023 rate hearings. Commentary will be collected solely on the topics listed in this notice. Proposed rates will not be published at this time.

The meetings will be held online only at the following times according to topic areas:

Acute Care Services: February 16, 2023, 9:00 a.m. - 11:00 a.m.

Long-term Services & Supports: February 16, 2023, 11:30 a.m. - 1:30 p.m.

To attend online: The meetings will be held online via GoToWebinar. Visit the following GoToWebinar link to register to attend one or both of the online meetings. After registering, you will receive a confirmation email containing information about joining the webinar.

https://attendee.gotowebinar.com/register/8906901132925854557

Webinar ID: 355-308-371

HHSC will record the meetings. The recording will be archived and can be accessed on-demand at: https://hhs.texas.gov/about-hhs/communications-events/live-archived-meetings.

HHSC may limit speakers' time to ensure all attendees wishing to present public comment are afforded an opportunity to do so. HHSC reserves the right to end an engagement meeting if no participants have registered to present public comments within the first 30 minutes of the meeting.

TOPICS.

Below is a list of topics that HHSC will collect commentary for during the stakeholder engagement meetings. These topics may potentially be presented at the subsequent rate hearing in May 2023. The final list of topics to be presented at the May 2023 rate hearing is at the discretion of HHSC.

Acute Care Services - Calendar Fee Review:

- Any Combination of Type of Service 1/2/I/T;

- Cardiovascular Services including Cardiography & Echocardiography;

- Dialysis;

- Diagnostic Radiology;

- Durable Medical Equipment;

- Evaluation and Management;

- Gastroenterology;

- Medical and Surgical Supplies;

- Medical Nutrition Therapy;

- Medicine (Other);

- Non-Clinical Labs (5/I/T);

- Noninvasive Vascular Diagnostic Studies;

- Outpatient Behavioral Health Services;

- Physician Administered Drugs - Non-Oncology;

- Physician Administered Drugs - Oncology;

- Physician Administered Drugs - Vaccines & Toxoids;

- "S" Codes; and

- Telemedicine, Telehealth & Telemonitoring.

Acute Care Services - Medical Policy Review:

- VDP Drug Cleanup.

Acute Care Services - Healthcare Common Procedure Coding System (HCPCS):

- Quarterly HCPCS Updates.

Long-term Services & Supports:

- Emergency Response Services;

- Home-delivered Meals; and

- In-home Respite in the Youth Empowerment Services 1915(c) Waiver program.

WRITTEN COMMENTS.

Written comments regarding the proposed topics may be submitted in lieu of, or in addition to, oral comments until 5:00 p.m. the day follow-

ing the meetings, February 17, 2023. Written comments may be sent by U.S. mail, overnight mail, fax, or email.

U.S. Mail:

Texas Health and Human Services Commission

Attention: Provider Finance Department

Mail Code H-400

P.O. Box 149030

Austin, Texas 78714-9030

Overnight mail or special delivery mail:

Texas Health and Human Services Commission

Attn: Provider Finance Department

North Austin Complex

Mail Code H-400

4601 Guadalupe St.

Austin, Texas 78751

Fax: Attention: Provider Finance at (512) 730-7475

Email: ProviderFinanceDept@hhs.texas.gov

PREFERRED COMMUNICATION.

Email or telephone communication is preferred.

Persons with disabilities who wish to participate in the hearing and require auxiliary aids or services should contact Provider Finance at (512) 730-7401 at least 72 hours before the hearing so appropriate arrangements can be made.

TRD-202300171
Karen Ray
Chief Counsel
Texas Health and Human Services Commission
Filed: January 13, 2023

♦ ♦ ♦

Public Notice: Statewide Transition Plan for Medicaid Home and Community Based Services Settings

Editor's Note: The Texas Health and Human Services Commission (HHSC) published a public notice regarding the Statewide Transition Plan for Medicaid Home and Community Based Services Settings in the January 13, 2023, issue of the Texas Register. Due to an error by the Texas Register, some of the text in the notice was published incorrectly. The correct notice is republished in its entirety below.

The Texas Health and Human Services Commission (HHSC) announces its intent to submit a Statewide Transition Plan (STP) to the Centers for Medicare & Medicaid Services (CMS) for approval, as required in Title 42 Code of Federal Regulations, Sections 441.301(c)(6) and 441.710(a)(3). The STP describes HHSC's planned activities to achieve full and ongoing compliance with the federal Home and Community Based Services (HCBS) settings regulations. The STP is expected to be submitted to CMS in February 2023.

CMS has issued federal regulations that add requirements for settings where Medicaid HCBS are provided. The regulations require that a Medicaid HCBS setting be selected by the person receiving Medicaid HCBS. Medicaid HCBS settings must also be integrated in and support the person's full access to the community. CMS has given states until March 17, 2023, to bring Medicaid HCBS settings into compliance with the regulations.

CMS requires states to submit an STP describing their planned initiatives and activities to achieve compliance with the federal HCBS settings regulations. The STP must include:

- An assessment of settings where Medicaid HCBS are provided;

- Remediation strategies for settings that do not meet the requirements of the regulations;

- A summary of public and stakeholder input on the assessment processes and remediation strategies; and

- A summary of public comments received on the transition plan and any revisions made to the plan in response to public comment.

HHSC has amended the version of the STP previously submitted to CMS based on public comments and guidance from CMS. This amended version of the STP includes updated information on site-specific assessments conducted for the following setting types:

- Three-person and four-person residences and host home and companion care residences in the Home and Community-based Services (HCS) waiver program;

- Adult foster care homes in the STAR+PLUS HCBS waiver program; and

- Assisted living facilities in the Deaf Blind with Multiple Disabilities waiver program.

The amended STP can be found at: https://www.hhs.texas.gov-/providers/long-term-care-providers/long-term-care-provider-resources/home-community-based-services-hcbs/statewide-transition-plan

Copy of STP: Interested parties may obtain a free copy of the STP by contacting Rachel Neely, Senior Policy Advisor, by U.S. mail, telephone, fax, or by email at the addresses below.

Written Comments: Written comments must be submitted by February 13, 2023. Written comments, requests to review comments, or both may be sent by U.S. mail, overnight mail, special delivery mail, hand delivery, fax, or email:

U.S. Mail:

Texas Health and Human Services Commission

Attention: Rachel Neely, Office of Policy

John H. Winters Complex

701 W. 51st Street

Mail Code H-600

Austin, Texas 78751

Overnight mail, special delivery mail, or hand delivery:

Texas Health and Human Services Commission

Attention: Rachel Neely, Office of Policy

John H. Winters Complex

701 W. 51st Street

Mail Code H-600

Austin, Texas 78751

Phone number for package delivery: (512) 438-4297

Fax:

Attention: Rachel Neely, Office of Policy at (512) 438-5835

Email:

Medicaid_HCBS@hhs.texas.gov

TRD-202300178
Karen Ray
Chief Counsel
Texas Health and Human Services Commission
Filed: January 18, 2023

♦ ♦ ♦

Texas Higher Education Coordinating Board

Meeting of Negotiated Rulemaking Committee on Data Request Reevaluation

Date of Meeting: February 13, 2023

Start Time of Meeting: 9:30 a.m.

Location: Meeting will be held via video conference. A link to the video conference will be available at https://www.highered.texas.gov/

Additional Information Obtained From: Laurie Frederick, Convener, (512) 427-6446, Laurie.Frederick@highered.texas.gov

Agenda:

1. Introductions

2. Brief Overview of the Negotiated Rulemaking Process: What it is, What it's not

3. Brief Overview of Roles and Responsibilities

a) Role of Facilitator

b) Role of Sponsor Agency

c) Role of Committee Members

4. Consideration and Possible Action to Approve Facilitator

5. Procedural Issues

a) Consideration and Possible Action to Approve Ground Rules

b) Consideration and Possible Action to Approve Definition of Consensus

6. Discussion of the Continuing Need for Identified Data Requests

7. Consideration and Possible Action to Approve the Continuing Need for Identified Data Requests

Individuals who may require auxiliary aids or services for this meeting should contact Glenn Tramel, ADA Coordinator, at (512) 427-6193 at least five days before the meeting so that appropriate arrangements can be made.

All persons requesting to address the Committee regarding an item on this agenda should do so in writing at least 24 hours before the start of the meeting at Laurie.Frederick@highered.texas.gov. A toll-free telephone number, free-of-charge video conference link, or other means will be provided by which to do so.

TRD-202300170
Nichole Bunker-Henderson
General Counsel
Texas Higher Education Coordinating Board
Filed: January 13, 2023

♦ ♦ ♦

Texas Department of Insurance

Company Licensing

Application to do business in the state of Texas for Republic Fire and Casualty Insurance Company, a foreign fire and/or casualty company. The home office is in Tulsa, Oklahoma.

Application for Horace Mann Lloyds, a domestic Lloyds converting to a fire/and or casualty company, to change its name to HML Insurance Company. The home office is in Irving, Texas.

Application for Evergreen Life Insurance Company, a domestic life, accident and/or health company, to change its name to Fort Worth Life and Annuity Insurance Company. The home office is in Fort Worth, Texas.

Any objections must be filed with the Texas Department of Insurance, within twenty (20) calendar days from the date of the *Texas Register* publication, addressed to the attention of John Carter, 1601 Congress Ave., Suite 6.900, Austin, Texas 78711.

TRD-202300165
Justin Beam
Chief Clerk
Texas Department of Insurance
Filed: January 13, 2023

♦ ♦ ♦

Company Licensing

Application to do business in the state of Texas for Pillar Life Insurance Company, a foreign life, accident and/or health insurance company. The home office is in Harrisburg, Pennsylvania.

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-202300185
Justin Beam
Chief Clerk
Texas Department of Insurance
Filed: January 18, 2023

♦ ♦ ♦

Notice of Public Hearing: Employer-Related Health Benefit Plan Regulations Docket No. 2836

The Texas Department of Insurance (TDI) will have a public hearing to consider the proposed amendments to 28 TAC Chapter 26, concerning employer-related health benefit plan regulations, including the proposed amendments to §26.5 and §26.301, published in the *Texas Register* on December 23, 2022, at (47 TexReg 8479). The hearing will be in person and begin at 10:00 a.m., central time, February 10, 2023, in Room 2.029 of the Barbara Jordan State Office Building, 1601 Congress Avenue, in Austin, Texas.

You may submit written comments and make oral comments on this rulemaking at the hearing, or you may submit your written comments to TDI on or before 5:00 p.m., central time, February 15, 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. Please include the docket number on any written comments, mailed or emailed.

TRD-202300200
Allison Eberhart
Deputy General Counsel
Texas Department of Insurance
Filed: January 18, 2023

♦ ♦ ♦

Texas Lottery Commission

Scratch Ticket Game Number 2471 "CASH GAMES"

1.0 Name and Style of Scratch Ticket Game.

A. The name of Scratch Ticket Game No. 2471 is "CASH GAMES". The play style is "multiple games".

1.1 Price of Scratch Ticket Game.

A. The price for Scratch Ticket Game No. 2471 shall be $5.00 per Scratch Ticket.

1.2 Definitions in Scratch Ticket Game No. 2471.

A. Display Printing - That area of the Scratch Ticket outside of the area where the overprint and Play Symbols appear.

B. Latex Overprint - The removable scratch-off covering over the Play Symbols on the front of the Scratch Ticket.

C. Play Symbol - The printed data under the latex on the front of the Scratch Ticket that is used to determine eligibility for a prize. Each Play Symbol is printed in Symbol font in black ink in positive except for dual-image games. The possible black Play Symbols are: 01, 02, 03, 04, 05, 06, 07, 08, 09, STAR SYMBOL, HORSESHOE SYMBOL, POT OF GOLD SYMBOL, COIN SYMBOL, JOKER SYMBOL, KEY SYMBOL, CHERRY SYMBOL, BELL SYMBOL, DIAMOND SYMBOL, BOOT SYMBOL, CACTUS SYMBOL, CLOVER SYMBOL, LADYBUG SYMBOL, BONE SYMBOL, CROWN SYMBOL, HEART SYMBOL, GOLD BAR SYMBOL, RING SYMBOL, ANCHOR SYMBOL, SEVEN SYMBOL, PIG SYMBOL, BANK ROLL SYMBOL, LEMON SYMBOL, BANANA SYMBOL, MELON SYMBOL, APPLE SYMBOL, GRAPE SYMBOL, PALM TREE SYMBOL, SMILE SYMBOL, LIGHTNING BOLT SYMBOL, FISH SYMBOL, BOAT SYMBOL, FLAG SYMBOL, HAT SYMBOL, WIN SYMBOL, $5.00, $10.00, $20.00, $50.00, $100, $500, $1,000, $5,000 and $100,000.

D. Play Symbol Caption - The printed material appearing below each Play Symbol which explains the Play Symbol. One caption appears under each Play Symbol and is printed in caption font in black ink in positive. The Play Symbol Caption which corresponds with and verifies each Play Symbol is as follows:

Figure 1: GAME NO. 2471 - 1.2D

PLAY SYMBOL	CAPTION
01	ONE
02	TWO
03	THR
04	FOR
05	FIV
06	SIX
07	SVN
08	EGT
09	NIN
STAR SYMBOL	STAR
HORSESHOE SYMBOL	HRSHOE
POT OF GOLD SYMBOL	PTGOLD
COIN SYMBOL	COIN
JOKER SYMBOL	JOKER
KEY SYMBOL	KEY
CHERRY SYMBOL	CHRY
BELL SYMBOL	BELL
DIAMOND SYMBOL	DIMND
BOOT SYMBOL	BOOT
CACTUS SYMBOL	CACTUS
CLOVER SYMBOL	CLOVER
LADYBUG SYMBOL	LBUG
BONE SYMBOL	BONE
CROWN SYMBOL	CROWN
HEART SYMBOL	HEART
GOLD BAR SYMBOL	BAR
RING SYMBOL	RING

ANCHOR SYMBOL	ANCHR
SEVEN SYMBOL	SEVN
PIG SYMBOL	PIG
BANK ROLL SYMBOL	ROLL
LEMON SYMBOL	LEMN
BANANA SYMBOL	BNNA
MELON SYMBOL	MELN
APPLE SYMBOL	APPL
GRAPE SYMBOL	GRPE
PALM TREE SYMBOL	PALM
SMILE SYMBOL	SMILE
LIGHTNING BOLT SYMBOL	BOLT
FISH SYMBOL	FISH
BOAT SYMBOL	BOAT
FLAG SYMBOL	FLAG
HAT SYMBOL	HAT
WIN SYMBOL	WIN$
$5.00	FIV$
$10.00	TEN$
$20.00	TWY$
$50.00	FFTY$
$100	ONHN
$500	FVHN
$1,000	ONTH
$5,000	FVTH
$100,000	100TH

E. Serial Number - A unique thirteen (13) digit number appearing under the latex scratch-off covering on the front of the Scratch Ticket. The Serial Number is for validation purposes and cannot be used to play the game. The format will be: 0000000000000.

F. Bar Code - A twenty-four (24) character interleaved two (2) of five (5) Bar Code which will include a four (4) digit game ID, the seven (7) digit Pack number, the three (3) digit Ticket number and the ten (10) digit Validation Number. The Bar Code appears on the back of the Scratch Ticket.

G. Game-Pack-Ticket Number - A fourteen (14) digit number consisting of the four (4) digit game number (2471), a seven (7) digit Pack number, and a three (3) digit Ticket number. Ticket numbers start with 001 and end with 075 within each Pack. The format will be: 2471-0000001-001.

H. Pack - A Pack of the "CASH GAMES" Scratch Ticket Game contains 075 Tickets, packed in plastic shrink-wrapping and fanfolded in pages of one (1). The Packs will alternate. One will show the front of Ticket 001 and back of 075 while the other fold will show the back of Ticket 001 and front of 075.

I. Non-Winning Scratch Ticket - A Scratch Ticket which is not programmed to be a winning Scratch Ticket or a Scratch Ticket that does not meet all of the requirements of these Game Procedures, the State Lottery Act (Texas Government Code, Chapter 466), and applicable rules adopted by the Texas Lottery pursuant to the State Lottery Act and referenced in 16 TAC, Chapter 401.

J. Scratch Ticket Game, Scratch Ticket or Ticket - Texas Lottery "CASH GAMES" Scratch Ticket Game No. 2471.

2.0 Determination of Prize Winners. The determination of prize winners is subject to the general Scratch Ticket validation requirements set forth in Texas Lottery Rule 401.302, Scratch Ticket Game Rules, these Game Procedures, and the requirements set out on the back of each Scratch Ticket. A prize winner in the "CASH GAMES" Scratch Ticket Game is determined once the latex on the Scratch Ticket is scratched off to expose forty-eight (48) Play Symbols. GAME 1: If YOUR NUMBER Play Symbols beats THEIR NUMBER Play Symbols in the same ROW, the player wins the PRIZE for that ROW. GAME 2: If the player matches any of YOUR SYMBOLS Play Symbols to either of the WINNING SYMBOLS Play Symbols, the player wins the PRIZE for that symbol. GAME 3: If the player reveals a WIN SYMBOL, the player wins the PRIZE for that symbol. BONUS: If the player reveals 2 matching prize amounts in the same BONUS, the player wins that amount. No portion of the Display Printing nor any extraneous matter whatsoever shall be usable or playable as a part of the Scratch Ticket.

2.1 Scratch Ticket Validation Requirements.

A. To be a valid Scratch Ticket, all of the following requirements must be met:

1. Exactly forty-eight (48) Play Symbols must appear under the Latex Overprint on the front portion of the Scratch Ticket;

2. Each of the Play Symbols must have a Play Symbol Caption underneath, unless specified, and each Play Symbol must agree with its Play Symbol Caption;

3. Each of the Play Symbols must be present in its entirety and be fully legible;

4. Each of the Play Symbols must be printed in black ink except for dual image games;

5. The Scratch Ticket shall be intact;

6. The Serial Number and Game-Pack-Ticket Number must be present in their entirety and be fully legible;

7. The Serial Number must correspond, using the Texas Lottery's codes, to the Play Symbols on the Scratch Ticket;

8. The Scratch Ticket must not have a hole punched through it, be mutilated, altered, unreadable, reconstituted or tampered with in any manner;

9. The Scratch Ticket must not be counterfeit in whole or in part;

10. The Scratch Ticket must have been issued by the Texas Lottery in an authorized manner;

11. The Scratch Ticket must not have been stolen, nor appear on any list of omitted Scratch Tickets or non-activated Scratch Tickets on file at the Texas Lottery;

12. The Play Symbols, Serial Number and Game-Pack-Ticket Number must be right side up and not reversed in any manner;

13. The Scratch Ticket must be complete and not miscut, and have exactly forty-eight (48) Play Symbols under the Latex Overprint on the front portion of the Scratch Ticket, exactly one Serial Number and exactly one Game-Pack-Ticket Number on the Scratch Ticket;

14. The Serial Number of an apparent winning Scratch Ticket shall correspond with the Texas Lottery's Serial Numbers for winning Scratch Tickets, and a Scratch Ticket with that Serial Number shall not have been paid previously;

15. The Scratch Ticket must not be blank or partially blank, misregistered, defective or printed or produced in error;

16. Each of the forty-eight (48) Play Symbols must be exactly one of those described in Section 1.2.C of these Game Procedures;

17. Each of the forty-eight (48) Play Symbols on the Scratch Ticket must be printed in the Symbol font and must correspond precisely to the artwork on file at the Texas Lottery; the Scratch Ticket Serial Numbers must be printed in the Serial font and must correspond precisely to the artwork on file at the Texas Lottery; and the Game-Pack-Ticket Number must be printed in the Game-Pack-Ticket Number font and must correspond precisely to the artwork on file at the Texas Lottery;

18. The Display Printing on the Scratch Ticket must be regular in every respect and correspond precisely to the artwork on file at the Texas Lottery; and

19. The Scratch Ticket must have been received by the Texas Lottery by applicable deadlines.

B. The Scratch Ticket must pass all additional validation tests provided for in these Game Procedures, the Texas Lottery's Rules governing the award of prizes of the amount to be validated, and any confidential validation and security tests of the Texas Lottery.

C. Any Scratch Ticket not passing all of the validation requirements is void and ineligible for any prize and shall not be paid. However, the Executive Director may, solely at the Executive Director's discretion, refund the retail sales price of the Scratch Ticket. In the event a defective Scratch Ticket is purchased, the only responsibility or liability of the Texas Lottery shall be to replace the defective Scratch Ticket with another unplayed Scratch Ticket in that Scratch Ticket Game (or a Scratch Ticket of equivalent sales price from any other current Texas Lottery Scratch Ticket Game) or refund the retail sales price of the Scratch Ticket, solely at the Executive Director's discretion.

2.2 Programmed Game Parameters.

A. GENERAL: The top Prize Symbol will appear on every Ticket, unless restricted by other parameters, play action or prize structure.

B. GENERAL: Consecutive Non-Winning Tickets within a Pack will not have matching patterns, in the same order, of either Play Symbols or Prize Symbols.

C. BONUS: A non-winning Prize Symbol in a BONUS play area will never match a winning Prize Symbol in the other BONUS play area.

D. BONUS: A Ticket will not have matching non-winning Prize Symbols across the two (2) BONUS play areas.

E. GAME 1 - YOURS BEATS THEIRS: There will be no ties between a YOUR NUMBER Play Symbol and a THEIR NUMBER Play Symbol in the same ROW.

F. GAME 1 - YOURS BEATS THEIRS: No duplicate non-winning ROWS in the same order on a Ticket.

G. GAME 1 - YOURS BEATS THEIRS: A non-winning Prize Symbol will never match a winning Prize Symbol.

H. GAME 1 - YOURS BEATS THEIRS: A Ticket will not have matching non-winning Prize Symbols across the four (4) ROWS in Game 1.

I. GAME 2 - KEY SYMBOL MATCH: No matching non-winning YOUR SYMBOLS Play Symbols on a Ticket.

J. GAME 2 - KEY SYMBOL MATCH: No matching WINNING SYMBOLS Play Symbols on a Ticket.

K. GAME 2 - KEY SYMBOL MATCH: A non-winning Prize Symbol will never match a winning Prize Symbol.

L. GAME 2 - KEY SYMBOL MATCH: A Ticket may have up to two (2) matching non-winning Prize Symbols, unless restricted by other parameters, play action or prize structure.

M. GAME 3 - FIND: A non-winning Prize Symbol will never match a winning Prize Symbol.

N. GAME 3 - FIND: A Ticket will not have matching non-winning Prize Symbols in GAME 3.

O. GAME 3 - FIND: No matching non-winning Play Symbols on a Ticket.

2.3 Procedure for Claiming Prizes.

A. To claim a "CASH GAMES" Scratch Ticket Game prize of $5.00, $10.00, $20.00, $25.00, $50.00, $100 or $500, a claimant shall sign the back of the Scratch Ticket in the space designated on the Scratch Ticket and may present the winning Scratch Ticket to any Texas Lottery Retailer. The Texas Lottery Retailer shall verify the claim and, if valid, and upon presentation of proper identification, if appropriate, make payment of the amount due the claimant and physically void the Scratch Ticket; provided that the Texas Lottery Retailer may, but is not required, to pay a $25.00, $50.00, $100 or $500 Scratch Ticket Game. In the event the Texas Lottery Retailer cannot verify the claim, the Texas Lottery Retailer shall provide the claimant with a claim form and instruct the claimant on how to file a claim with the Texas Lottery. If the claim is validated by the Texas Lottery, a check shall be forwarded to the claimant in the amount due. In the event the claim is not validated, the claim shall be denied and the claimant shall be notified promptly. A claimant may also claim any of the above prizes under the procedure described in Section 2.3.B and Section 2.3.C of these Game Procedures.

B. To claim a "CASH GAMES" Scratch Ticket Game prize of $1,000, $5,000 or $100,000, the claimant must sign the winning Scratch Ticket and may present it at one of the Texas Lottery's Claim Centers. If the claim is validated by the Texas Lottery, payment will be made to the bearer of the validated winning Scratch Ticket for that prize upon presentation of proper identification. When paying a prize of $600 or more, the Texas Lottery shall file the appropriate income reporting form with the Internal Revenue Service (IRS) and shall withhold federal income tax at a rate set by the IRS if required. In the event that the claim is not validated by the Texas Lottery, the claim shall be denied and the claimant shall be notified promptly.

C. As an alternative method of claiming a "CASH GAMES" Scratch Ticket Game prize the claimant may submit the signed winning Scratch Ticket and a thoroughly completed claim form via mail. If a prize value is $1,000,000 or more, the claimant must also provide proof of Social Security number or Tax Payer Identification (for U.S. Citizens or Resident Aliens). Mail all to: Texas Lottery Commission, P.O. Box 16600, Austin, Texas 78761-6600. The Texas Lottery is not responsible for Scratch Tickets lost in the mail. In the event that the claim is not validated by the Texas Lottery, the claim shall be denied and the claimant shall be notified promptly.

D. Prior to payment by the Texas Lottery of any prize, the Texas Lottery shall deduct the amount of a delinquent tax or other money from the winnings of a prize winner who has been finally determined to be:

1. delinquent in the payment of a tax or other money to a state agency and that delinquency is reported to the Comptroller under Government Code §403.055;

2. in default on a loan made under Chapter 52, Education Code;

3. in default on a loan guaranteed under Chapter 57, Education Code; or

4. delinquent in child support payments in the amount determined by a court or a Title IV-D agency under Chapter 231, Family Code.

E. If a person is indebted or owes delinquent taxes to the State, other than those specified in the preceding paragraph, the winnings of a person shall be withheld until the debt or taxes are paid.

2.4 Allowance for Delay of Payment. The Texas Lottery may delay payment of the prize pending a final determination by the Executive Director, under any of the following circumstances:

A. if a dispute occurs, or it appears likely that a dispute may occur, regarding the prize;

B. if there is any question regarding the identity of the claimant;

C. if there is any question regarding the validity of the Scratch Ticket presented for payment; or

D. if the claim is subject to any deduction from the payment otherwise due, as described in Section 2.3.D of these Game Procedures. No liability for interest for any delay shall accrue to the benefit of the claimant pending payment of the claim.

2.5 Payment of Prizes to Persons Under 18. If a person under the age of 18 years is entitled to a cash prize under $600 from the "CASH GAMES" Scratch Ticket Game, the Texas Lottery shall deliver to an adult member of the minor's family or the minor's guardian a check or warrant in the amount of the prize payable to the order of the minor.

2.6 If a person under the age of 18 years is entitled to a cash prize of $600 or more from the "CASH GAMES" Scratch Ticket Game, the Texas Lottery shall deposit the amount of the prize in a custodial bank account, with an adult member of the minor's family or the minor's guardian serving as custodian for the minor.

2.7 Scratch Ticket Claim Period. All Scratch Ticket prizes must be claimed within 180 days following the end of the Scratch Ticket Game or within the applicable time period for certain eligible military personnel as set forth in Texas Government Code §466.408. Any rights to a prize that is not claimed within that period, and in the manner specified in these Game Procedures and on the back of each Scratch Ticket, shall be forfeited.

2.8 Disclaimer. The number of prizes in a game is approximate based on the number of Scratch Tickets ordered. The number of actual prizes available in a game may vary based on number of Scratch Tickets manufactured, testing, distribution, sales and number of prizes claimed. A Scratch Ticket Game may continue to be sold even when all the top prizes have been claimed.

3.0 Scratch Ticket Ownership.

A. Until such time as a signature is placed upon the back portion of a Scratch Ticket in the space designated, a Scratch Ticket shall be owned by the physical possessor of said Scratch Ticket. When a signature is placed on the back of the Scratch Ticket in the space designated, the player whose signature appears in that area shall be the owner of the Scratch Ticket and shall be entitled to any prize attributable thereto. Notwithstanding any name or names submitted on a claim form, the Executive Director shall make payment to the player whose signature appears on the back of the Scratch Ticket in the space designated. If more than one name appears on the back of the Scratch Ticket, the Executive Director will require that one of those players whose name appears thereon be designated by such players to receive payment.

B. The Texas Lottery shall not be responsible for lost or stolen Scratch Tickets and shall not be required to pay on a lost or stolen Scratch Ticket.

4.0 Number and Value of Scratch Prizes. There will be approximately 7,080,000 Scratch Tickets in Scratch Ticket Game No. 2471. The approximate number and value of prizes in the game are as follows:

Figure 2: GAME NO. 2471 - 4.0

Prize Amount	Approximate Number of Winners*	Approximate Odds are 1 in **
$5.00	731,600	9.68
$10.00	542,800	13.04
$20.00	94,400	75.00
$25.00	141,600	50.00
$50.00	94,400	75.00
$100	20,650	342.86
$500	3,422	2,068.97
$1,000	413	17,142.86
$5,000	10	708,000.00
$100,000	6	1,180,000.00

*The number of prizes in a game is approximate based on the number of tickets ordered. The number of actual prizes available in a game may vary based on number of tickets manufactured, testing, distribution, sales and number of prizes claimed.

**The overall odds of winning a prize are 1 in 4.35. The individual odds of winning for a particular prize level may vary based on sales, distribution, testing, and number of prizes claimed.

A. The actual number of Scratch Tickets in the game may be increased or decreased at the sole discretion of the Texas Lottery Commission.

5.0 End of the Scratch Ticket Game. The Executive Director may, at any time, announce a closing date (end date) for the Scratch Ticket Game No. 2471 without advance notice, at which point no further Scratch Tickets in that game may be sold. The determination of the closing date and reasons for closing will be made in accordance with the Scratch Ticket closing procedures and the Scratch Ticket Game Rules. See 16 TAC §401.302(j).

6.0 Governing Law. In purchasing a Scratch Ticket, the player agrees to comply with, and abide by, these Game Procedures for Scratch Ticket Game No. 2471, the State Lottery Act (Texas Government Code, Chapter 466), applicable rules adopted by the Texas Lottery pursuant to the State Lottery Act and referenced in 16 TAC, Chapter 401, and all final decisions of the Executive Director.

TRD-202300174
Bob Biard
General Counsel
Texas Lottery Commission
Filed: January 17, 2023

♦ ♦ ♦


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)*

SALES AND CUSTOMER SUPPORT

Sales - To purchase subscriptions or back issues, you may contact LexisNexis Sales at 1-800-223-1940 from 7 a.m. to 7 p.m., Central Time, Monday through Friday. Subscription cost is $502 annually for first-class mail delivery and $340 annually for second-class mail delivery.

Customer Support - For questions concerning your subscription or account information, you may contact LexisNexis Matthew Bender Customer Support from 7 a.m. to 7 p.m., Central Time, Monday through Friday.

Phone: (800) 833-9844
Fax: (518) 487-3584
E-mail: customer.support@lexisnexis.com
Website: www.lexisnexis.com/printcdsc

LexisNexis