TEXAS REGISTER

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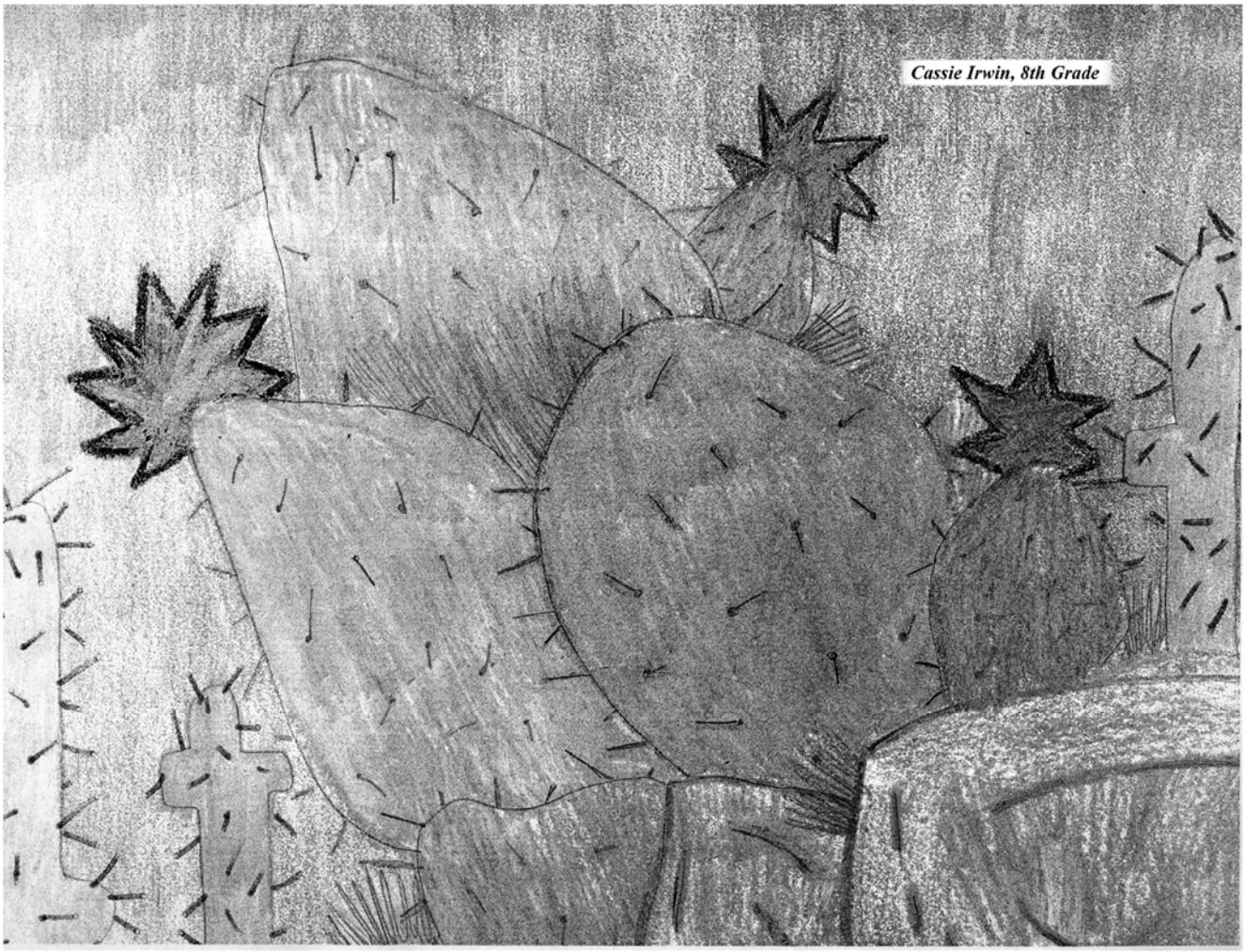

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Open Meetings

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

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

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

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

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

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

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

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

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

THE GOVERNOR

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

Appointments

Appointments for April 27, 2016

Appointed to the Texas Military Preparedness Commission for a term to expire February 1, 2021, Dennis L. Lewis of Texarkana (Mr. Lewis is being reappointed).

Appointed to the Texas Military Preparedness Commission for a term to expire February 1, 2021, Kevin E. Pottinger of Keller (replacing Paul F. Paine of Fort Worth whose term expired).

Appointed to the Texas Military Preparedness Commission for a term to expire February 1, 2021, Michael S. "Mike" Sullivan of Kingwood (replacing Alvin W. Jones of Bryan whose term expired).

Appointed to the Texas Military Preparedness Commission for a term to expire February 1, 2021, Shannalea G. Taylor of Del Rio (replacing Anna Arredondo Chapman of Del Rio whose term expired).

Appointments for April 29, 2016

Appointed to the Statewide Procurement Advisory Council for a term at the pleasure of the Governor, Jordan Hale of Austin (replacing Stacey Napier of Austin).

Greg Abbott, Governor

TRD-201602144

♦ ♦ ♦

Proclamation 41-3481

TO ALL TO WHOM THESE PRESENTS SHALL COME:

WHEREAS, Section 411.173(b) of the Government Code of the State of Texas directs that the governor shall negotiate an agreement with any other state that provides for the issuance of a license to carry a handgun under which a license issued by the other state is recognized in this state, or shall issue a proclamation that a license issued by the other state is recognized in this state, if the attorney general of the State of Texas determines that a background check of each applicant for a license issued by that state is initiated by state or local authorities or an agent of the state or local authorities before the license is issued; and

WHEREAS, Section 411.173(b) of the Government Code defines "background check" as a search of the National Crime Information Center database and the Interstate Identification Index maintained by the Federal Bureau of Investigation; and

WHEREAS, the governor has received a statement of finding from the attorney general that the State of Illinois performs background checks and that those checks meet the requirements of Section 411.173(b) of the Government Code; and

WHEREAS, the State of Texas is therefore authorized to recognize a valid license to carry a handgun from the State of Illinois;

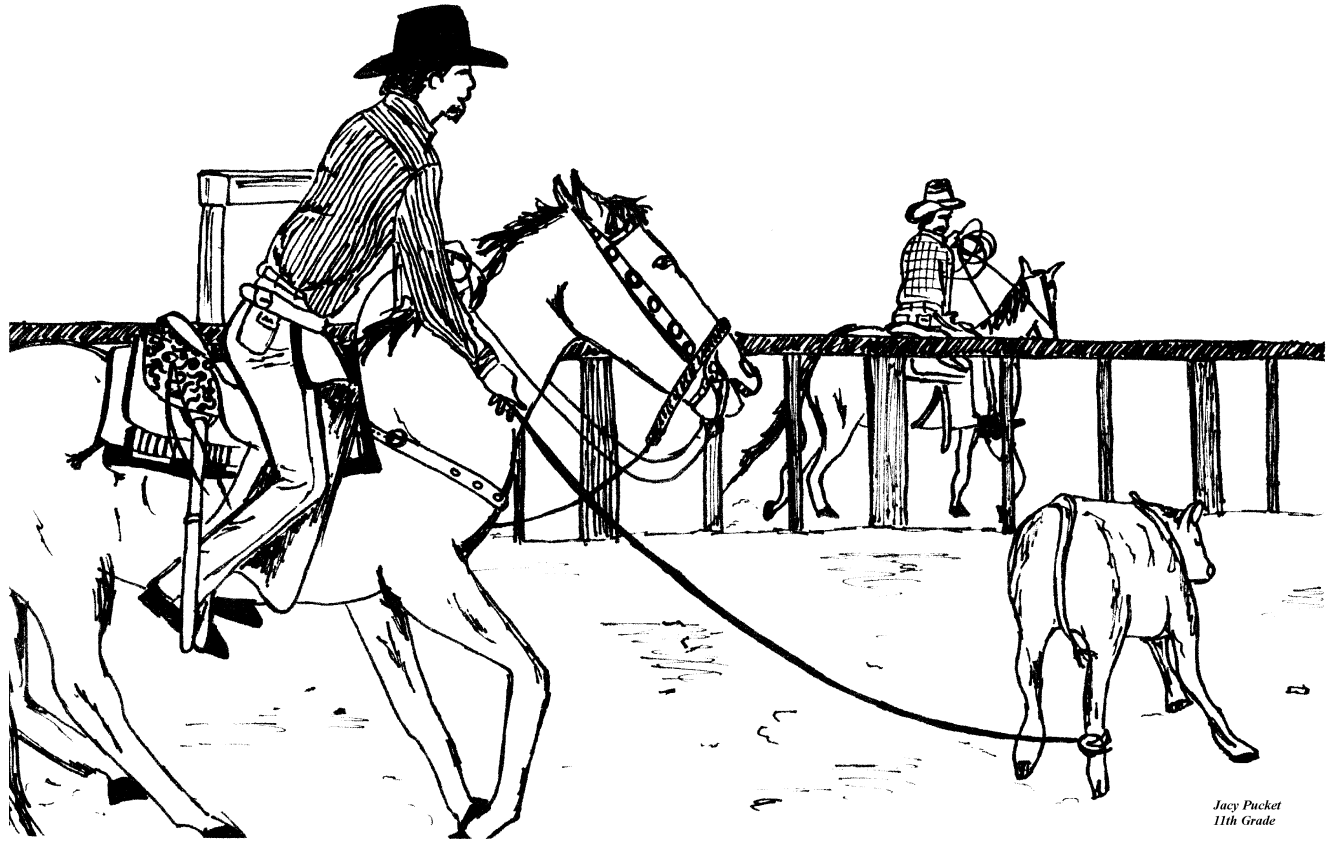
NOW, THEREFORE, I, Greg Abbott, Governor of Texas, do hereby proclaim that the State of Texas shall give full faith and credit to a valid license to carry a handgun issued by the State of Illinois as long as Illinois permit holders comply with all laws, rules, and regulations of the State of Texas governing the carrying of handguns, including age restrictions and types of weapons permitted.

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 29th day of April, 2016.

Greg Abbott, Governor

TRD-201602145

♦ ♦ ♦



Jacy Pucket
11th Grade

THE ATTORNEY GENERAL

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

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

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

Opinions

Opinion No. KP-0078

Mr. Richard A. Hyde, P.E.

Executive Director

Texas Commission on Environmental Quality

Post Office Box 13087

Austin, Texas 78711

Re: Administration of funds received through the federal Resources and Ecosystems Sustainability, Tourist Opportunities, and Revived Economies of the Gulf Coast States Act (RQ-064-KP)

S U M M A R Y

The federal RESTORE Act provides that its funds shall "be available for expenditure, without further appropriation." The federal Gulf Coast Ecosystem Restoration Council has previously determined that subjecting RESTORE Act funding to the Texas appropriations process would violate this law. The rider in the General Appropriations Act the Legislature passed ultimately draws RESTORE Act funds into the appropriations process and to the State Treasury and grants disapproval authority to an agency that is granted no such authority under the RESTORE Act. Therefore, the rider in the General Appropriations Act is in direct conflict with the federal interpretation of the federal RESTORE Act and is without effect.

Pursuant to section 404.093 of the Government Code, to the extent that the Office of the Governor or the Governor's appointee receives RESTORE Act funds in trust for the benefit of a person or entity other than a state agency, such funds may be deposited outside of the State Treasury in an account for which the Comptroller serves as trustee.

Opinion No. KP-0079

The Honorable C.R. Kit Bramblett

Hudspeth County Attorney

Post Office Box 221528

El Paso, Texas 79913-1528

Re: Administration and audit of accounts maintained by a county sheriff (RQ-0065-KP)

S U M M A R Y

Although the county sheriff has limited authority to maintain certain funds outside of the county treasury, all funds held by the sheriff in his official capacity are subject to oversight and audit by the county auditor, whether or not they are county funds.

In a county with a population of less than 190,000, unless a statute provides otherwise, a court would have a basis to conclude that there is no authority to require an auditor's countersignature on sheriff's funds properly held outside the county treasury.

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

TRD-201602140
Amanda Crawford
General Counsel
Office of the Attorney General
Filed: May 4, 2016

♦ ♦ ♦

Opinions

Opinion No. KP-0080

Mr. Charles Horton

Executive Director

Texas Board of Professional Geoscientists

Post Office Box 13225

Austin, Texas 78711-3225

Re: Whether the Texas Board of Professional Geoscientists has implied authority under Occupations Code chapter 1002 to accept and place limits on the voluntary surrender of a license (RQ-0066-KP)

S U M M A R Y

A court would likely determine that the Board of Professional Geoscientists has implied authority under chapter 1002 of the Occupations Code to accept the unilateral, voluntary surrender of a license by a licensee. A court would likely also find that the Board may impose reasonable conditions on its acceptance of a voluntary license surrender.

Opinion No. KP-0081

Ms. Lisa Smith

Bastrop County Auditor

804 Pecan Street

Bastrop, Texas 78602

Re: Whether Tax Code section 33.06 authorizes ad valorem property tax deferral on mixed-use property (RQ-0067-KP)

S U M M A R Y

A court would likely conclude that section 33.06 of the Tax Code impliedly authorizes a district to investigate facts recited in an affidavit for deferral, request additional information, and allow or deny a deferral as warranted by the law and facts. An appraisal district may grant deferral on mixed-use property provided that all uses are compatible with occupancy as a residence homestead. Whether an owner occupies an entire parcel as a residence homestead will depend on the particular facts.

Section 33.06 of the Tax Code does not authorize an appraisal district to require a property owner to provide a survey at the owner's expense in order to claim entitlement to tax deferral under subsection 33.06(a) of the Tax Code.

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

TRD-201602163
Amanda Crawford
General Counsel
Office of the Attorney General
Filed: May 4, 2016

♦ ♦ ♦

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

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

TITLE 1. ADMINISTRATION

PART 3. OFFICE OF THE ATTORNEY GENERAL

CHAPTER 61. CRIME VICTIMS' COMPENSATION

The Office of the Attorney General (OAG) proposes amendments to Chapter 61, Subchapter E, §§61.402, 61.403, 61.405, and 61.407 and Subchapter I, §61.801, concerning the administration of the OAG's Crime Victims' Compensation Program. Chapter 61, Subchapter E, Pecuniary Loss, §§61.402, 61.403, 61.405, and 61.407 will increase the limits on compensation for loss of earnings, loss of support, child care, funeral and burial and the costs of cleaning a crime scene. Chapter 61, Subchapter I, Reimbursement to Law Enforcement Agencies for Forensic Sexual Assault Medical Examinations, §61.801 is amended to increase the limit for reimbursement amounts.

Gene McCleskey, Division Chief, OAG Crime Victim Services Division, has determined that for the first five-year period that the amendments are in effect the constitutionally dedicated Victims of Crime Fund will incur costs of $27,492,672.77 on behalf of the state or local government as a result of enforcing or administering the amended sections.

Mr. McCleskey has determined that for each of the first five years following the adoption of the amendments, the anticipated public benefit of the proposal will be to increase the state's effective and efficient administration of the crime victim's compensation program.

Mr. McCleskey has also determined that the proposed amendments are not likely to have an adverse economic impact on micro-business or small business. There is no anticipated economic cost to persons who are required to comply with the amendments s as proposed.

Written comments on the proposal may be submitted for 30 calendar days following the publication of this notice to Kristen D. Huff, Assistant Attorney General, Crime Victim Services Division, Office of the Attorney General, at kristen.huff@texasattorneygeneral.gov.

SUBCHAPTER E. PECUNIARY LOSS

1 TAC §§61.402, 61.403, 61.405, 61.407

The amendments are proposed in accordance with Texas Code of Criminal Procedure, Articles 56.33 and 56.42 which requires the OAG to adopt rules governing the administration of its crime victims' compensation program.

No other code, article, or statute is affected by this proposal.

§61.402. Loss of Earnings.

(a) Pursuant to Texas Code of Criminal Procedure Article 56.32(a)(9)(B) and (I), the OAG shall determine an award for actual loss of past earnings, the anticipated loss of future earnings and bereavement leave. Loss of earnings may be paid to victims who suffer a disability period as defined in §61.101(a)(2) of this chapter (relating to Definitions), or to victims or claimants attending individual appointments, executions, or funerals and memorials as outlined in subsections (e), (i) and (j) of this section. The victim or claimant must submit information to the OAG in the manner prescribed in §61.404 of this subchapter (relating to Travel Expenses).

(b) The actual loss of past earnings will be computed by determining the weekly net earnings of the victim on the date of the criminally injurious conduct multiplied by the disability period. The OAG may determine the initial disability period upon verification of work missed up to fourteen calendar days after the criminally injurious conduct. Verification may be from any source deemed appropriate by the OAG.

(c) If a victim's loss of past or anticipated earnings is a result of a disability period lasting more than fourteen calendar days directly caused by the criminally injurious conduct, the M.D. or D.O. who regularly treats the victim must submit a written statement and any other documentation requested by the OAG in order to verify loss of past or anticipated earnings.

(d) If a victim was unemployed at the time of the criminally injurious conduct and claims a loss of anticipated earnings, the victim or claimant must provide the OAG with a sufficient showing that the victim would have had earnings had the victim not suffered injury or death as a direct result of the criminally injurious conduct. "Sufficient showing" may include a written statement from the employer that the victim was offered employment, but did not begin employment, or any other information deemed appropriate by the OAG.

(e) Loss of earnings may be paid to a claimant, consistent with the rest of this section, if the expense is reasonably and necessarily incurred as a result of the victim's personal injury or death for:

(1) the victim's disability period resulting from the personal injury;

(2) the receipt of medically indicated services related to the victim's disability period resulting from the personal injury; or

(3) the participation in or attendance at investigative, prosecutorial, or judicial processes related to the criminally injurious conduct and participation in or attendance at any post-conviction or post-adjudication proceeding relating to the criminally injurious conduct.

(f) In computing loss of earnings, the OAG will consider any other income earned subsequent to the crime, and any collateral source under Texas Code of Criminal Procedure Article 56.32(a)(3).

(g) Loss of past earnings may be paid upon verification of one of the following:

(1) income reported to the Internal Revenue Service;

(2) documentation from the Texas Workforce Commission;

(3) an affidavit from an employer, including the employer's Texas Workforce Commission employer identification number; or

(4) any other source approved by the OAG.

(h) The loss of earnings available under Texas Code of Criminal Procedure Article 56.32(a)(9)(B) is determined by the date of criminally injurious conduct and is limited pursuant to Texas Code of Criminal Procedure Article 56.42(c) as follows:

(1) Between January 1, 1980 and August 31, 1989, the maximum amount of an award for loss of earnings is $150 per week.

(2) Between September 1, 1989 and August 31, 1995, the maximum amount of an award for loss of earnings is $200 per week.

(3) Between September 1, 1995 and January 31, 1998, the maximum amount of an award for loss of earnings is $400 per week.

(4) Between [~~After~~] February 1, 1998 and July 14, 2016, the maximum amount of an award for loss of earnings is $500 per week.

(5) On or after July 15, 2016, the maximum amount of an award for loss of earnings is $700 per week.

(i) Loss of earnings may be paid to a household member, as defined in Texas Code of Criminal Procedure Article 56.32(a)(6), or immediate family member, as defined in Texas Code of Criminal Procedure Article 56.32(a)(7), if it can be substantiated in a manner that is acceptable to the OAG that bereavement leave was taken from work in connection with the death of a victim who died on or after September 1, 2003.

(j) Loss of earnings available to a victim or claimant to attend an execution under Texas Code of Criminal Procedure Article 56.32(a)(9)(B)(iii) is limited to three consecutive days per proceeding and cannot exceed the limits described in subsection (h) of this section. The OAG may extend this limit upon good cause shown.

(k) The amount of loss of earnings awarded under Texas Code of Criminal Procedure Article 56.32(a)(9)(I) for bereavement leave is determined by the date of the criminally injurious conduct, and is limited to ten work days of lost earnings, not to exceed: [~~$1,000.~~]

(1) $1000 for criminally injurious conduct before July 15, 2016; or

(2) $1400 for criminally injurious conduct on or after July 15, 2016.

(l) Loss of earnings may be paid to a claimant if it can be substantiated in a manner that is acceptable to the OAG that the claimant traveled to witness an execution, if the cost was incurred on or after June 21, 2003.

(m) Reimbursements for loss of earnings are limited to reimbursement for the actual loss of earnings due to individual medical, investigative, or court appointments, including judicial proceedings, but not to exceed four hours of work time, unless evidence presented by the victim or claimant or an investigation by the OAG indicates that the appointment exceeded four hours.

(n) At the discretion of the OAG, an award for loss of earnings due to a disability period may require review and application of the requirements provided in the "Official Disability Guidelines" adopted by the Texas Department of Insurance.

§61.403. Loss of Support Payments for Dependents.

(a) Pursuant to Texas Code of Criminal Procedure Article 56.32(a)(9)(E), the OAG may make payments for actual loss of support for the dependent(s) of a victim. Under this provision, actual loss of support will be paid to the victim or to a claimant on behalf of a dependent(s) if the victim is deceased.

(b) To determine the actual loss of support for the dependent(s), the OAG may consider the victim's income and the offender's income if the income source was available for the dependent(s) on the date of the criminally injurious conduct and was lost as a result of that criminally injurious conduct. The amount of any award for loss of support shall be reduced by any payments from collateral sources and any loss of earnings paid under §61.402 of this subchapter (relating to Loss of Earnings). Loss of support payments may not exceed the actual pecuniary loss or any other limits set by this section.

(c) Consistent with Texas Code of Criminal Procedure Article 56.41(b)(5), the OAG shall not make loss of support payments for the dependent(s) of a victim if the offender or an accomplice of the offender would benefit from such payment, consistent with §61.413 of this subchapter (relating to Unjust Enrichment).

(d) The OAG will review the supporting documentation provided by the victim or claimant to determine eligibility and amount of an award of loss of support payments. The OAG will determine if the documentation is sufficient to support an award under this section. The victim or claimant must provide all documentation deemed necessary by the OAG as proof of the following:

(1) the dependent is the victim's dependent, as defined in Texas Code of Criminal Procedure Article 56.32(a)(5);

(2) the amount of net income or other verifiable support available for the dependent;

(3) if applicable, verification that the victim is deceased or verification of the medical disability of the victim consistent with §61.502 of this chapter (relating to Medical Reports and Records); and

(4) any other documentation deemed necessary by the OAG.

(e) Payments made under this section are subject to ongoing review by the OAG to determine continued eligibility. If the victim has a medical disability as a result of the criminally injurious conduct and therefore is unable to work, then the victim or claimant must comply with, and is subject to, all provisions of §61.502 of this chapter.

(f) Loss of support payments for the dependent(s) of a deceased victim may be paid on an ongoing basis at 100% of the pecuniary loss, subject to the award cap determined by the date of the criminally injurious conduct, up to the maximum amount of the claim or until the dependent(s) no longer qualifies due to age or emancipation, subject to the following provisions:

(1) If there are multiple dependents of a deceased victim, the OAG will pay the loss of support payments in equal amounts for each eligible dependent claimant not to exceed the aggregate limits set in paragraph (2) of this subsection.

(2) The amount of the loss of support payment awarded for the dependent(s) of a deceased victim is determined by the date of the criminally injurious conduct and is limited pursuant to Texas Code of Criminal Procedure Article 56.42(c) as follows:

(A) Between January 1, 1980 and August 31, 1989, the maximum amount of an award for loss of support is $150 per week.

(B) Between September 1, 1989 and August 31, 1995, the maximum amount of an award for loss of support is $200 per week.

(C) Between September 1, 1995 and January 31, 1998, the maximum amount of an award for loss of support is $400 per week.

(D) Between [~~After~~] February 1, 1998 and July 14, 2016, the maximum amount of an award for loss of earnings is $500 per week.

(E) On or after July 15, 2016, the maximum amount of an award for loss of earnings is $700 per week.

(g) Loss of support payments made for the dependent(s) of a surviving victim may be paid to the victim, subject to the following provisions:

(1) To be eligible to receive an award under this section, the criminally injurious conduct causing the injury to the surviving victim must have occurred on or after September 1, 1997.

(2) If there are multiple dependents of a surviving victim, the OAG will pay the loss of support payments in equal amounts for each eligible dependent not to exceed the aggregate limits set in paragraph (3) of this subsection.

(3) The amount of the loss of support payment awarded for dependent(s) of a surviving victim is determined by the date of the criminally injurious conduct and is limited pursuant to Texas Code of Criminal Procedure Article 56.42(c) as follows:

(A) Between September 1, 1997 and January 31, 1998, the maximum amount of an award for loss of support is $400 per week.

(B) Between [~~After~~] February 1, 1998 and July 14, 2016, the maximum amount of an award for loss of support is $500 per week.

(C) On or after July 15, 2016, the maximum amount of an award for loss of support is $700 per week.

(4) An award of loss of support for the dependent(s) of a surviving victim is limited to 13 continuous weeks following the date of the criminally injurious conduct. If the surviving victim is medically disabled as a result of the criminally injurious conduct, such that the surviving victim is unable to work, loss of support payments for the dependent(s) of the surviving victim will be paid during the medical disability period and will continue for 13 continuous weeks after the removal of the medical disability. Loss of support payments are subject to the limits in effect on the date of the criminally injurious conduct, and are paid up to the maximum amount of the claim or until the dependent(s) no longer qualifies as a dependent by age or emancipation.

§61.405. Other Limits on Compensation.

(a) The limits on amounts of awards may be different from the amounts listed in this chapter based on the statute and rules in effect at the time of the criminally injurious conduct.

(b) Under Texas Code of Criminal Procedure Article 56.32(a)(9)(c), the actual cost of care for a child victim, a dependent of a victim or a minor child of a victim may be awarded if the criminally injurious conduct occurred on or after September 1, 1997, and the care is a new and ongoing expense resulting from the criminally injurious conduct. Care of a child or dependent under this section is subject to the following provisions:

(1) For criminally injurious conduct that occurs between May 8, 2005 and July 14, 2016, child care is limited to 13 continuous weeks if the victim is not deceased, unless good cause exists;

(2) For criminally injurious conduct that occurs on or after July 15, 2016, child care is limited to 52 continuous weeks if the victim is not deceased, unless good cause exists;

(3) [~~(1)~~] Limited to children 14 and under, unless good cause exists;

[~~(2) Limited to 13 continuous weeks if the victim is not deceased, unless good cause exists;~~]

(4) [~~(3)~~] Must be provided by a licensed, registered, or certified care provider;

(5) [~~(4)~~] May not be paid once a person no longer qualifies as a child or dependent; and

(6) [~~(5)~~] Limited to the following amounts for criminally injurious conduct occurring: [~~$100 per week for each child or dependent for criminally injurious conduct occurring after September 1, 1997.~~]

(A) Between September 1, 1997 and July 14, 2016, $100 per week for each child or dependent; or

(B) On or after July 15, 2016, $300 per week for each child or dependent.

(c) Funeral and burial expenses provided by Texas Code of Criminal Procedure Article 56.32(a)(9)(D) are limited as follows: [~~to $4,500.~~]

(1) for criminally injurious conduct occurring before July 15, 2016, compensation may not exceed $4500;

(2) for criminally injurious conduct occurring on or after July 15, 2016, compensation may not exceed $6500; and

(3) the [~~The~~] actual, reasonable and necessary costs of transporting the deceased victim 50 miles or more to the funeral service location, and 50 miles or more to the place of burial, are allowable funeral and burial expenses which are in addition to the funeral and burial limits associated with paragraphs (1) and (2) of this subsection. [~~the $4,500 limit~~]

(d) Under Texas Code of Criminal Procedure Article 56.32(a)(9)(F), the actual, reasonable, and necessary cost of cleaning the crime scene is limited as follows: [~~may be awarded if the criminally injurious conduct occurred after September 1, 1995 up to $750 per victim.~~]

(1) for criminally injurious conduct that occurs between September 1, 1995 and July 14, 2016, compensation may not exceed $750; and

(2) for criminally injurious conduct that occurs on or after July 15, 2016, compensation may not exceed $2250 per victim.

(e) Under Texas Code of Criminal Procedure Article 56.32(a)(9)(G), [~~if the criminally injurious conduct occurred after September 1, 1995,~~] the OAG may pay for the reasonable replacement costs as follows:[~~, not to exceed $750 in the aggregate, for property seized as evidence.~~]

(1) for criminally injurious conduct that occurs between September 1, 1995 and July 14, 2016, compensation may not exceed $750; and

(2) for criminally injurious conduct that occurs on or after July 15, 2016, compensation may not exceed $1000 per victim.

(f) Under Texas Code of Criminal Procedure Article 56.61, the OAG may reimburse claimants for pecuniary losses within the limits and at the rates in effect on the date the identity of the victim is established by a law enforcement agency.

§61.407. Additional Compensation for Extraordinary Pecuniary Losses.

(a) Compensation for extraordinary pecuniary losses are available to victims of criminally injurious conduct which occurred after September 1, 1995. Losses associated with (d)(6), (7), and (8) of this section are only available for victims of criminally injurious conduct which occurred after September 1, 2001.

(b) Pursuant to Texas Code of Criminal Procedure Article 56.42(b), the OAG may only award an additional amount to be used for actual extraordinary pecuniary losses if the personal injury to a victim is catastrophic and results in a total and permanent disability to the victim. Claims for extraordinary pecuniary losses are governed by the statute and rules in effect on the date of the criminally injurious conduct.

(c) Once the OAG determines that a victim is eligible for additional compensation, the OAG may approve payment of expenses from either the victim's initial compensation amount or from the additional compensation amount, as determined appropriate by the OAG. The additional compensation for extraordinary pecuniary losses is available for the actual, reasonable and necessary costs incurred as a result of the criminally injurious conduct occurring on or after September 1, 1995, as follows:

(1) An award for additional compensation for extraordinary pecuniary losses arising from criminally injurious conduct that occurred between September 1, 1995 and August 31, 1997, shall not exceed $25,000.

(2) An award for additional compensation for extraordinary pecuniary losses arising from criminally injurious conduct that occurred between September 1, 1997 and August 31, 2001, shall not exceed $50,000.

(3) An award for additional compensation for extraordinary pecuniary losses arising from criminally injurious conduct that occurred on or after September 1, 2001, shall not exceed $75,000.

(d) Lost wages under this section has the same meaning as loss of earnings in this chapter. Loss of earnings under this section will be computed, as follows:

(1) By determining the weekly net earnings of a victim at the time of the criminally injurious conduct and multiplying the victim's net earnings by the number of weeks the victim continues to incur a loss of earnings; and

(2) The OAG will consider any other income earned subsequent to the crime, and any collateral source under Texas Code of Criminal Procedure Article 56.32(a)(3).

(e) Lost wages may be paid upon verification of one of the following:

(1) income reported to the Internal Revenue Service;

(2) documentation from the Texas Workforce Commission;

(3) an affidavit from an employer, including the employer's Texas Workforce Commission employer identification number; or

(4) any other source approved by the OAG.

(f) Lost wages available under Texas Code of Criminal Procedure Article 56.42(b) are determined by the date of criminally injurious conduct and are limited pursuant to Texas Code of Criminal Procedure Article 56.42(c) as follows:

(1) Between January 1, 1980 and August 31, 1989, the maximum amount of an award for loss of earnings is $150 per week.

(2) Between September 1, 1989 and August 31, 1995, the maximum amount of an award for loss of earnings is $200 per week.

(3) Between September 1, 1995 and January 31, 1998, the maximum amount of an award for loss of earnings is $400 per week.

(4) Between [~~After~~] February 1, 1998 and July 14, 2016, the maximum amount of an award for loss of earnings is $500 per week.

(5) On or after July 15, 2016, the maximum amount of an award for loss of earnings is $700 per week.

(g) The additional compensation for extraordinary pecuniary losses shall be used only for the specific costs articulated in Texas Code of Criminal Procedure Article 56.42(b). Compensation may be made to replace lost wages and the following reasonable and necessary extraordinary pecuniary losses for expenses incurred as follows:

(1) Making a home accessible, including the actual, reasonable and necessary physical or structural modifications to a residence that are necessary to maintain an optimal level of independence in the activities of daily living. This includes, but is not limited to, modifications for ingress and egress to the home, modifying a kitchen, bedroom, or bathroom to accommodate the victim's physical limitations resulting from the criminal injury. The legal owner of the residence must submit to the OAG verification of ownership and written permission to modify the dwelling.

(2) Making an automobile accessible, including equipping a personal vehicle with reasonable and necessary equipment to allow the victim to control or to enter the vehicle to maintain an optimal level of independence in the activities of daily living. Modification of a vehicle is limited to one time per two year period unless good cause exists.

(3) Expenses for job training or vocational rehabilitation may be compensated if the service provider is licensed. Job training or vocational rehabilitation should be based upon a referral by one of the health care service providers treating the victim's injuries that resulted in the disability. All other collateral sources for job training and vocational rehabilitation must be utilized. Itemized bills must indicate the dates of service and the nature of the services provided. Semi-annual reviews of these conditions shall be conducted to assure continued compliance within the predicted length of rehabilitation.

(4) Training in the use of special appliances necessary due to the victim's physical limitations.

(5) Home health care expenses may be paid for services provided by health care service providers upon submission by the victim or claimant to the OAG of an itemized bill. Home health care service providers must be licensed, certified or registered within the state in which services are being provided. Itemized bills must indicate the dates of service and the nature of the services provided.

(6) Durable medical equipment, including those items that can withstand repeated use, are primarily used to serve a medical purpose, are generally not useful to a person in the absence of illness, injury or disease, and are appropriate for use in the victim's home or workplace or to assist with activities of daily living.

(7) Rehabilitation technology, including those therapeutic devices or systems, deemed appropriate by the OAG, which help the victim attain maximum function and an optimal level of independence in the activities of daily living.

(8) Long-term medical expenses are:

(A) incurred for medically indicated treatment which are considered reasonable and necessary and the expense occurs after 12 months of total and permanent disability or after the victim has reached maximum medical improvement, whichever is sooner; and

(B) medical, as defined by §61.101(a)(9) of this chapter (relating to Definitions), expenses which are a direct result of the crim-

inally injurious conduct include, but are not limited to: medications, supplies, surgery, and surgery related expenses necessary to sustain or achieve the highest possible quality of life; or

(C) other expenses resulting from medically indicated treatment related to the criminally injurious conduct in which the OAG finds good cause for an expense to be covered as a long-term medical expense which is either:

(i) prior to the 12 month period of total and permanent disability; or

(ii) outside of the services listed in this section.

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

Filed with the Office of the Secretary of State on April 25, 2016.

TRD-201601960
Amanda Crawford
General Counsel
Office of the Attorney General
Earliest possible date of adoption: June 12, 2016
For further information, please call: (512) 936-7940

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SUBCHAPTER I. REIMBURSEMENT TO LAW ENFORCEMENT AGENCIES FOR FORENSIC SEXUAL ASSAULT MEDICAL EXAMINATIONS

1 TAC §61.801

The amendments are proposed in accordance with Texas Code of Criminal Procedure, Articles 56.33 and 56.42 which requires the OAG to adopt rules governing the administration of its crime victims' compensation program.

No other code, article, or statute is affected by this proposal.

§61.801. Applicability, General Provisions, and Exclusions.

(a) A law enforcement agency is entitled to reimbursement from the OAG for the reasonable costs associated with a forensic sexual assault medical examination of a victim consistent with Texas Code of Criminal Procedure Articles 56.06, 56.065, and 56.54(k) and this subchapter.

(b) The OAG shall determine the manner for submitting reimbursement requests. Requests for reimbursement shall be submitted in accordance with the instructions, application, and documentation requirements as found on the OAG website.

(c) Only one forensic sexual assault medical examination per victim per alleged sexual assault will be considered a reimbursable cost.

(d) The OAG will reimburse a law enforcement agency for the reasonable costs associated with a forensic sexual assault medical examination of a victim as follows: [~~up to a maximum aggregate amount of $700. Reasonable costs for the services provided during the evidence collection portion of the examination include, but are not limited to, charges for the examiner, health care facility use, procedures, and materials.~~]

(1) for criminally injurious conduct occurring before July 15, 2016, reimbursement may not exceed $700;

(2) for criminally injurious conduct occurring on or after July 15, 2016, reimbursement may not exceed $1000.

(e) Law enforcement shall submit one complete application for reimbursement per victim per alleged sexual assault.

(f) If there are multiple fees from separate service providers, the OAG will reimburse the law enforcement agency up to a maximum aggregate amount of $700.

(g) The OAG will not reimburse the law enforcement agency for any costs associated with medical diagnosis and treatment. A law enforcement agency is not required to pay any costs of medical diagnosis or treatment for the victim's injuries.

(h) The OAG is not bound by any billing or contractual agreements made between a law enforcement agency and a service provider.

(i) The OAG may require additional documentation from a law enforcement agency or a service provider at any time to support a request for reimbursement.

(j) The OAG will not reimburse a law enforcement agency for any additional costs incurred during the testing and analysis of other physical evidence. This includes, but is not limited to: examining or treating a suspected perpetrator, laboratory testing of clothing, or forensic analysis of crime scene materials or other evidence.

(k) The OAG is only authorized to reimburse a law enforcement agency for a forensic sexual assault medical examination and reasonable costs for the services provided during the evidence collection portion of the examination including, but not limited to, charges for the examiner, health care facility use, procedures, and materials. [~~The OAG is not authorized to reimburse a victim, claimant, physician, sexual assault examiner, sexual assault nurse examiner, or health care facility for any charges associated with a forensic sexual assault medical examination.~~]

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

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Amanda Crawford
General Counsel
Office of the Attorney General
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For further information, please call: (512) 936-7940

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PART 7. STATE OFFICE OF ADMINISTRATIVE HEARINGS

CHAPTER 155. RULES OF PROCEDURE

The State Office of Administrative Hearings (SOAH) proposes revisions to Title 1, Part 7, Chapter 155, Rules of Procedure. SOAH proposes to amend Subchapter A, §§155.1, 155.3, 155.5, and 155.7; Subchapter B, §155.51 and §155.53; Subchapter D, §§155.151, 155.153, and 155.155; Subchapter E, §155.201; Subchapter G, §§155, 301, 155.305, and 155.307; Subchapter H, §155.351; Subchapter I, §§155.401, 155.405, 155.407, 155.411, 155.419, 155.421, 155.423, 155.425, 155.427, 155.429, and 155.431; and Subchapter J, §§155.501, 155.503, 155.505, and 155.507. SOAH proposes the repeal of §155.101 and §155.103 in Subchapter C; §155.251 in Sub-

chapter F; and §155.413 in Subchapter I. SOAH also proposes new §§155.101, 155.103, and 155.105 in Subchapter C; new §155.152 in Subchapter D; new §155.203 in Subchapter E; new §§155.251, 155.253, 155.255, 155.257, and 155.259 in Subchapter F; and new §155.509 in Subchapter J.

The existing subchapters have been developed to provide a uniform set of procedural rules to be followed in administrative proceedings at SOAH. The proposed amendments to the existing rules are to make grammatical corrections, make the language more understandable, and make the rules easier to use.

Thomas H. Walston, General Counsel, has determined that for the first five-year period the amendments, repeals and new rules are in effect, there will be no fiscal implications for state or local government as a result of enforcing or administering the proposed rules

Mr. Walston, also has determined that for the first five-year period the amendments, repeals and new rules are in effect, the anticipated public benefit will be in providing clearer, more uniform, and better-organized procedures for participants in the administrative proceedings at SOAH. There will be no effect on small businesses as a result of enforcing the proposed rules, and there is no anticipated economic cost to individuals who are required to comply with the proposed rules.

Written comments on the proposed rules must be submitted within 30 days after publication of the proposal in the *Texas Register* to Norma Lopez, Executive Assistant, State Office of Administrative Hearings, to P.O. Box 13025, Austin, Texas 78711-3025, by e:Mail at: norma.lopez@soah.texas.gov, or by facsimile to (512) 463-7791.

SUBCHAPTER A. GENERAL

1 TAC §§155.1, 155.3, 155.5, 155.7

The amendments are proposed under Government Code, Chapter 2003, §2003.050, which requires SOAH to adopt procedural rules that relate to the hearings it conducts, and Government Code, Chapter 2001, §2001.004, which requires agencies to adopt rules of practice setting forth the nature and requirements of formal and informal procedures.

The proposed amendments affect Government Code, Chapters 2001 and 2003.

§155.1. Purpose.

(a) This chapter governs the procedures of the State Office of Administrative Hearings (SOAH). These rules [~~procedures~~] apply in all matters referred to SOAH, including contested cases under the Administrative Procedure Act (APA), Tex. Gov't Code Chapter 2001. These rules [~~procedures~~] do not apply to matters otherwise addressed by statute or to matters that are otherwise limited by the provisions of this chapter.

(b) Administrative License Suspension cases initiated by the Texas Department of Public Safety are governed by Chapter 159 of this title [~~(relating to Rules of Procedure for Administrative License Suspension Hearings)~~].

(c) Arbitration procedures for certain enforcement actions of the Texas Department of Aging and Disability Services regarding assisted living facilities and nursing homes are governed by Chapters 156 and [~~Chapter~~] 163 of this title [~~(relating to Arbitration Procedures for Certain Enforcement Actions of the Texas Department of Aging and Disability Services)~~].

(d) Appeals of appraisal review board decisions are governed by Chapter 165 of this title.

(e) Dispute resolution procedures for certain consumer health benefit disputes under Insurance Code, Chapter 1467, are governed by Chapter 167 of this title.

(f) [~~(d)~~] SOAH adopts by reference the procedural rules of the Public Utility Commission of Texas (PUC) and the Texas Commission on Environmental Quality (TCEQ) that address the contested case process in matters referred by those agencies [~~and that are not inconsistent with applicable law~~]. This adoption does not include any PUC or TCEQ rules addressing the use of Alternative Dispute Resolution (ADR) processes at SOAH. Those ADR processes are governed by the Governmental Dispute Resolution Act, Tex. Gov't Code Chapter 2009; SOAH rule provisions pertaining to ADR; and interagency contracts, memoranda of understanding, or other written agreements with referring entities.

(g) [~~(e)~~] SOAH adopts by reference the procedural rules of the Comptroller of Public Accounts (CPA) that address the hearing process in matters referred by that agency pertaining to protesting preliminary findings of a property value study [~~taxable value. These rules are set out in 34 TAC, Chapter 9, Subchapter L (relating to Procedures for Protesting Preliminary Findings of Total Taxable Value)~~].

(h) [~~(f)~~] Under Tex. Gov't Code §815.102, the procedural rules of the Employees Retirement System of Texas (ERS) govern the formal contested case process in matters it refers to SOAH.

(i) Proceedings under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §§1400, et seq, are governed by that statute, federal regulations at 34 C.F.R. Part 300, and the rules of the Texas Education Agency at 19 TAC Chapter 89.

§155.3. Application and Construction of this Chapter.

(a) SOAH proceedings shall be conducted in accordance with the APA, when applicable, and with this chapter. The judge may modify and supplement the requirements of this chapter to promote the fair and efficient handling of the case and to facilitate resolution of issues, if doing so will not unduly prejudice the rights of any person or contravene applicable statutes.

(b) If there is [~~any~~] conflict between an agency's rules or prior decisions and statutory provisions applicable to the case, and the rules or decisions cannot be harmonized with the statute, the statute controls.

(c) The procedural rules of a state agency govern SOAH proceedings only to the extent that SOAH's rules adopt the agency's procedural rules by reference, unless otherwise required by law.

(d) If there is [~~any~~] conflict between SOAH's rules and the procedural rules of the TCEQ adopted in §155.1 of this chapter [~~title (relating to Purpose)~~], the TCEQ rules will control.

(e) If there is [~~any~~] conflict between SOAH's rules and the procedural rules of the PUC adopted in §155.1 of this chapter [~~title (relating to Purpose)~~], the PUC rules will control.

(f) If there is [~~any~~] conflict between SOAH's rules and the procedural rules of ERS referenced in §155.1 of this chapter [~~title (relating to Purpose)~~], the ERS rules will control.

(g) This chapter shall be construed to ensure the just and expeditious determination of every matter referred to SOAH. Not all contested procedural issues will be susceptible to resolution by reference to the APA and other applicable statutes, this chapter, and case law. When they are not, the presiding judge will consider applicable policy of the referring agency documented in the record in accordance with §155.419 of this chapter [~~title (relating to Consideration of Policy Not~~

~~Incorporated in Referring Agency's Rules)~~], the Texas Rules of Civil Procedure (TRCP) as interpreted and construed by Texas case law, and persuasive authority established in other forums.

(h) Unless otherwise expressly provided, the past, present, and future tense shall each include the others [~~other~~]; the masculine, feminine, and neuter gender shall each include the others; and the singular and plural number shall each include the other.

(i) Words and phrases shall be read in context and construed according to the rules of grammar and common usage. Words and phrases that have acquired a technical or particular meaning, whether by legislative definition or otherwise, shall be construed accordingly. The principles of statutory construction and of the Code Construction Act, Tex. Gov't Code Chapter 311, [~~§311.001 et seq.,~~] apply.

§155.5. Definitions.

When used in this chapter, the following words and terms have the following meanings, unless the context clearly indicates otherwise.

(1) Administrative law judge or judge--An individual appointed to serve as a presiding officer by SOAH's chief [~~administrative law~~] judge under Tex. Gov't Code Chapter 2003.

(2) Alternative Dispute Resolution or ADR--Processes used at SOAH to resolve disputes outside or in connection with contested cases, including mediation, mini-trials, early neutral evaluation, and arbitration.

(3) APA--The Administrative Procedure Act, Tex. Gov't Code Chapter 2001.

(4) Arbitration--A form of ADR, governed by an agreement between the parties or special rules or statutes providing for the process in which a third-party neutral issues a decision after a streamlined and simplified hearing. Arbitrations may be binding or non-binding, depending on the agreement, statutes, or rules. See Chapters 156 and [~~Chapter~~] 163 of this title [~~(relating to Arbitration Procedures for Certain Enforcement Actions of the Texas Department of Aging and Disability Services)~~] for procedural rules specifically governing the arbitration of certain nursing home and assisted living facility enforcement cases referred by the Texas Department of Aging and Disability Services.

(5) Authorized representative--An attorney authorized to practice law in the State of Texas or, if authorized by applicable law, a non-attorney [~~person~~] designated by a party to represent the party.

(6) Business day--A weekday on which state offices are open.

~~[(7) Case--A dispute over which SOAH exercises jurisdiction to be resolved by a contested case proceeding or an ADR process.]~~

(7) [~~(8)~~] Chief Judge--The chief administrative law judge of SOAH.

~~[(9) Contested case--A proceeding, including a ratemaking or licensing proceeding, in which the legal rights, duties, or privileges of a party are to be determined after opportunity for an adjudicative hearing.]~~

(8) [~~(10)~~] Discovery--The process of compulsory disclosure by a party, upon another party's request, of information, including facts and documents, relating to a [~~the~~] contested case.

(9) [~~(11)~~] Evidence--Testimony and exhibits admitted into the record to prove or disprove the existence of an alleged fact.

(10) [~~(12)~~] Exhibits--Documents, records, photographs, and other forms of data compilation, regardless of media, or other tangible objects offered by a party as evidence.

(11) IDEA--The Individuals with Disabilities Education Act.

~~[(13) Final decision--A decision on the merits that is issued by the judge after a contested case hearing or after a ruling on a motion for summary disposition and authorized by APA §2001.058 or other applicable law.]~~

~~[(14) Law--The United States and Texas Constitutions, state and federal statutes, rules and regulations, and relevant case law.]~~

(12) [~~(15)~~] Media or media agency--A person or organization regularly engaged in news gathering or reporting, including any newspaper, radio or television station or network, news service, magazine, trade paper, professional journal, or other news reporting or news gathering entity.

(13) [~~(16)~~] Mediation--A confidential, informal dispute resolution process in which an impartial person, the mediator, facilitates communication among the parties to promote settlement, reconciliation, or understanding.

(14) [~~(17)~~] Party--A person named or admitted to participate in a case before SOAH.

(15) [~~(18)~~] Person--An individual, representative, corporation, or other entity, including [~~any~~] public or non-profit corporation, or an agency or instrumentality of federal, state, or local government.

(16) [~~(19)~~] Pleading--A filed document that requests procedural or substantive relief, makes claims, alleges facts, makes legal argument(s) [~~argument~~], or otherwise addresses matters involved in the case.

~~[(20) Proceeding--Any ADR process or any hearing in a contested case, including prehearing conferences, preliminary hearings, and hearings on the merits.]~~

(17) [~~(21)~~] PUC--The Public Utility Commission of Texas.

(18) [~~(22)~~] Referring agency--A state board, commission, department, agency, or other governmental entity that refers a contested case or other matter [~~dispute~~] to SOAH.

(19) [~~(23)~~] SOAH--The State Office of Administrative Hearings.

(20) [~~(24)~~] Stipulation--A binding [~~An~~] agreement among opposing parties concerning a relevant issue or fact.

(21) TAC--The Texas Administrative Code.

(22) [~~(25)~~] TCEQ--The Texas Commission on Environmental Quality.

(23) [~~(26)~~] TRCP--The Texas Rules of Civil Procedure. The TRCP are found on the website of the Texas Supreme Court, [~~www.supreme.courts.state.tx.us/rules and in the Texas Rules of Court published by Thomson/West~~].

(24) [~~(27)~~] TRE--The Texas Rules of Evidence. The TRE are found on the website of the Texas Supreme Court[~~, www.supreme.courts.state.tx.us/rules and in the Texas Rules of Court published by Thomson/West~~].

§155.7. Computation of Time.

(a) Application of rule. This rule applies unless another method is required by statute, another rule in this chapter, or order.

(b) Computing time periods. When computing periods of time prescribed or allowed in this chapter:

(1) the day of the act, event, or default from which the designated time period begins to run is not counted; and

(2) the last day of the time period is counted, unless it is a day on which SOAH's offices are closed, in which case the time period will end on the next day SOAH's offices are open.

(c) Calendar days. Time limits shall be computed using calendar days rather than business days except as provided by subsection (d) of this section.

(d) Five days or less. If the time limit is five days or less, the intervening Saturdays, Sundays, and legal holidays are not counted.

(e) Requests to extend a time limit are governed by §155.307 of this chapter.

[(e) Extensions of time. If a party seeks an extension of time, the judge may:]

[(1) grant the party's request upon a showing of good cause; and]

[(2) permit the act to be done after the expiration of the original time period.]

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SUBCHAPTER B. DOCKETING--FILING A CONTESTED CASE

1 TAC §155.51, §155.53

The amendments are proposed under Government Code, Chapter 2003, §2003.050, which requires SOAH to adopt procedural rules that relate to the hearings it conducts, and Government Code, Chapter 2001, §2001.004, which requires agencies to adopt rules of practice setting forth the nature and requirements of formal and informal procedures.

The proposed amendments affect Government Code, Chapters 2001 and 2003.

§155.51. Jurisdiction.

(a) Acquisition of jurisdiction. SOAH acquires jurisdiction over a case when a referring agency completes and files a Request to Docket Case form [and any documents described in §155.53 of this title (relating to Request to Docket Case)]. A separate Request to Docket Case form shall be completed and filed for each case referred to SOAH.

(b) When Request to Docket Case form is considered filed. A Request to Docket Case form shall be considered filed on the date the form is received by SOAH.

(c) Commencement of time periods. A [Any] period of time established by these rules shall not begin to run until SOAH acquires jurisdiction over a case.

(d) Effect of acquisition of jurisdiction by SOAH. After SOAH acquires jurisdiction, any party may initiate discovery or move for appropriate relief, including evidentiary rulings, continuances, summary disposition, and setting of proceedings.

§155.53. Request to Docket Case.

(a) Documents to be filed with Request to Docket Case form. A referring agency shall file with SOAH a completed Request to Docket Case form and the complaint, petition, application, or other pertinent documents describing the agency action giving rise to the case.

(b) Actions to be requested. A referring agency shall request one of the following actions on the Request to Docket Case form:

(1) setting of a hearing;

(2) assignment of a judge; or

(3) an ADR process.

(c) Request for setting of hearing. If a referring agency requests a setting of hearing, SOAH will attempt to set the hearing on the date and time requested, but the setting will be based on the availability of hearing rooms and judges. SOAH [assign a judge and] will provide the agency with the date, time, and place of the setting.

(d) Request for assignment of judge [ALJ]. If a referring agency requests assignment of a judge, SOAH will assign a judge to handle the case. [consider motions and other pre-hearing matters.]

(e) Request for ADR. If a referring agency requests ADR, SOAH will assign a judge, mediator, or arbitrator to handle the proceeding. [advise the parties of:]

[(1) the mediator, arbitrator, or judge appointed; and]

[(2) the date, time, and place for the ADR.]

(f) Refusal of Request to Docket Case form. SOAH may refuse to accept for filing a [any] Request to Docket Case form that has not been properly referred to SOAH or that does not substantially conform to the filing procedures of this section.

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

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SUBCHAPTER C. FILING AND SERVICE OF DOCUMENTS

1 TAC §155.101, §155.103

The repeals are proposed under Government Code, Chapter 2003, §2003.050, which requires SOAH to adopt procedural rules that relate to the hearings it conducts, and Government Code, Chapter 2001, §2001.004, which requires agencies to adopt rules of practice setting forth the nature and requirements of formal and informal procedures.

The proposed repeals affect Government Code, Chapters 2001 and 2003.

§155.101. Filing Documents.
§155.103. Service of Documents on Parties.

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1 TAC §§155.101, 155.103, 155.105

The new rules are proposed under Government Code, Chapter 2003, §2003.050, which requires SOAH to adopt procedural rules that relate to the hearings it conducts, and Government Code, Chapter 2001, §2001.004, which requires agencies to adopt rules of practice setting forth the nature and requirements of formal and informal procedures.

The proposed new rules affect Government Code, Chapters 2001 and 2003.

§155.101. Filing Documents.

(a) Filing and Service Required.

(1) All pleadings and other documents, except for confidential materials (as described in §155.103), shall be filed using one of the methods described in this rule.

(2) On the same date a document is filed, it shall also be served on all other parties using one of the methods described in §155.105.

(b) Method and format of filing in all cases other than PUC, TCEQ, or IDEA cases.

(1) Filing by Electronic Case Information System.

(A) Except as otherwise provided in this subchapter, attorneys, state agencies, and other governmental entities are required to file all documents in SOAH's electronic Case Information System (CIS). CIS may be accessed and filings uploaded using SOAH's internet home page, www.soah.texas.gov. Parties not represented by an attorney are strongly encouraged to use CIS but may use alternative methods of filing described in paragraph (2) of this subsection.

(B) The electronic version of a document maintained in CIS shall be given the same legal status as the originally filed document, without regard to the original means of filing.

(C) Formatting. A document filed in CIS must:

(i) be in text-searchable portable document format (PDF);

(ii) be directly converted to PDF rather than scanned, if possible;

(iii) not be locked;

(iv) otherwise comply with the Technology Standards set by the Judicial Committee on Information Technology and approved by the Supreme Court;

(v) if scanned, be at least 300 dots per inch (dpi) resolution;

(vi) include the email address of a party, attorney, or representative of a state agency who electronically files a document; and

(vii) include the SOAH docket number and the name of the case in which it is filed.

(D) Time of filing. The time and date of documents filed electronically shall be determined by the time and date of receipt recorded by CIS.

(E) If deemed necessary by SOAH, alternative means of filing or maintaining documents may be established, including the filing and maintenance of the official file in a paper format.

(F) Testimony and exhibits offered at a hearing will not be filed in CIS. Confidential material filed or submitted pursuant to §155.103 will not be publicly available in CIS.

(2) Non-CIS Filings.

(A) For unrepresented parties who do not use CIS, documents may be filed with SOAH:

(i) by mail addressed to SOAH at P.O. Box 13025, Austin, Texas 78711-3025;

(ii) by hand-delivery to SOAH at 300 West 15th Street, Room 504;

(iii) by fax to SOAH at (512) 322-2061; or

(iv) at the SOAH field office where the case is assigned, using the field office address or fax number, which are available at SOAH's website.

(B) All documents must include the SOAH docket number and the name of the case in which it is filed.

(C) Time of filing. With respect to documents filed by mail, fax, or hand delivery, the time and date of filing shall be determined by the file stamp affixed by SOAH. Documents received when SOAH is closed shall be deemed filed the next day SOAH is open.

(3) Non-conforming documents. When a filed document fails to conform to this rule, the presiding judge or SOAH's docketing department may identify the errors to be corrected and state a deadline for the person, attorney, or agency to resubmit the document in conforming format.

(c) Method of filing in cases referred by the PUC.

(1) Except for exhibits offered at a prehearing conference or hearing, the original of all documents shall be filed at the PUC in accordance with the PUC rules.

(2) The party filing a document with the PUC (except documents provided in the discovery process that are not the subject of motions filed in a discovery dispute) shall serve the judge with a copy of the document by delivery to SOAH on the same day as the filing.

(3) The court reporter shall provide the transcript and exhibits to the judge at the same time the transcript is provided to the requesting party. SOAH shall maintain the transcript and exhibits until they are released to the PUC by the judge. If no court reporter was requested by a party, SOAH shall maintain the recording of the hearing and the exhibits until they are released to the PUC by the judge.

(d) Methods of Filing in Cases Referred by the TCEQ.

(1) Except for exhibits offered at a prehearing conference or hearing, the original of all documents shall be filed with the TCEQ's chief clerk in accordance with the TCEQ rules.

(2) The time and date of filing of these materials shall be determined by the file stamp affixed by the chief clerk, or as evidenced by the file stamp affixed to the document or envelope by the TCEQ mail room, whichever is earlier.

(3) The party filing a document with the TCEQ (except documents provided in the discovery process that are not the subject of motions filed in a discovery dispute) shall serve the judge with a copy of the document by delivery to SOAH on the same day as the filing.

(4) The court reporter shall provide the transcript and exhibits to the judge at the time the transcript is provided to the requesting party. SOAH shall maintain the transcript and exhibits until they are released to the TCEQ by the judge. If no court reporter was requested by a party, SOAH shall maintain the recording of the hearing and the exhibits until they are released to the TCEQ by the judge.

§155.103. Public and Confidential Information.

(a) Documents filed in proceedings at SOAH are accessible to the public through SOAH's website unless the proceeding is made confidential by law or the documents are designated as confidential pursuant to this rule. The party filing or offering documents has the responsibility to ensure that confidential information and personal identifiers are not publicly available.

(1) Confidential information is information made confidential by law.

(2) A "personal identifier" is information that identifies a specific individual. Personal identifiers include: Social Security numbers, taxpayer identification numbers, driver's license numbers, passport numbers, other similar government-issued personal identification numbers, bank account numbers, credit card numbers or other financial account numbers, dates of birth, full names of minors, full names of patients or clients in a health care setting, full names of persons who are victims of crimes, addresses and telephone numbers of commissioned peace officers, expunged criminal records, or records subject to a non-disclosure order issued by a court unless allowed by law.

(b) Redaction required. A person who files documents at SOAH, including exhibits offered at hearing, shall redact from the documents all confidential information and personal identifiers that are unnecessary for resolution of the case. A party may not file an entire document as confidential and non-public except as provided in subsection (c) of this section.

(c) Confidential documents.

(1) A party may make an entire document or exhibit confidential and non-public only if:

(A) the entire document or exhibit is protected by law from disclosure;

(B) redaction of the document or exhibit would remove confidential information or personal identifiers necessary to the resolution of the case; or

(C) it would be unduly burdensome to redact confidential information or personal identifiers from the document or exhibit.

(2) Filing confidential documents. A party filing confidential documents in a public case must file them by delivery in a sealed and labeled package, accompanied by an explanatory cover letter. The cover letter shall identify the docket number and style of the case and shall explain the nature of the sealed materials. The outside of the package shall identify the docket number, style of the case, and name of the submitting party and shall be marked "CONFIDENTIAL" in bold print at least one inch in size. Each page of the confidential document shall be marked "CONFIDENTIAL" in bold print, 12-point type.

(d) Challenging confidentiality designations. A party may file a motion to challenge the redaction or confidential filing of any information, or the judge can raise the issue. If a confidentiality designation is challenged, the designating party has the burden of showing that the document should remain non-public.

(1) If the judge determines that a confidential filing under subsection (c) is appropriate, the judge may allow the filing to remain inaccessible to the public on SOAH's website, admit the information into the evidentiary record under seal, or employ appropriate protective measures.

(2) If the judge determines that a confidential filing under subsection (c) is not appropriate, the offering party must redact the confidential information or the personal identifiers before resubmitting the document.

(e) Designation of a document as confidential in a SOAH proceeding is not determinative of whether that document would be subject to disclosure under Tex. Gov't Code Chapter 552 or any other applicable law.

(f) Documents in non-public cases. Certain SOAH cases are designated confidential by law. Hearings in these cases are not open to the public, and filings in these cases are not accessible through SOAH's public website.

§155.105. Service of Documents on Parties.

(a) Method of service by parties in all cases other than those referred by PUC or TCEQ.

(1) Service on all parties. On the same date a document is filed, a copy shall also be sent to each party or the party's authorized representative by hand-delivery; by regular, certified, or registered mail; by email, upon agreement of the parties; or by fax. By order, the judge may exempt a party from serving certain documents or materials on all parties.

(2) Certificate of service. A person filing a document shall include a certificate of service that certifies compliance with this section.

(A) A certificate of service shall be sufficient if it substantially complies with the following example: "Certificate of Service: I certify that on {date}, a true and correct copy of this {name of document} has been sent to {name of opposing party or authorized representative for the opposing party} by {specify method of delivery, e.g., regular mail, fax, certified mail.} {Signature}

(B) If a filing does not certify service, SOAH may:

(i) return the filing;

(ii) send a notice of noncompliance to all parties, stating the filing will not be considered until all parties have been served; or

(iii) send a copy of the filing to all parties.

(3) Presumed time of receipt of served documents. The following rebuttable presumptions shall apply regarding a party's receipt of documents served by another party:

(A) If a document was hand-delivered to a party, the judge shall presume that the document was received on the date of filing at SOAH.

(B) If a document was served by courier-receipted overnight delivery, the judge shall presume that the document was received no later than the next business day after filing at SOAH.

(C) If a document was served by regular, certified, or registered mail, or non-overnight courier-receipted delivery, the judge shall presume that it was received no later than three days after mailing.

(D) If a document was served by fax or email before 5:00 p.m. on a business day, the judge shall presume that the document was received on that day; otherwise, the judge shall presume that the document was received on the next business day.

(4) Burden on sender. The sender has the burden of proving date and time of service.

(b) Method of service by parties in all cases referred by PUC or TCEQ. The procedural rules of the PUC and TCEQ govern the parties' service of documents in cases referred by those agencies.

(c) Service of SOAH-issued documents by email. Parties may be served all SOAH-issued orders, proposals for decision, decisions, and other SOAH-issued documents in each case to which the requestor is a party, by subscribing to SOAH's email service, subject to the following:

(1) Parties must access SOAH's public website, enter the link "Request Email Service," and submit a completed consent form "Request to be Served by E-mail."

(2) Parties requesting to be served SOAH-issued documents by email shall thereafter be served SOAH-issued documents only by email and shall no longer receive paper copies or any other form of service of such documents. Service of SOAH-issued documents by email applies to all SOAH dockets to which the requestor is a party.

(3) Parties who request service of SOAH-issued documents by email waive any right to confidentiality of their email address, which is added to the public service list for each SOAH docket to which the requestor is a party and is viewable on SOAH's public website through SOAH's Case Information System.

(4) Parties requesting to be served SOAH-issued documents by email shall:

(A) maintain a current email address and provide that email address to SOAH through the consent form "Request to be Served by E-mail";

(B) notify SOAH of any change to their email address in writing; and

(C) ensure that email filters and settings allow the delivery of emails from SOAH.

(5) Parties may rescind the election to be served SOAH-issued documents by email, but the rescission will not be effective until communicated to SOAH and all other parties in writing.

(6) Service of SOAH-issued documents by email is not available for SOAH's non-public cases.

(7) Requesting and consenting to service by email of SOAH-issued documents does not affect a party's duties to serve other parties with filings at SOAH as described in this subchapter.

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SUBCHAPTER D. JUDGES

1 TAC §§155.151 - 155.153, 155.155

The amendments and new rule are proposed under Government Code, Chapter 2003, §2003.050, which requires SOAH to adopt procedural rules that relate to the hearings it conducts, and Government Code, Chapter 2001, §2001.004, which requires agencies to adopt rules of practice setting forth the nature and requirements of formal and informal procedures.

The proposed amendments and new rule affect Government Code, Chapters 2001 and 2003.

§155.151. Assignment of Judges to Cases.

(a) Discretion of Chief Judge. Assignment of judges to cases is at the discretion of the Chief Judge and the Chief Judge's designees and is not subject to request except as provided by §155.152 of this subchapter [~~subsection (b) of this section~~].

[~~(b) Disqualification or recusal. On motion of a party or on the judge's own action, a judge is subject to recusal or disqualification on the same grounds and under the same circumstances as specified in TRCP Rule 18b.~~]

[~~(1) Motion. A motion to recuse or disqualify a judge assigned to a case shall:~~]

[~~(A) be filed at the earliest practicable time;~~]

[~~(B) be verified;~~]

[~~(C) state with particularity the grounds for the motion; and~~]

[~~(D) be made on personal knowledge and include such facts as would be admissible in evidence, except that facts may be stated on information and belief if the basis for such belief is specifically stated.~~]

[~~(2) Response to motion. Any other party may file a statement opposing or concurring with motion to recuse or disqualify.~~]

(b) [~~(c)~~] Judge's inability to continue presiding. If a judge is unable to continue presiding or to issue a decision or proposal for decision after the conclusion of the hearing, the Chief Judge or the Chief Judge's designee may reassign the case to another judge. That judge shall review the existing record and need not repeat previous proceedings[,] but may conduct further proceedings as necessary.

(c) [~~(d)~~] Assignment of more than one judge. More than one judge may be assigned to a case.

(1) If more than one judge is assigned to a case, the judges may divide their areas of responsibility.

(2) Evidentiary and procedural questions [~~ordinarily~~] will be resolved by the judge presiding at the time the issues arise or[~~, but~~] may be referred to another judge assigned to the case.

(d) [~~(e)~~] Temporary assignments. Cases may be temporarily assigned to a [~~single~~] judge or panel of judges to decide regularly occurring threshold issues.

§155.152. Disqualification or Recusal of Judges.

(a) A judge is subject to recusal or disqualification on the same grounds and under the same circumstances as specified in TRCP Rule 18b.

(1) Motion. A motion to recuse or disqualify a judge assigned to a case should:

(A) be made at the earliest practicable time;

(B) be verified, if the motion is in writing;

(C) state with particularity the grounds for the motion; and

(D) be based on personal knowledge and include such facts as would be admissible in evidence, except that facts may be stated on information and belief if the basis for such belief is specifically stated.

(2) Response to motion. Any other party may file or make a statement opposing or concurring with a motion to recuse or disqualify.

(b) If the presiding judge who is the subject of the motion disqualifies or recuses him- or herself based on the motion, the Chief Judge or a designee of the Chief Judge shall assign a different presiding judge to the case.

(c) If the presiding judge who is the subject of the motion does not disqualify or recuse him- or herself from the case, the Chief Judge or a designee of the Chief Judge shall assign another judge to consider and rule on the motion. At the discretion of the assigned judge, a hearing may be held on the motion. If the assigned judge finds that the presiding judge is disqualified or should be recused, the Chief Judge or a designee of the Chief Judge shall assign a different presiding judge to the case.

§155.153. Powers and Duties.

(a) Judge's authority and duties. The judge shall have the authority and duty to:

(1) conduct a full, fair, and efficient hearing;

(2) take action to avoid unnecessary delay in the disposition of the proceeding; and

(3) maintain order.[; and]

[(4) reopen the record when justice requires, if the judge has not issued a dismissal, proposal for decision, or final decision.]

(b) Judge's powers. The judge shall have the power to regulate prehearing matters, the hearing, posthearing matters, and the conduct of the parties and authorized representatives, including the power to:

(1) administer oaths;

(2) take testimony, including the power to question witnesses and to request the presence of a witness from a state agency[, as contemplated by APA §2001.090(d)];

(3) rule on questions of evidence;

(4) rule on discovery issues;

(5) issue orders relating to hearing and prehearing matters, including orders imposing sanctions;

(6) admit or deny party status;

(7) designate the party with the burden of proof pursuant to §155.427 of this chapter [title (relating to Burden of Proof)];

(8) exclude irrelevant, immaterial, and unduly repetitious testimony and reasonably limit the time for presentations of evidence or argument;

(9) order parties to submit legal memoranda and proposed findings of fact and conclusions of law;

(10) reopen the record when justice requires, if the judge has not issued a dismissal, proposal for decision, or final decision;

(11) [(10)] issue proposals for decision pursuant to Tex. Gov't Code [APA] §2001.062[,] and, when authorized, final decisions; [and]

(12) [(11)] rule on motions for rehearing, when authorized;[.]

(13) reopen the record after a proposal for decision has been issued when a case is remanded by a referring agency for further proceedings; and

(14) reopen the record after a final decision has been issued by SOAH if the judge grants a motion for rehearing, or when a case is remanded by a court to SOAH for further proceedings.

§155.155. Orders.

(a) Judge's authority. The judge has authority to:

(1) issue orders to control the conduct and scope of the proceeding;

(2) rule on motions;

(3) establish deadlines;

(4) schedule and conduct prehearing or posthearing conferences;

(5) require the prefiling of exhibits and testimony;

(6) set out requirements for participation in the case; and

(7) take other steps conducive to a fair and efficient contested case process.

(b) Record of rulings. Rulings not made orally at a recorded prehearing conference or hearing shall be in writing and issued to all parties of record.

(c) Consolidation or joinder for hearing. The judge may order that cases be consolidated or joined for hearing if:

(1) there are common issues of law or fact; and

(2) consolidation or joint hearing will promote the fair and efficient handling of the matters.

(d) Severance of issues. The judge may order severance of issues if separate hearings on the [such] issues will promote the fair and efficient handling of the matters.

(e) Referral to mediation. The judge may order referral of a case to mediation or other appropriate alternative dispute resolution procedure as provided by the Governmental Dispute Resolution Act, Tex. Gov't Code Chapter 2009, and the statute creating SOAH, Tex. Gov't Code Chapter 2003.

[(f) Final decisions. Where authorized by law, the judge may issue a final decision resolving the contested issues in a case and ruling on all requests for relief.]

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SUBCHAPTER E. REPRESENTATION OF PARTIES

1 TAC §155.201, §155.203

The amendments and new rule are proposed under Government Code, Chapter 2003, §2003.050, which requires SOAH to adopt procedural rules that relate to the hearings it conducts, and Government Code, Chapter 2001, §2001.004, which requires agencies to adopt rules of practice setting forth the nature and requirements of formal and informal procedures.

The proposed amendments and new rule affect Government Code, Chapters 2001 and 2003.

§155.201. Representation of Parties.

(a) Representation. A party [~~for individuals. An individual~~] may represent himself or herself or may appear by authorized representative. Parties that are not represented by an attorney may obtain information regarding contested case hearings on SOAH's public website at www.soah.texas.gov.

(b) Appearance by authorized representative. A party's authorized representative shall enter an appearance with SOAH that contains the representative's mailing address and telephone and fax [~~facsimile~~] numbers. If the party's representative is not licensed to practice law in Texas and the authority of the representative is challenged, the representative must show authority to appear as the party's representative.

(c) Nonresident attorney. An attorney who is a resident of and licensed to practice law in another state and who is not an active member of the State Bar of Texas shall comply with the requirements of Tex. Gov't Code §82.0361 and Rule XIX of the Rules Governing Admission to the Bar of Texas before entering an appearance on behalf of a party at SOAH. Rule XIX may be found on the website of the Board of Law Examiners.

(d) Attorney in charge. When more than one attorney makes an appearance on behalf of a party, the attorney whose signature first appears on the initial pleading for a party shall be the attorney in charge for that party unless another attorney is specifically designated in writing. Unless otherwise ordered by the judge, all communications sent by SOAH or other parties regarding the matter shall be sent to the attorney in charge.

(e) This rule does not allow a person to engage in the unauthorized practice of law.

[~~(e) Motion to withdraw as counsel. The attorney of record or authorized representative seeking to withdraw shall file a motion to withdraw and shall provide in the motion a mailing address and telephone number for the party. If the party is to be represented by another attorney, the motion shall include the mailing address, telephone number, and any facsimile number of the substitute attorney. A party's attorney of record or authorized representative shall remain as such until a motion to withdraw is filed and granted by the judge.~~]

§155.203. Withdrawal of Counsel.

(a) An attorney may withdraw from representing a party only if a written motion showing good cause for withdrawal is filed by the withdrawing attorney, the substituting attorney, or the client.

(1) If another attorney is to be substituted as attorney for the party, the motion shall state: the substituted attorney's name, address, telephone number, and fax number; that the substituting attorney has been notified of all pending settings and deadlines; and that the substituting attorney approves the substitution.

(2) If the party has no substitute attorney, the motion shall state: the party's last known address, telephone number, and fax number; that the party has been notified of all pending settings and deadlines; and whether the party consents to the withdrawal. If the party does not consent to the withdrawal, the attorney also must affirm that the party has been served with a copy of the motion and informed of the right to object to the withdrawal.

(b) A motion to withdraw must be served on all parties and must comply with §155.305(b)(2) of this chapter.

(c) An attorney will remain a party's attorney of record until a filed motion to withdraw has been granted by the judge.

(d) If the motion to withdraw is granted, the withdrawing attorney shall immediately notify the party or substitute attorney in writing of any settings or deadlines of which the attorney has knowledge at the time of the withdrawal and about which the attorney has not already notified the party or substitute attorney.

(e) A state agency may substitute one attorney for another by providing written notice to all parties and the judge without necessity for a motion or order.

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SUBCHAPTER F. DISCOVERY

1 TAC §155.251

The repeal is proposed under Government Code, Chapter 2003, §2003.050, which requires SOAH to adopt procedural rules that relate to the hearings it conducts, and Government Code, Chapter 2001, §2001.004, which requires agencies to adopt rules of practice setting forth the nature and requirements of formal and informal procedures.

The proposed repeal affects Government Code, Chapters 2001 and 2003.

§155.251. Discovery.

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

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1 TAC §§155.251, 155.253, 155.255, 155.257, 155.259

The new rules are proposed under Government Code, Chapter 2003, §2003.050, which requires SOAH to adopt procedural rules that relate to the hearings it conducts, and Government Code, Chapter 2001, §2001.004, which requires agencies to adopt rules of practice setting forth the nature and requirements of formal and informal procedures.

The proposed new rules affect Government Code, Chapters 2001 and 2003.

§155.251. General Provisions.

(a) Commencement of discovery. Discovery may begin when SOAH acquires jurisdiction under §155.51 of this chapter.

(b) Discovery period. The discovery period ends ten days before the hearing on the merits begins, unless otherwise ordered by the judge or agreed by the parties.

(c) Discovery rights. Parties have the discovery rights provided in this section, the APA, and the TRCP, other than the provisions relating to discovery control plans and except as modified by this chapter. Discovery rights may be modified or changed by the judge. For cases not adjudicated under the APA, the judge will determine what discovery, if any, will be permitted.

(d) Discovery requests, responses, and documents produced in discovery shall not be filed with SOAH, except as provided in §155.259 of this chapter.

§155.253. Depositions.

(a) The APA governs the taking and use of depositions unless otherwise provided by law.

(b) Except with permission of the judge upon a showing of good cause or upon agreement by all parties, the following apply:

(1) All parties must receive at least seven days' notice of a deposition. The parties should make reasonable efforts to confer on the date, time, and location of the deposition.

(2) No party or side may examine or cross-examine an individual witness for more than six hours.

(3) Brief breaks taken during the deposition do not count in the calculation of the period for a deposition.

§155.255. Written Discovery.

(a) Forms of written discovery. Unless otherwise ordered by the judge, parties may use the forms of written discovery provided by the TRCP, with the following modifications:

(1) Requests for production. Each party may serve no more than 25 written requests for production. Each discrete subpart of a request for production is considered a separate request for production.

(2) Interrogatories. Each party may serve no more than 25 written interrogatories, excluding interrogatories asking a party only to identify or authenticate specific documents. Each discrete subpart of an interrogatory is considered a separate interrogatory.

(3) Requests for admissions. Each party may serve no more than 25 requests for admissions. Requests for admissions may be used only to address jurisdictional facts or the genuineness of any documents served with the request.

(b) Written discovery requests shall be served at least 30 days before the end of the discovery period.

(c) Response. Unless otherwise ordered by the judge or agreed by the parties, responses to written discovery requests shall be made within 30 days after receipt.

(1) Responses and documents produced in discovery shall be served upon the requesting party, and notice of service shall be given to all parties.

(2) A party producing documents in response to a discovery request must retain the original documents or exact duplicates of the original documents.

§155.257. Subpoenas and Commissions.

(a) Except in TCEQ and PUC cases, requests for issuance of subpoenas or commissions shall be directed to the referring agency. Any such requests shall comply with the APA and the applicable agency procedure, if any, regarding issuance of subpoenas or commissions.

(b) In TCEQ and PUC cases, requests for issuance of subpoenas or commissions shall be submitted in accordance with those agencies' rules.

(c) Disputes over whether a request complies with applicable law should be presented to the judge in a motion filed pursuant to §155.259 of this chapter.

§155.259. Discovery Motions.

(a) Certificate of conference. The parties and their authorized representatives shall cooperate in discovery and shall endeavor to make any agreements reasonably necessary for the efficient disposition of the case. All discovery motions shall include a certificate of conference complying with §155.305(b)(2) of this chapter.

(b) Motions for protection. A person from whom discovery is sought may file a motion within the time permitted for a response to request an order protecting that person from the discovery sought. A motion for protection should include the relevant portion of the discovery request at issue. A person must comply with a discovery request to the extent protection is not sought unless it is unreasonable under the circumstances to do so before obtaining a ruling on the motion.

(c) Motions to compel. A person alleging failure to comply with discovery shall file a motion to compel as soon as practicable. A motion to compel should include the relevant portion of the discovery response at issue. A motion to compel shall not be filed less than 10 days before the first day of the hearing on the merits, unless good cause is shown. A judge may deny or limit relief sought in a motion to compel if the judge determines that the discovery requests at issue are improper or unduly burdensome.

(d) In camera inspections. If a party's assertion of a privilege or an exemption under the TRCP is made the subject of a motion for protection or a motion to compel, the party resisting discovery must request an in camera inspection (inspection by the judge) and provide the documents for review under seal. The request shall state the factual and legal bases that support the claimed privilege or exemption and shall comply with the provisions of §155.101 of this chapter.

(e) Responses to discovery motion. Responses to discovery motions shall be filed in accordance with §155.305(c).

(f) Discovery materials. Motions and responses in a discovery dispute shall include only the relevant portions of the discovery materials at issue.

(g) Confidentiality. Confidential information contained in or attached to a discovery motion or response must be filed in compliance with §155.103 of this chapter.

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

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SUBCHAPTER G. PLEADINGS AND MOTIONS

1 TAC §§155.301, 155.305, 155.307

The amendments are proposed under Government Code, Chapter 2003, §2003.050, which requires SOAH to adopt procedural rules that relate to the hearings it conducts, and Government Code, Chapter 2001, §2001.004, which requires agencies to adopt rules of practice setting forth the nature and requirements of formal and informal procedures.

The proposed amendments affect Government Code, Chapters 2001 and 2003.

§155.301. Required Form of Pleadings.

(a) Content generally. Written requests for action in a contested case shall be typewritten or printed legibly on 8-1/2 x 11 inch paper and timely filed at SOAH. Photocopies are acceptable if copies are clear and legible. All filings shall contain or be accompanied by the following:

(1) the name of the party seeking action;

(2) the SOAH docket number;

(3) the parties to the case and their status as petitioner or respondent;

(4) a concise statement of the type of relief, action, or order desired by the pleader and identification of the specific reasons for and facts to support the action requested;

(5) a certificate of service, as required by §155.105(a)(2) [~~§155.103(b)~~] of this chapter [~~title (related to Service of Documents on Parties)~~];

(6) any other matter required by statute or rule; and

(7) the signature of the submitting party or the party's authorized representative.

(b) Amendment or supplementation of pleadings. A party may amend or supplement its pleadings as follows: [~~only by written filing.~~]

(1) As to a proceeding in which a state agency has the burden of proof and intends to rely on a section of a statute or rule not previously referenced in the notice of hearing, the agency must amend the notice of hearing not later than the seventh day before the hearing. This subsection does not prohibit the state agency from filing an amendment during the hearing provided, if requested, the opposing party is granted a continuance of at least seven days to prepare its case.

(2) As to all other matters in a pleading, an [~~An~~] amendment or supplementation that includes information material to the substance of the hearing, requests for relief, changes to the scope of the hearing, or other matters that unfairly surprise other parties may not be filed later than seven [~~ten~~] days before the date of the hearing, except by agreement of all parties or by permission of the judge.

§155.305. Motions, Generally.

(a) Purpose and effect of motions. To make a [~~any~~] request, including a request to change a setting or obtain a ruling, order, or any other procedural relief from the judge, a party shall file a written motion. The motion shall describe specifically the action requested and the basis for the requested action. Unless otherwise specified in this chapter, a motion is not granted until it has been ruled on by the judge, even if the motion is uncontested or agreed. [~~The mere filing of a motion that has not been ruled on by the judge, even if uncontested or agreed, does not serve to grant the motion or to change or extend any time limit or deadline established by statute, rule, or order, or operate to continue or delay any setting by SOAH or the judge.~~]

(b) General requirements for motions. Except as provided in this [~~section or~~] chapter, or unless otherwise ordered by the judge, all motions shall:

(1) be filed in writing no later than seven days before the date of the hearing; except, for good cause demonstrated in the motion, the judge may consider a motion filed after that time or presented orally at a hearing;

(2) include a certificate of conference that complies substantially with one of the following examples:

(A) Example one: "Certificate of Conference: I certify that I conferred with {name of other party or other party's authorized representative} on {date} about this motion. {Succinct statement of other party's position on the action sought and/or a statement that the parties negotiated in good faith but were unable to resolve their dispute before submitting it to the judge for resolution.} Signature."

(B) Example two: "Certificate of Conference: I certify that I made reasonable but unsuccessful attempts to confer with {name of other party or other party's authorized representative} on {date or dates} about this motion. {Succinctly describe these attempts.} Signature."; and

(3) include a reference in the motion's title to a request for a hearing on the motion if the moving party seeks a hearing.[~~; and~~]

[~~(4) if requesting an extension of an established deadline, include:~~]

[~~(A) a proposed date for the deadline; and~~]

[~~(B) a certificate of conference that complies substantially with one of the examples set out in paragraph (2) of this subsection.~~]

(c) Responses to motions [~~generally~~].

(1) Except as otherwise provided in this [~~section or~~] chapter or as ordered or allowed by the judge, responses to motions [~~described in subsection (b) of this section~~] shall be in writing and filed on the earlier of:

(A) [~~(1)~~] five days after [~~receipt of~~] the motion is filed; or

(B) [~~(2)~~] the date and time of the hearing; however, if the judge finds a good reason has been shown, [~~late-filed~~] responses to written motions may be presented orally at hearing.

(2) If no response is filed within the time period prescribed by this section or chapter, the judge may consider the motion unopposed.

(d) Motions to intervene or for party status. Motions for party status shall be filed no later than 20 days prior to the date the case is set for hearing. Responses to such motions shall be filed no later than seven days after the motion is filed [~~served on other parties~~].

(e) Other motions. In addition, other types of motions are addressed in other sections of this chapter. If there is a conflict between this section and a requirement found in another section relating to a specific type of motion, the more specific provision applies. [~~Motions to reopen the record under §155.153(a)(4) of this title (relating to Powers and Duties), to compel and for protective orders under §155.251 of this title (relating to Discovery), to set aside a default under §155.501 (d) of this title (relating to Default Proceedings), to set aside a dismissal for failure to prosecute under §155.503 (a) of this title (relating to Dismissal Proceedings), and for summary disposition under §155.505 (relating to Summary Disposition), shall be governed by the referenced sections.~~]

§155.307. Motions for Continuance and to Extend Time [~~Continuance~~].

(a) Contents of a motion for continuance. A request to postpone or delay a hearing or prehearing conference [~~Motions for continuance~~] shall include:

(1) a statement of the number of motions for continuance previously filed in the case by each party;

(2) the specific reason for the continuance;

(3) at least three proposed dates for the rescheduled proceeding or a deadline by which the movant will confer with the nonmoving parties to submit three agreed proposed dates; and

(4) a certificate of conference that complies substantially with one of the examples set out in §155.305(b)(2) of this subchapter [~~title (relating to Motions, Generally)~~].

(b) Contents of a motion to extend time. A request for more time to file a document or respond to discovery shall include:

(1) a statement of the number of extension requests previously sought in the case by the movant;

(2) the specific reason for the request;

(3) a proposed date for the deadline the movant seeks to extend; and

(4) a certificate of conference that complies substantially with one of the examples set out in §155.305(b)(2) of this subchapter.

(c) [~~(b)~~] Date of filing. Motions for continuance or to extend time shall be filed no later than five days before the date of the proceeding or deadline at issue or shall state good cause for presenting the motion after that time. If, [~~except, if~~] the judge finds [~~a~~] good cause [~~reason~~] has been demonstrated, the judge may consider a motion filed after that time or presented orally at the proceeding.

(d) [~~(c)~~] Date of service. Motions for continuance or extension shall be served in accordance with §155.105 [~~§155.103~~] of this chapter [~~title (relating to Service of Documents on Parties)~~]. However, a motion for continuance that is filed five days or less before the date of the proceeding shall be served:

(1) by hand-delivery, fax, or email [~~personal or facsimile delivery~~] on the same day it is filed with SOAH, if feasible; or

(2) if same-day service is not feasible, by overnight delivery on the next business day.

(e) [~~(d)~~] Responses to [~~written~~] motions for continuance. Responses to [~~written~~] motions for continuance shall be in writing, except a response to a [~~written~~] motion for continuance made [~~filed~~] on the date of the proceeding may be presented orally at the proceeding. Unless otherwise ordered or allowed by the judge, responses [~~Responses~~] to motions for continuance shall be made by [~~filed on~~] the earlier of:

(1) three days after receipt of the motion; or

(2) the date and time of the proceeding.

(f) Responses to motions to extend time. Unless otherwise ordered by the judge, responses to motions for extension of a deadline are due three days after receipt of the motion.

(g) [~~(e)~~] A motion for continuance or extension of time is not granted until it has been ruled on by the judge, even if the motion is uncontested or agreed. [~~Consequences of failure to appear when a motion for continuance has not been ruled on.~~] A case is subject to default or dismissal for a party's failure to appear at a scheduled hearing in which a motion for continuance has not been ruled on by the judge, even when the motion is agreed or unopposed.

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SUBCHAPTER H. MEDIATION

1 TAC §155.351

The amendments are proposed under Government Code, Chapter 2003, §2003.050, which requires SOAH to adopt procedural rules that relate to the hearings it conducts, and Government Code, Chapter 2001, §2001.004, which requires agencies to adopt rules of practice setting forth the nature and requirements of formal and informal procedures.

The proposed amendments affect Government Code, Chapters 2001 and 2003.

§155.351. Mediation.

(a) Requesting mediation.

(1) A party may request mediation in writing or orally during a prehearing conference or hearing.

(2) A request for mediation must be based on a good faith belief that the parties may be able to resolve all or a portion of their dispute in mediation.

(3) A party may object to a request for mediation orally or in writing.

(4) Mediation may not be used as a delay or discovery tactic.

(5) Mediation does not stay an existing procedural schedule unless ordered by the presiding judge.

(6) A judge may refer a case to mediation without agreement of all [~~the~~] parties.

(7) An agency may refer a case for mediation only.

(b) Evaluation for Mediation.

(1) A party may request, or the presiding judge may order, that a mediator evaluate whether a case is appropriate for mediation. The presiding judge will refer the case to the SOAH ADR Team Leader for assignment of a mediation evaluator.

(2) The mediation evaluator [~~mediator evaluating the case~~] may conduct confidential, ex parte communications with the parties during the course of the evaluation.

(3) The mediation evaluator [~~mediator~~] will make a written recommendation to the presiding judge indicating whether the case is appropriate for mediation as of the time of the evaluation. The written recommendation will be served on all parties.

(c) Referral to mediation.

(1) If a request for mediation is granted, the presiding judge will refer the case to the SOAH [~~SOAH's~~] ADR Team Leader for assignment of a mediator, unless the parties have notified the judge that they have agreed upon a non-SOAH [~~intend to retain and pay a private~~] mediator qualified in accordance with Tex. Civ. Prac. & Rem. Code Chapter 154 and that they will be responsible for any costs and expenses of the non-SOAH mediator.

(2) The referral order may include requirements to facilitate the mediation.

(d) Assignment of SOAH mediators.

(1) The SOAH [~~SOAH's~~] ADR Team Leader will assign a qualified judge or judges to serve as mediator or co-mediators.

(2) A [~~If either~~] party may object [~~promptly and with good cause objects~~] to an appointed mediator. Upon a timely showing of good cause for the objection, the[,] SOAH ADR Team Leader will appoint another qualified judge to serve as mediator or co-mediator.

(3) The appointed mediator will not serve as presiding judge in the case.

(e) Use of non-SOAH mediators.

(1) Parties who agree to retain a non-SOAH qualified [~~private~~] mediator shall notify the presiding judge within ten days of the mediator's retention.

(A) The notice must include the name, address, and telephone number of the non-SOAH mediator selected; a statement that the parties have entered into an agreement with the mediator regarding the mediator's rate and method of compensation; and an affirmation that the mediator is qualified to serve according to Tex. Civ. Prac. & Rem. Code Chapter 154.

(B) The presiding judge shall issue an order specifying the date by which the mediation must be completed.

(2) When a presiding judge refers a TCEQ case to mediation, the mediation will be conducted by a TCEQ mediator unless a party or TCEQ's Senior Mediator requests that SOAH conduct the mediation. TCEQ enforcement cases shall not be referred to mediation except on request of the Executive Director's representative.

(f) Confidentiality of mediation.

(1) All communications in a mediation are confidential and subject to the provisions of Tex. Gov't Code §2009.054 [~~the Governmental Dispute Resolution Act,~~] and TRE [~~Tex. R. Evid~~] 408.

(2) The mediator shall not communicate about the mediation with the presiding judge except to disclose in a written report, copied to all parties, whether the parties attended the mediation, whether the matter settled, and any other stipulations or matters the parties agree to be reported.

(3) The mediator shall not be required to testify about communications that occur in mediation or to produce documents submitted to the mediator.

(g) Agreements reached in mediation.

(1) Agreements reached by the parties in mediation shall be reduced to writing and signed by the parties before the end of the mediation, if possible.

(2) Whether an agreement signed by a governmental entity is subject to disclosure shall be determined in accordance with applicable law.

(h) Limits on mediator's authority.

(1) A mediator has no authority to order the parties to settle their dispute.

(2) A mediator has no authority to issue orders in a case referred to mediation. Deadlines in the case may be extended only by order of the presiding judge.

(i) This section does not limit the parties' ability to settle cases without mediation.

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SUBCHAPTER I. HEARINGS AND PREHEARINGS

1 TAC §§155.401, 155.405, 155.407, 155.411, 155.419, 155.421, 155.423, 155.425, 155.427, 155.429, 155.431

The amendments are proposed under Government Code, Chapter 2003, §2003.050, which requires SOAH to adopt procedural rules that relate to the hearings it conducts, and Government Code, Chapter 2001, §2001.004, which requires agencies to adopt rules of practice setting forth the nature and requirements of formal and informal procedures.

The proposed amendments affect Government Code, Chapters 2001 and 2003.

§155.401. Notice of Hearing.

(a) Notice of hearing. A referring agency shall provide notice of hearing to all parties in accordance with Tex. Gov't Code §§2001.051 and [~~APA~~] 2001.052 and shall include a specific citation

to Chapter 155 of this title unless applicable law provides otherwise. The notice of hearing shall include the following language in 12-point, bold-face type: "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."

(b) Judge's orders. A judge may issue orders regarding the date, time, and place for hearing, and orders affecting the scope of the proceeding.

(c) Sufficiency of initial notice of hearing. A notice of rescheduling of a hearing will not affect the sufficiency of an initial notice of hearing provided by an agency under subsection (a) of this section.

§155.405. Participation by Telephone or Videoconference.

(a) Request to appear by telephone. A party may request to appear or present testimony by telephone or to present the testimony of a witness by telephone.

(1) To appear or present testimony by telephone, a party must file a motion no later than ten days before the proceeding unless a different time period is allowed by the judge.

(2) A motion shall include at least the following:

(A) the reason for the request;

(B) the name of the party or witness who will appear by phone;

(C) [~~(B)~~] the telephone number at which the party or witness may be reached at the time of the proceeding;

(D) [~~(C)~~] a statement that the party or witness will be the same person who will appear by telephone at the proceeding; and

(E) [~~(D)~~] a certificate of conference complying with §155.305(b)(2) of this chapter [~~title (relating to Motions, Generally)~~].

(3) A timely, unopposed motion will be deemed granted without the necessity of an order, unless denied by order.

(b) Request to appear by videoconference. A party may request to appear or present the testimony of a witness by videoconference.

(1) To appear or present testimony by videoconference, a party must file a motion no later than ten days before the proceeding.

(2) A motion shall include a statement of the reason for the request, the name of the party or witness who will appear by videoconference, and the city in which the party or witness will be located at the time of the proceeding.

(c) Hearings and prehearing conferences by telephone or videoconference. The judge may conduct hearings and prehearing conferences by telephone or videoconference upon notice to the parties, even in the absence of a motion.

(d) Substantive and procedural rights. All substantive and procedural rights apply to telephone and videoconference proceedings, subject only to the limitations of the physical arrangement.

(e) Documentary evidence. Prior to the hearing, the parties must exchange, and provide to witnesses appearing telephonically or by videoconference, all documents necessary for effective participation in the hearing. [~~Documentary evidence to be offered at a telephone or videoconference proceeding shall be served on all parties and filed with SOAH at least three days before the proceeding unless the judge orders otherwise.~~]

(f) Failure to appear at telephone or videoconference proceeding. For a telephone or videoconference proceeding, the following may be considered a failure to appear and grounds for default, dismissal for want of prosecution, or other adverse action if the conditions exist for more than ten minutes after the scheduled time for the proceeding:

(1) failure to answer the telephone or videoconference line;

(2) failure to free the line for the proceeding; or

(3) failure to be ready to proceed.

§155.407. Interpreters.

(a) A party or witness who needs an interpreter or translator in order to participate in a proceeding shall file a written request at least seven days before the setting. A timely, unopposed request will be deemed granted without the necessity of an order, unless denied by order.

(b) SOAH shall provide and pay for the following:

(1) an interpreter for hearing-impaired parties and witnesses, in accordance with Tex. Gov't Code §2001.055 [~~of the APA~~];

(2) reader services or other communication services for visually-impaired parties and witnesses; and

(3) a certified language interpreter.

§155.411. Media Coverage and Use of Recording Devices.

(a) When coverage is permitted. Proceedings that are open to the public may be photographed or recorded, whether for broadcast or personal use, [~~broadcast, televised, recorded, or photographed unobtrusively and~~] in a manner that does not interfere with the orderly conduct of the proceeding, unduly distract participants, or impair the dignity of the proceedings. A person desiring to photograph or record a SOAH proceeding must notify the judge before doing so. Photographing or recording in a covert manner is prohibited.

(b) Recording or photographing any of the following [~~When coverage~~] is prohibited:[~~.~~]

(1) [~~Media coverage of~~] proceedings that are closed to the public [~~is prohibited~~];

(2) [~~Media coverage of~~] conferences between an attorney and client, witness, or aide, or between attorneys; [~~is prohibited.~~]

(3) bench conferences or other deliberations of the judge(s); or

(4) other privileged or confidential communications.

(c) Authority of presiding judge.

(1) The judge may deny, limit, or terminate any recording or photographing that does not comply with this section. [~~media coverage that is obtrusive or interferes with the orderly conduct of the proceeding.~~]

(2) No proceeding will be delayed or continued for the sole purpose of facilitating recording or photographing the proceeding [~~allowing media coverage~~].

(d) Equipment and personnel. The judge may specify the placement of media personnel and equipment to permit reasonable coverage or recording without disruption to the proceeding. Unless the judge orders otherwise, the following standards apply to the placement and operation of media equipment:

(1) If media coverage is sought by more than one person or entity, the judge may require a pool system to be used. It will be the responsibility of the media to resolve any disputes among themselves as to which personnel will operate equipment in the hearing room.

(2) Equipment shall not produce distracting sound or light. Moving lights, flash attachments, or sudden lighting changes are prohibited [~~shall not be used~~].

(3) Operators shall not move equipment while the hearing is in session or otherwise cause a distraction. All equipment shall be in place in advance of the commencement of the proceeding.

(4) Media personnel operating outside the hearing room shall not create a distraction and shall withdraw whenever necessary to avoid restricting movement of persons passing through the hearing room door.

§155.419. Consideration of Policy Not Incorporated in Referring Agency's Rules.

(a) Agency policy. A [~~Any~~] party relying on a specific, written agency policy not incorporated in a rule has the burden of authenticating the policy and showing it to be applicable to a factual or legal issue in the case.

(b) Judge's consideration of agency policy. In resolving contested issues, the judge shall consider any applicable agency policy not incorporated in the agency's rules that is written and supported by the evidence. The judge's decision or recommendation on whether to apply an agency's policy will depend upon the nature and context of the policy, [~~and~~] any request to apply it, and other factors such as:

(1) the extent to which the parties were given notice of the policy, including whether:

(A) the policy was made available through a generally accessible internet site as provided in Tex. Gov't Code §2001.007(a);

(B) the parties had adequate opportunity to address it in the presentation of their cases and arguments; and

(C) a [~~any~~] party opposes application of the policy in the case;[~~.~~]

(2) the specificity of the policy statement and the relative certainty of its applicability to the case;

(3) the stability and duration of the policy, as illustrated by the type of process that led to its adoption (including whether it was published in the *Texas Register),* the frequency and consistency with which it has been previously applied, and the level of formality of the process required for the agency to amend it;

(4) the highest level within the agency at which the policy has been adopted or ratified;

(5) whether the policy is a substantive principle coming within the agency's subject matter expertise and jurisdiction or pertains more to contested case procedure and practice; and

(6) whether application of the policy would violate applicable constitutional or statutory provisions or would be inconsistent with the agency's rules or applicable decisions by Texas courts.

§155.421. Certification of Issues [~~Questions~~].

In cases referred by the PUC and the TCEQ, a party may move to certify an issue to the respective commission. A judge may also certify an issue without a motion. Certified issues [~~questions~~] are governed by the rules of the PUC and the TCEQ.

§155.423. Making a Record of the Proceeding.

(a) Record of proceedings. A record will be made of all contested case proceedings and prehearing conferences. [~~At the judge's discretion, the making of a record of a prehearing conference may be waived. The actions taken at the prehearing conference may instead be reflected in a written order.~~]

(b) Court reporters. Unless otherwise ordered by the judge, the referring agency shall provide a court reporter for a [~~any~~] proceeding set to last longer than one day.

(c) SOAH's responsibility. For a [~~any~~] proceeding in a docket set to last no longer than one day, SOAH is responsible for making an audio [~~a~~] recording of the proceeding unless otherwise ordered by the judge. If SOAH has recorded the proceeding, a party may request a copy of the recording from SOAH.

[~~(d) Official record. The recording made by SOAH under subsection (c) of this section or the transcript prepared under subsection (e) of this section is the official record of the proceeding for purposes of all actions within SOAH's jurisdiction. The judge may order a different means of making a record and may designate that record as the official record of the proceeding.~~]

(d) [~~(e)~~] Transcripts. If a court reporter is provided for a proceeding, the [~~The~~] court reporter shall make a stenographic record of the proceeding but shall prepare a transcript only on the request of a party or the judge. If a proceeding lasts longer than one day, the judge may order that a transcript be prepared. [~~Costs of a transcript ordered by any party ordinarily shall be paid by that party. If SOAH has recorded the proceeding, the referring agency shall inform SOAH of the need to deliver a copy of the original recording to a court reporter.~~]

(1) The original transcript shall be filed with SOAH, and SOAH may assess the cost of the transcript to one or more of the parties.

(2) The cost of a copy of a transcript ordered by a party shall be paid by that party, unless otherwise ordered by the judge.

(3) [~~(2)~~] The transcript prepared according to these procedures becomes part of the official record of the proceedings for purposes of all actions within SOAH's jurisdiction.

(4) [~~(3)~~] Proposed written corrections of purported transcript errors must be filed with SOAH and served on the parties and the court reporter before issuance of the proposal for decision or final decision. The judge may establish deadlines for the filing of proposed corrections and responses. The transcript will be corrected only upon order of the judge.

(e) Official record. The recording made by SOAH under subsection (c) of this section or the transcript prepared under subsection (d) of this section constitutes part of the official record of the proceeding for purposes of all actions within SOAH's jurisdiction. The judge may order a different means of making a record and may designate that record as the official record of the proceeding.

(f) Maintenance of exhibits and official record. The judge shall maintain all exhibits admitted during the proceeding and the official record of the proceeding.

(1) The judge may allow the court reporter to retain the exhibits and the recording of the proceeding, if applicable, while a transcript is being prepared.

(2) The judge may retain the exhibits and transcript or recording to prepare for presentation of the proposal for decision to the referring agency. SOAH will send the exhibits and transcript or recording to the referring agency no later than after:

(A) the judge has issued the final decision; or

(B) the judge has issued the proposal for decision and the deadline for filing exceptions and replies has passed.

(g) Sealing records. The judge may order all or part of the record sealed in accordance with applicable law or rule or upon a showing of the following:

(1) a specific, serious, and substantial interest that clearly outweighs the presumption of openness that applies to SOAH's records and any probable adverse effect that sealing will have upon the public health or safety; and

[(2) any probable adverse effect that sealing will have upon the public health or safety; and]

(2) [(3)] no less restrictive means than sealing the records will adequately and effectively protect the specific interest asserted.

§155.425. Procedure at Hearing.

(a) Control of the hearing. The judge shall exercise reasonable control over the mode and order of presenting preliminary matters, pending motions, opening statements, witness testimony and other evidence, oral or written closing argument, and other processes in the hearing.

(b) Designation of order of parties' presentations. The judge will designate the order in which the parties will present evidence and argument. Generally, the party with the burden of proof will present evidence first and will open and conclude oral argument. The judge shall designate the party with the burden of proof in accordance with §155.427 of this chapter [title (relating to Burden of Proof)].

(c) Waiver of allegations. An allegation contained in the notice of hearing or complaint that is not addressed during the proceeding may be deemed waived.

(d) Closing arguments. Closing arguments may be made orally or, when ordered by the judge, in writing.

(e) Closing the evidentiary record. Unless otherwise ordered by the judge, the record will close at the later of:

(1) the end of the hearing; or

(2) the date the final brief is due, when closing arguments are made in writing.

§155.427. Burden of Proof.

In determining which party bears the burden of proof, the judge shall first consider the applicable statute, the referring agency's rules, and the referring agency's policy in accordance with §155.419 of this chapter [title (relating to Consideration of Policy Not Incorporated in Referring Agency's Rules)]. After considering those sources, the judge may consider additional factors, including:

(1) the status of the parties;

(2) the parties' relative access to and control over information pertinent to the merits of the case;

(3) the party seeking affirmative relief;

(4) the party seeking to change the status quo; and

(5) whether a party would be required to prove a negative.

§155.429. Evidence.

(a) Rules of evidence.

(1) The Texas Rules of Evidence as applied in a nonjury civil case in district court govern contested case hearings conducted by SOAH.

(2) Evidence may be admitted if it meets the standards set out in Tex. Gov't Code §2001.081.

(b) Physical evidence: Exhibits.

(1) Paper size. Documents shall not be submitted on paper other than 8-1/2 x 11 inches unless good cause is shown that the documents cannot be reduced without loss of information, or if allowed by the judge.

(2) Numbering of pages. A [Any] multipage document shall be paginated.

(3) Physical limits.

(A) Exhibits offered as evidence must not unduly encumber the records of SOAH by their size or other qualities.

(B) Physical evidence that is bulky, dangerous, perishable, or otherwise not suitable for inclusion in agency records shall not be offered into the record.

(C) A party seeking to admit an exhibit contrary to this section must make reasonable efforts to use photographs, recordings, or other mechanical or electronic means to substitute for physical evidence that would encumber SOAH's records.

(D) Maps, drawings, blueprints, and other documents not reasonably susceptible to reduction shall be rolled or folded to avoid physically encumbering the record.

(4) Numbering of exhibits.

(A) Each exhibit to be offered shall first be numbered by the offering party or court reporter.

(B) Copies of the original exhibit shall be furnished by the party offering the exhibit to the presiding judge and to each party present at the hearing unless otherwise ordered by the judge.

(5) Excluded exhibits. An exhibit excluded from evidence will be considered withdrawn by the offering party and will be returned to the party, unless the party makes an offer of proof in accordance with the TRE [Texas Rules of Evidence].

(6) Exhibits deemed withdrawn. Prefiled exhibits that are not offered and admitted at the hearing will be deemed withdrawn.

(7) [(6)] Non-conforming exhibits. The judge may exclude exhibits not conforming to this section.

(c) Prefiled [Testimonial] evidence.

(1) Prefiled testimony.

(A) The judge may require that direct [exhibits and] testimony of witnesses to be called at the hearing, and any exhibits to be presented through those witnesses, be [submitted in writing,] filed in writing prior to hearing[,] and served on other parties. The written testimony of a witness may be prepared in narrative or question-and-answer form.

(B) Prefiled testimony and related exhibits shall be subject to evidentiary objections. The judge may require that objections to prefiled testimony [exhibits and objections to testimony] of witnesses and related exhibits [to be called at hearing] be submitted in writing, filed prior to hearing, and served on other parties.

(C) After a witness has been sworn and has identified his or her written testimony as a true record of what the testimony would have been if given orally, the written testimony may be admitted into evidence at the hearing as if read or presented orally.

(D) When written testimony is offered into evidence, the witness must attend the hearing for cross-examination, unless cross-examination is waived by the other parties.

(E) A party may object to the prefiling of exhibits, testimony, and objections if the hearing will not be expedited and the interests of the parties will be substantially prejudiced by the entry of an order under this section.

[(C) A party may object to the prefiling of exhibits, testimony, and objections if the hearing will not be expedited and the interests of the parties will be substantially prejudiced by the entry of an order under this section.]

(2) Prefiled exhibits. The judge may require parties to prefile some or all exhibits and provide those exhibits to the other parties. The judge may also require that objections to prefiled exhibits be submitted in writing, filed prior to the hearing, and provided to other parties.

(d) [(2)] Exclusion of witnesses.

(1) [(A)] At the request of either party or by the judge's own action, the judge may:

(A) [(i)] order witnesses excluded from the hearing room so that they may not hear the proceedings;

(B) [(ii)] instruct the witnesses not to converse about the case with each other or any person other than the attorneys in the proceeding except by permission of the judge; and

(C) [(iii)] instruct the witnesses not to read any report of, or comment upon, the testimony in the case while under order of this section.

(2) [(B)] This section does not authorize the exclusion of:

(A) [(i)] a party who is a natural person or the spouse of such natural person;

(B) [(ii)] an officer or employee of a party that is not a natural person and who is designated by the party as its representative;

(C) [(iii)] a person whose presence is shown by a party to be essential to the presentation of the party's case.

§155.431. Conduct and Decorum.

(a) Standards of conduct. Parties, representatives, and other participants shall conduct themselves with dignity, show courtesy and respect for one another and for the judge, follow any additional guidelines of decorum prescribed by the judge, and adhere to the time schedule. Attorneys shall adhere to the standards of conduct in the Texas Lawyers' Creed promulgated by the Texas Supreme Court.

(b) Judge's authority. To maintain and enforce proper conduct and decorum, the judge may take appropriate action, including:

(1) issuing a warning;

(2) sanctioning a party pursuant to §155.157 of this chapter;

(3) [(2)] excluding persons from the proceeding; and

(4) [(3)] recessing the proceeding.

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 April 29, 2016.

TRD-201602051
Thomas H. Walston
General Counsel
State Office of Administrative Hearings
Earliest possible date of adoption: June 12, 2016
For further information, please call: (512) 475-1276

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1 TAC §155.413

The repeal is proposed under Government Code, Chapter 2003, §2003.050, which requires SOAH to adopt procedural rules that relate to the hearings it conducts, and Government Code, Chapter 2001, §2001.004, which requires agencies to adopt rules of practice setting forth the nature and requirements of formal and informal procedures.

The proposed repeal affects Government Code, Chapters 2001 and 2003.

§155.413. Redaction of Documents.

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

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SUBCHAPTER J. DISPOSITION OF CASE

1 TAC §§155.501, 155.503, 155.505, 155.507, 155.509

The amendments and new rule are proposed under Government Code, Chapter 2003, §2003.050, which requires SOAH to adopt procedural rules that relate to the hearings it conducts, and Government Code, Chapter 2001, §2001.004, which requires agencies to adopt rules of practice setting forth the nature and requirements of formal and informal procedures.

The proposed amendments and new rule affect Government Code, Chapters 2001 and 2003.

§155.501. Default Proceedings.

(a) [Default.] If a party who [that] does not bear the burden of proof and to whom a notice of hearing with factual allegations is served or provided [under this section] fails to appear for the hearing, the judge may proceed in that party's absence on a default basis. [If a proposal for decision or final decision is issued, the factual allegations listed in the notice of hearing will be deemed admitted.]

(b) A [Proof to support default. Any] default proceeding under this section requires adequate proof of the following:

[(1) proper notice was received by the defaulting party;]

(1) [(2)] the notice of hearing included a disclosure in at least 12-point, bold-face type that the factual allegations listed in the notice could be deemed admitted[,] and that the relief sought in the notice of hearing might be granted by default against the party that fails to appear at the hearing; [and]

(2) [(3)] the notice of hearing satisfies the requirements [requirement] of Tex. Gov't [Texas Government] Code, §2001.051 and §2001.052, and §155.401 of this chapter [title (relating to Notice of Hearing)]; and

(3) the notice of hearing was:

(A) received by the defaulting party; or

(B) sent by first class or certified mail to the party's last known address as shown by the referring agency's records, and the re-

ferring agency's statute or rules authorize service of the notice of hearing by sending it to the party's last known address.

(c) In the absence of adequate proof to support a default, the judge shall continue the case and direct the party responsible to provide adequate notice of hearing. If the responsible party persists in failing to provide adequate notice, the judge may dismiss the case from the SOAH docket without prejudice to refiling.

[~~(c) Alternative showing of notice. In the alternative, when it is not possible to prove actual receipt of notice, a hearing may proceed on a default basis if:~~]

[~~(1) the referring agency's statute or rules authorize service of the notice of hearing by sending it to the party's last known address as shown by the referring agency's records; and~~]

[~~(2) there is credible evidence that the notice of hearing was sent by first class or certified mail to such address.~~]

(d) Upon receiving the required showing of proof to support a default, the judge may: [~~announce the default, recess the hearing,~~]

(1) issue an order finding adequate notice, conditionally dismissing the case from the SOAH docket, and conditionally remanding the case [~~return the file~~] to the referring agency for informal disposition on a default basis in accordance with Tex. Gov't [~~Texas Government~~] Code §2001.056; or[~~. If there is adequate proof of notice to support a default, the judge shall include a finding of adequate notice in the order dismissing the case from the SOAH docket.~~]

(2) deem admitted the factual allegations in the notice of hearing and issue a default decision or proposal for decision.

(e) Default dismissals.

(1) A conditional order of dismissal issued under subsection (d) shall inform the party of the opportunity to have the default set aside under this subsection by filing an adequate motion no later than 15 days after the issuance of the conditional order of dismissal.

(2) If a motion to set aside a default is filed within 15 days after the issuance of a conditional order of dismissal, the judge may grant the motion, set aside the default, and reopen the hearing for good cause shown or in the interests of justice.

(3) In the absence of a timely motion to set aside a default, a conditional order of dismissal shall become final on the sixteenth day after its issuance without further action by the judge.

(f) Default proposals for decision.

(1) A default proposal for decision issued under subsection (d) shall inform the party of the opportunity to have the default set aside under this subsection by filing an adequate motion no later than 15 days after the issuance of the default proposal for decision.

(2) If a motion to set aside a default is filed within 15 days after the issuance of a default proposal for decision, the judge may grant the motion, set aside the default, and reopen the hearing for good cause shown or in the interests of justice.

(g) Default decisions.

(1) Default decisions are subject to motions for rehearing as provided for in the APA.

(2) A default decision issued under subsection (d) shall inform the party of the opportunity to have the default set aside by filing a motion for rehearing under Tex. Gov't Code Chapter 2001, Subchapter F.

[~~(e) In the absence of receiving adequate proof to support a default, the judge shall continue the case and direct the party responsible for the provision of notice to provide adequate notice. If the responsible party persists in failing to provide adequate notice, the judge may dismiss the case from the SOAH docket without prejudice to refiling.~~]

[~~(f) Motion to set aside default. A party may file a motion with SOAH no later than ten days after the hearing to set aside a default announced at the hearing and to reopen the record. The judge will not issue a dispositive order or proposal for decision during this ten-day period. If a timely motion to set aside a default is filed, the judge may grant the motion, set aside the default, and reopen the hearing for good cause shown, or in the interests of justice.~~]

§155.503. Dismissal Proceedings.

(a) Failure to prosecute.

(1) A contested case may be dismissed in whole or in part for want of prosecution if the party seeking affirmative relief [~~or the party requesting the hearing~~]:

(A) fails to appear for a [~~any~~] hearing of which the party had notice; or

(B) fails to prosecute the case in accordance with a requirement of statute, rule, or order of the judge.

[~~(2) Dismissal under this section removes the case from the SOAH docket without a decision on the merits.~~]

(2) [~~(3)~~] The judge may dismiss the case by issuing [~~issue~~] a conditional order of dismissal that:

(A) explains the party's failure to prosecute;

(B) informs the party of an opportunity to contest the dismissal; and

(C) states the order of dismissal will become final unless:

(i) the party files a motion to retain the case on the docket not later than 15 [~~20~~] days after the issuance of the order [~~is signed~~]; and

(ii) the motion to retain specifies the bases for the motion.

(3) [~~(4)~~] The judge may grant a motion to retain in the interests of justice or if the moving party shows good cause for the failure to prosecute.

(4) In the absence of a timely motion to retain the case on the docket, the conditional order of dismissal shall become final on the sixteenth day after its issuance without further action by the judge.

(5) Dismissal under this section removes the case from the SOAH docket without a decision on the merits.

(b) Other Dismissal Actions.

(1) The judge may dismiss a case or a portion of the case from SOAH's docket for:

(A) lack of jurisdiction over the matter by the referring agency;

(B) lack of statute, rule, or contract authorizing SOAH to conduct the proceeding;

(C) mootness of the case;

(D) failure to state a claim for which relief can be granted;

(E) unnecessary duplication of proceedings;[.]

(F) withdrawal of a claim by a moving party; or

(G) full or partial settlement of a case.

(2) The judge may issue an order in response to a party's motion or after the judge notifies the parties of an intent to dismiss a case and allows time for responses.

[(c) Dismissal from SOAH's docket.]

[(1) A judge may dismiss a matter from SOAH's docket with or without prejudice if a moving party withdraws its entire claim or the parties settle all matters in controversy.]

[(2) A judge may order withdrawn or settled matters severed before dismissing them if other related matters in the docket remain in controversy.]

§155.505. Summary Disposition.

(a) Final decision or proposal for decision on summary disposition. Summary disposition shall be granted on all or part of a contested case if the pleadings, the motion for summary disposition, and the summary disposition evidence show that there is no genuine issue as to any material fact and that the moving party is entitled to a decision in its favor as a matter of law on all or some of the issues expressly set out in the motion. Summary disposition is not permitted based on the ground that there is no evidence of one or more essential elements of a claim or defense on which the opposing party would have the burden of proof at hearing.

(b) Deadlines. Unless otherwise ordered by the judge: [Motions: deadlines, content, and format.]

(1) A party may file a motion for summary disposition at any time after SOAH acquires jurisdiction over a case, but the motion must be filed at least 30 days before a scheduled hearing on the merits[, unless otherwise ordered by the judge].

(2) The response and opposing summary disposition evidence shall be filed no later than 15 days after the filing of the motion.

(c) Contents of Motion. A motion for summary disposition shall include the contents listed below. A motion may be denied for failure to comply with these requirements.

(1) [(2)] The motion shall state the specific issues upon which summary disposition is sought and the specific grounds justifying summary disposition.

(2) [(3)] The motion shall also separately state all material facts upon which the motion is based. Each material fact stated shall be followed by a clear and specific reference to the supporting summary disposition evidence.

(3) [(4)] The first page of the motion shall contain the following statement in at least 12-point, bold-face type: "Notice to parties: This motion requests the judge to decide some or all of the issues in this case without holding an evidentiary hearing on the merits. You have 15 [14] days after the filing of the [you received this] motion to file a response. If you do not file a response, this case may be decided against you without an evidentiary hearing on the merits. See SOAH's rules at 1 Texas Administrative Code §155.505. These rules are available on SOAH's public website."

[(5) A party's motion may be denied for failure to comply with these requirements.]

(d) [(c)] Responses to motions[: deadlines, content, and format].

(1) A party may file a response and summary disposition evidence to oppose a motion for summary disposition. [The response and opposing summary disposition evidence shall be filed within 14 days of receipt of the motion, unless otherwise ordered by the judge.]

(2) The response shall include all arguments against the motion for summary disposition, any objections to the form of the motion, and any objections to the summary disposition evidence offered in support of the motion.

(e) [(d)] Summary disposition evidence.

(1) Summary disposition evidence may include deposition transcripts;[,] interrogatory answers and other discovery responses;[,] pleadings;[,] admissions;[,] affidavits;[,] materials obtained by discovery;[,] matters officially noticed;[,] stipulations;[,] authenticated or certified public, business, or medical records;[,] and other admissible evidence. No oral testimony shall be received at a hearing on a motion for summary disposition.

(2) Summary disposition may be based on uncontroverted written testimonial evidence of an interested witness, or of an expert witness as to subject matter concerning which the judge must be guided solely by the opinion testimony of experts, if the evidence is clear, positive and direct, otherwise credible and free from contradictions and inconsistencies, and could have been readily controverted.

(3) All summary disposition evidence offered in support of or in opposition to a motion for summary disposition shall be filed with the motion or response. Copies of relevant portions of materials obtained by discovery that are relied upon to support or oppose a motion for summary disposition shall be included in the summary disposition evidence.

(f) [(e)] Proceedings on motions.

(1) A judge may hold a hearing on a motion for summary disposition or rule on the motion without a hearing.

(2) If summary disposition is granted on all contested issues in a case, the record shall close on the date ordered by the judge or on the later of the filing of the last summary disposition arguments or evidence, the date the summary disposition response was due, or the date a hearing was held on the motion. The judge shall [close the record and] prepare a final decision or proposal for decision as appropriate. The final decision or proposal for decision shall include a statement of reasons, findings of fact, and conclusions of law in support of the summary disposition rendered.

(3) If summary disposition is granted on some but not all of the contested issues in a case, the judge shall not take evidence or hear further argument upon the issues for which summary disposition has been granted. The judge shall issue an order:

(A) specifying the facts about which there is no genuine issue;

(B) specifying the issues for which summary disposition has been granted; and

(C) directing further proceedings as necessary. If an evidentiary hearing is held on the remaining issues, the facts and issues resolved by summary disposition shall be deemed established, and the hearing shall be conducted accordingly. After the evidentiary hearing is concluded, the judge shall include in the final decision or proposal for decision a statement of reasons, findings of fact, and conclusions of law in support of the partial summary disposition rendered.

§155.507. Proposals [Proposal] for Decision; Exceptions and Replies.

[(a) Proposal for decision. For contested cases in which the judge does not have authority to issue a final decision, the judge shall prepare a proposal for decision.]

(a) [(b)] Submission of the proposal for decision. For contested cases in which a proposal for decision is issued, the [The] judge shall submit the proposal for decision to the referring agency and furnish a copy to each party.

(b) [(c)] Exceptions and replies. The parties may submit to the judge and the referring agency exceptions to the proposal for decision and replies to exceptions to the proposal for decision.

(1) Unless the referring agency's rules apply by statute, exceptions shall be filed within 15 days after the date [of service of] the proposal for decision is issued.

(2) A reply to the exceptions shall be filed within 15 days of the filing of the exceptions.

[(2) If the proposal for decision was served by hand delivery or by facsimile, the date of service shall be presumed to be the date of delivery. If the proposal for decision was served by regular mail, interagency mail, certified mail, or registered mail, the date of service shall be presumed to be no later than three days after mailing.]

(3) A motion to change the time to file exceptions or replies to exceptions shall be filed no later than the applicable deadline. The judge may change [extend or shorten] the time to file exceptions or replies if:[.]

(A) good cause is shown for the requested change; or

(B) all parties agree.

[(4) The parties shall file with SOAH any motions for extension of time to file exceptions and replies. Parties' motions for extensions of time shall be filed no later than five days before the applicable deadline for submission of exceptions or replies and shall demonstrate either:]

[(A) good cause for the requested extension; or]

[(B) agreement of all other parties to the extension.]

(c) [(d)] Judge's review of exceptions and replies. The judge shall review all exceptions and replies and notify the referring agency and parties whether the judge recommends any changes to the proposal for decision.

(d) [(e)] Judge's authority. The judge may:

(1) amend the proposal for decision in response to exceptions and replies to exceptions; and

(2) correct any clerical errors in the proposal for decision.

§155.509. Final Decisions; Motions for Rehearing.

(a) Final decisions. For contested cases in which the judge issues a final decision, the judge shall furnish a copy of the decision to the referring agency and to each party.

(b) Motions for rehearing. Motions for rehearing shall be filed and handled in accordance with Tex. Gov't Code Chapter 2001, Subchapter F.

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

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Thomas H. Walston
General Counsel
State Office of Administrative Hearings
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PART 12. COMMISSION ON STATE EMERGENCY COMMUNICATIONS

CHAPTER 251. 9-1-1 SERVICE--STANDARDS

1 TAC §251.14

The Commission on State Emergency Communications (CSEC) proposes amended rule §251.14.

BACKGROUND AND PURPOSE

CSEC proposes amended rule §251.14 (Title 1, Part 12, Chapter 251 of the Texas Administrative Code) relating to the establishment of minimum requirements for VoIP Positioning Center (VPC) Operators providing or facilitating the providing of 9-1-1 service using a dynamic Automatic Location Identification (ALI) solution.

SECTION BY SECTION SUMMARY

Proposed amendments to §251.14 expands the list of authorized customers of a VPC Operators service to include the end-users of non-mobile communications services providers. The amendments clarify the requirements for a VPC Operator to register with CSEC, obtain authorization to interface with a 9-1-1 Entity's network, submit a service plan, and annually (and upon request) certify the accuracy of its registration and service plan using forms provided by CSEC. Revised subsection (h) adds the requirement for a VPC Operator to begin using a 9-1-1 Entity's Location Validation Function (LVF) upon request by the entity, and it adds a preference for real time latitude and longitude coordinates when a nomadic VPC Customer end-user accesses service over a wireless telecommunications connection. Revised subsection (i) and new subsection (j) prescribe how a VPC Operator will address ALI Validation Errors and ALI Discrepancies. New subsection (k) instructs a VPC Operator to address Master Street Address Guide or LVF questions to the appropriate 9-1-1 Entity. New subsection (m) makes clear a VPC Operator's responsibility to ensure static 9-1-1 ALI records of its VPC Customers are removed from the 9-1-1 Entity's 9-1-1 ALI Database. New subsection (n) requires that a 9-1-1 Entity's request for records or information must be in writing. New subsection (o) deems a VPC Operator in compliance with the rule as being a "third party or other entity involved in the providing of 9-1-1 service" as that term is used to limit liability in Health and Safety Code §771.053.

FISCAL NOTE

Kelli Merriweather, CSEC's executive director, has determined that for each year of the first five fiscal years (FY) that §251.14 is adopted there will be no cost implications to the state or local governments as a result of enforcing or administering the adoption of §251.14.

PUBLIC BENEFIT

Ms. Merriweather has determined that for each year of the first five years the amended section is in effect, the public benefits anticipated as a result of the rule adoption will be to provide end

users whose 9-1-1 calls are delivered through a VPC with a consistent level of 9-1-1 service.

REGULATORY ANALYSIS OF MAJOR ENVIRONMENTAL RULES

CSEC has determined that this proposal is not a "major environmental rule" as defined by Government Code §2001.0225.

LOCAL EMPLOYMENT IMPACT STATEMENT

CSEC has determined that this proposal does not directly affect a local economy and, therefore, has not drafted a local employment impact statement as would otherwise be required under Administrative Procedure Act §2001.022.

SMALL AND MICRO-BUSINESS IMPACT ANALYSIS

In accordance with Government Code §2006.002(c), Ms. Merriweather has determined that there will be no adverse economic effect on small businesses or micro-businesses. Accordingly, CSEC has not prepared the economic impact statement or regulatory flexibility analysis that would otherwise be required.

TAKINGS IMPACT ASSESSMENT

CSEC has determined that the proposal does not restrict or limit an owner's right to his or her property that would otherwise exist in the absence of government action and, therefore, does not constitute a taking under Government Code §2007.043.

PUBLIC COMMENT

Comments on the proposed rule may be submitted in writing to Patrick Tyler, Commission on State Emergency Communications, 333 Guadalupe Street, Suite 2-212, Austin, Texas 78701-3942 or by email to patrick.tyler@csec.texas.gov. Comments will be accepted for 30 days following publication of the proposal in the *Texas Register.*

STATEMENT OF AUTHORITY

The amended section is proposed pursuant to Texas Health and Safety Code §771.051 and §771.055; 47 U.S.C. §615a-1 and §615b; and 47 C.F.R. §§9.1 - 9.7.

No other statute, article, or code is affected by the proposal.

§251.14. VoIP Positioning Center Operator Minimum Requirements.

(a) Purpose. The purpose of this rule is to establish minimum requirements for VoIP Positioning Center (VPC) Operators providing or facilitating the providing of 9-1-1 service using a dynamic Automatic Location Identification (ALI) solution. This rule is intended to provide the end-users of interconnected Voice over Internet Protocol [~~IP-enabled voice~~] service providers and non-mobile communications service providers (collectively, VPC Customers) [~~(VSPs)~~] with a consistent level of 9-1-1 service that is [~~more~~] comparable to wireline E9-1-1 service.

(b) Applicability. This rule is applicable to VPC Operators providing or facilitating the providing of 9-1-1 service to its VPC Customers' [~~VSP~~] end-users whose voice service is either fixed or nomadic, but non-mobile. Nomadic service is service that an end-user can access from any broadband connection, including from a wireless telecommunications connection, provided the accessed service does not utilize the commercial mobile radio services network. This rule provides the minimum standards for a VPC Operator to implement 9-1-1 service requirements.

(c) Registration. A VPC Operator shall register with the Commission and provide written notice to each 9-1-1 Entity (i.e., an Emergency Communication District or Regional Planning Commission as defined in Texas Health and Safety Code §771.001) in whose region or territory they provide VPC service. A current registration [~~Registration~~] is a prerequisite to interfacing with [~~accessing~~] a 9-1-1 Entity's Network and 9-1-1 Database or Geospatial Database, and[~~,~~] for obtaining 9-1-1 Entity approval to obtain emergency services query keys (ESQKs) [~~pseudo automatic number identifications (pANIs), and for accessing dedicated 9-1-1 trunking, as applicable~~]. Registration shall be made on a form provided by Commission staff and include [~~includes~~]:

(1) VPC Operator name (including d/b/a), address, website, and contact information including email;

(2) Contact information of VPC E9-1-1 Coordination Manager, VPC 9-1-1 Database Manager, and VPC 24X7 Operations;

(3) Names and contact information of ESGW Operators that will provide services to the VPC Operator;

(4) [~~(2)~~] Services provided;

(5) [~~(3)~~] Name of each 9-1-1 Entity in whose region or territory the VPC Operator provides VPC services [~~service~~];

(6) [~~(4)~~] Name and contact information of its VPC Customers; and [~~VSP customers;~~]

(7) [~~(5)~~] Whether the VPC Operator collects or remits 9-1-1 service fees on behalf of any of its VPC Customers' [~~VSP customers'~~] end-users.

(d) Authorization to Interface with 9-1-1 Entity's Network. A 9-1-1 Entity will upon request provide a VPC Operator registered under subsection (c) with a Certificate of Authorization (COA) authorizing the ESGW Operator to interface with the 9-1-1 Entity's Network. A COA serves as authorization to the 9-1-1 Entity's 9-1-1 Network Services Provider and 9-1-1 Database Management Services Provider that the VPC Operator is authorized to provide VPC services within the 9-1-1 Entity's service area.

(e) [~~(d)~~] Service Plan. A VPC Operator shall submit to the Commission a service plan consisting of the ESQKs [~~pANIs~~] obtained from the North America Numbering Plan Administrator, [~~and~~] the wireline Emergency Service Number (ESN) assignment associated with each ESQK, the ESQK Quantity, the PSAP name, the 9-1-1 entity name, and the date the Certificate was received. The service plan shall be submitted on a form provided by Commission staff. [~~pANI.~~]

(f) [~~(e)~~] Annual Certification. A VPC Operator shall annually, and upon request by the Commission or a 9-1-1 Entity, update and certify the accuracy of its Registration and Service Plan. A VPC Operator shall submit an amended Registration and/or Service Plan to the Commission at the time of Annual Certification if changes have been made to the Registration and/or Service Plan. [~~registration information.~~]

(g) [~~(f)~~] Compliance and the Provisioning of 9-1-1 Service. [~~Coordination with 9-1-1 Entity.~~] Upon receipt of a written request from the Commission or a 9-1-1 Entity in whose region or territory a VPC Operator provides service, the VPC Operator shall coordinate with the Commission or requesting 9-1-1 Entity to ensure compliance with this rule and the proper provisioning of 9-1-1 service. Upon receipt of a written request, a VPC Operator will provide reasonable access to and/or copies of the VPC Operator's basic network information and/or provisioning related records or a detailed explanation why the requested information cannot reasonably be made available.

(h) [~~(g)~~] VPC Operator Minimum Requirements in Providing 9-1-1 Service. A VPC Operator shall:

(1) use the current Master Street [~~and~~] Address Guide (MSAG) of each 9-1-1 Entity in whose region or territory the VPC

Operator provides 9-1-1 service or, upon request from a 9-1-1 Entity, utilize the location validation function (LVF) provided by the 9-1-1 Entity or its 9-1-1 Database Management Services Provider to:

(A) provide validated [~~validate~~] end-user ALI;

(B) assign wireline ESNs from ESQK [~~Emergency Services Query Key (ESQK)~~] pools created for such purpose; and

(C) use the correct ESQK pool in order to enable displaying valid English Language Translations (ELTs) matching the assigned wireline ESN;

(2) accept delta MSAG files in a manner consistent with the standard current format of initial MSAG files to maintain the MSAG for near real-time validation purposes or, if LVF has been requested, use the requesting 9-1-1 Entity's LVF in a manner consistent with industry standards in order to confirm valid addresses for 9-1-1 calls;

(3) provide an ESQK [~~a pANI~~] shell record containing the Automatic Number Information (ANI) and ALI associated with the 9-1-1 call;

(4) provide the equivalent of MSAG and/or LVF validated [~~MSAG-validated~~] routing with associated wireline ESN, including the appropriate National Emergency Number Association (NENA) Class of Service (COS) code provided by the VPC Customer [~~its VSP~~] and used by the 9-1-1 Entity in its region or territory. The foregoing requires VPC Operator to request from its VPC Customers [~~VSP customers~~] that they convey the correct COS codes for the VPC Customers [~~VSPs' end-users~~];

(5) provide its VPC Customer's [~~VSP customer's~~] NENA Company ID in the Company ID field in the ALI record associated with each 9-1-1 call. VPC Operator's NENA Company ID should be identified by the ESQK [~~pANI~~]. In areas where the 9-1-1 Database supports using two NENA Company IDs, the two Company IDs shall be populated as provided in NENA standard 02-010; [~~and~~]

(6) not use temporary and/or fictitious ALI data in the LIF or equivalent; and [~~pANI shell record associated with each 9-1-1 call.~~]

(7) for a VPC Customer's nomadic end-users whose service is accessed via a wireless telecommunications connection, the preferred ALI provided is the real time latitude and longitude coordinates of the wireless telecommunications connection.

(i) [~~(h)~~] ALI Validation Errors. An ALI validation error occurs when prior to a 9-1-1 call being placed the end-user's ALI is not recognized as being valid using the 9-1-1 Entity's MSAG or LVF provided by the 9-1-1 Entity's 9-1-1 Database Management Services Provider. [~~MSAG validation and ALI Discrepancies.~~]. A VPC Operator shall address MSAG and LVF validation errors with its VPC Customer and/or the appropriate 9-1-1 Entity [~~and ALI discrepancies~~] within three (3) business days of the error occurring. A VPC Operator may, within its own Location Information Server (LIS) or equivalent, build a translation or alias in order to provide validated end-user ALI. On a quarterly basis, a VPC shall provide each 9-1-1 Entity with a list of all ALI validation errors that occurred during the quarter and confirm that the VPC provided notice of the errors to its VPC Customers. [~~notification by a 9-1-1 Entity. A VPC Operator shall verify that referred MSAG validation errors and ALI discrepancies have been resolved and provide written notice to the notifying 9-1-1 Entity.~~]

[~~(1) A VPC shall obtain prior approval from the notifying 9-1-1 Entity before resolving a validation or discrepancy using an address translation or alias. A notifying 9-1-1 Entity shall use its best efforts to approve/deny requests for translations or aliases within three (3) business days of receipt of a request from a VPC Operator.~~]

[~~(2) A VPC shall refer questions about a 9-1-1 Entity's MSAG to the appropriate 9-1-1 Entity. If the VPC Operator does not receive a response within three (3) business days, it shall escalate the issue to the 9-1-1 Entity or a representative of the appropriate MSAG authority.~~]

(j) ALI Discrepancies. An ALI discrepancy occurs when the ALI provided for a 9-1-1 call is inaccurate or is not an MSAG-valid address. A VPC Operator shall address ALI discrepancies within three (3) business days of notification from the 9-1-1 Entity or VPC Customer. A VPC Operator shall verify that ALI discrepancies have been resolved and provide written notice to the notifying 9-1-1 Entity.

(k) MSAG or LVF Questions. A VPC shall refer questions about a 9-1-1 Entity's MSAG or LVF to the appropriate 9-1-1 Entity. If the VPC Operator does not receive a response within three (3) business days, it shall escalate the issue to the 9-1-1 Entity's 9-1-1 coordinator or equivalent.

(l) [~~(i)~~] ESQKs. Upon request from a 9-1-1 Entity, a VPC Operator will provide a listing of ESQKs used in the requesting 9-1-1 Entity's region or territory and a description of the standard period of aging and re-use cycle of ESQKs (e.g., how long ESQK information for the 9-1-1 call remains visible for call transfers).

(m) [~~(j)~~] Conversion and Deletion of Static 9-1-1 ALI Records. A VPC Operator whose VPC Customer [~~VSP customer~~] has static 9-1-1 ALI records in the 9-1-1 Database shall notify in writing its customer and the 9-1-1 Entity when conversion from the static protocol is complete to enable the customer [~~VSP~~] to initiate removal of all affected static records from the 9-1-1 Database. It is the responsibility of a VPC Operator to ensure that all static 9-1-1 ALI records of its VPC Customers are removed from a 9-1-1 Entity's 9-1-1 Database within a timely period not to exceed thirty (30) days.

(n) [~~(k)~~] Records and Information. To the extent permitted by 47 U.S.C. §222(g), a VPC Operator will, upon receipt of a written request from the Commission or a 9-1-1 Entity, provide records and information described by that section, or timely forward the request to all of its affected VPC Customers [~~VSPs~~] and provide notice to the Commission or the requesting 9-1-1 Entity. Records and information submitted in response to a request shall be kept confidential in accordance with 47 U.S.C. §222(g) and Health and Safety Code §771.061, and used for purposes of enhancing the provisioning of 9-1-1 service or emergency notification service.

(o) Liability Protection. A VPC Operator in compliance with this rule is deemed a "third party or other entity involved in the providing of 9-1-1 service" as used to limit liability in Texas Health and Safety Code §771.053.

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 April 27, 2016.

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Patrick Tyler
General Counsel
Commission on State Emergency Communications
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For further information, please call: (512) 305-6922

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1 TAC §251.15

The Commission on State Emergency Communications (CSEC) proposes new rule §251.15.

BACKGROUND AND PURPOSE

CSEC proposes new §251.15 (Title 1, Part 12, Chapter 251 of the Texas Administrative Code), relating to the establishment of minimum requirements for Emergency Services Gateway (ESGW) Operators facilitating the provision of 9-1-1 service via a dynamic Automatic Location Identification (ALI).

SECTION BY SECTION SUMMARY

Proposed §251.15 requires, at a minimum, that an ESGW Operator will register with CSEC, obtain authorization to interface with a 9-1-1 Entity's network, submit a service plan, and annually (and upon request) certify the accuracy of its registration and service plan using forms provided by CSEC. The rule includes a subsection on the applicability of the rule, and subsections regarding implementation, testing, and maintenance; compliance in the provisioning of 9-1-1 service; and reimbursement for direct dedicated 9-1-1 trunking. Subsection (i) deems an ESGW Operator in compliance with the rule as being a "third party or other entity involved in the providing of 9-1-1 service" as that term is used to limit liability in Health and Safety Code §771.053.

FISCAL NOTE

Kelli Merriweather, CSEC's executive director, has determined that for each year of the first five fiscal years (FY) that §251.15 is adopted there will be no cost implications to the state or local governments as a result of enforcing or administering the adoption of §251.15.

PUBLIC BENEFIT

Ms. Merriweather has determined that for each year of the first five years the new section is in effect, the public benefits anticipated as a result of the rule adoption will be to provide end users whose 9-1-1 calls are delivered through an ESGW with a consistent level of 9-1-1 service. Adoption of a minimum requirements rule eliminates the need for a 9-1-1 Entity to enter into a service agreement with each ESGW Operator providing services within the 9-1-1 Entity's region or territory.

REGULATORY ANALYSIS OF MAJOR ENVIRONMENTAL RULES

CSEC has determined that this proposal is not a "major environmental rule" as defined by Government Code §2001.0225.

LOCAL EMPLOYMENT IMPACT STATEMENT

CSEC has determined that this proposal does not directly affect a local economy and therefore has not drafted a local employment impact statement as would otherwise be required under Administrative Procedure Act §2001.022.

SMALL AND MICRO-BUSINESS IMPACT ANALYSIS

In accordance with Government Code §2006.002(c), Ms. Merriweather has determined that there will be no adverse economic effect on small businesses or micro-businesses. Accordingly, CSEC has not prepared the economic impact statement or regulatory flexibility analysis that would otherwise be required.

TAKINGS IMPACT ASSESSMENT

CSEC has determined that the proposal does not restrict or limit an owner's right to his or her property that would otherwise exist in the absence of government action and, therefore, does not constitute a taking under Government Code §2007.043.

PUBLIC COMMENT

Comments on the proposed rule may be submitted in writing to Patrick Tyler, Commission on State Emergency Communications, 333 Guadalupe Street, Suite 2-212, Austin, Texas 78701-3942 or by email to *patrick.tyler@csec.texas.gov.* Comments will be accepted for 30 days following publication of the proposal in the *Texas Register.*

STATEMENT OF AUTHORITY

The new section is proposed pursuant to Texas Health and Safety Code §771.051, §771.055; 47 U.S.C. §615a-1 and §615b; 47 C.F.R. §§9.1 - 9.7; 20.18.

No other statute, article, or code is affected by the proposal.

§251.15. Emergency Services Gateway Operator Minimum Requirements

(a) Purpose. The purpose of this rule is to establish minimum requirements for Emergency Services Gateway (ESGW) Operators providing or facilitating the providing of 9-1-1 service using a dynamic Automatic Location Identification (ALI) solution. This rule is intended to ensure end-users whose 9-1-1 calls are delivered through an ESGW are provided with a consistent level of 9-1-1 service.

(b) Applicability. This rule is applicable to ESGW Operators providing or facilitating the providing of 9-1-1 service to interconnected Voice over Internet Protocol (VoIP) or wireless end-users directly through the end-user's VoIP service provider (VSP) or commercial mobile radio service (CMRS) provider, respectively, or indirectly through either a VoIP Positioning Center (VPC) or a Mobile Positioning Center (MPC). An ESGW Operator does not include an entity operating under a certificate required by Texas Utilities Code §54.001, acting solely to provide local exchange telephone service, basic local telecommunications service, or switched access service; or a VSP that self-provisions 9-1-1 service for its own end-users. This rule provides the minimum standards for an ESGW Operator to implement 9-1-1 service requirements.

(c) Registration. An ESGW Operator shall register with the Commission and provide written notice to each 9-1-1 Entity (i.e., an Emergency Communication District or Regional Planning Commission as defined in Texas Health and Safety Code §771.001) in whose region or territory they provide ESGW service. A current registration is a prerequisite to interfacing with a 9-1-1 Entity's Network, and for obtaining 9-1-1 Entity authorization to order dedicated 9-1-1 trunks (16 Tex. Admin Code §26.5(64)). Registration shall be made on a form provided by Commission staff and include:

(1) ESGW Operator name (including d/b/a), address, website, and contact information including email;

(2) Contact information of the ESGW E9-1-1 Coordination Manager and ESGW 24X7 Operations;

(3) Name and contact information of VPC Operators utilizing ESGW Operator's services;

(4) Services provided;

(5) Name of each 9-1-1 Entity in whose region or territory the ESGW Operator provides services;

(6) Name and contact information of its ESGW customers; and

(7) Whether the ESGW Operator collects or remits 9-1-1 service fees on behalf of any of its ESGW customers' end-users.

(d) Authorization to Interface with 9-1-1 Entity's Network. A 9-1-1 Entity will upon request provide an ESGW Operator registered

under subsection (c) with a Certificate of Authorization (COA) authorizing the ESGW Operator to interface with the 9-1-1 Entity's Network. A COA serves as authorization to the 9-1-1 Entity's 9-1-1 Network Services Provider that the ESGW Operator is authorized to provide ESGW services within the 9-1-1 Entity's service area.

(e) Service Plan. An ESGW Operator shall submit to the Commission a service plan that for each selective router includes 911 Trunk Circuit ID 2+6 Code(s), number of Trunks in Trunk Group, CILLI code, 9-1-1 Entity Authorizing Trunk Group and the date the COA was received. The service plan shall be submitted on a form provided by Commission staff.

(f) Annual Certification. An ESGW Operator shall annually, and upon request by the Commission or a 9-1-1 Entity, update and certify the accuracy of its Registration and Service Plan. An ESGW Operator shall submit an amended Registration and/or Service Plan at the time of its Annual Certification if changes have been made to the Registration and/or Service Plan.

(g) Implementation, Testing and Maintenance Procedures. An ESGW Operator shall use reasonable diligence to implement, test, and maintain its ability to provide ESGW services consistent with recognized industry standards, best practices, and applicable law. An ESGW Operator shall notify the Commission and each potentially affected 9-1-1 Entity in writing of any new services or of changes to existing services or arrangements that may materially impact the provisioning of 9-1-1 service.

(h) Compliance and the Provisioning of 9-1-1 Service. Upon written request from the Commission or a 9-1-1 Entity in whose region or territory an ESGW Operator provides service, an ESGW Operator shall coordinate with the Commission or requesting 9-1-1 Entity to ensure compliance with this rule and the proper provisioning of 9-1-1 service. Upon receipt of a written request, an ESGW Operator will provide reasonable access to and/or copies of the ESGW Operator's basic network information and/or provisioning related records or a detailed explanation why the requested information cannot reasonably be made available.

(i) Reimbursement for Direct Dedicated 9-1-1 Trunking. The reimbursable costs for direct dedicated 9-1-1 trunks are set by the Public Utility Commission (16 Tex. Admin Code §26.435(c)). Cost reimbursement is provided to the extent permitted by law and only within the 9-1-1 Entity's then available appropriations and budget. An ESGW Operator seeking direct dedicated 9-1-1 trunking reimbursement shall request reimbursement directly from the appropriate 9-1-1 Entity.

(j) Liability Protection. An ESGW Operator in compliance with this rule is deemed a "third party or other entity involved in the providing of 9-1-1 service" as that term is used to limit liability in Texas Health and Safety Code §771.053.

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 April 27, 2016.

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Patrick Tyler
General Counsel
Commission on State Emergency Communications
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CHAPTER 252. ADMINISTRATION

1 TAC §252.5

The Commission on State Emergency Communications (CSEC) proposes amended rule §252.5.

BACKGROUND AND PURPOSE

CSEC proposes amended §252.5 (Title 1, Part 12, Chapter 252 of the Texas Administrative Code), relating to the eligibility of the agency's employees for training supported by the agency; and the obligations assumed by the employees on receiving the training and education as required by Texas Government Code §656.048. CSEC proposes the following amendments to §252.5:

Revised the section name to delete "and Education". Education is included in the added definition of "Training";

Defined the term "Training" using the statutory definition thereof in Government Code Chapter 656;

Clarified the requirements for obtaining reimbursement of training program offered by an institution of higher education--including the requirement that tuition reimbursement must be approved by CSEC's Executive Director; and

Added employee obligations with respect to a training program to obtain a degree or certification for which the Commission agrees to provide or reimburse all or part of the required tuition.

FISCAL NOTE

Kelli Merriweather, CSEC's executive director, has determined that for each year of the first five fiscal years that §252.5 is in effect there will be no cost implications to the state or local governments as a result of enforcing or administering the adoption of §252.5.

PUBLIC BENEFIT

Ms. Merriweather has determined that for each year of the first five years the section is in effect the public will benefit from the training and educating of CSEC employees to ensure continued efficient and effective service to the public. Ms. Merriweather has also determined that for each year of the first five years the proposed section is in effect there are no probable economic costs to persons required to comply with the section.

REGULATORY ANALYSIS OF MAJOR ENVIRONMENTAL RULES

CSEC has determined that this proposal is not a "major environmental rule" as defined by Government Code §2001.0225.

LOCAL EMPLOYMENT IMPACT STATEMENT

CSEC has determined that this proposal does not directly affect a local economy and therefore has not drafted a local employment impact statement as would otherwise be required under Administrative Procedure Act §2001.022.

SMALL AND MICRO-BUSINESS IMPACT ANALYSIS

In accordance with Government Code §2006.002(c), Ms. Merriweather has determined that there will be no adverse economic effect on small businesses or micro-businesses. Accordingly, CSEC has not prepared the economic impact statement or regulatory flexibility analysis that would otherwise be required.

TAKINGS IMPACT ASSESSMENT

CSEC has determined that the proposal does not restrict or limit an owner's right to his or her property that would otherwise exist

in the absence of government action and, therefore, does not constitute a taking under Government Code §2007.043.

PUBLIC COMMENT

Comments on the proposed rule may be submitted in writing to Patrick Tyler, Commission on State Emergency Communications, 333 Guadalupe Street, Suite 2-212, Austin, Texas 78701-3942 or by email to *patrick.tyler@csec.texas.gov.* Comments will be accepted for 30 days following publication of the proposal in the *Texas Register.*

STATEMENT OF AUTHORITY

The amended section is proposed under Government Code §656.048.

No other statutes, articles or codes are affected by the proposed amended section.

§252.5. Employee Training.

(a) "Training" as used in this rule means instruction, teaching, or other education received by a Commission employee that is not normally received by all Commission employees and that is designed to enhance the ability of the employee to perform the employee's job. The term includes a course of study at an institution of higher education or a private or independent institution of higher education as defined by §61.003, Education Code, if the employing state agency spends money to assist the state employee to meet the expense of the course of study or pays salary to the employee to undertake the course of study as an assigned duty. The term does not include training required either by state or federal law or that is determined necessary by the Commission and offered to all Commission employees performing similar jobs.

(b) [~~(a)~~] The Commission may make public funds available to its employees for training [~~and education~~] in accordance with the State Employees Training Act (Texas Government Code, §§656.041 - 656.104). The Commission may spend public funds to pay the salary, tuition and other fees, travel and living expenses, training stipend, expense of training materials, and other necessary expenses of an instructor, student, or other participant in a training program.

(c) [~~(b)~~] The training [~~or education~~] must be related to the duties or prospective duties of the employee.

(d) [~~(c)~~] Employees may be required to complete a training [~~or education~~] program related to the employee's duties or prospective duties.

(e) [~~(d)~~] Requirements for eligibility and participation in a training [~~or education~~] program shall be in accordance with this rule and the Commission's current Human Resources [~~Resource~~] Policy and Procedures Manual.

(f) [~~(e)~~] Approval to participate in a training [~~or education~~] program, including Commission-sponsored programs, shall not in any way affect an employee's at-will status or constitute a guarantee or indication of continued employment, nor shall it constitute a guarantee or indication of future employment in a current or prospective position.

(g) [~~(f)~~] Permission to participate in any training [~~or education~~] program may be withdrawn if the Commission's Executive Director determines that participation would negatively impact the employee's job duties or performance.

(h) For an authorized training program offered by an institution of higher education or private or independent institution of higher education:

(1) the Commission may only reimburse the tuition expenses for a program course(s) successfully completed by the employee at an accredited institution of higher education (including online courses or courses not credited towards a degree); and

(2) the Commission's Executive Director must authorize the tuition reimbursement payment.

(i) An employee who requests a training program to obtain a degree or certification for which the Commission agrees to provide or reimburse all or part of the required tuition must agree in writing, as part of the employee's request, to fully repay the Commission any amounts paid if the employee voluntarily terminates employment with the Commission within one year after the training program is completed (prorated to credit any full calendar month of employment following completion of the training program) and any reasonable expenses the Commission incurs in obtaining restitution, including reasonable attorney's fees. An employee who voluntarily terminates employment before the end of one year after completing the training program due to extraordinary circumstances may request that the Executive Director waive repayment.

(j) [~~(g)~~] All materials received by an employee through Commission-funded training [~~or education~~] are the property of the Commission.

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

Filed with the Office of the Secretary of State on April 27, 2016.

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Patrick Tyler
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PART 15. TEXAS HEALTH AND HUMAN SERVICES COMMISSION

CHAPTER 370. STATE CHILDREN'S HEALTH INSURANCE PROGRAM

SUBCHAPTER C. ENROLLMENT, RENEWAL, DISENROLLMENT, AND COST SHARING

DIVISION 1. ENROLLMENT AND DISENROLLMENT

1 TAC §370.303

The Texas Health and Human Services Commission (HHSC) proposes amendments to §370.303, concerning Completion of Enrollment.

BACKGROUND AND JUSTIFICATION

HHSC proposes to amend this rule to include consideration of a Children's Health Insurance Program (CHIP) child's managed care history in the algorithm used to assign a managed care organization (MCO) when the applicant has not made a selection. The proposed change is intended to improve continuity of care.

HHSC proposes to amend this rule to include requirements for completion of enrollment when a Medicaid member transitions

to CHIP after being determined ineligible for Medicaid, including paying any applicable enrollment fees. Effective January 1, 2014, the modified adjusted gross income (MAGI) methodologies established a 12-month certification period for Medicaid. The first six months are designated as continuous eligibility and the second six-month period is non-continuous eligibility. Children may not be denied eligibility for excess income during the continuous period. However, during the non-continuous period, children may be determined ineligible for Medicaid but eligible for CHIP. When a child on Medicaid moves to CHIP during the non-continuous eligibility period, there may be a gap in the child's medical coverage, even if the individual meets all HHSC deadlines. The proposed rule change will allow children in these circumstances to be enrolled in CHIP prior to paying any applicable enrollment fees, eliminating gaps in coverage.

In addition to these changes, HHSC proposes to amend this rule to clarify that an applicant must pay an enrollment fee, if one is due, to complete CHIP enrollment. Current Medicaid processes require CHIP applicants to pay applicable enrollment fees prior to enrollment, so the addition of this requirement to the rule is only for clarification and consistency. HHSC proposes changes to ensure consistency of terminology throughout the section.

SECTION-BY-SECTION SUMMARY

Proposed §370.303(a) clarifies that CHIP enrollment is not complete until an enrollment fee is paid, if one is due, and makes other nonsubstantive changes.

Proposed §370.303(b) describes the requirements for completing CHIP enrollment when a child transitions from Medicaid to CHIP after being determined ineligible for Medicaid.

Proposed §370.303(c) clarifies that an applicant or member is not enrolled or is disenrolled if applicable enrollment fees are not paid by the due date

Proposed §370.303(e) makes nonsubstantive changes to terminology.

Proposed §370.303(f) makes nonsubstantive changes to terminology.

Proposed §370.303(g) adds language requiring the MCO assignment algorithm to take into account a child's managed care history in either Medicaid or CHIP, and makes other nonsubstantive changes.

FISCAL NOTE

Greta Rymal, Deputy Executive Commissioner for Financial Services, has determined that for each year of the first five years the amended rule is in effect, costs and revenues of state government and local governments will not be affected.

SMALL BUSINESS AND MICRO-BUSINESS IMPACT ANALYSIS

HHSC has determined that there will be no adverse effect on small businesses or micro-businesses as a result of enforcing or administering the amended rule because no Texas CHIP MCOs qualify as small businesses or micro-businesses.

PUBLIC BENEFIT AND COSTS

Gary Jessee, State Medicaid Director, has determined that for each year of the first five years the rule is in effect, the public will benefit from the adoption of the rule. The anticipated public benefit will be improved continuity of care by taking into account previous Medicaid or CHIP MCO choice when assigning an MCO to a child enrolling in CHIP. Another anticipated public benefit is reduced gaps in coverage when a member transitions from Medicaid to CHIP.

Ms. Rymal has also determined that there are no probable economic costs to persons who are required to comply with the amended rule. The amended rule will not affect a local economy nor will it have a negative impact on local employment.

REGULATORY ANALYSIS

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

TAKINGS IMPACT ASSESSMENT

HHSC has determined that this proposal does not restrict or limit an owner's right to his or her property that would otherwise exist in the absence of government action and, therefore, does not constitute a taking under §2007.043 of the Government Code.

PUBLIC COMMENT

Written comments on the proposal may be submitted to Daniela De Luna Olivares, Program Advisor, at 4900 N. Lamar Blvd., MC H-320, Austin, Texas 78751; by fax to (512) 730-7452; or by e-mail to *daniela.deluna@hhsc.state.tx.us* within 30 days of publication of this proposal in the *Texas Register.*

STATUTORY AUTHORITY

The amendment is proposed under the authority granted to HHSC by Government Code §531.033, which authorizes the Executive Commissioner of HHSC to adopt rules necessary to implement HHSC's duties under Chapter 531 of the Government Code, and Texas Health and Safety Code §62.051(d), which directs HHSC to adopt rules a necessary to implement the Children's Health Insurance Program.

The amendment affects Texas Health and Safety Code, Chapter 62, and Texas Government Code, Chapter 531. No other statutes, articles, or codes are affected by the amended rule.

§370.303. Completion of Enrollment.

(a) To complete CHIP enrollment, an applicant must:

(1) select and indicate on the enrollment form[,] a health care MCO [~~managed care organization (MCO)~~] and a dental MCO for all eligible children;

(2) select a PCP [~~primary care provider (PCP)~~] and a dental home, and place the names on the enrollment form;

(3) indicate if an eligible child has special health care needs based on criteria in the member guide; [~~and~~]

(4) sign and return the enrollment form; and[.]

(5) pay any applicable enrollment fee on or before the due date.

(b) If a child enrolled in Medicaid transitions to CHIP after being determined ineligible for Medicaid before the end of the child's Medicaid certification period, the applicant must do the following to complete CHIP enrollment:

(1) select and indicate on the enrollment form a health care MCO and dental MCO;

(2) select a PCP and dental home, and place the names on the enrollment form; and

(3) pay any applicable enrollment fee on or before the due date.

(c) If an applicant or member does not pay an applicable enrollment fee as described in subsections (a) and (b) of this section, the applicant or member is not enrolled in CHIP or is disenrolled from CHIP.

(d) [~~(b)~~] An applicant may select a PCP, dental home, health care MCO, and dental MCO by mail, telephone, or facsimile. Unless the application [~~applicant~~] is for a perinate receiving expedited enrollment in accordance with §370.401 of this chapter (relating to Perinates), the applicant [~~he or she~~] will have 30 calendar days from the date the enrollment packet is mailed to choose a health care MCO, dental MCO, PCP, and dental home. If the applicant does not choose a health care MCO, dental MCO, PCP, or dental home within the time period established by HHSC, HHSC or its designee will assign one using the default assignment methodologies described in this section.

(e) [~~(c)~~] PCP assignment. If an applicant has not selected a PCP, the health care MCO will assign one using an algorithm that considers:

(1) the beneficiary's [~~applicant's~~] established history with a PCP, as demonstrated by [~~the health care MCO's~~] encounter history with the provider in the preceding year, if available;

(2) the geographic proximity of the beneficiary's [~~applicant's~~] home address to the PCP;

(3) whether the provider serves as a PCP to other members of the beneficiary's [~~applicant's~~] household;

(4) limitations on default assignment, such as PCP restrictions on age, gender, and capacity; and

(5) other criteria approved by HHSC.

(f) [~~(d)~~] Dental home assignment. If an applicant has not selected a dental home, the dental MCO will assign one using an algorithm that considers:

(1) the beneficiary's [~~applicant's~~] established history with a dental home, as demonstrated by [~~the dental MCO's~~] encounter history with the provider in the preceding year, if available;

(2) the geographic proximity of the beneficiary's [~~applicant's~~] home address to the dental home;

(3) whether the provider serves as the dental home to other members of the beneficiary's [~~applicant's~~] household;

(4) limitations on default assignment, such as dental home restrictions on age and capacity; and

(5) other criteria approved by HHSC.

(g) [~~(e)~~] MCO assignment. If an applicant [~~a beneficiary~~] has not selected a health care MCO or dental MCO, HHSC or its administrative services contractor will assign one using an algorithm that considers the beneficiary's history, including [~~with a~~] PCP or dental home when possible. If this is not possible, HHSC or its administrative services contractor will equitably distribute beneficiaries among qualified MCOs, using an algorithm that considers one or more of the following factors:

(1) whether the member was previously enrolled in the MCO in Medicaid or CHIP;

(2) [~~(1)~~] whether other members of the beneficiary's household are enrolled in the MCO in Medicaid or CHIP;

(3) [~~(2)~~] MCO performance;

(4) [~~(3)~~] the greatest variance between the percentage of elective and default enrollments (with the percentage of default enrollments subtracted from the percentage of elective enrollments);

(5) [~~(4)~~] capitation rates;

(6) [~~(5)~~] market share; and

(7) [~~(6)~~] other criteria determined by HHSC.

(h) [~~(f)~~] Modified default enrollment process. HHSC has the option to implement a modified default enrollment process for MCOs when contracting with a new MCO or implementing managed care in a new service area, or when it has placed an MCO on full or partial enrollment suspension.

(i) [~~(g)~~] Request to change dental home or PCP. There is no limit on the number of times a member can request to change his or her dental home or PCP. A member can request a change in writing or by calling the MCO's toll-free member hotline.

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 April 29, 2016.

TRD-201602038
Karen Ray
Chief Counsel
Texas Health and Human Services Commission
Earliest possible date of adoption: June 12, 2016
For further information, please call: (512) 424-6900

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TITLE 10. COMMUNITY DEVELOPMENT

PART 1. TEXAS DEPARTMENT OF HOUSING AND COMMUNITY AFFAIRS

CHAPTER 5. COMMUNITY AFFAIRS PROGRAMS

SUBCHAPTER A. GENERAL PROVISIONS

10 TAC §5.2

The Texas Department of Housing and Community Affairs (the "Department") proposes amendments to 10 TAC Chapter 5, §5.2, Definitions.

The purpose of the amendment to 10 TAC §5.2 is to state that: 1) households assisted through the Low Income Home Energy Assistance Program are categorically income eligible if they are recipients of Supplemental Security Income ("SSI") or a means tested veterans program; 2) households assisted through the Homeless Housing and Services Program ("HHSP") are categorically eligible for HHSP rapid re-housing or homelessness prevention if they are recipients of Supplemental Security Income ("SSI") or a means tested veterans program; 3) that while households must be below 30% of the Emergency Solutions Grants

("ESG") Income Limits at the time of program qualification, the person may be up to, but not exceed, 50% of the ESG limits at recertification of income twelve months after initial intake; and 4) that Income Limits will be defined by the U.S. Department of Housing and Urban Development ("HUD") ESG Program and not HUD's Section 8 Program.

FISCAL NOTE. Timothy K. Irvine, Executive Director, has determined that, for each year of the first five years the amendments are in effect, enforcing or administering the amendments does not have any foreseeable implications related to costs or revenues of the state or local governments.

PUBLIC BENEFIT/COST NOTE. Mr. Irvine also has determined that, for each year of the first five years the amendments are in effect, the public benefit anticipated as a result of the amendments will be clarity of program requirements and the ability to continue to assist low income clients that may otherwise have lost access to services. There will not be any economic cost to any individuals required to comply with the amendments.

ADVERSE IMPACT ON SMALL OR MICRO-BUSINESSES. The Department has determined that there will be no economic effect on small or micro-businesses.

REQUEST FOR PUBLIC COMMENT. The public comment period will be held May 16, 2016, to June 15, 2016, to receive input on the amendments. Written comments may be submitted to the Texas Department of Housing and Community Affairs, Attention: Annette Cornier, Rule Comments, P.O. Box 13941, Austin, Texas 78711-3941, by email to the following address: cadrulecomments@tdhca.state.tx.us, or by fax to (512) 475-3935. ALL COMMENTS MUST BE RECEIVED BY 5:00 P.M. June 15, 2016.

STATUTORY AUTHORITY. The amendments are proposed pursuant to Texas Government Code §2306.053, which authorizes the Department to adopt rules, and Chapter 2306, Subchapter E, which authorizes the Department to administer its Community Affairs programs.

The proposed amendments affect no other code, article, or statute.

§5.2. Definitions.

(a) To ensure a clear understanding of the terminology used in the context of the programs of the Community Affairs Division, a list of terms and definitions has been compiled as a reference.

(b) The words and terms in this chapter shall have the meanings described in this subsection unless the context clearly indicates otherwise.

(1) Affiliate--If, directly or indirectly, either one controls or has the power to control the other or a third person controls or has the power to control both. The ways the Department may determine control include, but are not limited to:

(A) Interlocking management or ownership;

(B) Identity of interests among family members;

(C) Shared facilities and equipment;

(D) Common use of employees; or

(E) A business entity which has been organized following the exclusion of a person which has the same or similar management, ownership, or principal employees as the excluded person.

(2) Award Date--Date on which the Department's Board commits funds to an awardee.

(3) Awarded Funds--The amount of funds committed by the Department's board to a Subrecipient or service area.

(4) Child--Household dependent not exceeding eighteen (18) years of age.

(5) Code of Federal Regulations (CFR)--The codification of the general and permanent rules and regulations of the federal government as adopted and published in the Federal Register.

(6) Collaborative Application--An application from two or more organizations to provide services to the target population.

(7) Community Action Agencies (CAAs)--Local Private Nonprofit Organizations and Public Organizations that carry out the Community Action Program, which was established by the 1964 Economic Opportunity Act to fight poverty by empowering the poor in the United States.

(8) Community Affairs Division (CAD)--The Division at the Department that administers CEAP, CSBG, ESG, HHSP, Section 8 Housing Choice Voucher Program, and WAP.

(9) Community Services Block Grant (CSBG)--An HHS-funded program which provides funding for CAAs and other Eligible Entities that seek to address poverty at the community level.

(10) Comprehensive Energy Assistance Program (CEAP)--A LIHEAP-funded program to assist low-income Households, particularly those with the lowest incomes, that pay a high proportion of Household income for home energy, primarily in meeting their immediate home energy needs.

(11) Contract--The executed written Agreement between the Department and a Subrecipient performing an Activity related to a CAD program that describes performance requirements and responsibilities assigned by the document; for which the first day of the contract period is the point at which programs funds may be considered by a Subrecipient for expenditure unless otherwise directed in writing by the Department.

(12) Contracted Funds--The amount of funds obligated by the Department to a Subrecipient as reflected in a Contract.

(13) Declaration of Income Statement (DIS)--A Department-approved form for limited use and only when an applicant cannot obtain income documentation requiring the Subrecipient to document income and the circumstances preventing the client from obtaining documentation. The DIS is not complete unless notarized in accordance with §406.014 of the Texas Government Code.

(14) Deobligation--The partial or full removal of Contracted Funds from a Subrecipient. Partial Deobligation is the removal of some portion of the full Contracted Funds from a Subrecipient, leaving some remaining balance of Contracted Funds to be administered by the Subrecipient. Full Deobligation is the removal of the full amount of Contracted Funds from a Subrecipient. This definition does not apply to CSBG.

(15) Department of Energy (DOE)--Federal department that provides funding for the weatherization assistance program.

(16) Department of Health and Human Services (HHS)--Federal department that provides funding for CSBG and LIHEAP energy assistance and weatherization.

(17) Department of Housing and Urban Development (HUD)--Federal department that provides funding for ESG.

(18) Dwelling Unit--A house, including a stationary mobile home, an apartment, a group of rooms, or a single room occupied

as separate living quarters. This definition does not apply to the ESG or HHSP.

(19) Elderly Person--

(A) for CSBG, a person who is fifty-five (55) years of age or older;

(B) for CEAP, WAP and HHSP, a person who is sixty (60) years of age or older; and

(C) for ESG, a person who is sixty-two (62) years of age or older.

(20) Emergency Solutions Grants (ESG)--A HUD-funded program which provides funds for services necessary to help persons that are at risk of homelessness or homeless quickly regain stability in permanent housing.

(21) Equipment--Tangible non-expendable personal property including exempt property, charged directly to the award, having a useful life of more than one year, and an acquisition cost of $5,000 or more per unit.

(22) Expenditure--Funds having been drawn from the Department through the Contract System. For purposes of this rule, expenditure will include draws requested through the system.

(23) Families with Young Children--A family that includes a Child age five (5) or younger.

(24) High Energy Burden--Households with energy burden which exceeds 11% of annual gross income. Determined by dividing a Household's annual home energy costs by the Household's annual gross income.

(25) High Energy Consumption--Household energy expenditures exceeding the median of low-income home energy expenditures, by way of example, at the time of this rulemaking, that amount is $1,000, but is subject to change.

(26) Homeless or Homeless Individual--An individual as defined by 42 U.S.C. §§11371 - 11378 and 24 CFR §576.2.

(27) Homeless Housing and Services Program (HHSP)--A state funded program established under §2306.2585 of the Texas Government Code with the purpose of providing funds to local programs to prevent and eliminate homelessness in municipalities with a population of 285,500 or more.

(28) Household--Any individual or group of individuals who are living together as one economic unit. For DOE WAP this includes all persons living in the Dwelling Unit. For energy programs, these persons customarily purchase residential energy in common or make undesignated payments for energy.

(29) Inverse Ratio of Population Density Factor--The number of square miles of a county divided by the number of poverty Households of that county.

(30) Local Unit of Government--City, county, council of governments, and housing authorities.

(31) Low Income--Income in relation to family size and that governs income eligibility for a program:

(A) For DOE WAP, at or below 200% of the DOE Income guidelines;

(B) For CEAP and LIHEAP WAP, at or below 150% of the HHS Poverty Income guidelines or categorically eligible because a Household member receives SSI or benefits from a means tested veterans program;

(C) For CSBG, at or below 125% of the HHS Poverty Income guidelines;

(D) For ESG, below 30% of the Median Family Income (MFI) as defined by HUD's 30% Income Limits for All Areas for persons receiving prevention assistance or as amended by HUD; and

(E) For HHSP, there is no procedural requirement to verify income for persons living on the street (or other places not fit for human habitation), [~~or~~] living in emergency shelter, or receiving rapid re-housing. For all other persons, below 30% of the MFI as defined by HUD for the ESG Program, although persons may be up to, but not exceed, 50% of ESG income limits, at recertification for rapid re-housing or homelessness prevention. Households in which any member is a recipient of SSI or a means tested veterans program are categorically income eligible. [~~For all other persons, at or below 30% of the Extremely Low Income Limits as defined by HUD for the Section 8 program.~~]

(32) Low Income Home Energy Assistance Program (LIHEAP)--An HHS-funded program which serves low income Households who seek assistance for their home energy bills and/or weatherization services.

(33) Migrant Farm Worker--An individual or family that is employed in agricultural labor or related industry and is required to be absent overnight from their permanent place of residence.

(34) Modified Cost Reimbursement--A contract sanction whereby reimbursement of costs incurred by the Subrecipient is made only after the Department has reviewed and approved backup documentation provided by the Subrecipient to support such costs.

(35) Office of Management and Budget (OMB)--Office within the Executive Office of the President of the United States that oversees the performance of federal agencies and administers the federal budget.

(36) OMB Circulars--Instructions and information issued by OMB to Federal agencies that set forth principles and standards for determining costs for federal awards and establish consistency in the management of grants for federal funds. Uniform cost principles and administrative requirements for local governments and for nonprofit organizations, as well as audit standards for governmental organizations and other organizations expending federal funds are set forth in 2 CFR Part 200, unless different provisions are required by statute or approved by OMB.

(37) Outreach--The method that attempts to identify clients who are in need of services, alerts these clients to service provisions and benefits, and helps them use the services that are available. Outreach is utilized to locate, contact and engage potential clients.

(38) Performance Statement--A document which identifies the services to be provided by a Subrecipient.

(39) Persons with Disabilities--Any individual who is:

(A) a handicapped individual as defined in §7(9) of the Rehabilitation Act of 1973;

(B) under a disability as defined in §1614(a)(3)(A) or §223(d)(1) of the Social Security Act or in §102(7) of the Developmental Disabilities Services and Facilities Construction Act; or

(C) receiving benefits under 38 U.S.C. Chapter 11 or 15.

(40) Population Density--The number of persons residing within a given geographic area of the state.

(41) Poverty Income Guidelines--The official poverty income guidelines as issued by HHS annually.

(42) Private Nonprofit Organization--An organization described in §501(c) of the Internal Revenue Code (the "Code") of 1986 and which is exempt from taxation under subtitle A of the Code, has an accounting system and a voluntary board, and practices nondiscrimination in the provision of assistance. For ESG, this does not include a governmental organization such as a public housing authority or a housing finance agency.

(43) Production Schedule--A Production schedule signed by the applicable Executive Director/Chief Executive Officer of the Subrecipient, and approved by the Department meeting the requirements of this definition. The Production Schedule shall include the estimated monthly and quarterly performance targets and the estimated monthly and quarterly expenditure targets for all Contracted Funds reflecting achievement of the criteria identified in the specific program sections of this chapter by the end of the contract period.

(44) Public Organization--A unit of government, as established by the Legislature of the State of Texas. Includes, but may not be limited to, cities, counties, and councils of governments.

(45) Referral--The process of providing information to a client Household about an agency, program, or professional person that can provide the service(s) needed by the client.

(46) Reobligation--The reallocation of deobligated funds to other Subrecipients administering those same program's funds.

(47) Seasonal Farm Worker--An individual or family that is employed in seasonal or temporary agricultural labor or related industry and is not required to be absent overnight from their permanent place of residence. In addition, at least 20% of the Household annualized income must be derived from the agricultural labor or related industry.

(48) Single Audit--As defined in the Single Audit Act of 1984 (as amended) or UGMS, a series of audits that cover departments, agencies, and other organizational units which expended or otherwise administered federal or state awards during such fiscal year provided that each such audit shall encompass the financial statements and schedule of expenditures of federal or state awards for each such department, agency, and organizational unit.

(49) State--The State of Texas or the Department, as indicated by context.

(50) Subcontractor--A person or an organization with whom the Subrecipient contracts with to provide services.

(51) Subgrant--An award of financial assistance in the form of money, or property in lieu of money, made under a grant by a Subrecipient to an eligible Subgrantee. The term includes financial assistance when provided by contractual legal agreement, but does not include procurement purchases.

(52) Subgrantee--The legal entity to which a subgrant is awarded and which is accountable to the Subrecipient for the use of the funds provided.

(53) Subrecipient--Generally, an organization with whom the Department contracts and provides CSBG, CEAP, ESG, HHSP, DOE WAP, or LIHEAP funds. (Refer to Subchapters B, D - G, J, and K of this chapter for program specific definitions.)

(54) Supplies--All tangible personal property excluding equipment, intangible property, and debt instruments, and inventions of a contractor conceived or first actually reduced to practice in the performance of work under a funding agreement (subject inventions), as defined in 37 CFR Part 401, "Rights to Inventions Made by Nonprofit Organizations and Small Business Firms Under Government Grants, Contracts, and Cooperative Agreements." A computing device is a supply if the acquisition cost is less than the lesser of the capitalization level established by the Subrecipient for financial statement purposes or $5,000, regardless of the length of its useful life.

(55) System for Award Management (SAM)--Combined federal database that includes the Excluded Parties List System (EPLS).

(56) Supplemental Security Income ("SSI")--A means tested program run by the Social Security Administration

(57) [~~(56)~~] Systematic Alien Verification for Entitlements (SAVE)--Automated intergovernmental database that allows authorized users to verify the immigration status of applicants.

(58) [~~(57)~~] Texas Administrative Code (TAC)--A compilation of all state agency rules in Texas.

(59) [~~(58)~~] Treatment as a State or Local Agency--For purposes of 5 U.S.C. Chapter 15, any entity that assumes responsibility for planning, developing, and coordinating activities under the CSBG Act and receives assistance under CSBG Act shall be deemed to be a state or local agency.

(60) [~~(59)~~] Uniform Grant Management Standards (UGMS)--Established to promote the efficient use of public funds by providing awarding agencies and grantees a standardized set of financial management procedures and definitions, by requiring consistency among grantor agencies in their dealings with grantees, and by ensuring accountability for the expenditure of public funds. State agencies are required to adhere to these standards when administering grants and other financial assistance agreements with cities, counties and other political subdivisions of the state. In addition, Chapter 2105, Texas Government Code, subjects subrecipients of federal block grants (as defined therein) to the Uniform Grant and Contract Management Standards.

(61) [~~(60)~~] Unit of General Local Government--A unit of government which has, among other responsibilities, the authority to assess and collect local taxes and to provide general governmental services.

(62) [~~(61)~~] United States Code (U.S.C.)--A consolidation and codification by subject matter of the general and permanent laws of the United States.

(63) [~~(62)~~] Vendor Agreement--An agreement between the Subrecipient and energy vendors that contains assurance as to fair billing practices, delivery procedures, and pricing for business transactions involving ESG and LIHEAP beneficiaries.

(64) [~~(63)~~] Weatherization Assistance Program (WAP)--DOE and LIHEAP funded program designed to reduce the energy cost burden of low income households through the installation of energy efficient weatherization materials and education in energy use.

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 May 2, 2016.

TRD-201602085
Timothy K. Irvine
Executive Director
Texas Department of Housing and Community Affairs
Earliest possible date of adoption: June 12, 2016
For further information, please call: (512) 475-3803

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10 TAC §5.19

The Texas Department of Housing and Community Affairs (the "Department") proposes amendments to 10 TAC Chapter 5, §5.19, Income Eligibility.

The amendment to Income Eligibility for HHS and DOE funded programs are to ensure the rules are consistent with newly released federal changes.

The amendment clarifies that income eligibility must be done at least every twelve months (unless a more frequent period is required by federal regulation), that income must be re-certified after a period of twelve months (this is a new requirement for HHSP), and that the method of calculation for HHSP income must match the Emergency Solutions Grants ("ESG") method.

FISCAL NOTE. Timothy K. Irvine, Executive Director, has determined that, for each year of the first five years the amendments are in effect, enforcing or administering the amendments does not have any foreseeable implications related to costs or revenues of the state or local governments.

PUBLIC BENEFIT/COST NOTE. Mr. Irvine also has determined that, for each year of the first five years the amendments are in effect, the public benefit anticipated as a result of the amendments will be clarity of program requirements and ease delivery of services when clients have a break in assistance. There will not be any economic cost to any individuals required to comply with the amendments.

ADVERSE IMPACT ON SMALL OR MICRO-BUSINESSES. The Department has determined that there will be no economic effect on small or micro-businesses.

REQUEST FOR PUBLIC COMMENT. The public comment period will be held May 16, 2016, to June 16, 2016, to receive input on the amendments. Written comments may be submitted to the Texas Department of Housing and Community Affairs, Attention: Annette Cornier, Rule Comments, P.O. Box 13941, Austin, Texas 78711-3941, by email to the following address: cadrulecomments@tdhca.state.tx.us, or by fax to (512) 475-3935. ALL COMMENTS MUST BE RECEIVED BY 5:00 P.M. June 16, 2016.

STATUTORY AUTHORITY. The amendments are proposed pursuant to Texas Government Code §2306.053, which authorizes the Department to adopt rules, and Chapter 2306, Subchapter E, which authorizes the Department to administer its Community Affairs programs.

The proposed amendments affect no other code, article, or statute.

§5.19. Income Eligibility.

(a) These changes are effective for HHSP funds received by Subrecipients on or after September 1, 2016.

(b) [~~(a)~~] For HHS and DOE funded programs, eligibility for program assistance is determined under the Poverty Income Guidelines and calculated as described herein. Income means cash receipts earned and/or received by the applicant before taxes during applicable tax year(s) but not the Excluded Income listed in paragraph (2) of this subsection. Gross income is to be used, not net income.

(1) If an income source is not excluded below, it must be included when determining income eligibility.

(2) Excluded Income:

(A) Capital gains;

(B) Any assets drawn down as withdrawals from a bank;

(C) Balance of funds in a checking or savings account;

(D) Any amounts in an "individual development account" as provided by the Assets for Independence Act, as amended in 2002 (Pub. L. 107-110, 42 U.S.C. 604(h)(4));

(E) The sale of property, a house, or a car;

(F) One-time payments from a welfare agency to a family or person who is in temporary financial difficulty;

(G) Tax refunds, Earned Income Tax Credit refunds;

(H) Jury duty compensation;

(I) Gifts, loans, and lump-sum inheritances;

(J) One-time insurance payments, or compensation for injury;

(K) Non-cash benefits, such as the employer-paid or union-paid portion of health insurance or other employee fringe benefits;

(L) Reimbursements (for mileage, gas, lodging, meals, etc.);

(M) Employee fringe benefits such as food [~~Food~~] or housing received in lieu of wages;

(N) The value of food and fuel produced and consumed on farms;

(O) The imputed value of rent from owner-occupied non-farm or farm housing;

(P) Federal non-cash benefit programs such as Medicare, Medicaid, SNAP, WIC, [~~and~~] school lunches, and housing assistance (Medicare deduction from Social Security Administration benefits should not be counted as income);

(Q) Combat [~~Housing assistance and combat~~] zone pay to the military;

(R) Veterans (VA) Disability Payments;

(S) College scholarships, Pell and other grant sources, assistantships, fellowships and work study, VA Education Benefits (GI Bill), Bureau of Indian Affairs student assistance programs (20 U.S.C. 1087uu);

(T) Child support payments (amount paid by payor may not be deducted from income);

(U) Income of Household members under eighteen (18) years of age;

(V) Stipends from senior companion programs, such as Retired Senior Volunteer Program and Foster Grandparents Program;

(W) AmeriCorps Program payments, allowances, earnings, and in-kind aid;

(X) Depreciation for farm or business assets;

(Y) Reverse mortgages;

(Z) Payments for care of Foster Children;

(AA) Payments or allowances made under the Low-Income Home Energy Assistance Program (42 U.S.C. 8624(f));

(BB) Any amount of crime victim compensation (under the Victims of Crime Act) received through crime victim assistance (or payment or reimbursement of the cost of such assistance) as determined under the Victims of Crime Act because of the commission of a crime against the applicant under the Victims of Crime Act (42 U.S.C. 10602(c));

(CC) Major disaster and emergency assistance received by individuals and families under the Robert T. Stafford Disaster Relief and Emergency Assistance Act (93, as amended) and comparable disaster assistance provided by States, local governments, and disaster assistance organizations (42 U.S.C. 5155(d));

(DD) Allowances, earnings, and payments to individuals participating in programs under the Workforce Investment Act of 1998 (29 U.S.C. 2931(a)(2));

(EE) Payments received from programs funded under Title V of the Older Americans Act of 1965 (42 U.S.C. 3056(g));

(FF) The value of any child care provided or arranged (or any amount received as payment for such care or reimbursement for costs incurred for such care) under the Child Care and Development Block Grant Act of 1990 (42 U.S.C. 9858(q));

(GG) Certain payments received under the Alaska Native Claims Settlement Act (43 U.S.C. 1626(c));

(HH) Income derived from certain submarginal land of the United States that is held in trust for certain Indian tribes (25 U.S.C. 459(e));

(II) Income derived from the disposition of funds to the Grand River Band of Ottawa Indians (94, §6);

(JJ) The first $2,000 of per capita shares received from judgment funds awarded by the National Indian Gaming Commission or the U.S. Claims Court, the interests of individual Indians in trust or restricted lands, and the first $2000 per year of income received by individual Indians from funds derived from interests held in such trust or restricted lands (25 U.S.C. 1407-1408). This exclusion does not include proceeds of gaming operations regulated by the Commission;

(KK) Payments received on or after January 1, 1989, from the Agent Orange Settlement Fund (101) or any other fund established pursuant to the settlement in In Re Agent Orange Liability Litigation, M.D.L. No. 381 (E.D.N.Y.);

(LL) Payments received under the Maine Indian Claims Settlement Act of 1980 (96, 25 U.S.C. 1728);

(MM) Payments by the Indian Claims Commission to the Confederated Tribes and Bands of Yakima Indian Nation or the Apache Tribe of Mescalero Reservation (95);

(NN) Any allowance paid under the provisions of 38 U.S.C. 1833(c) to children of Vietnam veterans born with spina bifida (38 U.S.C. 1802-05), children of women Vietnam veterans born with certain birth defects (38 U.S.C. 1811-16), and children of certain Korean service veterans born with spina bifida (38 U.S.C. 1821);

(OO) Payments, funds, or distributions authorized, established, or directed by the Seneca Nation Settlement Act of 1990 (25 U.S.C. 1774f(b));

(PP) Payments from any deferred U.S. Department of Veterans Affairs disability benefits that are received in a lump sum amount or in prospective monthly amounts (42 U.S.C. §1437a(b)(4));

(QQ) A lump sum or a periodic payment received by an individual Indian pursuant to the Class Action Settlement Agreement in the case entitled Elouise Cobell et al. v. Ken Salazar et al., 816 F.Supp.2d 10 (Oct. 5, 2011 D.D.C.), for a period of one year from the time of receipt of that payment as provided in the Claims Resolution Act of 2010 (Pub. L. 111-291);

(RR) Per capita payments made from the proceeds of Indian Tribal Trust Cases as described in PIH Notice 2013-30 "Exclusion from Income of Payments under Recent Tribal Trust Settlements" (25 U.S.C. 117b(a)); and

(SS) Any other income required to be excluded by the federal or state funding program.

(c) [~~(b)~~] For HHS and DOE funded programs, the [~~The~~] requirements for determining whether an applicant Household is eligible for assistance require the Subrecipient to annualize the Household income based on verifiable documentation of income.

(1) The Subrecipient must calculate projected annual income by annualizing current income. Income that may not last for a full 12 months (e.g., unemployment compensation) should be calculated assuming current circumstances will last a full 12 months.

(2) Subrecipient must collect verifiable documentation of Household income received in the thirty (30) days prior to the date of application.

(3) Once all sources of income are known, Subrecipient must convert reported income to an annual figure. Convert periodic wages to annual income by multiplying:

(A) Hourly wages by the number of hours worked per year (2,080 hours for full-time employment with a 40-hour week and no overtime);

(B) Weekly wages by 52;

(C) Bi-weekly wages (paid every other week) by 26;

(D) Semi-monthly wages (paid twice each month) by 24; and

(E) Monthly wages by 12.

(4) To annualize other than full-time income, multiply the wages by the actual number of hours or weeks the person is expected to work.

(5) Except where a more frequent period is required by federal regulation, re-certification of income eligibility must occur at least every twelve months.

[~~(c) Except for ESG, to annualize other than full-time income, multiply the wages by the actual number of hours or weeks the person is expected to work.~~]

[~~(d) For HHSP, Subrecipients may select either the method described in (a) - (c) of this section or the must use method described in (c) of this section, but once selected the method must be used consistently throughout the contract period.~~]

(d) [~~(e)~~] For ESG and HHSP, Subrecipients must use the income determination method outlined in 24 CFR 5.609, must use the list of income included in HUD Handbook 4350, and must exclude from income those items listed in HUD's Updated List of Federally Mandated Exclusions from Income, as may be amended from time to time.

(e) If a federal or state requirement provides an updated definition of income or method for calculating income, the Department will provide written notice to Subrecipients about the implementation date for the new requirements.

(f) If proof of income is unobtainable, the applicant must complete and sign a Declaration of Income Statement (DIS). In order to use

the DIS form, each Subrecipient shall develop and implement a written policy and procedure on the use of the DIS form. In developing the policy and procedure, Subrecipients shall limit the use of the DIS form to cases where there are serious extenuating circumstances that justify the use of the form. Such circumstances might include, but are not limited to, crisis situations such as a [~~applicants that are affected by~~] natural disaster which prevents the applicant from obtaining income documentation, an applicant [~~applicants~~] that flees [~~flee~~] a home due to physical abuse, or an applicant [~~applicants~~] who is [~~are~~] unable to locate income documentation of a recently deceased Household member [~~spouse~~]. To ensure limited use, the Department will review the written policy and its use, as well as client-provided descriptions of the circumstances requiring use of the form, during on-site monitoring visits.

(g) The DIS must be notarized. Attainment of notary public commission is an allowable activity as an administrative cost.

[~~(h) If a federal or state requirement provides an updated definition of income or method for calculating income, the Department will provide written notice to Subrecipients about the implementation date for the new requirements.~~]

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

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Timothy K. Irvine
Executive Director
Texas Department of Housing and Community Affairs
Earliest possible date of adoption: June 12, 2016
For further information, please call: (512) 475-3803

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SUBCHAPTER L. COMPLIANCE MONITORING

10 TAC §5.2101

The Texas Department of Housing and Community Affairs (the "Department") proposes amendments to 10 TAC Chapter 5, §5.2101, Purpose and Overview.

The purpose of the amendment to 10 TAC §5.2101 is to remove the reference to the Compliance Committee. The rule will alternatively indicate that when an Administrator, Subrecipient, Developer, etc. has concerns with a compliance finding, they may pursue an appeal with the Executive Director consistent with the process used in 10 TAC Chapter 1 for most other areas of the Department.

FISCAL NOTE. Timothy K. Irvine, Executive Director, has determined that, for each year of the first five years the amendments are in effect, enforcing or administering the amendments does not have any foreseeable implications related to costs or revenues of the state or local governments.

PUBLIC BENEFIT/COST NOTE. Mr. Irvine also has determined that, for each year of the first five years the amendments are in effect, the public benefit anticipated as a result of the amendments will be more streamlined handling of Administrator concerns. There will not be any economic cost to any individuals required to comply with the amendments.

ADVERSE IMPACT ON SMALL OR MICRO-BUSINESSES. The Department has determined that there will be no economic effect on small or micro-businesses.

REQUEST FOR PUBLIC COMMENT. The public comment period will be held May 16, 2016, to June 15, 2016, to receive input on the amendments. Written comments may be submitted to the Texas Department of Housing and Community Affairs, Attention: Annette Cornier, Rule Comments, P.O. Box 13941, Austin, Texas 78711-3941, by email to the following address: cadrulecomments@tdhca.state.tx.us, or by fax to (512) 475-3935. ALL COMMENTS MUST BE RECEIVED BY 5:00 P.M. June 15, 2016.

STATUTORY AUTHORITY. The amendments are proposed pursuant to Texas Government Code §2306.053, which authorizes the Department to adopt rules.

The proposed amendments affect no other code, article, or statute.

§5.2101. Purpose and Overview.

(a) This subchapter provides the procedures that will be followed for monitoring for compliance with the community affairs programs administered by the Texas Department of Housing and Community Affairs (the "Department"). As of the date of the adoption of this subchapter, those programs include the Community Services Block Grant program (CSBG), the Low Income Home Energy Assistance Program (LIHEAP) (including the two (2) programs utilizing this funding source: the LIHEAP Weatherization Assistance Program (LIHEAP WAP) and the Comprehensive Energy Assistance Program (CEAP)), the Department of Energy Weatherization Assistance Program (DOE WAP), the Emergency Solutions Grant (ESG), and the Homeless Housing and Services Program (HHSP).

(b) Any entity administering any or all of the programs enumerated in subsection (a) of this section is a Subrecipient. A Subrecipient may also administer other programs, including programs administered by other state or federal agencies and privately funded programs. If the Subrecipient has contracts for other programs through the Department, including but not limited to the HOME Partnerships Program, the Neighborhood Stabilization Program, or the Housing Trust Fund, the Department may, but is not required to and does not commit to, coordinate monitoring of those programs with monitoring of community affairs programs under this subchapter.

(c) Frequency of reviews, information collection. In general, Subrecipients will be scheduled for monitoring based on federal monitoring requirements and/or a risk assessment. Factors to be included in the risk assessment include but are not limited to: the number of contracts administered by the Subrecipient, the amount of funds awarded and expended, the length of time since the last monitoring, findings identified during previous monitoring, issues identified through the submission or lack of submission of a single audit, complaints, and reports of fraud, waste and/or abuse. The risk assessment will also be used to determine which Subrecipients will have an onsite review and which may have a desk review.

(d) The Department will provide a Subrecipient with written notice of any upcoming onsite or desk monitoring review, and such notice will be given to the Subrecipient by email to the Subrecipient's chief executive officer at the email address most recently provided to the Department by the Subrecipient. In general, a thirty (30) day notice will be provided. However, if a credible complaint of fraud or other egregious noncompliance is received the Department reserves the right to conduct unannounced monitoring visits. It is the responsibility of the Subrecipient to provide to the Department the current contact information for the organization and the Board in accordance with §5.21 of this

chapter (relating to Subrecipient Contact Information) and §1.22 of this title (relating to Providing Contact Information to the Department).

(e) Upon request, Subrecipients must make available to the Department all books and records that the Department determines are reasonably relevant to the scope of the Department's review. Typically, these records may include:

(1) Minutes of the governing board and any committees thereof, together with all supporting materials;

(2) Copies of all internal operating procedures or other documents governing the Subrecipient's operations;

(3) Procurement documentation;

(4) The Subrecipient's Board approved operating budget;

(5) The Subrecipient's strategic plan or comparable document if applicable;

(6) Correspondence to or from any independent auditor;

(7) Contracts with any third party Subrecipients of goods or services and files documenting compliance with any applicable procurement and property disposition requirements;

(8) All general ledgers and other records of financial operations (including copies of checks and other supporting documents);

(9) Applicable client files with all required documentation;

(10) Applicable human resources records;

(11) Monitoring reports from other funding entities;

(12) Client files regarding complaints, appeals and termination of services; and

(13) Documentation to substantiate compliance with any other applicable state or federal requirements including, but not limited to, the Davis-Bacon Act, United States Department of Housing and Urban Development (HUD) requirements for environmental clearance, Lead Based Paint, the Personal Responsibility and Work Opportunity Act, HUD limited English proficiency requirements, requirements imposed by Section 3 of the Housing and Urban Development Act of 1968.

(f) Post Monitoring Procedures. After the monitoring review is completed, the Subrecipient will be briefed on the initial findings and/or observations through an exit briefing, which may be in person or through a conference call. The Subrecipient will be notified via conference call or email of any finding(s) and/or observation(s) not discussed during the exit briefing. In general, within thirty (30) days of the last day of the monitoring visit, a written monitoring report will be prepared for the Subrecipient describing the monitoring assessment and any corrective actions, if applicable. The monitoring report will be emailed and sent through the U.S. Postal Service to the Board Chair and the Subrecipient's Executive Director. Issues of concern over which there is uncertainty or ambiguity may be discussed by the Department with the staff of cognizant agencies overseeing federal funding.

(g) Subrecipient Response. If there are any findings of noncompliance requiring corrective action, the Subrecipient will be provided thirty (30) days, from the date of the email, to respond which may be extended for good cause. In order to receive an extension, the Subrecipient must submit a written request to the Chief of Compliance within the corrective action period, stating the basis for good cause that the Subrecipient believes justifies the extension. The Department will approve or deny the extension request within three (3) business days.

(h) Monitoring Close Out. Within forty-five (45) days after the end of the corrective action period, a close out letter will be issued to the Subrecipient. If the Subrecipient supplies evidence establishing continual compliance that negates the finding of noncompliance, the issue of noncompliance will be rescinded. If the Subrecipient's response satisfies all findings and concerns noted in the monitoring letter, the issue of noncompliance will be noted as resolved. In some circumstances, the Subrecipient may be unable to secure documentation to resolve a finding. In those instances, if there are mitigating circumstances, the Department may note the finding is not resolved but close the issue with no further action required. If the Subrecipient's response does not correct all findings noted, the close out letter will identify the documentation that must be submitted to correct the issue.

(i) Options for Review. If, following the submission of corrective action documentation, Compliance staff continues to find the Subrecipient in noncompliance, and the Subrecipient disagrees, the Subrecipient may request or initiate review of the matter using the following options, where applicable:

(1) If the issue is related to a program requirement or prohibition Subrecipients may contact the applicable federal program officer for guidance or request that the Department contact applicable federal program officer for guidance without identifying the Subrecipient.

(2) If the issue is related to application of a provision of the contract or a requirement of the Texas Administrative Code, or the application of a provision of an OMB Circular, the Subrecipient may submit an appeal to the Executive Director consistent with §1.7, Staff Appeals Process, in Chapter 1 of this Title [~~request review by the Department's Compliance Committee, as set out in subsection (j) of this section~~].

(3) Subrecipients may request Alternative Dispute Resolution (ADR). A Subrecipient may send a proposal to the Department's Dispute Resolution Coordinator to initiate ADR pursuant to §1.17 of this title.

[~~(j) Compliance Committee.~~]

[~~(1) The Compliance Committee is a committee of three (3) to five (5) persons appointed by the Executive Director. The Compliance Committee is established to provide independent review of certain compliance issues as provided by this section. Staff from the Legal and the Compliance Division will not be appointed to the committee but will be available to provide guidance to Department staff.~~]

[~~(2) Informal discussion with Compliance Monitoring staff. If the Subrecipient has questions or disagreements regarding any compliance issues, they should first try to resolve them by discussing them with the Compliance Monitoring staff, including, as needed, the Chief of Compliance.~~]

[~~(3) Informal discussion with the Compliance Committee. A Subrecipient may request an informal meeting with the Compliance Committee if the informal discussion with the Compliance Monitoring staff did not resolve the issue.~~]

[~~(4) Compliance Committee Process and Timeline:~~]

[~~(A) At any time, the Subrecipient may call or request an informal conference with the Compliance Monitoring staff and/or the Chief of Compliance.~~]

[~~(B) If a call or an informal conference with the Compliance Monitoring staff does not result in a resolution of the issue, the Subrecipient may, within thirty (30) days of the call or informal conference with Compliance Monitoring staff, request a meeting with the Compliance Committee.~~]

[~~(C) If timely requested in accordance with this section, the Compliance Committee will hold an informal conference with the~~

~~Subrecipient. A Subrecipient should not offer evidence, documentation, or information to the Committee that was not presented to Compliance Monitoring staff during the informal staff conference. If additional information is offered, the Committee may disallow the information or refer the matter back to Compliance Monitoring staff to allow review of the additional information prior to any consideration by the Committee.]~~

~~[(D) If a meeting with the Compliance Committee does not result in a resolution, matters related to a compliance requirement, other than those required by federal regulation, may be appealed directly to the Board.]~~

(j) [~~(k)~~] If Subrecipients do not respond to a monitoring letter or fail to provide acceptable evidence of compliance within six (6) months of notification of an issue, the matter will be reported to the Department's Enforcement Committee for consideration of administrative penalties, review for a third party review, full or partial cost reimbursement, or contract suspension.

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

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CHAPTER 20. SINGLE FAMILY PROGRAMS UMBRELLA RULE

10 TAC §20.15

The Texas Department of Housing and Community Affairs (the "Department") proposes amendments to 10 TAC Chapter 20, §20.15, Compliance and Monitoring.

The purpose of the amendment to 10 TAC §20.15 is to remove the reference to the Compliance Committee. The rule will alternatively indicate that when an Administrator, Subrecipient, Developer, etc. has concerns with a compliance finding, they may pursue an appeal with the Executive Director consistent with the process used in 10 TAC Chapter 1 for most other areas of the Department.

FISCAL NOTE. Timothy K. Irvine, Executive Director, has determined that, for each year of the first five years the amendments are in effect, enforcing or administering the amendments does not have any foreseeable implications related to costs or revenues of the state or local governments.

PUBLIC BENEFIT/COST NOTE. Mr. Irvine also has determined that, for each year of the first five years the amendments are in effect, the public benefit anticipated as a result of the amendments will be more streamlined handling of Administrator concerns. There will not be any economic cost to any individuals required to comply with the amendments.

ADVERSE IMPACT ON SMALL OR MICRO-BUSINESSES. The Department has determined that there will be no economic effect on small or micro-businesses.

REQUEST FOR PUBLIC COMMENT. The public comment period will be held May 16, 2016, to June 15, 2016, to receive input on the amendments. Written comments may be submitted to the Texas Department of Housing and Community Affairs, Attention: Annette Cornier, Rule Comments, P.O. Box 13941, Austin, Texas 78711-3941, by email to the following address: cadrulecomments@tdhca.state.tx.us, or by fax to (512) 475-3935. ALL COMMENTS MUST BE RECEIVED BY 5:00 P.M. June 15, 2016.

STATUTORY AUTHORITY. The amendments are proposed pursuant to Texas Government Code §2306.053, which authorizes the Department to adopt rules.

The proposed amendments affect no other code, article, or statute.

§20.15. Compliance and Monitoring.

(a) The Department will perform monitoring of single family Program Contracts and Activities in order to ensure that applicable requirements of federal laws and regulations, and state laws and rules have been met, and to provide Administrators with clear communication regarding the condition and operation of their Contracts and Activities so they understand clearly, with a documented record, how they are performing in meeting their obligations.

(1) The physical condition of assisted properties and Administrator's documented compliance with contractual and program requirements may be subject to monitoring.

(2) The Department may contract with an independent third party to monitor an Activity for compliance with any conditions imposed by the Department in connection with the award of any Department funds, and appropriate state and federal laws.

(b) If an Administrator has Contracts for more than one single family Program, or other programs through the Department or the State, the Department may, at its discretion, coordinate monitoring of those programs with monitoring of single family Contracts under this chapter.

(c) In general, Administrators will be scheduled for monitoring based on federal or state monitoring requirements, or a risk assessment process including but not limited to: the number of Contracts administered by the Administrator, the amount of funds awarded and expended, the length of time since the last monitoring, findings identified during previous monitoring, issues identified through the submission or lack of submission of a single audit, complaints, and reports of fraud, waste and/or abuse. The risk assessment will also be used to determine which Administrators will have an onsite review and which may have a desk review.

(d) The Department will provide an Administrator with written notice of any upcoming onsite or desk monitoring review, and such notice will be given to the Administrator by email to the Administrator's chief executive officer at the email address most recently provided to the Department by the Administrator. In general, a thirty (30) day notice will be provided. However, if a credible complaint of fraud or other egregious noncompliance is received the Department reserves the right to conduct unannounced monitoring visits, or provide a shorter notice period. It is the responsibility of the Administrator to maintain current contact information with the Department for the organization, key staff members, and governing body.

(e) Upon request, Administrators must make available to the Department all books and records that the Department determines are reasonably relevant to the scope of the Department's review, along with access to assisted properties.

(f) Post Monitoring Procedures. After the review, a written monitoring report will be prepared for the Administrator describing the monitoring assessment and any corrective actions, if applicable. The monitoring report will be emailed to the Administrator. Issues of concern over which there is uncertainty or ambiguity may be discussed by the Department with the staff of cognizant agencies overseeing federal funding.

(g) Administrator Response. If there are any findings of noncompliance requiring corrective action, the Administrator will be provided a thirty (30) day corrective action period, which may be extended for good cause. In order to receive an extension, the Administrator must submit a written request to the Chief of Compliance within the corrective action period, stating the basis for good cause that the Administrator believes justifies the extension. In general, the Department will approve or deny the extension request within three (3) business days. Failure to timely respond to a corrective action notice and/or failure to correct all findings will be taken into consideration if the Administrator applies for additional funding and may result in suspension of the Contract, referral for administrative penalties, or other action under this Title.

(h) Monitoring Close Out. After the end of the corrective action period, a close out letter will be issued to the Administrator. If the Administrator supplies evidence establishing continual compliance that negates the finding of noncompliance, the issue of noncompliance will be rescinded. If the Administrator's response satisfies all findings and concerns noted in the monitoring letter, the issue of noncompliance will be noted as resolved. In some circumstances, the Administrator may be unable to secure documentation to resolve a finding. In those instances, if there are mitigating circumstances, the Department may note the finding is not resolved but may close the issue with no further action required. If the Administrator's response does not correct all findings noted, the close out letter will identify the documentation that must be submitted to correct the issue. Results of monitoring findings may be reported to the Executive Awards and Review Advisory Committee for consideration relating to previous participation.

(i) Options for Review. If, following the submission of corrective action documentation, Compliance staff continues to find the Administrator in noncompliance, and the Administrator disagrees, the Administrator may request or initiate review of the matter using the following options, where applicable:

(1) If the issue is related to a program requirement or prohibition Administrators may contact an applicable federal program officer for guidance or request that the Department contact applicable federal program officer for guidance without identifying the Administrator.

(2) If the issue is related to application of a provision of the Contract or a requirement of the Texas Administrative Code, or the application of a provision of an OMB Circular, the Administrator may submit an appeal to the Executive Director consistent with §1.7, Staff Appeals Process, in Chapter 1 of this Title [~~request review by the Department's Compliance Committee, as set out in paragraph (l) of this subsection~~].

(3) Administrators may request Alternative Dispute Resolution (ADR). An Administrator may send a proposal to the Department's Dispute Resolution Coordinator to initiate ADR pursuant to §1.17 of this title.

(j) If Administrators do not respond to a monitoring letter or fail to provide acceptable evidence of timely compliance after notification of an issue, the matter will be reported to the Department's Enforcement Committee for consideration of administrative penalties, full or partial cost reimbursement, or suspension.

(k) Administrators must provide timely response to corrective action requirements imposed by other agencies. Administrator records may be reviewed during the course of monitoring or audit of the Department by HUD, the Office of the Inspector General, the State Auditor's Office or others. If a finding or concern is identified during the course of a monitoring or audit by another agency, the Administrator is required to provide timely action and response within the conditions imposed by that agency's notice.

~~[(l) Compliance Committee.]~~

~~[(1) The Compliance Committee is a committee of three (3) to five (5) persons appointed by the Executive Director. The Compliance Committee is established to provide independent review of certain compliance issues as provided by this section. Staff from the Legal and the Compliance Divisions will not be appointed to the committee, but may be available as a resource to the Committee.]~~

~~[(2) Informal discussion with Compliance staff. If the Administrator has questions or disagreements regarding any compliance issues, they should first try to resolve them by discussing them with the Compliance staff, including, as needed, the Chief of Compliance.]~~

~~[(3) Informal discussion with the Compliance Committee. An Administrator may request an informal meeting with the Compliance Committee if the informal discussion with the Compliance staff did not resolve the issue.]~~

~~[(4) Compliance Committee Process and Timeline:]~~

~~[(A) At any time, the Administrator may call or request an informal conference with the Compliance staff and/or the Chief of Compliance.]~~

~~[(B) If a call or an informal conference with the Compliance staff does not result in a resolution of the issue, the Administrator may, within thirty (30) days of the call or informal conference with Compliance staff, request a meeting with the Compliance Committee.]~~

~~[(C) If timely requested in accordance with this section, the Compliance Committee will hold an informal conference with the Administrator. An Administrator should not offer evidence, documentation, or information to the Compliance Committee that was not presented to Compliance staff during the informal staff conference. If additional information is offered, the Compliance Committee may disallow the information or refer the matter back to Compliance staff to allow review of the additional information prior to any consideration by the Compliance Committee.]~~

~~[(D) If a meeting with the Compliance Committee does not result in a resolution, matters related to a compliance requirement, other than those required by federal regulation, may be appealed in accordance with appeal rights described in Chapter 1 of this Title.]~~

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

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TITLE 19. EDUCATION

PART 2. TEXAS EDUCATION AGENCY

CHAPTER 33. STATEMENT OF INVESTMENT OBJECTIVES, POLICIES, AND GUIDELINES OF THE TEXAS PERMANENT SCHOOL FUND

SUBCHAPTER A. STATE BOARD OF EDUCATION RULES

19 TAC §§33.5, 33.15, 33.20, 33.25, 33.30, 33.35, 33.60

The State Board of Education (SBOE) proposes amendments to §§33.5, 33.15, 33.20, 33.25, 33.30, 33.35, and 33.60, concerning the statement of investment objectives, policies, and guidelines of the Texas Permanent School Fund (PSF). The sections address provisions related to the PSF code of ethics, objectives, responsible parties and their duties, permissible and restricted investments and general guidelines for investment managers, standards of performance, guidelines for the custodian and the securities lending agent, and performance and review procedures. The proposed amendments would better reflect the PSF asset allocation and consolidate some provisions to avoid repetition.

In accordance with statute, the rules in 19 TAC Chapter 33, Subchapter A, establish investment objectives, policies, and guidelines for the investment and management of the Texas PSF. The proposed amendments to 19 TAC Chapter 33, Subchapter A, would, among other things, reflect the changing PSF investment portfolio, including investments of the PSF in investment funds, and changing market conditions.

The proposed amendment to 19 TAC §33.5, Code of Ethics, would provide various clarifications to the rule, including how it applies to investments of the PSF in investment funds.

The proposed amendment to 19 TAC §33.15, Objectives, would reflect the current objectives for the management of the PSF, including the asset allocation policy, established by the SBOE.

The proposed amendment to 19 TAC §33.20, Responsible Parties and Their Duties, would provide various clarifications to the rule to accurately reflect the responsibilities, respectively, of the SBOE, the PSF staff, and other parties retained by the SBOE to assist with aspects of the PSF.

The proposed amendment to 19 TAC §33.25, Permissible and Restricted Investments and General Guidelines for Investment Managers, would reflect the SBOE's general management authority over the PSF, including permitted and prohibited transactions as currently established or as may be established from time to time by the SBOE.

The proposed amendment to 19 TAC §33.30, Standards of Performance, would reflect the SBOE's general management authority over the PSF, including standards of performance for each asset class as currently established or as may be established from time to time by the SBOE.

The proposed amendment to 19 TAC §33.35, Guidelines for the Custodian and the Securities Lending Agent, would provide various clarifications to the rule and reflect the changing PSF investment portfolio and changing market conditions.

The proposed amendment to 19 TAC §33.60, Performance and Review Procedures, would clarify aspects of the SBOE's oversight role with respect to all asset classes.

The SBOE approved the proposed amendments for first reading and filing authorization at its April 8, 2016 meeting.

The proposed amendments would have no procedural and reporting requirements. The proposed amendments would have no locally maintained paperwork requirements.

FISCAL NOTE. Holland Timmins, executive administrator and chief investment officer of the Texas Permanent School Fund, has determined that for the first five-year period the proposed amendments are in effect there would be no additional costs for state and local government as a result of enforcing or administering the proposed amendments. The distribution of the PSF is projected to be $2.1 billion during the 2016-2017 biennium. There is no effect on local economy for the first five years that the proposed amendments are in effect; therefore, no local employment impact statement is required under Texas Government Code, §2001.022.

PUBLIC BENEFIT/COST NOTE. Mr. Timmins has determined that for each year of the first five years the proposed amendments are in effect the public benefit anticipated as a result of enforcing the amendments will be to update and clarify provisions supporting the management and investment of the PSF. The distribution of the PSF will flow to the school districts and reduce the tax burden to the public and the State of Texas. There is no anticipated economic cost to persons who are required to comply with the proposed amendments.

ECONOMIC IMPACT STATEMENT AND REGULATORY FLEXIBILITY ANALYSIS FOR SMALL BUSINESSES AND MICROBUSINESSES. There is no direct adverse economic impact for small businesses and microbusinesses; therefore, no regulatory flexibility analysis, specified in Texas Government Code, §2006.002, is required.

REQUEST FOR PUBLIC COMMENT. Comments on the proposal may be submitted to Cristina De La Fuente-Valadez, Rulemaking, Texas Education Agency, 1701 North Congress Avenue, Austin, Texas 78701. Comments may also be submitted electronically to *rules@tea.texas.gov.* A request for a public hearing on the proposed amendments submitted under the Administrative Procedure Act must be received by the commissioner of education not more than 14 calendar days after notice of the proposal has been published in the *Texas Register.*

STATUTORY AUTHORITY. The amendments are proposed under the Texas Education Code (TEC), §7.102(c)(31), which states that the SBOE may invest the PSF within the limits of the authority granted by the Texas Constitution, Article VII, §5, and the TEC, Chapter 43, and §7.102(c)(33), which authorizes the SBOE to adopt an annual report on the status of the guaranteed bond program and states that the SBOE may adopt rules as necessary to administer the guaranteed bond program as provided under the TEC, Chapter 45, Subchapter C; TEC, §43.0031, which requires the SBOE to adopt and enforce an ethics policy regarding management and investment of the PSF; TEC, §43.0032, which requires disclosure of certain relationships with entities that provide services relating to the management and investment of the PSF, requires the board to define those relationships, and prohibits giving advice when relationships exist in certain circumstances; TEC, §43.0033, which requires certain persons providing services to the SBOE regarding management and investment of the PSF to file expenditure reports; TEC, §43.0034, which requires the SBOE to adopt forms for conflicts of interest and expenditure reports; TEC, §43.004, which requires the SBOE to adopt written invest-

ment objectives for the PSF and employ a service to analyze the performance of the PSF; Texas Government Code, §2263.004, which requires the SBOE to adopt by rule standards of conduct applicable to certain financial advisors or service providers; and Texas Constitution, Article VII, §5, which describes the PSF, the limit on distributions to the Available School Fund, the setting of spending rates by the SBOE, and the ten-year distribution test; authorizes a bond guarantee utilizing the PSF; and describes the management of the PSF by the SBOE.

CROSS REFERENCE TO STATUTE. The new section implements the Texas Education Code, §§7.102(c)(31) and (33), 43.0031-43.0034, and 43.004; Texas Government Code, §2263.004; and the Texas Constitution, Article VII, Section 5(a)(2), (d), and (f).

§33.5. Code of Ethics.

(a) General principles. The Texas Permanent School Fund (PSF) is held in public trust for the benefit of the schoolchildren of Texas. All those charged with the management of the PSF will aspire to the highest standards of ethical conduct. The purpose of the PSF code of ethics is to assist and help guide all such persons in the proper discharge of their duties and to assist them in avoiding even the appearance of impropriety.

(b) Fiduciary responsibility. The members of the State Board of Education (SBOE) serve as fiduciaries of the PSF and are responsible for prudently investing its assets. The SBOE members or anyone acting on their behalf shall comply with the provisions of this section, the Texas Constitution, Texas statutes, and all other applicable provisions governing the responsibilities of a fiduciary.

(c) Compliance with constitution and code of ethics. The SBOE members are public officials governed by the provisions of the Texas Government Ethics Act, as stated in the Texas Government Code, Chapter 572.

(d) Definitions. For purposes of this chapter [~~section~~], the following terms shall have the following meanings.

(1) SBOE Member, for[~~--For~~] the purposes of the PSF code of ethics, means a member of the SBOE shall be deemed to include the SBOE Member or a person related to the member within the second degree of affinity or consanguinity.

(2) Person means any individual, corporation, firm, limited liability company, limited partnership, trust, association, or other legal entity.

(3) Investment manager or manager means a Person who manages and invests PSF assets and may be either an internal investment manager or an external investment manager.

(4) [~~(2)~~] PSF Service Providers [~~Persons Providing PSF Investment and Management Services to the SBOE (PSF Service Providers)~~] are the following Persons [~~individuals~~]:

(A) any Person who is an external investment manager, as described in §33.20(b)(1) of this title (relating to Responsible Parties and Their Duties), or who is [~~person~~] responsible by contract for providing legal advice regarding [~~managing the PSF, investing~~] the PSF, executing PSF brokerage transactions, or acting as a custodian of the PSF;

(B) any Person except the Texas Education Agency (TEA) or a member of the PSF staff who acts as the sponsor, general partner, managing member, manager, or adviser to an investment fund or other investment vehicle (which, by way of example but without limitation, may include a partnership, a limited liability company, trust, association, or other entity) in which the PSF is invested. Such Persons hereafter in this chapter referred to as Fund Managers;

(C) [~~(B)~~] a member of the Committee of Investment Advisors;

(D) [~~(C)~~] any Person [~~person~~] who is Investment Counsel as described in §33.20(b)(4) of this title or provides consultant services for compensation regarding the management and investment of the PSF;

(E) [~~(D)~~] any Person [~~person~~] who provides investment and management advice to an SBOE Member, with or without compensation, if an SBOE Member:

(i) gives the Person [~~person~~] access to PSF records or information that are identified as confidential; or

(ii) asks the Person [~~person~~] to interview, meet with, or otherwise confer with a PSF Service Provider or TEA [~~Texas Education Agency (TEA)~~] staff;

(F) [~~(E)~~] any Person who is a member of the [~~TEA~~] PSF staff [~~or legal staff~~] who is responsible for managing or investing assets of the PSF, executing brokerage transactions, acting as a custodian of the PSF, or providing investment or management advice [~~or legal advice~~] regarding the investment or management of the PSF to an SBOE Member or PSF staff; [~~or~~]

(G) any Person who is a member of TEA legal staff who is responsible for providing legal advice regarding the investment or management of the PSF; or

(H) [~~(F)~~] any Person [~~person~~] who submits a response to a Request for Proposal (RFP) or Request for Qualifications (RFQ), or similar types of solicitations, while such response is pending. An applicant is not required to file reports under this section except as required in the RFP or RFQ process.

(5) Expenditure, for purposes of this section, means any expenditure other than an expenditure made on behalf of an employee acting in the scope of their employment.

(6) For purposes of this chapter, Fund Managers are not considered to be external investment managers, consultants, or Investment Counsel.

(e) Assets affected by this section. The provisions of this section apply to all PSF assets, both publicly and nonpublicly traded investments.

(f) General ethical standards.

(1) SBOE Members and PSF Service Providers must comply with all laws applicable to them, which may include one or more of [~~laws, specifically,~~] the following statutes: Texas Government Code, Chapter 2263 (Ethics and Disclosure Requirements for Outside Financial Advisors and Service Providers), §572.051 (Standards of Conduct; State Agency Ethics Policy [~~for Public Servants~~]), §552.352 (Distribution or Misuse of Confidential Information), §572.002 (General Definitions), §572.004 (Definition: Regulation), §572.054 (Representation by Former Officer or Employee of Regulatory Agency Restricted; Criminal Offense), §572.058 (Private Interest in Measure or Decision; Disclosure; Removal from Office for Violation), [~~§572.054 (Representation by Former Officer or Employee of Regulatory Agency Restricted), §572.002 (General Definitions), §572.004 (Definition: Regulation),~~] and Chapter 305 (Registration of Lobbyists); Texas Penal Code, Chapter 36 (Bribery and[~~,~~] Corrupt Influence[~~, and Gifts to Public Servants~~]) and Chapter 39 (Abuse of Office[~~, Official Misconduct~~]); and Texas Education Code, §43.0031 (Permanent School Fund Ethics Policy), §43.0032 (Conflicts of Interest), and §43.0033 (Reports of Ex-

penditures). The omission of any applicable statute listed in this paragraph does not excuse violation of its provisions.

(2) SBOE Members and PSF Service Providers must be honest in the exercise of their duties and must not take actions that will discredit the PSF.

(3) SBOE Members and PSF Service Providers shall be loyal to the interests of the PSF to the extent that such loyalty is not in conflict with other duties, which legally have priority (which, by way of example but without limitation, may include obligations of Fund Managers to other investors in commingled funds). SBOE Members and PSF Service Providers shall avoid personal, employment, or business relationships that create conflicts of interest as defined in subsection (i)(1) of this section. Should an SBOE Member or a PSF Service Provider become aware of any conflict of interest involving himself or herself or another SBOE Member or PSF Service Provider, he or she has an affirmative duty to disclose the conflict to the SBOE chair and vice chair and the commissioner within seven days of discovering the conflict and, in the case of a conflict involving himself or herself, to cure the conflict in a manner provided for under this section prior to the next SBOE or committee meeting and such SBOE Member shall take no action nor participate in the RFP or RFQ process, or similar types of solicitations, that concerns the conflict.

(4) SBOE Members and PSF Service Providers shall not use nonpublic information gained through their relationship with the PSF to seek or obtain personal gain beyond agreed compensation and/or any properly authorized expense reimbursement. This should not be interpreted to forbid the use of PSF as a reference or the communication to others of the fact that a relationship with PSF exists, provided that no misrepresentation is involved.

(5) An SBOE Member shall report in writing the name and address of any PSF Service Provider, as defined by subsection (d)(4)(E) [~~(d)(2)(D)~~] of this section, who provides investment and management advice to that SBOE Member. The SBOE Member shall submit the report to the commissioner of education for distribution to the SBOE within 30 days of the PSF Service Provider first providing investment and management advice to that SBOE Member.

(6) SBOE Members and PSF Service Providers shall report in writing any action described by the Texas Education Code, §7.108, to the commissioner of education for distribution to the SBOE within seven days of discovering the violation.

(7) A PSF Service Provider shall not make any gift or donation to a school or other charitable interest on behalf of, at the request of, or in coordination with an SBOE Member. Any PSF Service Provider or SBOE Member shall disclose in writing to the commissioner of education any information regarding such a donation.

(8) A PSF Service Provider shall disclose in writing to the commissioner of education for dissemination to all SBOE Members any business or financial transaction greater than $50 in value with an SBOE Member, the commissioner of education, or any member of PSF staff or TEA legal staff who is a PSF Service Provider [~~TEA employee~~] within 30 days of the transaction. Excluded from this subsection are checking accounts, savings accounts, credit cards, brokerage accounts, mutual funds, or other financial accounts that are provided to the SBOE Member or to a member of the PSF staff or TEA legal staff under the same terms and conditions as they are provided to members of the general public.

(9) An SBOE Member shall disclose in writing to the commissioner of education on a quarterly basis any business or financial transaction greater than $50 in value between the SBOE Member, or a business entity in which the SBOE Member has a significant ownership interest, and a PSF Service Provider. A report shall be filed even if there has not been a business or financial transaction greater than $50 in value between the SBOE Member, or a business entity in which the SBOE Member has a significant ownership interest, and a PSF Service Provider. Excluded from this subsection are checking accounts, savings accounts, credit cards, brokerage accounts, mutual funds, or other financial accounts that are provided to an SBOE Member under the same terms and conditions as they are provided to members of the general public. The reports shall be filed on or before January 15, April 15, July 15, and October 15 and shall cover the preceding three calendar months. The first report filed for each SBOE Member shall cover the preceding one-year period. Subsection (u) of this section does not apply to the first report filed. The commissioner of education shall communicate the information included in the disclosure to all SBOE Members.

(g) Notification of disclosure. In order to preserve the integrity and public trust in the PSF, it is deemed necessary and appropriate to allow all SBOE Members a reasonable time to promptly review and respond to any disclosures or written inquiries made by applicants or made by PSF Service Providers as provided in SBOE operating procedures. In compliance with Texas Government Code, §2156.123, no SBOE Member or PSF Service Provider should publicly disclose any submission materials prior to completion of the RFP or RFQ process. For purposes of this subsection, an RFP or RFQ is completed upon final award of an RFP, or selection of qualified bidders for an RFQ, or closure without any selection. This subsection does not allow an SBOE Member to refrain from publicly disclosing a conflict of interest as required by subsections (f)(3) and (i)(4) of this section and Texas Government Code, §572.058.

(h) Disclosure.

(1) If an SBOE Member solicited a specific investment action by the PSF staff or a PSF Service Provider, the SBOE Member shall publicly disclose the fact to the SBOE in a public meeting. The disclosure shall be entered into the minutes of the meeting. For purposes of this section, a matter is a prospective directive to the PSF staff or a PSF Service Provider to undertake a specific investment or divestiture of securities for the PSF. This term does not include ratification of prior securities transactions performed by the PSF staff or a PSF Service Provider and does not include an action to allocate classes of assets within the PSF.

(2) In addition, an SBOE Member shall fully disclose any substantial interest in any publicly or nonpublicly traded PSF investment (business entity) on the SBOE Member's annual financial report filed with the Texas Ethics Commission pursuant to Texas Government Code, §572.021. An SBOE Member has a substantial interest if the SBOE Member:

(A) has a controlling interest in the business entity;

(B) owns more than 10% of the voting interest in the business entity;

(C) owns more than $25,000 of the fair market value of the business entity;

(D) has a direct or indirect participating interest by shares, stock, or otherwise, regardless of whether voting rights are included, in more than 10% of the profits, proceeds, or capital gains of the business entity;

(E) is a member of the board of directors or other governing board of the business entity;

(F) serves as an elected officer of the business entity; or

(G) is an employee of the business entity.

(i) Conflicts of interest.

(1) A conflict of interest exists whenever SBOE Members or PSF Service Providers have business, [personal or private] commercial, or other [business] relationships, including, but not limited to, personal and private relationships, that could reasonably be expected to diminish their independence of judgment in the performance of their duties. For example, a person's independence of judgment is diminished when the person is in a position to take action or not take action with respect to PSF and such act or failure to act is, may be, or reasonably appears to be influenced by considerations of personal gain or benefit rather than motivated by the interests of the PSF. Conflicts include, but are not limited to, beneficial interests in securities, corporate directorships, trustee positions, familial relationships, or other special relationships that could reasonably be considered a conflict of interest with the duties to the PSF. Further, Texas Education Code, §43.0032, requires disclosure and no participation, unless a waiver is granted, when an SBOE Member or a PSF Service Provider has a business, commercial, or other relationship that could reasonably be expected to diminish a person's independence of judgment in the performance of the person's responsibilities relating to the management or investment of the PSF. Such business, commercial, or other relationship is defined to be a relationship that is prohibited under Texas Government Code, §572.051, or that would require public disclosure under Texas Government Code, §572.058, or a relationship that does not rise to this level but that is determined by the SBOE to create an unacceptable risk to the integrity and reputation of the PSF investment program.

(2) Any SBOE Member or PSF Service Provider who has a possible conflict of interest as defined in paragraph (1) of this subsection shall disclose the possible conflict to the commissioner of education and the chair and vice chair of the SBOE on the disclosure form. The disclosure form is provided in this paragraph entitled "Potential Conflict of Interest Disclosure Form."
Figure: 19 TAC §33.5(i)(2) (No change.)

(3) A person who files a statement under paragraph (2) of this subsection disclosing a possible conflict of interest may not give advice or make decisions about a matter affected by the possible conflict of interest unless the SBOE, after consultation with the general counsel of the TEA, expressly waives this prohibition. The SBOE may delegate the authority to waive this prohibition. If a waiver is not granted by the SBOE or its delegate to an SBOE Member or a PSF Service Provider for [wishes to seek a waiver or determination of] a possible conflict of interest, the SBOE Member or PSF Service Provider may [shall] request an opinion from the Texas Ethics Commission as to a determination of whether a conflict of interest exists. An SBOE Member will be given the assistance of the TEA ethics advisor to help draft a request for an opinion, if such assistance is requested. When the SBOE Member or PSF Service Provider receives the opinion of the Texas Ethics Commission and if a waiver is still sought, the SBOE Member or PSF Service Provider shall forward the opinion to the SBOE chair and vice chair and the commissioner. An opinion of the Texas Ethics Commission that determines a conflict exists is final and the SBOE may not waive the conflict of interest. An opinion of the Texas Ethics Commission that determines that no conflict exists will automatically result in an SBOE waiver. [If a decision concerning a waiver cannot be achieved with sufficient expedition through the procedures specified in this subsection, the SBOE may vote to grant a waiver after consultation with the general counsel of the TEA.]

(4) If an SBOE Member believes he or she has a conflict of interest based on the existence of certain relationships described in Texas Government Code, §572.058, the SBOE Member shall publicly disclose the conflict at an SBOE meeting or committee meeting and the SBOE Member shall not vote or otherwise participate in any decision involving the conflict. In accordance with Texas Government Code, §572.058, the SBOE may not waive the prohibition under this paragraph. This requirement is in addition to the requirement of filing a disclosure under paragraph (2) of this subsection.

(5) Texas Government Code, §572.051, establishes standards of conduct for state officers and employees. SBOE Members and TEA employees shall abide by these standards.

(j) Prohibited transactions and interests.

(1) For purposes of this section, the term "direct placement" (with respect to investments that are not publicly traded) is defined as a direct sale of fixed income securities, generally to institutional investors, with or without the use of brokers or underwriters, primarily offered to Qualified Institutional Buyers (QIBs) and not registered by the Securities and Exchange Commission. The term does not include offerings or sales of interests in investment funds or investment vehicles.

(2) For the purposes of this section, the term "placement agent" is defined as any third party, whether or not affiliated with a PSF Service Provider, that is a party to an agreement or arrangement (whether written or oral) with a PSF Service Provider for direct or indirect payment of a fee in connection with a PSF investment.

(3) No SBOE Member or PSF Service Provider shall:

(A) have a financial interest in a direct placement investment of the PSF;

(B) serve as an officer, director, or employee of an entity in which a direct placement investment is made by the PSF; or

(C) serve as a consultant to, or receive any fee, commission or payment from, an entity in which a direct placement investment is made by the PSF.

(4) No SBOE Member shall:

(A) act as a representative or agent of a third party in dealing with a PSF investment manager, Investment Counsel, or consultant in connection with a PSF investment; or

(B) be employed for two years after the end of his or her term on the SBOE with an organization in which the PSF invested, unless the organization's stock or other evidence of ownership is traded on the public stock or bond exchanges.

(5) A PSF Service Provider shall:

(A) not act as a representative or agent of a third party in dealing with a PSF investment manager, Investment Counsel, or consultant in connection with a PSF investment; and

(B) except as approved by the SBOE, not use a placement agent in connection with a PSF investment unless:

(i) the relationship of the PSF Service Provider with the placement agent, [and] any compensation, and a description of the services provided by the placement agent in connection with a PSF investment are [is] disclosed in writing to PSF staff [and approved by the SBOE];

(ii) the placement agent is registered with the Securities and Exchange Commission (SEC) or the Financial Industry Regulatory Authority (FINRA) or, if not required to register with the SEC or FINRA, is registered with an applicable regulatory body; [and]

(iii) such placement agent does not share any fees with a non-registered person or entity; and[.]

(iv) in executed closing documents for the PSF investment, the PSF Service Provider contractually represents and warrants that the information provided about the placement agent is true, correct, and complete in all material respects.

[(6) A placement agent approved by the SBOE may only be used in accordance with the SBOE's approval. If a PSF Service Provider wishes to use the same placement agent for a different purpose or in a different manner, a separate approval is required.]

(6) [(7)] A placement agent shall file campaign contribution reports in the same manner as does a PSF Service Provider under subsection (o)(1) of this section for the period during which the placement agent provides services in connection with a PSF investment.

(k) Solicitation of support. No SBOE Member shall solicit or receive a campaign contribution on behalf of any political candidate, political party, or political committee from a PSF Service Provider [or any PSF manager, consultant, or staff member]. The [manager,] PSF Service Provider[, consultant, or staff member] shall report any such incident in writing to the commissioner of education for distribution to the SBOE.

(l) Hiring external professionals. The SBOE may contract with [private professional] investment managers to [help] make or assist with PSF investments. The SBOE has the authority and responsibility to hire other external professionals, including custodians, Investment Counsel, or consultants. The SBOE shall select each professional based on merit and cost and subject to the provisions of §33.55 of this title (relating to Standards for Selecting Consultants, Investment Managers, Custodians, and Other Professionals To Provide Outside Expertise for the Fund).

(m) Responsibilities of PSF Service Providers. The PSF Service Providers shall be notified in writing of the code of ethics contained in this section. Any existing contracts for investment and any future investment shall strictly conform to this code of ethics. The PSF Service Provider shall report in writing any suggestion or offer by an SBOE Member to deviate from the provisions of this section to the commissioner of education for distribution to the SBOE within 30 days of the PSF Service Provider discovering the violation. The PSF Service Provider shall report in writing any violation of this code of ethics committed by another PSF Service Provider to the commissioner of education for distribution to the SBOE within 30 days of the PSF Service Provider discovering the violation. A PSF Service Provider or other person retained in a fiduciary capacity must comply with the provisions of this section.

(n) Gifts and entertainment.

(1) Bribery. SBOE Members are prohibited from soliciting, offering, or accepting gifts, payments, and other items of value in exchange for an official act, including a vote, recommendation, or any other exercise of official discretion pursuant to Texas Penal Code, §36.02.

(2) Acceptance of gifts.

(A) An SBOE Member may not accept gifts, favors, services, or benefits that may reasonably tend to influence the SBOE Member's official conduct or that the SBOE Member knows or should know are intended to influence the SBOE Member's official conduct. For purposes of this paragraph, a gift does not include an item with a value of less than $50, excluding cash, checks, loans, direct deposit, or negotiable instruments.

(B) An SBOE Member may not accept a gift, favor, service, or benefit from a Person [person] that the SBOE Member knows is interested or is likely to become interested in a charter, contract, purchase, payment, claim, or other pecuniary transaction over which the SBOE has discretion.

(C) An SBOE Member may not accept a gift, favor, service, or benefit from a Person [person] that the SBOE Member knows to be subject to the regulation, inspection, or investigation of the SBOE or the TEA.

(D) An SBOE Member may not solicit, accept, or agree to accept a gift, favor, service, or benefit from a Person [person] with whom the SBOE Member knows that civil or criminal litigation is pending or contemplated by the SBOE or the TEA.

(E) Except as prohibited in subparagraphs (A)-(D) of this paragraph and [So long as the gift or benefit is not given by a person] subject to the requirements for PSF Service providers and lobbyists in subparagraph (F) of this paragraph, [SBOE's or the TEA's regulation, inspection, or investigation,] an SBOE Member may accept a gift, favor, service, or benefit [payment, or contribution from an individual who is not registered as a lobbyist with the Texas Ethics Commission] if it fits into one of the following categories:

(i) items worth less than $50, but [{] may not be cash, checks, loans, or negotiable instruments[}];

(ii) item is given in the context of a [independent] relationship, such as kinship, or a personal, professional, or business relationship that is independent of the SBOE Member's official capacity;

(iii) fees for services rendered outside the SBOE Member's official capacity;

(iv) government property issued by a governmental entity that allows the use of the property; or

(v) food, lodging, entertainment, and transportation, if accepted as a guest and the donor is present.

(F) In addition to the requirements of subparagraph (E) of this paragraph, the [The] following provisions govern the disposition of an individual who is a PSF Service Provider or who is both a lobbyist registered with the Texas Ethics Commission and who represents a person subject to the SBOE's or the TEA's regulation, inspection, or investigation. A gift, favor, service, or benefit from a PSF Service Provider or lobbyist will not be considered a violation of the prohibition set forth in subparagraph (C) of this paragraph.

(i) An SBOE Member may not accept the following from a PSF Service Provider or lobbyist, even if otherwise permitted under subparagraph (E) of this paragraph:

(I) loans, cash, checks, direct deposits, or negotiable instruments;

(II) transportation [travel] or lodging for a pleasure trip;

(III) transportation or [travel and] lodging in connection with a fact-finding trip or to a seminar or conference at which the SBOE Member does not provide services;

(IV) entertainment worth more than $250 in a calendar year;

(V) gifts, other than awards and mementos, that combined are worth more than $250 in value for a calendar year. Gifts do not include food, entertainment, lodging, and transportation if accepted as a guest and the PSF Service Provider or lobbyist is present; or

(VI) individual awards and mementos worth more than $250 each if from a lobbyist or worth $50 or more each if from a PSF Service Provider.

(ii) An SBOE Member may accept food and beverages as a guest if the PSF Service Provider or lobbyist is present.

(G) An SBOE Member may not solicit, agree to accept, or accept an honorarium in consideration for services that the SBOE Member would not have been asked to provide but for the SBOE Member's official position. An SBOE Member may accept food, transportation, and lodging in connection with a speech performed as a result of the SBOE Member's position in accordance with the rulings with the Texas Ethics Commission, which may place limitations on the type of entity that may fund such travel. An SBOE Member must report the food, lodging, or transportation accepted under this subparagraph in the SBOE Member's annual personal financial statement.

(H) Under no circumstances shall an SBOE Member accept a prohibited gift if the source of the gift is not identified or if the SBOE Member knows or has reason to know that the gift is being offered through an intermediary.

(I) If an unsolicited prohibited gift is received by an SBOE Member, he or she should return the gift to its source. If that is not possible or feasible, the gift should be donated to charity. The SBOE Member shall report the return of the gift or the donation of the gift to the commissioner of education.

(J) A PSF Service Provider shall file a report annually on January 31 of each year on the expenditure report provided in this subparagraph entitled "Report of Expenditures of Persons Providing Services to the State Board of Education Relating to the Management and Investment of the Permanent School Fund." The report shall be for the time period beginning on January 1 and ending on December 31 of the previous year. The expenditure report must describe in detail any expenditure of more than $50 made by the Person [~~person~~] on behalf of:

Figure: 19 TAC §33.5(n)(2)(J)

[~~Figure: 19 TAC §33.5(n)(2)(J)~~]

(i) an SBOE Member;

(ii) the commissioner of education; or

(iii) an employee of the TEA or of a nonprofit corporation created under the Texas Education Code, §43.006.

(K) A PSF Service Provider shall file a report annually with the TEA's PSF office, in the format specified by the PSF staff, on or before January 31 of each year. The report will be deemed to be filed when it is actually received. The report shall be for the time period beginning on January 1 and ending on December 31 of the previous year. It shall list any individuals who served in any of the following capacities at any time during the reporting period:

(i) all members of the governing body of the PSF Service Provider;

(ii) the officers of the PSF Service Provider;

(iii) any broker who conducts transactions with PSF funds;

(iv) all members of the governing body of the firm of a broker who conducts transactions with PSF funds; and

(v) all officers of the firm of a broker who conducts transactions with PSF funds.

(L) This subsection does not apply to campaign contributions.

(M) Each SBOE Member and each PSF Service Provider shall, no later than April 15, file an annual report affirmatively disclosing any violation of this code of ethics known to that Person [~~person~~] during the time period beginning January 1 and ending December 31 of the previous year which has not previously been disclosed in writing to the commissioner of education for distribution to all board members, or affirmatively state that the Person [~~person~~] has no knowledge of any such violation. For purposes of this subparagraph only, "SBOE Member" means only the individual elected official.

(o) Campaign contributions.

(1) A PSF Service Provider shall, no later than January 31 and July 31, file a semi-annual report of each political contribution that the PSF Service Provider has made to an SBOE Member or a candidate seeking election to the SBOE in writing to the commissioner of education. The report shall be for the six-month time period preceding the reporting dates and include the name of each SBOE Member or candidate seeking election to the SBOE who received a contribution, the amount of each contribution, and date of each contribution. Subsection (u) of this section does not apply to the first report filed. A report shall be filed even if the PSF Service Provider made no reportable contribution during the reporting period to an SBOE Member or a candidate seeking election to the SBOE. The commissioner of education shall communicate the information included in the disclosure to all SBOE Members.

(2) Any person or firm filing a response to an RFP or RFQ relating to the management and investments of the PSF shall disclose in the response whether at any time in the preceding four years from the due date of the response to the RFP or RFQ the person or firm has made a campaign contribution to a candidate for or member of the SBOE.

(p) Compliance with professional standards.

(1) SBOE Members and PSF Service Providers who are members of professional organizations which promulgate standards of conduct must comply with those standards.

(2) To the extent applicable to them, PSF Service Providers must comply with the Code of Ethics and Standards of Professional Conduct of the Chartered Financial Analyst Institute [~~(CFA Institute)~~].

(q) Transactions involving [~~between~~] PSF Service Providers [~~and/or consultants~~].

(1) A PSF Service Provider other than a PSF executing broker [~~Providers or persons who act as consultants to the SBOE regarding investment and management of the PSF~~] shall not engage in any transaction involving the assets of the PSF with a Person who is an SBOE Member, Investment Counsel, [~~another PSF Service Provider or a person who acts as~~] a consultant to the SBOE or to an SBOE Member, or a member of the PSF staff or TEA legal staff who is responsible for managing or investing assets of the PSF or providing investment or management advice or legal advice regarding the investment or [~~and~~] management of the PSF.

(2) A PSF Service Provider other than a PSF executing broker [~~Providers and/or consultants to the SBOE who provide advice regarding investment and management of the PSF~~] shall report to the SBOE on a quarterly basis all investment transactions or trades and any fees or compensation paid or received in connection with the transactions or trades with a Person who is an SBOE Member, Investment Counsel, [~~another PSF Service Provider or a person who acts as~~] a consultant to the SBOE or an SBOE Member, or a member of the PSF staff or TEA legal staff who is responsible for managing or investing assets of the PSF or providing investment or management advice or legal advice regarding the investment or [~~and~~] management of the PSF.

(r) Compliance and enforcement.

(1) The SBOE will enforce this section through its chair or vice chair or the commissioner of education.

(2) Any violation of this section will be reported to the chair and vice chair of the SBOE and the commissioner of education and a recommended action will be presented to the SBOE by the chair or the commissioner. A violation of this section may result in the termination of the contract or a lesser sanction. Repeated minor violations may also result in the termination of the contract.

(3) The PSF compliance officer under the direction of the TEA confidentiality officer shall act as custodian of all statements, waivers, and reports required under this section for purposes of public disclosure requirements.

(4) The ethics advisor of the TEA shall respond to inquiries from the SBOE Members and PSF Service Providers concerning the provisions of this section. The ethics advisor may confer with the general counsel and the executive administrator of the PSF.

(5) No payment shall be made to a PSF Service Provider who has failed to timely file a completed report as described by subsection (m) of this section, until a completed report is filed.

(s) Ethics training. The SBOE shall receive annual training regarding state ethics laws through the Texas Ethics Commission and the TEA's ethics advisor.

(t) TEA general ethical standards. The commissioner of education and PSF staff shall comply with the General Ethical Standards for the Staff of the Permanent School Fund and the Commissioner of Education.

(u) Reporting period. A new report required by an amendment to the code of ethics need only concern events after the effective date of the amendment. An amendment to a rule that presently requires a report does not affect the reporting period unless the amendment explicitly changes the reporting period.

(v) Statutory statement.

(1) A "statutory financial advisor or service provider" as defined in this subsection shall on or before April 15 file a statement as required by Texas Government Code, §2263.005, with the commissioner of education and the state auditor, for the previous calendar year. The statement will be deemed filed when it is actually received. A statutory financial advisor or service provider shall promptly file a new or amended statement with the commissioner of education and the state auditor whenever there is new information required to be reported under Texas Government Code, §2263.005(a).

(2) A "statutory financial advisor or service provider" is a member of the Committee of Investment Advisors or an individual or business entity, including a financial advisor, financial consultant, money or investment manager, or broker, who is not an employee of the TEA, but who provides financial services or advice to the TEA or the SBOE or an SBOE member in connection with the management and investment of the PSF and who may reasonably be expected to receive, directly or indirectly, more than $5,000 in compensation from the TEA or the SBOE during a fiscal year.

(3) An annual statement required to be filed under this subsection will be made using the form developed by the state auditor.

§33.15. Objectives.

(a) Investment objectives.

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

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

(B) the need to preserve capital;

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

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

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

(F) the need to invest according to the prudent person rule; and

(G) the need to document investment objectives, guidelines, and performance standards.

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

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

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

(b) Goal and objectives for the PSF.

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

(2) Objectives.

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

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

(C) To the extent possible, the PSF management [~~administrators~~] shall hedge against inflation.

(D) Securities, except investments for cash management purposes [~~as specified in §33.25 of this title (relating to Permissible and Restricted Investments and General Guidelines for Investment Managers)~~], shall be selected for investment on the basis of long-term investment merits rather than short-term gains.

(c) Investment rate of return and risk objectives.

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

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

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

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

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

(C) a degree of emphasis on stable growth.

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

(5) The rate of return objective of the total PSF [~~domestic equity~~] fund shall be to earn, over time, an average annual total rate of return that meets or exceeds the rate of return of a composite benchmark index, consisting of [~~that of a~~] representative benchmark indices for the asset classes in which the PSF is invested that are aggregated in proportion to the actual asset allocation of the PSF for the relevant time period, while maintaining an acceptable risk level compared to that of the composite [~~index, combining dividends and capital appreciation, while maintaining an acceptable risk level compared to that of the representative~~] benchmark index.

(6) The rate of return objective of each asset class in which the PSF is invested, other than the short-term cash [~~the international equity~~] fund, shall be to earn, over time, an average annual average [~~total~~] rate of return that meets or exceeds that of a representative [~~international~~] benchmark index for such asset class in U.S. dollars, combining dividends, [~~and~~] capital appreciation, income, and interest income, as applicable, while maintaining an acceptable risk level compared to that of the representative benchmark index.

[~~(7) The objective of the domestic fixed income fund shall be to earn, over time, an average annual total rate of return that meets or exceeds that of a representative benchmark index, combining interest income and capital appreciation, while maintaining an acceptable risk level compared to that of the representative benchmark index.~~]

[~~(8) The objective of the real estate fund shall be to earn, over time, an average annual total rate of return that meets or exceeds that of a representative benchmark index in U.S. dollars, combining income and capital appreciation, while maintaining an acceptable risk level compared to that of the representative benchmark index.~~]

[~~(9) The objective of the private equity fund shall be to earn, over time, an average annual total rate of return that meets or exceeds that of a representative benchmark or a targeted internal rate of return in U.S. dollars, combining income and capital appreciation, while maintaining an acceptable risk level compared to that of the representative benchmark.~~]

[~~(10) The objective of the absolute return fund shall be to earn, over time, an average annual total rate of return that meets or exceeds that of a representative benchmark index in U.S. dollars, combining income and capital appreciation, while maintaining an acceptable risk level compared to that of the representative benchmark index.~~]

[~~(11) The objective of the real return fund shall be to earn, over time, an average annual total rate of return that meets or exceeds that of a representative benchmark index in U.S. dollars, combining income and capital appreciation, while maintaining an acceptable risk level compared to that of the representative benchmark index.~~]

[~~(12) The objective of the risk parity fund shall be to earn, over time, an average annual total rate of return that meets or exceeds that of a representative benchmark index in U.S. dollars, combining income and capital appreciation, while maintaining an acceptable risk level compared to that of the representative benchmark index.~~]

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

(8) [~~(14)~~] Notwithstanding the risk parameters specified in paragraphs (4)-(6) [~~(4)-(13)~~] of this subsection, consideration shall be given to marginal risk variances exceeding the representative benchmark indices if returns are commensurate with the risk levels of the respective portfolios.

(d) Asset allocation policy.

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

(A) the long-term nature of the PSF;

(B) the spending policy of the PSF;

(C) the relatively low liquidity requirements of the PSF;

(D) the investment preferences and risk tolerance of the SBOE;

(E) the rate of return objectives; and

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

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

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

(A) domestic equities;

(B) international equities;

(C) emerging market equities;

(D) [~~(C)~~] domestic fixed income;

(E) emerging market debt local currency;

(F) [~~(D)~~] real estate;

(G) [~~(E)~~] private equity;

(H) [~~(F)~~] absolute return;

(I) [~~(G)~~] real return;

(J) [~~(H)~~] risk parity; [~~and~~]

(K) [~~(I)~~] cash; and[~~.~~]

(L) other asset classes as approved by the SBOE.

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

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

§33.20. Responsible Parties and Their Duties.

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

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

(1) An external investment manager is a Person [~~person, firm, corporation, financial company, or insurance company~~] the SBOE retains by contract to manage and invest a portion of the PSF assets under specified guidelines.

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

(3) A consultant is a Person [~~person or firm~~] the SBOE retains to advise the SBOE on PSF matters based on professional expertise.

(4) Investment Counsel [~~counsel or consultant~~] is a Person [~~person or firm~~] retained under criteria specified in the PSF Investment Procedures Manual to advise PSF investment staff and the SBOE Committee on School Finance/Permanent School Fund within the policy framework established by the SBOE. Investment Counsel may be assigned such tasks as [~~is responsible for~~] asset allocation reviews, manager searches, spending policy recommendations and research related to the management of PSF [~~the fund's~~] assets.

(5) A performance measurement consultant is a Person [~~person or firm~~] retained to provide the SBOE Committee on School Finance/Permanent School Fund an analysis of the PSF portfolio performance. The outside portfolio performance measurement service firm shall perform the analysis on a quarterly or as-needed basis. Quarterly reports shall be distributed to each member of the SBOE Committee on School Finance/Permanent School Fund, and a representative of the firm shall be available as necessary to brief the committee.

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

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

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

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

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

(1) determining the strategic asset allocation mix between asset classes based on the attending economic conditions and the PSF goals and objectives;

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

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

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

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

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

(7) representing the PSF to the state.

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

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

applicable Texas statutes, as amended, and SBOE rules governing the operation of the PSF. The PSF staff shall:

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

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

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

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

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

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

(7) make recommendations regarding investment and policy matters to the SBOE Committee on School Finance/Permanent School Fund and the SBOE; and

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

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

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

[(1) Equities are considered to be common or preferred corporate stocks; corporate bonds, debentures, or preferreds that may be converted into corporate stock; and investment trusts. Stocks listed or traded on well recognized or principal U.S. or foreign exchanges or nationally recognized over-the-counter markets are permitted.]

[(2) Fixed income securities are considered to be U.S. or foreign treasury or government agency obligations, U.S. or foreign corporate bonds, asset- or mortgage-backed securities, taxable municipal obligations, Canadian bonds, Yankee bonds, supranational bonds (denominated in U.S. dollars), and 144A securities.]

[(3) Real estate is considered to be investments in real properties, as well as investments in real estate related securities, real estate related debt, and real estate related funds. Common property types associated with real estate investments are, but not limited to, apartments, office buildings, retail centers, infrastructure, timberlands, and industrial parks.]

[(4) Private equity is considered to be, but not limited to, venture capital, buy-out investing, mezzanine financing, and distressed debt.]

[(5) Absolute returns are investments in a diversified bundle of primarily marketable investment strategies that seek positive returns, regardless of market direction.]

[(6) Real returns are investments that target a return that exceed the rate of inflation, measured by the Consumer Price Index (CPI), by a premium.]

[(7) Risk parity is an investment strategy that creates a portfolio in which various asset class groups contribute equally to the overall risk of the portfolio as measured by the standard deviation of returns.]

[(8) Cash equivalents are securities with maturities of less than or equal to one year that are considered to include interest bearing or discount instruments of the U.S. government or its agencies, money market funds, corporate discounted instruments, corporate-issued commercial paper, time deposits of U.S. or foreign banks, bankers acceptances, and fully collateralized repurchase agreements. Both U.S. and foreign offerings are permitted. All residual cash in the Texas Permanent School Fund (PSF) portfolio must be swept and invested on a daily basis.]

[(9) Any form of investment or nonpublicly traded investment may be considered by the State Board of Education (SBOE) based on risk and return characteristics, provided the investment is consistent with PSF goals and objectives.]

[(10) The SBOE may approve currency hedging strategies for the international portfolios and delineate the related procedures in the "Standards of Performance" section of the PSF Investment Procedures Manual.]

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

(1) short sales of any kind;

(2) purchasing letter or restricted stock;

(3) buying or selling on margin;

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

(5) purchasing or selling futures on commodities contracts;

(6) borrowing by [money, or] pledging or otherwise encumbering PSF assets;

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

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

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

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

(11) purchasing tax exempt bonds;

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

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

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

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

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

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

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

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

(17) purchasing precious metals or other commodities;

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

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

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

(c) General guidelines for investment managers.

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

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

(A) Diversification. Each manager's portfolio should be appropriately diversified within its applicable asset class. [~~The investment policy shall be to diversify each manager's common stock portfolio by participating in industries and companies with above average prospects or sound fundamentals.~~]

(B) Securities trading.

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

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

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

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

(C) Acknowledgments in writing.

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

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

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

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

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

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

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

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

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

(4) implement a specific investment process for the PSF. The manager shall describe the process and its underlying philosophy in an attachment to its investment management agreement with the PSF

and manage according to this process until the PSF and manager agree in writing to any change.

§33.30. Standards of Performance.

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

(1) time horizon;

(2) real rate of return;

(3) representative benchmark index;

(4) volatility of returns (or risk), as measured by standard deviation; and

(5) universe comparison.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(i) Permissible investments.

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

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

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

(-c-) maximum three-year maturity on floating rate, with maximum reset period of 94 [~~90~~] days and use a standard repricing index such as London InterBank Offered Rate (LIBOR), Federal Funds, Treasury Bills, or commercial paper; and

(-d-) no maximum dollar limit.

(II) Bank obligations, under the following criteria:

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

(-b-) negotiable Certificates of Deposit with maximum 397-day maturity on fixed rate or three-year maturity for floating rate, with maximum reset period of 94 [~~90~~] days and use a standard repricing index such as LIBOR, Federal Funds, Treasury Bills, or commercial paper;

(-c-) bank notes with maximum 397-day maturity on fixed rate or three-year maturity on floating rate, with maximum reset period of 94 [~~90~~] days and use a standard repricing index such as LIBOR, Federal Funds, Treasury Bills, or commercial paper;

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

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

(-1-) Canada;

(-2-) France;

(-3-) United Kingdom; and

(-4-) United States; and

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

(III) Commercial paper, under the following criteria:

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

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

(-c-) maximum 397-day maturity.

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

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

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

(-c-) maximum 397-day maturity.

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

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

(-b-) maximum three-year weighted average life on floating rate, with maximum reset period of 94 [~~90~~] days and use a standard repricing index such as LIBOR, Federal Funds, Treasury Bills, or commercial paper; and

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

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

(-a-) must be senior debt;

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

(-c-) maximum three-year maturity on floating rate, with maximum reset [~~rest~~] period of 94 [~~90~~] days and use a standard repricing index such as LIBOR, Federal Funds, Treasury Bills, or commercial paper;

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

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

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

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

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

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

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

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

(-2-) Certificate of Deposits, Bankers Acceptance, bank notes, commercial paper at 102% under one year to maturity and rated at least "Tier 1" as defined in clause (ii)(IV) of this subparagraph; and

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

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

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

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

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

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

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

(-c-) maximum maturity of 397 days.

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

(-a-) funds must comprise investments similar to those that would otherwise be approved for securities lending

investment under the provisions of this subparagraph, not invest in derivatives, and not re-hypothecate assets;

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

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

(ii) Investment parameters.

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

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

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

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

(-a-) Standard & Poor's;

(-b-) Moody's Investors Service;

(-c-) Fitch Investors Service; and

(-d-) Duff & Phelps, LLC.

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

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

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

(VIII) Mortgage backed securities are not permitted.

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

(-a-) inverse floating rate notes;

(-b-) defined range floating rate notes;

(-c-) trigger notes; and

(-d-) set-up notes.

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

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

§33.60. Performance and Review Procedures.

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

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

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

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

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

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

(A) any event that is likely to adversely impact to a significant degree the management, professionalism, integrity, or financial position of the custodian or investment manager. A custodian must report the loss of an account of $500 million or more. An investment manager must report the loss of an account of $25 million or more;

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

(C) a significant change in investment philosophy;

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

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

(F) any violation of policy.

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

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Cristina De La Fuente-Valadez
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Texas Education Agency
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CHAPTER 89. ADAPTATIONS FOR SPECIAL POPULATIONS

SUBCHAPTER C. TEXAS CERTIFICATE OF HIGH SCHOOL EQUIVALENCY

19 TAC §§89.42, 89.43, 89.46, 89.47

The State Board of Education (SBOE) proposes amendments to §§89.42, 89.43, 89.46, and 89.47, concerning the Texas Certificate of High School Equivalency. The sections address official testing centers, eligibility for a Texas Certificate of High School Equivalency, accommodations, and issuance of the certificate. The proposed amendments would update provisions related to the administration of high school equivalency examinations by multiple providers, including offering both paper-based and computer-based testing formats; accommodations for applicants with documented disabilities; court-ordered examinations; and fees and other provisions for the issuance of certificates.

In November 2011, the SBOE Committee on Instruction discussed proposed modifications to the current high school equivalency program. The SBOE asked Texas Education Agency (TEA) staff to produce a Request for Information (RFI) to identify available options for the operation of the Texas Certificate of High School Equivalency and report to the SBOE the results of the RFI. At the November 2012 committee meeting, TEA staff presented the results of the RFI and provided information regarding the potential development of a new Texas High School Equivalency Examination. The committee requested that the TEA continue its relationship with the GED® Testing Service and not issue a Request for Proposals (RFP) for a Texas High School Equivalency Examination.

At the September 2013 meeting, the SBOE approved for second reading and final adoption proposed amendments to 19 TAC Chapter 89, Adaptations for Special Populations, Subchapter C, Texas Certificate of High School Equivalency, to update the rules, including the expansion of eligible entities that may apply to become testing centers and the change in the fee structure.

In November 2013, the committee requested that the TEA draft an RFP to solicit proposals for a provider for the Texas Certificate of High School Equivalency examination.

Beginning in January 2014, all tests administered as part of the Texas Certificate of High School Equivalency, with the exception of tests provided by correctional institutions, transitioned from paper-based tests to computer-based tests.

On January 5, 2015, the TEA released a competitive RFP. Responses were due to the TEA on February 17, 2015. At the April 2015 SBOE meeting, the TEA staff presented the results of the RFP. The SBOE requested that the TEA extend the existing provider's Memorandum of Understanding for six months beyond the expiration date and begin the development of a new RFP to potentially identify multiple test providers.

At the July 2015 meeting, the SBOE approved a decision matrix of requirements to be included in a future RFP. During the September 2015 meeting, the SBOE approved the competitive RFP to be released in fall 2015. On October 6, 2015, the TEA released a competitive RFP. Responses were due to the TEA on November 17, 2015.

On January 29, 2016, the SBOE voted to award contracts to three separate companies to provide high school equivalency assessments in Texas. The three companies are Data Recognition Corporation, Educational Testing Service, and GED® Testing Service.

The rules in 19 TAC Chapter 89, Subchapter C, provide for administration of high school equivalency testing and certification, including provisions relating to official testing centers, test taker eligibility, accommodations for examinees with disabilities, and the issuance of high school equivalency certificates.

Proposed amendments to 19 TAC Chapter 89, Subchapter C, would update the rules as follows.

Section 89.42, Official Testing Centers, would be amended to establish entities eligible to serve as official paper-based testing centers, identify potential testing center violations, and update provisions related to the administration of high school equivalency examinations as both paper-based and computer-based testing formats.

Section 89.43, Eligibility for a Texas Certificate of High School Equivalency, would be amended to add the statutory reference for court-ordered examinations and the high school equivalency program and to clarify the age requirements.

Section 89.46, Accommodations, would be amended to prohibit testing centers from charging fees or prepayments to evaluate requests for accommodations and from charging additional fees for the administration of examinations with approved accommodations.

Section 89.47, Issuance of the Certificate, would be amended to update the total state administrative fee and the calculation of that administrative fee; clarify that the certificate must indicate the language, format, and provider of each test taken; and specify that notification of nonissuance or cancellation of a certificate will be made by the state administrator instead of the testing entity.

The SBOE approved the proposed amendments for first reading and filing authorization at its April 8, 2016 meeting.

The proposed amendments would have no procedural and reporting requirements. The proposed amendments would have no new locally maintained paperwork requirements.

FISCAL NOTE. Monica Martinez, associate commissioner for standards and programs, has determined that for the first five-year period the proposed amendments are in effect there will be fiscal implications for state and local government as a result of enforcing or administering the proposed amendments.

The Texas Certificate of High School Equivalency (TxCHSE) receives no legislative appropriation and is administered solely on the revenue generated by the per test fee paid by the individuals who test for the certificate of high school equivalency. Due to changes in testing format in January 2014 (conversion to computer-based testing) and action by the SBOE in January 2016 (to allow multiple providers to offer the exam battery), the number of test takers has significantly fluctuated since calendar year 2013 and an accurate estimated number of test takers is not able to be determined. In 2014, TEA contributed approximately $140,000 of general revenue to the TxCHSE budget to cover estimated overage costs of administering the TxCHSE. It is anticipated in TEA's budget projections for 2016 that the TxCHSE budget will have an approximate $106,000 budget shortfall. By increasing the fee, the state will have an increase in revenue to cover the program costs.

School district, charter schools, and/or education service centers may choose to serve as testing centers that administer the TxCHSE. Based on preliminary information from the SBOE, testing centers would set their own fee for administering the TxCHSE. As the fee would be set locally, the TEA would not know what the actual costs or revenue would be for each test center. The costs or savings cannot be determined.

There is no effect on local economy for the first five years that the proposed amendments are in effect; therefore, no local em-

ployment impact statement is required under Texas Government Code, §2001.022.

PUBLIC BENEFIT/COST NOTE. Ms. Martinez has determined that for each year of the first five years the proposed amendments are in effect the public benefit anticipated as a result of enforcing the amendments will include added flexibility in test options and locations for individuals to access the test. There is anticipated economic cost to persons who are required to comply with the proposed amendments. The state administrative fee for the test battery will increase from $15 to $25. Individual test takers would have an increased cost in the state administrative fee of $10 per test battery. There has been no increase to the administrative fee since the TEA last increased the fee in 2004 from $5 to $15.

ECONOMIC IMPACT STATEMENT AND REGULATORY FLEXIBILITY ANALYSIS FOR SMALL BUSINESSES AND MICROBUSINESSES. There is no direct adverse economic impact for small businesses and microbusinesses; therefore, no regulatory flexibility analysis, specified in Texas Government Code, §2006.002, is required. A business may choose to serve as testing centers that administer TxCHSE. Based on preliminary information from the SBOE, testing centers would set their own fee for administering the TxCHSE. As the fee would be set locally, the TEA would not know what the actual costs or revenue would be for each test center. The costs or savings cannot be determined.

REQUEST FOR PUBLIC COMMENT. Comments on the proposal may be submitted to Cristina De La Fuente-Valadez, Rulemaking, Texas Education Agency, 1701 North Congress Avenue, Austin, Texas 78701. Comments may also be submitted electronically to *rules@tea.texas.gov.* A request for a public hearing on the proposed amendments submitted under the Administrative Procedure Act must be received by the commissioner of education not more than 14 calendar days after notice of the proposal has been published in the *Texas Register.*

STATUTORY AUTHORITY. The amendments are proposed under the Texas Education Code, §7.111, which requires the SBOE to adopt rules to develop and deliver high school equivalency examinations and provide for the administration of the examinations online.

CROSS REFERENCE TO STATUTE. The amendments implement the Texas Education Code, §7.111.

§89.42. Official Testing Centers.

(a) Entities eligible to serve as official computer-based testing centers include:

(1) an accredited school district;

(2) an institution of higher education;

(3) an education service center;

(4) a local workforce development board;

(5) a United States Department of Labor One-Stop Career Center;

(6) a United States Department of Labor Job Corps Center;

(7) a public or private correctional institution;

(8) a public or private technical institution or career preparation school;

(9) any other public or private postsecondary institution offering academic or technical education or vocational training under a certificate program or an associate degree program; and

(10) an independent, stand-alone testing center.

(b) Entities eligible to serve as official paper-based testing centers include:

(1) an accredited school district;

(2) an institution of higher education; and

(3) an education service center.

(c) [~~(b)~~] The appropriate official of an eligible entity desiring to provide the testing service to residents in the community must request approval from the Texas Education Agency (TEA) to apply for authorization from the authorized testing organization. If the need for a testing center in the location exists, the appropriate entity official, in writing, shall inform the state administrator appointed by the commissioner of education that the establishment of an official testing center is requested at that particular entity. The contract to operate a center shall be between the applicant entity and the authorized testing organization and its partners.

(d) [~~(c)~~] The authorization to function as an official testing center may be withdrawn by the TEA if the testing center is in violation of State Board of Education rules. Potential violations include neglecting to follow test, vendor, or jurisdictional policies and procedures; unauthorized use or sale of test candidate information; or misrepresentation of the testing center's authority to issue transcripts or credentials on behalf of the TEA.

(e) [~~(d)~~] A testing center may administer the test by paper, [~~or~~] computer, or both, as approved by the TEA, [~~as appropriate, at the testing center~~] to eligible candidates [~~who are 16 years of age or older~~].

§89.43. Eligibility for a Texas Certificate of High School Equivalency.

(a) An applicant for a certificate of high school equivalency shall meet the following requirements.

(1) Residence. The applicant must be a resident of Texas or a member of the United States armed forces stationed at a Texas installation.

(2) Age.

(A) The applicant must be at least 18 years old.

(B) An applicant who is 17 years of age is eligible with parental or guardian consent. An applicant who is 17 years of age must submit permission of the applicant's parent or guardian according to procedures established by the Texas Education Agency (TEA). An applicant who is 17 years of age and married, who has entered military service, who has been declared an adult by the court, or who has otherwise legally severed the child/parent relationship is not required to present parent or guardian permission to be tested.

(C) An applicant who is at least 16 years of age may test if recommended by a public agency having supervision or custody under a court order. Recommendations must include the applicant's name and date of birth and must be submitted according to procedures established by the TEA by an official of the public agency having supervision or custody of the person under a court order. An applicant who is at least 16 years old may also test if:

(i) required to take the examination under a court order issued under the Texas Family Code, §65.103(a)(3);

(ii) enrolled in a Job Corps training program under the Workforce Investment Act of 1998 (29 United States Code, §§2801 et seq.) and its subsequent amendments; or

(iii) enrolled in the Texas Military Department's Texas ChalleNGe Academy program.

(3) Educational status. The applicant must not have received a high school diploma from an accredited high school in the United States. The applicant must not be enrolled in school, unless the applicant is enrolled in a High School Equivalency Program (HSEP) approved by the TEA. A student who is 17 years of age is eligible to test if the student is enrolled in an HSEP approved by the TEA. The student must comply with the provisions of the HSEP.

(4) Minimum test scores. An applicant must achieve the appropriate minimum standard scores in effect at the time the applicant tested as established by the TEA or the designated test organization, as appropriate.

(b) Verification that any person being tested meets the eligibility requirements in this section will be provided according to procedures established by the TEA.

§89.46. Accommodations.

(a) Reasonable and appropriate accommodations shall be provided to applicants with documented disabilities that prevent fair access to the high school equivalency examinations.

(b) Requests for accommodations must:

(1) be submitted in writing for approval from the examination provider; and

(2) include appropriate documentation of disability and rationale for each modification requested.

(c) No fees or prepayments may be charged to the applicant to evaluate an accommodation request.

(d) No additional fees may be charged to the applicant for the administration of the examinations with approved accommodations.

§89.47. Issuance of the Certificate.

(a) A nonrefundable state administrative fee, calculated by dividing $25 by the number of tests in the battery, [~~of $3.00~~] will be assessed for each individual test upon registration [~~through December 31, 2013. A nonrefundable fee of $3.75 will be assessed for each individual test upon registration beginning January 1, 2014~~]. A permanent file shall be maintained for all certificates issued.

(b) Duplicate certificates will be issued upon request from the client. The client is required to pay a nonrefundable fee of $5.00 for each request for a duplicate certificate. An additional convenience fee of no more than $2.00 per transaction shall be charged to cover the cost of printing certificates online.

(c) The certificate of high school equivalency shall indicate the language, format, and provider [~~version~~] of each [~~the~~] test taken by the applicant.

(d) The state administrator appointed by the commissioner of education may disapprove issuance of a certificate or may cancel a certificate under the following conditions:

(1) an applicant does not meet eligibility requirements under §89.43 of this title (relating to Eligibility for a Texas Certificate of High School Equivalency);

(2) the applicant in any way violates security of the restricted test material;

(3) the applicant presents fraudulent identification or is not who he or she purports to be;

(4) the applicant uses another person's certificate or test scores in an attempt to defraud; or

(5) the applicant willingly allows another person to use his or her certificate or test scores in an attempt to defraud.

(e) In the case of nonissuance or cancellation of a certificate, the applicant shall be notified in writing by the state administrator [~~testing entity~~] that the certificate will not be issued or may be canceled. A decision by the state administrator appointed by the commissioner is final and may not be appealed.

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

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Cristina De La Fuente-Valadez
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Texas Education Agency
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CHAPTER 129. STUDENT ATTENDANCE
SUBCHAPTER B. STUDENT ATTENDANCE ACCOUNTING

19 TAC §129.21

The State Board of Education (SBOE) proposes an amendment to §129.21, concerning student attendance accounting. The section addresses requirements for student attendance accounting for state funding purposes. The proposed amendment would modify the requirements for taking attendance for board-approved off-campus activities to allow paraprofessionals to take attendance.

Section 129.21 provides the student attendance accounting requirements school districts must follow and describes the manner in which student attendance is earned. The rule also provides a list of conditions under which a student who is not actually on campus at the time attendance is taken may be considered in attendance for FSP funding purposes.

The proposed amendment to 19 TAC §129.21(j)(1) would allow paraprofessionals to take attendance at off-campus activities approved by the local school board.

The SBOE approved the proposed amendment for first reading and filing authorization at its April 8, 2016 meeting.

The proposed amendment would have no new procedural and reporting requirements. The proposed amendment would have no locally maintained paperwork requirements.

FISCAL NOTE. Amanda Brownson, director of state funding, has determined that for the first five-year period the proposed amendment is in effect there will be no additional costs for state or local government as a result of enforcing or administering the proposed amendment. There is no effect on local economy for the first five years that the proposed amendment is in effect;

therefore, no local employment impact statement is required under Texas Government Code, §2001.022.

PUBLIC BENEFIT/COST NOTE. Ms. Brownson has determined that for each year of the first five years the proposed amendment is in effect the public benefit anticipated as a result of enforcing the amendment will be to allow paraprofessionals to take attendance when accompanying students to activities approved by the school board that occur off-campus. There is no anticipated economic cost to persons who are required to comply with the proposed amendment.

ECONOMIC IMPACT STATEMENT AND REGULATORY FLEXIBILITY ANALYSIS FOR SMALL BUSINESSES AND MICROBUSINESSES. There is no direct adverse economic impact for small businesses and microbusinesses; therefore, no regulatory flexibility analysis, specified in Texas Government Code, §2006.002, is required.

REQUEST FOR PUBLIC COMMENT. Comments on the proposal may be submitted to Cristina De La Fuente-Valadez, Rulemaking, Texas Education Agency, 1701 North Congress Avenue, Austin, Texas 78701. Comments may also be submitted electronically to *rules@tea.texas.gov.* A request for a public hearing on the proposed amendment submitted under the Administrative Procedure Act must be received by the commissioner of education not more than 14 calendar days after notice of the proposal has been published in the *Texas Register.*

STATUTORY AUTHORITY. The amendment is proposed under the Texas Education Code (TEC), §42.004, which requires the commissioner, in accordance with rules adopted by the State Board of Education, to take such action and require such reports as are necessary to administer the Foundation School Program (FSP) under the TEC, Chapter 42, and the TEC, §12.106, which provides for charter schools to receive funding under certain conditions through the TEC, Chapter 42.

CROSS REFERENCE TO STATUTE. The amendment implements the Texas Education Code, §42.004 and §12.106.

§129.21. Requirements for Student Attendance Accounting for State Funding Purposes.

(a) All public schools in Texas must maintain records to reflect the average daily attendance (ADA) for the allocation of Foundation School Program (FSP) funds and other funds allocated by the Texas Education Agency (TEA). Superintendents, principals, and teachers are responsible to their school boards and to the state to maintain accurate, current attendance records.

(b) The commissioner of education is responsible for providing guidelines and procedures for attendance accounting in accordance with state law.

(c) The commissioner must provide for special circumstances regarding attendance accounting in accordance with the provisions of law.

(d) The superintendent of schools is responsible for the safekeeping of all attendance records and reports. The superintendent of schools may determine whether the properly certified attendance records or reports for the school year are to be stored in the central office, on the respective school campuses of the district, or at another secure location. Regardless of where such records are stored, they must be readily available for audit by the TEA division responsible for performing school financial audits.

(e) Districts must maintain records and make reports concerning student attendance and participation in special programs as required by the commissioner.

(f) If a school district chooses to use a locally developed record or automated system, the record or automated system must contain the minimum information required by the commissioner.

(g) A student must be enrolled for at least two hours of instruction to be considered in membership for one half day, and for at least four hours of instruction to be considered in membership for one full day.

(h) Attendance for all grades must be determined by the absences recorded in the second or fifth instructional hour of the day, unless the local school board adopts a district policy, or delegates to the superintendent the authority to establish procedures, for recording absences in an alternative hour, or unless the students for which attendance is being taken are enrolled in and participating in an alternative attendance accounting program approved by the commissioner.

(1) Students enrolled on a half-day basis may earn only one half day of attendance each school day. Attendance is determined for these pupils by recording absences in a period during the half day that they are scheduled to be present. Students enrolled on a full-day basis may earn one full day of attendance each school day.

(2) Students who are enrolled in and participating in an alternative attendance accounting program approved by the commissioner will earn attendance according to the statutory and rule provisions applicable to that program.

(3) The established period in which absences are recorded may not be changed during the school year.

(4) Students absent at the time the attendance roll is taken, during the daily period selected, are counted absent for the entire day, unless the students are enrolled in and participating in an alternative attendance accounting program approved by the commissioner. Students present at the time the attendance roll is taken, during the daily period selected, are counted present for the entire day, unless the students are enrolled in and participating in an alternative attendance accounting program approved by the commissioner.

(i) A student who is not actually in school at the time attendance is taken must not be counted in attendance for FSP funding purposes, unless the student is participating in an activity that meets the conditions set out in subsection (j) of this section, or unless the student is enrolled in and participating in an alternative attendance accounting program approved by the commissioner.

(j) A student not actually on campus at the time attendance is taken may be considered in attendance for FSP funding purposes under the following conditions.

(1) The student is participating in an activity that is approved by the local board of school trustees and is under the direction of a member of the professional or paraprofessional staff of the school district, or an adjunct staff member who:

(A) has a minimum of a bachelor's degree; and

(B) is eligible for participation in the Teacher Retirement System of Texas.

(2) The student is participating in a mentorship approved by district personnel to serve as one or more of the advanced measures needed to complete the Distinguished Achievement Program outlined in Chapter 74 of this title (relating to Curriculum Requirements).

(3) The student is absent for one of the purposes specified in the Texas Education Code (TEC), §25.087(b), (b-1), (b-2), (b-4), or (c). Excused days for travel under the TEC, §25.087(b)(1), are limited to not more than one day for travel to and one day for travel from the applicable site. A temporary absence excused under the TEC, §25.087(b)(2), must be supported by a document such as a note from the health care professional.

(k) A student not actually on campus at the time attendance is taken also may be considered in attendance for FSP funding purposes under other conditions described in the handbook adopted under §129.1025 of this title (relating to Adoption by Reference: Student Attendance Accounting Handbook) related to off-campus instruction.

(l) Before a district or charter school may count a student in attendance under this section or in attendance when the student was allowed to leave campus during any part of the school day, the local school board or governing body must adopt a policy, or delegate to the superintendent the authority to establish procedures, addressing parental consent for a student to leave campus, and the district or charter school must distribute the policy or procedures to staff and to all parents of students in the district or charter school.

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

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Cristina De La Fuente-Valadez
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TITLE 22. EXAMINING BOARDS

PART 9. TEXAS MEDICAL BOARD

CHAPTER 185. PHYSICIAN ASSISTANTS

22 TAC §§185.2, 185.4, 185.6, 185.7

The Texas Medical Board (Board) proposes amendments to §185.2, concerning Definitions, §185.4 concerning Procedural Rules for Licensure Applicants, §185.6, concerning Annual Renewal of License, and §185.7, concerning Temporary License.

The amendments to §185.2 add definitions for "Active Duty" and "Armed Forces of the United States" and amend definitions for "Military service member", "Military spouse" and "military veteran." These amendments are in accordance with the passage of SB 1307 (84th Regular Session) which amended Chapter 55 of the Texas Occupations Code.

The amendment to §185.4 expands subsection (f), Alternative Licensing Procedure, to include military service members and military veterans. The amendment also includes language allowing the executive director to waive any prerequisite to obtaining a license for an applicant described in the subsection, after reviewing the applicant's credentials. These amendments are in accordance with the passage of SB 1307 (84th Regular Session) which amended Chapter 55 of the Texas Occupations Code.

The amendment to §185.6 adds new subsection (b)(9) providing that a surgical assistant who is a military service member may request an extension of time, not to exceed two years, to complete any continuing education requirements. The amendment also adds new subsection (j) providing that military service members who hold a license to practice in Texas are entitled to two years of additional time to complete any other requirement related to the renewal of the military service member's license. This amendment is in accordance with the passage of SB 1307 (84th Regular Session) which amended Chapter 55 of the Texas Occupations Code.

The amendment to §185.7 changes an incorrect citation, §185.4(d), to the correct citation, §185.4(c)

Scott Freshour, General Counsel for the Board, has determined that for each year of the first five years the sections, as proposed, are in effect the public benefit anticipated as a result of enforcing this proposal will be to have rules consistent with statutes.

Mr. Freshour has also determined that for the first five-year period the sections are in effect there will be no fiscal implication to state or local government as a result of enforcing the sections as proposed. There will be no effect to individuals required to comply with the rules as proposed. There will be no effect on small or micro businesses.

Comments on the proposal may be submitted to Rita Chapin, P.O. Box 2018, Austin, Texas 78768-2018 or e-mail comments to: rules.development@tmb.state.tx.us. A public hearing will be held at a later date.

The amendments are proposed under the authority of the Texas Occupations Code Annotated, §204.101, which provides authority for the Board to adopt rules and bylaws as necessary to: govern its own proceedings; perform its duties; enforce this subtitle; and establish rules related to licensure.

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

§185.2. Definitions.

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

(1) Act--The Physician Assistant Licensing Act, Texas Occupations Code Annotated, Title 3, Subtitle C, Chapter 204 as amended.

(2) Agency--The divisions, departments, and employees of the Texas Medical Board, the Texas Physician Assistant Board, and the Texas State Board of Acupuncture Examiners.

(3) Alternate physician--A physician providing appropriate supervision on a temporary basis.

(4) APA--The Administrative Procedure Act, Texas Government Code, Chapter 2001 as amended.

(5) Applicant--A party seeking a license from the Texas Physician Assistant Board.

(6) Board or the "physician assistant board"--The Texas Physician Assistant Board.

(7) Executive Director--The Executive Director of the Agency or the authorized designee of the Executive Director.

(8) Good professional character--An applicant for licensure must not be in violation of or committed any act described in the Physician Assistant Licensing Act, §§204.302 - 204.304, Texas Occupations Code Annotated.

(9) Medical Board--The Texas Medical Board.

(10) Medical Practice Act--Texas Occupations Code Annotated, Title 3, Subtitle B, as amended.

(11) Military service member--A person who is on active duty [currently serving in the armed forces of the United States, in a reserve component of the armed forces of the United States, including the National Guard, or in the state military service of any state].

(12) Military spouse--A person who is married to a military service member [who is currently on active duty].

(13) Military veteran--A person who served on active duty [in the army, navy, air force, marine corps, or coast guard of the United States, or in an auxiliary service of one of those branches of the armed forces] and who was discharged or released from active duty [under conditions other than dishonorable].

(14) Open Meetings Act--Texas Government Code Annotated, Chapter 551 as amended.

(15) Party--The physician assistant board and each person named or admitted as a party in a hearing before the State Office of Administrative Hearings or contested case before the physician assistant board.

(16) Physician assistant--A person licensed as a physician assistant by the Texas Physician Assistant Board.

(17) Prescriptive authority agreement--An agreement entered into by a physician and an advanced practice registered nurse or physician assistant through which the physician delegates to the advanced practice registered nurse or physician assistant the act of prescribing or ordering a drug or device. Prescriptive authority agreements are required for the delegation of the act of prescribing or ordering a drug or device in all practice settings, with the exception of a facility-based practice, pursuant to §157.054 of the Act.

(18) Presiding Officer--The physician assistant member of the Board appointed by the Governor to serve as the presiding officer of the board.

(19) State--Any state, territory, or insular possession of the United States and the District of Columbia.

(20) Submit--The term used to indicate that a completed item has been actually received and date-stamped by the board along with all required documentation and fees, if any.

(21) Supervising physician--A physician licensed by the medical board who has an active and unrestricted license and assumes responsibility and legal liability for the services rendered by the physician assistant, and who has notified the Medical Board of the intent to supervise a specific physician assistant and of the termination of such supervision.

(22) Supervision--Overseeing the activities of, and accepting responsibility for, the medical services rendered by a physician assistant. Supervision does not require the constant physical presence of the supervising physician but includes a situation where a supervising physician and the person being supervised are, or can easily be, in contact with one another by radio, telephone, or another telecommunication device.

(23) Unrestricted medical license--A license held by a physician issued by the Medical Board that is not subject to an order with restrictions that would impair a physician's ability to supervise a PA inconsistent with the public's well-being that could harm patients.

(24) Active duty--A person who is currently serving as full-time military service member in the armed forces of the United States or active duty military service as a member of the Texas military forces, as defined by §437.001, Government Code, or similar military service of another state.

(25) Armed forces of the United States--Army, Navy, Air Force, Coast Guard, or Marine Corps of the United States or a reserve unit of one of those branches of the armed forces.

§185.4. Procedural Rules for Licensure Applicants.

(a) - (e) (No change.)

(f) Alternative License Procedure for Military Service Members, Military Veterans, and Military Spouses [Spouse].

(1) An applicant who is a military service member, military veteran, or military spouse [the spouse of a member of the armed forces of the United States assigned to a military unit headquartered in Texas] may be eligible for alternative demonstrations of competency for certain licensure requirements. Unless specifically allowed in this subsection, an applicant must meet the requirements for licensure as specified in this chapter.

(2) To be eligible, an applicant must be a military service member, military veteran, or military spouse [the spouse of a person serving on active duty as a member of the armed forces of the United States] and meet one of the following requirements:

(A) holds an active unrestricted physician assistant license issued by another state that has licensing requirements that are substantially equivalent to the requirements for a Texas physician assistant license; or

(B) within the five years preceding the application date held a physician assistant license in this state [that expired and was cancelled for nonpayment while the applicant lived in another state for at least six months].

(3) The executive director may waive any prerequisite to obtaining a license for an applicant described in this subsection after reviewing the applicant's credentials.

(4) [(3)] Applications for licensure from applicants qualifying under paragraphs (1) and (2) of this subsection shall be expedited by the board's licensure division. Such applicants shall be notified, in writing or by electronic means, as soon as practicable, of the requirements and process for renewal of the license.

(5) [(4)] Alternative Demonstrations of Competency Allowed. Applicants qualifying under paragraphs (1) and (2) of this subsection:

(A) in demonstrating compliance with subsection (d) of this section must only provide sufficient documentation to the board that the applicant has, on a full-time basis, actively practiced as a physician assistant, has been a student at an acceptable approved physician assistant program, or has been on the active teaching faculty of an acceptable approved physician assistant program, within one of the last three years preceding receipt of an Application for licensure;

(B) notwithstanding the one year expiration in subsection (e)(1) of this section, are allowed an additional 6 months to complete the application prior to it becoming inactive; and

(C) notwithstanding the 20 day deadline in subsection (e)(6) of this section, may be considered for permanent licensure up to 5 days prior to the board meeting.

(g) Applicants with Military Experience.

(1) For applications filed on or after March 1, 2014, the Board shall, with respect to an applicant who is a military service member or military veteran as defined in §185.2 of this title (relating to Definitions), credit verified military service, training, or education toward

the licensing requirements, other than an examination requirement, for a license issued by the Board.

(2) This section does not apply to an applicant who:

(A) has had a physician assistant license suspended or revoked by another state or a Canadian province;

(B) holds a physician assistant license issued by another state or a Canadian province that is subject to a restriction, disciplinary order, or probationary order; or

(C) has an unacceptable criminal history.

(h) Re-Application for Licensure Prohibited. A person who has been determined ineligible for a license by the Licensure Committee may not reapply for a license prior to the expiration of one year from the date of the Board's ratification of the Licensure Committee's determination of ineligibility and denial of licensure.

§185.6. Annual Renewal of License.

(a) (No change.)

(b) The following documentation shall be submitted as part of the renewal process:

(1) - (8) (No change.)

(9) A physician assistant, who is a military service member, may request an extension of time, not to exceed two years, to complete any CME requirements.

(c) - (i) (No change.)

(j) A military service member who holds a physician assistant license in Texas is entitled to two years of additional time to complete any other requirement related to the renewal of the military service member's license.

§185.7. Temporary License.

(a) The board, or its designee may issue a temporary license to an applicant who:

(1) meets all the qualifications for a license under the Act but is waiting for the next scheduled meeting of the board for the license to be issued;

(2) seeks to temporarily substitute for a licensed physician assistant during the licensee's absence, if the applicant:

(A) is licensed or registered in good standing in another state, territory, or the District of Columbia;

(B) submits an application on a form prescribed by the board; and

(C) pays the appropriate fee prescribed by the board;

(3) has graduated from an educational program for physician assistants or surgeon assistants accredited by the Accreditation Review Commission for the Education of Physician Assistants (ARC-PA) or by the committee's predecessor or successor entities no later than six months previous to the application for temporary licensure and is waiting for examination results from the National Commission on Certification of Physician Assistants; or

(4) has not, on a full-time basis, actively practiced as a physician assistant, as defined under §185.4(c) [~~§185.4(d)~~] of this title (relating to Procedural Rules for Licensure Applicants), but meets guidelines set by the physician assistant board including, but not limited to, length of time out of active practice as a physician assistant and duration of temporary licenses.

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

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

Filed with the Office of the Secretary of State on May 2, 2016.

TRD-201602088
Mari Robinson, J.D.
Executive Director
Texas Medical Board
Earliest possible date of adoption: June 12, 2016
For further information, please call: (512) 305-7016

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PART 11. TEXAS BOARD OF NURSING

CHAPTER 217. LICENSURE, PEER ASSISTANCE AND PRACTICE

22 TAC §217.4

The Texas Board of Nursing (Board) proposes amendments to §217.4, concerning Requirements for Initial Licensure by Examination for Nurses Who Graduate from Nursing Education Programs Outside of United States' Jurisdiction. The amendments are proposed under the authority of the Occupations Code §§301.151, 301.252, and 301.253(a).

Background.

The proposed amendments are necessary to treat foreign educated nurse applicants for initial licensure in Texas more similarly to individuals educated within the United States and to remove unnecessary barriers to licensure for these individuals.

At the outset, the proposed amendments clarify the eligibility requirements for foreign educated nurse applicants. As clarified by the proposed amendments, a foreign educated applicant will be eligible for initial licensure in Texas in two circumstances. Under the first condition, an individual will be eligible for initial licensure in Texas if he/she graduated from an approved foreign nursing education program within the four years immediately preceding the filing of an application for initial licensure in Texas. There is no practice requirement associated with this condition.

There is, however, a practice requirement associated with the second condition. Under the second condition, an individual will be eligible for initial licensure in Texas even if he/she graduated from an approved foreign nursing education program more than four years immediately preceding the filing of an application for initial licensure in Texas, *so long* as he/she has practiced nursing within the four years immediately preceding the filing of an application for initial licensure in Texas.

If an individual meets either of these two conditions, he/she will be eligible to take the National Council Licensing Examination for Registered Nurses (NCLEX-RN) or the National Council Licensing Examination for Practical/Vocational Nurses (NCLEX-PN), as applicable.

The proposed amendments also eliminate several requirements from the current rule. First, the proposed amendments eliminate the current requirement that certain foreign educated nurse applicants must have practiced for at least two years since graduation in order to be eligible for initial licensure in Texas. Although recent practice may qualify an individual for licensure under the rule in some situations, the proposal does not contain

any mandatory practice requirement. An individual may qualify for licensure through recent graduation from an approved foreign nursing education program (within the four years immediately preceding the filing of an application for initial licensure in Texas) or through recent practice (within the four years immediately preceding the filing of an application for initial licensure in Texas) *and* graduation from an approved foreign nursing education program.

Second, the proposed amendments eliminate the requirement that a foreign educated nurse applicant who passes the licensing examination must complete a refresher course. Currently, the Board's rule requires individuals who have not practiced nursing within the four years immediately preceding the filing of an application for initial licensure in Texas to complete a refresher course before being issued a license, despite the fact that the individual passed the national licensing exam. The proposed amendments eliminate this unnecessary requirement, as an individual's minimum competency will be established by successfully passing the national licensing examination.

Finally, the proposed amendments eliminate any requirement that a foreign educated registered nurse applicant hold licensure elsewhere in order to be eligible for initial licensure in Texas. The Board's current rule does not include a similar requirement for foreign educated vocational nurse applicants. The elimination of this requirement promotes parity among applicants.

Overall, the proposed amendments are intended to align the requirements, as closely as possible, for foreign educated nurse applicants for initial licensure in Texas with those required for applicants educated within the United States' jurisdiction. Further, the proposed amendments remove unnecessary barriers to licensure for foreign educated nurse applicants, making it easier for these individuals to become licensed in Texas.

Section by Section Overview.

Proposed amended §217.4(a)(1) requires a vocational nurse applicant to meet certain requirements for initial licensure in Texas. First, the applicant must hold a high school diploma issued by an accredited secondary school or equivalent educational credentials as established by the General Education Development Equivalency Test (GED). Second, the applicant must have *either* successfully completed an approved program for educating vocational/practical (second level general nurses) nurses within the four years immediately preceding the filing of an application for initial licensure in Texas *or* have practiced as a second level general nurse within the four years immediately preceding the filing of an application for initial licensure in Texas and have successfully completed an approved program for educating vocational/practical (second level general nurses) nurses. In either case, the applicant must provide a Credential Evaluation Service Full Education Course-by-Course Report from the Commission on Graduates of Foreign Nursing Schools (CGFNS), Educational Records Evaluation Service (ERES), or the International Education Research Foundation (IERF). The applicant must also achieve an approved score on an English proficiency test acceptable to the Board, unless a substantial portion of the applicant's nursing program of study, as determined by the Board, was conducted in English.

Proposed amended §217.4(a)(2) requires a registered nurse applicant to meet certain requirements for initial licensure in Texas. First, the applicant must *either* have successfully completed an approved program for educating registered (first level general nurses) nurses within the four years immediately preceding the filing of an application for initial licensure in Texas or have practiced as a first level general nurse within the four years immediately preceding the filing of an application for initial licensure in Texas and have successfully completed an approved program for educating registered (first level general nurses) nurses. In either case, the applicant must provide a Credential Evaluation Service Full Education Course-by-Course Report from the Commission on Graduates of Foreign Nursing Schools (CGFNS), Educational Records Evaluation Service (ERES), or the International Education Research Foundation (IERF), which verifies that the applicant: (i) has the educational credentials equivalent to graduation from a governmentally accredited/approved, postsecondary general nursing program of at least two academic years in length; (ii) received both theory and clinical education in nursing care of the adult which includes both medical and surgical nursing, maternal/infant nursing, nursing care of children, and psychiatric/mental health nursing; and (iii) achieved an approved score on an English proficiency test acceptable to the Board, or the equivalent, unless a substantial portion of the applicant's nursing program of study, as determined by the Board, was conducted in English.

The proposed amendments eliminate the current rule's requirement in §217.4(b) that an applicant who has passed the licensing examination, but has not practiced nursing within the four years immediately preceding the filing of an application for initial licensure, must complete a nurse refresher course prior to being licensed.

The remaining proposed amendments reorder the section appropriately and correct grammatical errors.

Fiscal Note.

Katherine Thomas, Executive Director, has determined that for each year of the first five years the proposed amendments will be in effect, there will be no fiscal impact to state or local governments.

Public Benefit/Cost Note.

Ms. Thomas has also determined that for each year of the first five years the proposed amendments are in effect, the anticipated public benefits will be the adoption of amendments that will treat applicants for initial licensure in Texas more similarly, regardless of where the individuals received their nursing education. Further, the proposed amendments will remove unnecessary barriers to licensure for foreign educated nurse applicants.

There are no anticipated costs of compliance with the proposal. First, the proposal only affects foreign educated nurse applicants seeking initial licensure in Texas through examination. The Board's rule currently prescribes requirements for these individuals. The proposed amendments, however, eliminate unnecessary and potentially burdensome requirements from the rule. For example, the proposed amendments eliminate the rule's current requirement that an individual take a refresher course after passing the national licensing examination (in situations where the individual had not practiced within the four-year period preceding the individual's application). The Board anticipates that the elimination of this requirement will reduce the costs for individuals seeking initial licensure in Texas under this rule because they will not have to incur the expenses associated with a refresher course and/or the delay of licensure. Further, the proposed amendments eliminate the requirement that certain applicants practice nursing for a minimum of two years following graduation from an approved foreign nursing education program in order to be eligible for licensure, which may allow these ap-

plicants to apply for licensure in Texas sooner, defraying costs associated with relocation and delay of licensure. Finally, the proposal eliminates the requirement that registered nurse applicants must hold licensure elsewhere. The elimination of this requirement may also reduce duplicative costs associated with obtaining and maintaining licensure outside of Texas.

Further, the proposal does not impose any requirements that would result in new costs to individuals seeking licensure under the rule. The proposal clarifies existing requirements of the rule, such as requirements related to re-education, but it does not create new costs of compliance, nor does it impose new requirements that are not already required by the rule. As such, the Board does not anticipate that any new costs of compliance will result from the proposal.

Economic Impact Statement and Regulatory Flexibility Analysis for Small and Micro Businesses.

As required by the Government Code §2006.002(c) and (f), the Board has determined that the proposed amendments will not have an adverse economic effect on any individual, Board regulated entity, or other entity required to comply with the proposed amendments because there are no anticipated costs of compliance with the proposal. As such, the Board is not required to prepare a regulatory flexibility analysis.

Takings Impact Assessment.

The Board has determined that no private real property interests are affected by this proposal and that this proposal does not restrict or limit an owner's right to property that would otherwise exist in the absence of government action and, therefore, does not constitute a taking or require a takings impact assessment under the Government Code §2007.043.

Request for Public Comment.

To be considered, written comments on the proposal or any request for a public hearing must be submitted no later than 5:00 p.m. on June 13, 2016, to Mark Majek, Director of Operations, and James W. Johnston, General Counsel, Texas Board of Nursing, 333 Guadalupe, Suite 3-460, Austin, Texas 78701, or by e-mail to mark.majek@bon.texas.gov and dusty.johnston@bon.texas.gov, or faxed to (512) 305-8101. If a hearing is held, written and oral comments presented at the hearing will be considered.

Statutory Authority.

The amendments are proposed under the authority of the Occupations Code §§301.151, 301.252, and 301.253(a).

Section 301.151 addresses the Board's rulemaking authority. Section 301.151 authorizes the Board to adopt and enforce rules consistent with Chapter 301 and necessary to: (i) perform its duties and conduct proceedings before the Board; (ii) regulate the practice of professional nursing and vocational nursing; (iii) establish standards of professional conduct for license holders under Chapter 301; and (iv) determine whether an act constitutes the practice of professional nursing or vocational nursing.

Section 301.252 addresses requirements for licensure. Section 301.252(a) requires that each applicant for a registered nurse license or a vocational nurse license must submit to the Board a sworn application that demonstrates the applicant's qualifications, accompanied by evidence that the applicant: (i) has good professional character; (ii) has successfully completed a program of professional or vocational nursing education approved under §301.157(d); and (iii) has passed the jurisprudence examination approved by the Board.

Section 301.252(a-1) requires the jurisprudence examination to be conducted on the licensing requirements under Chapter 301 and Board rules and other laws, rules, or regulations applicable to the nursing profession in this state. Section 301.252(a-1) also provides the Board with authority to adopt rules for the jurisprudence examination regarding: (i) the development of the examination; (ii) applicable fees; (iii) administration of the examination; (iv) reexamination procedures; (v) grading procedures; and (vi) notice of results.

Section 301.252(b) states that the Board may waive the requirement of Subsection (a)(2) for a vocational nurse applicant if the applicant provides satisfactory sworn evidence that the applicant has completed an acceptable level of education in a professional nursing school or a school of professional nurse education located in another state or a foreign country.

Section 301.252(c) authorizes the Board to determine acceptable levels of education under Subsection (b).

Section 301.253 addresses requirements related to the licensure examination. Section 301.253(a) states that, except as provided by §301.452, an applicant is entitled to take the examination prescribed by the Board if the Board determines that the applicant meets the qualifications required by §301.252 and the applicant pays the fees required by the Board.

Cross Reference To Statute.

The following statutes are affected by this proposal: Occupations Code §§301.151, 301.252, and 301.253(a).

§217.4 Requirements for Initial Licensure by Examination for Nurses Who Graduate from Nursing Education Programs Outside of United States' Jurisdiction.

(a) Criteria for nurse [~~Nurse~~] applicants for initial licensure applying under this section.

(1) A licensed vocational nurse applicant must:

(A) hold a high school diploma issued by an accredited secondary school or equivalent educational credentials as established by the General Education Development Equivalency Test (GED);

(B) have either:

(i) successfully completed an approved program for educating vocational/practical (second level general nurses) nurses within the four years immediately preceding the filing of an application for initial licensure in Texas by providing a Credential Evaluation Service Full Education Course-by-Course Report from the Commission on Graduates of Foreign Nursing Schools (CGFNS), Educational Records Evaluation Service (ERES), or the International Education Research Foundation (IERF); or

(ii) successfully completed an approved program for educating vocational/practical (second level general nurses) nurses by providing a Credential Evaluation Service Full Education Course-by-Course Report from the Commission on Graduates of Foreign Nursing Schools (CGFNS), Educational Records Evaluation Service (ERES), or the International Education Research Foundation (IERF) and practiced as a second level general nurse within the four years immediately preceding the filing of an application for initial licensure in Texas; and

[~~(B) have successfully completed an approved program for educating vocational/practical (second level general nurses) nurses by providing a Credential Evaluation Service Full Education Course-by-Course Report from the Commission on Graduates of~~

Foreign Nursing Schools (CGFNS), Educational Records Evaluation Service (ERES), or the International Education Research Foundation (IERF); and]

(C) have achieved an approved score on an English proficiency test acceptable to the Board, unless a substantial portion of the applicant's nursing program of study, as determined by the Board, was conducted in English.

(2) A registered nurse applicant must either:

(A) have successfully completed an approved program for educating registered (first level general nurses) nurses within the four years immediately preceding the filing of an application for initial licensure in Texas by providing a Credential Evaluation Service Full Education Course-by-Course Report from the Commission on Graduates of Foreign Nursing Schools (CGFNS), Educational Records Evaluation Service (ERES), or the International Education Research Foundation (IERF), which verifies that the applicant:

(i) has the educational credentials equivalent to graduation from a governmentally accredited/approved, post-secondary general nursing program of at least two academic years in length;

(ii) received both theory and clinical education in each of the following: nursing care of the adult which includes both medical and surgical nursing, maternal/infant nursing, nursing care of children, and psychiatric/mental health nursing; and

(iii) has achieved an approved score on an English proficiency test acceptable to the Board, or the equivalent, unless a substantial portion of the applicant's nursing program of study, as determined by the Board, was conducted in English; or

(B) have practiced as a first level general nurse within the four years immediately preceding the filing of an application for initial licensure in Texas and have successfully completed an approved program for educating registered (first level general nurses) nurses by providing a Credential Evaluation Service Full Education Course-by-Course Report from the Commission on Graduates of Foreign Nursing Schools (CGFNS), Educational Records Evaluation Service (ERES), or the International Education Research Foundation (IERF), which verifies that the applicant:

(i) has the educational credentials equivalent to graduation from a governmentally accredited/approved, post-secondary general nursing program of at least two academic years in length;

(ii) received both theory and clinical education in each of the following: nursing care of the adult which includes both medical and surgical nursing, maternal/infant nursing, nursing care of children, and psychiatric/mental health nursing; and

(iii) has achieved an approved score on an English proficiency test acceptable to the Board, or the equivalent, unless a substantial portion of the applicant's nursing program of study, as determined by the Board, was conducted in English.

[(2) A registered nurse applicant must provide a Credential Evaluation Service Full Education Course-by-Course Report from the Commission on Graduates of Foreign Nursing Schools (CGFNS), Educational Records Evaluation Service (ERES), or the International Education Research Foundation (IERF) and an English proficiency test acceptable to the Board, or the equivalent which verifies that the applicant:]

[(A) has the educational credentials equivalent to graduation from a governmentally accredited/approved, post-secondary general nursing program of at least two academic years in length;]

[(B) received both theory and clinical education in each of the following: nursing care of the adult which includes both medical and surgical nursing, maternal/infant nursing, nursing care of children, and psychiatric/mental health nursing;]

[(C) received initial registration/license as a first-level, general nurse in the country where the applicant completed general nursing education;]

[(D) is currently registered/licensed as a first-level general nurse; and]

[(E) has achieved an approved score on an English proficiency test acceptable to the Board, unless a substantial portion of the applicant's nursing program of study, as determined by the Board, was conducted in English.]

(3) All [all] applicants must file a complete application for registration containing data required by the board attesting that all information contained in, or referenced by, the application is complete and accurate and is not false or misleading, and the required application processing fee which is not refundable.[;]

(4) All [all] applicants must pass the NCLEX-PN (LVN applicants) or NCLEX-RN (RN applicants) as a Texas applicant within four years of completion of the requirements for graduation or within four years of the date of eligibility.[;]

[(A) within four years of completion of the requirements for graduation from the nursing education program if the applicant has not practiced as a second-level or first-level general nurse since completing the requirements for graduation; or]

[(B) within four years of the date of eligibility for the NCLEX-PN or NCLEX-RN if the applicant has practiced as a second-level or first-level general nurse at least two years since completing the requirements for graduation;]

(5) All [all] nurse applicants must submit FBI fingerprint cards provided by the Board for a complete criminal background check.[; and]

(6) All [all] nurse applicants must pass the jurisprudence exam approved by the board, effective September 1, 2008.

[(b) An applicant who has completed the requirements for graduation and has practiced as a second-level or first-level general nurse for at least two years but has not practiced as a second-level or first-level general nurse within the four years immediately preceding the filing of an application for initial licensure will be issued a six month limited permit (temporary authorization) upon passing the NCLEX-PN or NCLEX-RN examination and must complete a nurse refresher course that meets the criteria defined by the Board in order to be eligible for licensure under this section.]

(b) [(c)] An applicant who has not passed the NCLEX-PN or NCLEX-RN within four years of completion of the requirements for graduation or within four years of the date of eligibility must complete an appropriate nursing education program in order to be eligible to take or retake the examination.

(c) [(d)] Should it be ascertained from the application filed, or from other sources, that the applicant should have had an eligibility issue determined by way of a petition for declaratory order pursuant to the Occupations Code §301.257, then the application will be treated and processed as a petition for declaratory order under §213.30 of this title (relating to Declaratory Order of Eligibility for Licensure), and the

applicant will be treated as a petitioner under that section and will be required to pay the non-refundable fee required by that section.

(d) [~~(e)~~] Accustomation Permit.

(1) An applicant who has graduated from an accredited nursing program outside the United States may apply to the Board for a six month accustomation permit by completing an application and paying a fee. An applicant holding an accustomation permit under this subsection may participate in nursing education courses and clinical experiences.

(2) An applicant is eligible to apply for an accustomation permit under this subsection only if the applicant has:

(A) graduated from an accredited nursing program outside the United States;

(B) never taken the NCLEX-PN (LVN applicants) or NCLEX-RN (RN applicants); and

(C) successfully completed a credential evaluation service from a board approved credentialing agency.

(e) [~~(f)~~] Upon initial licensure by examination, the license is issued for a period ranging from six months to 29 months depending on the birth month. Licensees born in even-numbered years shall renew their licenses in even-numbered years; licensees born in odd-numbered years shall renew their licenses in odd-numbered years.

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 April 29, 2016.

TRD-201602053
Jena Abel
Assistant General Counsel
Texas Board of Nursing
Earliest possible date of adoption: June 12, 2016
For further information, please call: (512) 305-6822

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TITLE 28. INSURANCE

PART 1. TEXAS DEPARTMENT OF INSURANCE

CHAPTER 3. LIFE, ACCIDENT, AND HEALTH INSURANCE AND ANNUITIES

SUBCHAPTER W. MISCELLANEOUS RULES FOR GROUP AND INDIVIDUAL ACCIDENT AND HEALTH INSURANCE

28 TAC §3.3615

The Texas Department of Insurance (TDI) proposes the repeal of 28 TAC §3.3615, relating to Continuation of Existing Texas Health Insurance Pool Coverage. The repeal is necessary because the Texas Health Insurance Pool (THIP) was abolished by SB 1367, 83rd Legislature, Regular Session (2013), which repealed Insurance Code Chapter 1506, the THIP's enabling legislation, effective September 1, 2015.

EXPLANATION. Section 3.3615 was adopted under Section 7 of SB 1367 to temporarily extend THIP insurance coverage until March 31, 2014, because of problems with the federal implementation of the Patient Protection and Affordable Care Act. That function now is complete, and the THIP's enabling act is repealed. Section 3.3615 is no longer needed and should be repealed.

FISCAL NOTE AND LOCAL EMPLOYMENT IMPACT STATEMENT. Ms. Judy Wooten, project manager for the Life and Health Regulatory Initiatives Team, Regulatory Policy Division, has determined that during each year of the first five years that the proposed repeal is in effect, there will be no fiscal impact on state or local government as a result of enforcing or administering the section. There will be no measurable effect on local employment or the local economy as a result of the proposal.

PUBLIC BENEFIT AND COST NOTE. Ms. Wooten has also determined that for each year of the first five years the repeal of the section is in effect, the public benefit anticipated as a result of administration and enforcement of the repealed section will be the elimination of provisions that continued existing THIP coverage until March 31, 2014, since the coverage no longer exists. There is no anticipated economic cost to persons who are required to comply with the proposed repeal. There is no anticipated difference in cost of compliance between small and large businesses.

ECONOMIC IMPACT STATEMENT AND REGULATORY FLEXIBILITY ANALYSIS FOR SMALL AND MICRO BUSINESSES. In accordance with Government Code §2006.002(c), TDI has determined that this proposed repeal will not have an adverse economic effect on small or micro businesses because it is simply a repeal of an obsolete rule. Therefore, in accordance with Government Code §2006.002(c), TDI is not required to prepare a regulatory flexibility analysis.

TAKINGS IMPACT ASSESSMENT. TDI has determined that no private real property interests are affected by this proposal and that this proposal does not restrict or limit an owner's right to property that would otherwise exist in the absence of government action and, therefore, does not constitute a taking or require a takings impact assessment under Government Code §2007.043.

REQUEST FOR PUBLIC COMMENT. TDI invites the public and affected persons to comment on this proposal. Submit your written comments on the proposal no later than 5 p.m., Central Time, on June 13, 2016. Send written comments by mail to the Office of the Chief Clerk, Mail Code 113-2A, Texas Department of Insurance, P.O. Box 149104, Austin, Texas 78714-9104, or by email to chiefclerk@tdi.texas.gov. You must simultaneously submit an additional copy of the comments by mail to Ms. Judy Wooten, Project Manager for Life and Health Regulatory Initiatives Team, Regulatory Policy Division, Mail Code 106-1A, Texas Department of Insurance, P.O. Box 149104, Austin, Texas 78714-9104, or by email to LHLComments@tdi.texas.gov. You must submit any request for a public hearing separately to the Office of the Chief Clerk, Mail Code 113-2A, Texas Department of Insurance, P.O. Box 149104, Austin, Texas 78714-9104, or by email to chiefclerk@tdi.texas.gov before the close of the public comment period. If a hearing is held, written comments and public testimony presented at the hearing will be considered.

STATUTORY AUTHORITY. The repeal of §3.3615 is proposed under SB 1367, 83rd Legislature, Regular Session (2013), and Insurance Code §36.001. SB 1367 abolished the THIP and repealed Insurance Code Chapter 1506. Section 36.001 provides that the commissioner of insurance may adopt any rules necessary and appropriate to implement the powers and duties of TDI under the Insurance Code and other laws of this state.

CROSS REFERENCE TO STATUTE. The proposed repeal of §3.3615 implements SB 1367, 83rd Legislature, Regular Session (2013).

§3.3615. Continuation of Existing Texas Health Insurance Pool Coverage.

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

Filed with the Office of the Secretary of State on May 2, 2016.

TRD-201602077
Norma Garcia
General Counsel
Texas Department of Insurance
Earliest possible date of adoption: June 12, 2016
For further information, please call: (512) 676-6584

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SUBCHAPTER DD. ASSESSMENTS

28 TAC §3.4401

The Texas Department of Insurance (TDI) proposes the repeal of 28 TAC Chapter 3, Subchapter DD, §3.4401, relating to Assessment. The repeal is necessary because the Texas Health Insurance Pool (THIP) was abolished by SB 1367, 83rd Legislature, Regular Session (2013), which repealed Insurance Code Chapter 1506, the THIP's enabling legislation, effective September 1, 2015.

EXPLANATION. SB 1367 obviated the purpose of Subchapter DD, which provided for assessments for the purpose of providing the funds necessary to carry out the powers and duties of the THIP. The subchapter is now unnecessary and should be repealed.

FISCAL NOTE AND LOCAL EMPLOYMENT IMPACT STATEMENT. Ms. Judy Wooten, project manager for the Life and Health Regulatory Initiatives Team, Regulatory Policy Division, has determined that during each year of the first five years that the proposed repeal is in effect, there will be no fiscal impact on state or local governments as a result of enforcing or administering the section. There will be no measurable effect on local employment or the local economy as a result of the proposal.

PUBLIC BENEFIT AND COST NOTE. Ms. Wooten has also determined that for each year of the first five years the repeal of the section is in effect, the public benefit anticipated as a result of administration and enforcement of the repealed sections will be the elimination of provisions requiring assessments to fund a program that no longer exists. There is no anticipated economic cost to persons required to comply with the proposed repeal. There is no anticipated difference in cost of compliance between small and large businesses.

ECONOMIC IMPACT STATEMENT AND REGULATORY FLEXIBILITY ANALYSIS FOR SMALL AND MICRO BUSINESSES. In accordance with Government Code §2006.002(c), TDI has determined that this proposed repeal will not have an adverse economic effect on small or micro businesses because it is simply a repeal of an obsolete rule. Therefore, in accordance with Government Code §2006.002(c), TDI is not required to prepare a regulatory flexibility analysis.

TAKINGS IMPACT ASSESSMENT. TDI has determined that no private real property interests are affected by this proposal and that this proposal does not restrict or limit an owner's right to property that would otherwise exist in the absence of government action and, therefore, does not constitute a taking or require a takings impact assessment under Government Code §2007.043.

REQUEST FOR PUBLIC COMMENT. TDI invites the public and affected persons to comment on this proposal. Submit your written comments on the proposal no later than 5 p.m., Central Time, on June 13, 2016. Send written comments by mail to the Office of the Chief Clerk, Mail Code 113-2A, Texas Department of Insurance, P.O. Box 149104, Austin, Texas 78714-9104, or by email to chiefclerk@tdi.texas.gov. You must simultaneously submit an additional copy of the comments by mail to Ms. Judy Wooten, Project Manager for Life and Health Regulatory Initiatives Team, Regulatory Policy Division, Mail Code 106-1A, Texas Department of Insurance, P.O. Box 149104, Austin, Texas 78714-9104, or by email to LHLComments@tdi.texas.gov. You must submit any request for a public hearing separately to the Office of the Chief Clerk, Mail Code 113-2A, Texas Department of Insurance, P.O. Box 149104, Austin, Texas 78714-9104, or by email to chiefclerk@tdi.texas.gov before the close of the public comment period. If a hearing is held, written comments and public testimony presented at the hearing will be considered.

STATUTORY AUTHORITY. The repeal of §3.4401 is proposed under SB 1367, 83rd Legislature, Regular Session (2013), and Insurance Code §36.001. SB 1367 abolished the THIP and repealed Insurance Code Chapter 1506. Section 36.001 provides that the commissioner of insurance may adopt any rules necessary and appropriate to implement the powers and duties of TDI under the Insurance Code and other laws of this state.

CROSS REFERENCE TO STATUTE. The proposed repeal of §3.4401 implements SB 1367, 83rd Legislature, Regular Session (2013).

§3.4401. Assessments.

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

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General Counsel
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CHAPTER 21. TRADE PRACTICES
SUBCHAPTER M. MANDATORY BENEFIT NOTICE REQUIREMENTS

INTRODUCTION. The Texas Department of Insurance (TDI) proposes amendments to 28 TAC §§21.2101 - 21.2103 and §§21.2105 - 21.2107, and proposes the repeal of §21.2104, concerning Mandatory Benefits Notice Requirements. The proposed amendments and repeal are necessary to require the extension of ovarian cancer screening due to the passage of HB 2813, 84th Legislature, Regular Session, 2015, and change the use of the term "hospital confinement" as it relates to SB 979, 84th Legislature, Regular Session, 2015.

EXPLANATION. HB 2813 amended Insurance Code §1370.002 and §1370.003, concerning Certain Tests for Detection of Human Papillomavirus and Cervical Cancer. The amendments require the inclusion of an annual diagnostic screening test for early detection of ovarian cancer, specifically the CA 125 blood test. Section 1370.004 requires that a health plan carrier must provide written notice of the coverage required under Chapter 1370.

SB 979 amended Insurance Code §1201.104 to expand one category of individual accident and health insurance policy from "hospital confinement indemnity" to "hospital indemnity or other fixed indemnity." The amendments make conforming changes to the text of Chapter 21, Subchapter M.

Section 21.2101 is amended to remove notice requirements related to date limitations that are no longer relevant, and §21.2102 is amended to clarify definitions. The amendments to §21.2103 require the mandatory benefit notice to include language related to ovarian cancer.

If a plan is not required to provide a benefit for ovarian cancer screening due to the exception in Insurance Code §1370.002(b), the notice may be modified to omit the references to ovarian cancer and the CA 125 blood test. Section 21.2103(b) is amended to clarify that any notice that includes "substantially similar language," issued after the effective date of these amendments, must be filed with TDI for review and approval by the commissioner. Existing subsection (d) is deleted because the grandfathering language is no longer necessary. This section also requires that the notices be printed in no less than 10-point type. Section 21.2104 is repealed because its 10-point type requirement is moved to §21.2103 and §21.2107.

The amendments to §21.2105 remove date requirements that are no longer relevant. Section 21.2106 is amended to update the TDI website address and provide for language regarding ovarian cancer to be added to the notice. The amendments to §21.2107 clarify language and include the relocated requirement that notices must be printed in no less than 10-point type.

FISCAL NOTE AND LOCAL EMPLOYMENT IMPACT STATEMENT. Patricia Brewer, team lead for the Life and Health Regulatory Initiatives Program, has determined that for each year of the first five years the proposed amendments and repeal will be in effect, there will be no fiscal impact to state or local governments as a result of the enforcement or administration of the rule. There will be no measurable effect on local employment or the local economy as a result of the proposal.

PUBLIC BENEFIT AND COST NOTE. Ms. Brewer has also determined that for each year of the first five years the amendments and repeal are in effect, the public benefits anticipated as a result of the proposed amendments and repeal will be that consumers will have notice that the test for ovarian cancer is part of their mandatory benefits.

TDI has determined that the proposed amendments and repeal of §21.2104 may have an adverse economic effect; however, TDI has no discretion in proposing the extension of a notice to include ovarian cancer because TDI, in accordance with Insurance Code §1370.004, must adopt rules requiring health benefit plan carriers to provide notice of the coverage required under Chapter 1370.

The rule also clarifies that all notices issued after the effective date of these amendments are required to be filed with TDI for review and approval by the commissioner unless the carrier uses the TDI promulgated notices. There will be no filing costs if carriers use the adopted notices. Carriers using "substantially similar" notices will incur a $100 fee per filing.

Carriers may also incur a cost to update the language in their notices to include ovarian cancer screenings. If the business has existing stock of notices and has not reprinted since the passage of HB 2813, the costs required to comply with the proposal may include administrative and computer programming costs to update and print new notices to reflect the changed information. Carriers may calculate the total cost of labor for each category by multiplying the number of estimated hours for each cost component by the median hourly wage for each category of labor. The Texas statewide median hourly wage for each category is published online by the Texas Workforce Commission at www.texaswages.com and is as follows:

(a) a computer programmer: $75,539 per year, divided by 2080 hours per year equals $36.32

(b) an administrative assistant: $30,477 per year, divided by 2080 hours per year equals $14.65.

There is no additional postage cost because notices are already required to be issued within 60 days of the plan's issuance or renewal. It is not feasible for TDI to estimate the total increased printing attributable to compliance with this proposal because there are numerous factors involved that are not suited to reliable quantification. TDI estimates that printing or copying costs between $.08 and $.12 per page.

TDI estimates that preparation of the changes to the notice information will likely require a one-time cost of approximately one hour of administrative staff time. The cost will vary depending on whether an administrative assistant or a computer programmer, or a combination of both positions, perform this function.

ECONOMIC IMPACT STATEMENT AND REGULATORY FLEXIBILITY ANALYSIS FOR SMALL AND MICRO BUSINESSES.

Economic Impact Statement. As required by Government Code §2006.002(c), TDI has determined that the proposal may have an adverse economic effect on small or micro businesses that must comply with the rules. The adverse economic impact will result from amending their current notices. The cost of compliance with these proposed rules will not vary between large businesses and small or micro businesses, and TDI's cost analysis and resulting estimated costs in the Public Benefit and Cost Note portion of this proposal are equally applicable to large businesses and small or micro businesses.

Regulatory Flexibility Analysis. Government Code §2006.002(c)(2) requires a state agency, before adopting a rule that may have an adverse economic effect on small businesses, to prepare a regulatory flexibility analysis that includes the agency's consideration of alternative methods of achieving the purpose of the proposed rule. Government Code §2006.002(c)(1) requires that the analysis consider, if consistent with the health, safety, and environmental and economic welfare of the state, using regulatory methods that will accomplish the objectives of applicable rules while minimizing adverse impacts on small businesses.

The requirement for carriers to file the notices that have "substantially similar language" will have the same effect on all carriers. Small and micro business carriers may eliminate the cost by using the promulgated notice.

TDI considered the following three additional regulatory alternatives: (i) not proposing the new requirements; (ii) proposing different requirements for small and micro businesses; and (iii) exempting small and micro businesses. For the following reasons, TDI rejected each of these alternatives.

Not Proposing the New Requirements. The primary objective of the proposal is to provide consumers with complete and easily understood notice information consistent with HB 2813. This mandate applies to all health benefit plan carriers subject to Insurance Code Chapter 1370, including small and micro businesses. The rule also clarifies that all notices issued after the effective date of these amendments are required to be filed with TDI for review and approval by the commissioner unless the carrier uses the exact wording of the TDI promulgated notices. This requirement promotes consistency and clarity in notices.

Proposing Different Requirements for Small and Micro Businesses. As previously noted, a purpose of the proposal is to provide consistency and clarity in notices. The same consumer protection reasons exist for all notices. Requiring all health plans to file notices with "substantially similar" language facilitates understanding of the coverage provided. There is no reason why one notice should be distinguished from another. The notices would not be consistent if TDI required something different for small or micro business health benefit plan carriers.

Exempting Small and Micro Businesses. Finally, TDI considered not requiring small and micro businesses to file notices that have "substantially similar" language; however, TDI has determined that the importance of consistency applies equally to large and small carriers and that such an exemption could result in some consumers being unaware of their rights under the statute. Without filing, TDI does not have any insight on the contents of the notice and cannot proactively protect consumers by verifying compliance with the statutes.

TAKINGS IMPACT ASSESSMENT. TDI has determined that no private real property interests are affected by this proposal and this proposal does not restrict or limit an owner's right to property that would otherwise exist in the absence of government action. As a result, this proposal does not constitute a taking or require a takings impact assessment under Government Code §2007.043.

REQUEST FOR PUBLIC COMMENT. TDI invites the public and affected persons to comment on this proposal. Submit your written comments on the proposal no later than 5 p.m., Central Time on June 13, 2016. Send written comments by mail to the Texas Department of Insurance, Office of the Chief Clerk, Mail Code 113-2A, P.O. Box 149104, Austin, Texas 78714-9104; or by email to chiefclerk@tdi.texas.gov. You must simultaneously submit an additional copy of the comments by mail to Patricia Brewer, Team Lead, Texas Department of Insurance, Life and Health Regulatory Initiatives Program, Mail Code 106-1D, P.O. Box 149104, Austin, Texas 78714-9104; or by email to LHLComments@tdi.texas.gov. You must submit any request for a public hearing separately to the Office of the Chief Clerk, Mail Code 113-2A, P.O. Box 149104, Austin, Texas 78714-9104; or by email to chiefclerk@tdi.texas.gov before the close of the public comment period. If a hearing is held, written comments and public testimony presented at the hearing will be considered.

28 TAC §§21.2101 - 21.2103, 21.2105 - 21.2107

STATUTORY AUTHORITY. The amendments to 28 TAC §§21.2101 - 21.2103 and §§21.2105 - 21.2107 are proposed under Insurance Code §1357.006, which requires notice of coverage for reconstructive surgery following a mastectomy; §1357.056, which requires notice of coverage required for hospital stays after mastectomies; §1362.004, which requires notice of coverage for detection of prostate cancer; §1363.004, which requires notice of coverage for detection of colorectal cancer; §1366.058, which requires notice of coverage for maternity, childbirth, and in-home postdelivery care; and §1370.004, which requires notice of coverage for human papillomavirus, ovarian cancer, and cervical cancer screening. Insurance Code §1201.104 requires TDI to adopt rules establishing minimum benefit standards for individual accident and health insurance policies. Insurance Code §36.001 provides that the commissioner of insurance may adopt any rules necessary and appropriate to implement the powers and duties of TDI under the Insurance Code and other laws of the state.

CROSS-REFERENCE TO STATUTE. The amendments implement Insurance Code §§1370.001, 1370.004, and 1201.104, and Insurance Code Chapters 843, 1271, and 1701.

§21.2101. Scope.

The purpose of this subchapter is:

(1) to require notice to enrollees in a health benefit plan of coverage or [~~and/or~~] benefits for:

(A) prostate cancer examinations;

(B) minimum inpatient stays for maternity and childbirth;

(C) minimum inpatient stays for mastectomy or lymph node dissection;

(D) reconstructive surgery after mastectomy;

(E) certain diagnostic screening tests for early detection of human papillomavirus, ovarian cancer, and cervical cancer;[~~,~~] and

(F) certain tests for the detection of colorectal cancer; and[~~. With the exception of notice for reconstructive surgery after mastectomy, notice for certain diagnostic screening tests for early detection of human papillomavirus and cervical cancer, and notice for colorectal cancer detection, §§21.2102 - 21.2106 of this subchapter apply to all carriers issuing, delivering, or renewing health benefit plans as defined in this subchapter as of January 1, 1998. For state notice requirements pertaining to reconstructive surgery after mastectomy, §§21.2102 - 21.2106 of this subchapter apply to all carriers issuing, delivering, or renewing health benefit plans as defined in this subchapter as of June 18, 1999. For notice requirements pertaining to tests for colorectal cancer detection, §§21.2102 - 21.2106 of this subchapter apply to all carriers issuing, delivering, or renewing health benefit plans as defined in this subchapter as of January 1, 2002. For notice requirements pertaining to diagnostic screening tests for early detection of human papillomavirus and cervical cancer, §§21.2102 - 21.2106 of this subchapter apply on or after January 1, 2006, to all carriers issuing, delivering, or renewing health benefit plans as defined in this subchapter.~~]

(2) to require notice to individuals who become eligible for certain protections regarding Medicare supplement coverage under [~~pursuant to~~] §3.3312 of this title (relating to Guaranteed Issue for Eligible Persons). [~~Section 21.2107 of this subchapter applies to all entities, as defined in §3.3312 of this title, that terminate coverage or have covered individuals who cease coverage on or after July 1, 1998, as described in §3.3312 of this title.~~]

§21.2102. Definitions.

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

(1) Another limited benefit--A plan that provides coverage, singularly or in combination, for benefits for a specifically named disease, accident, or combination of diseases or accidents, including, but not limited to:

(A) heart attack;

(B) stroke;

(C) AIDS; or

(D) travel, farm, or occupational accident.

(2) [~~(1)~~] Carrier--The term includes:

(A) an [~~An~~] insurance company, a group hospital service corporation, a fraternal benefit society, a stipulated premium insurance company, a health maintenance organization, a multiple employer welfare arrangement that holds a certificate of authority under Insurance Code Chapter 846, or an approved nonprofit health corporation that holds a certificate of authority issued by the commissioner under Insurance Code Chapter 844;~~.~~

(B) [~~In addition,~~] for the purposes of paragraph (4)(B) [~~(3)(B)~~] and (F) of this section, [~~the term also includes~~] a reciprocal exchange operating under Insurance Code Chapter 942;

(C) for purposes of paragraph (4)(E) [~~(3)(E)~~] and (F) of this section, [~~the term also includes~~] a Lloyds plan operating under Insurance Code, Chapter 941; and

(D) for purposes of paragraph (4)(E) [~~(3)(E)~~] of this section, [~~the term also includes~~] a risk pool created under Chapter 172, Local Government Code.

(3) [~~(2)~~] Enrollee--A person enrolled in and entitled to coverage under a health benefit plan, including covered dependents.

(4) [~~(3)~~] Health Benefit Plan--Subject to subparagraphs (A), (B), (C), (D), (E), and (F) of this paragraph, a plan that is offered by a carrier and provides benefits for medical or surgical expenses incurred as a result of a health condition, accident, or sickness including an individual, group, blanket, or franchise insurance policy or insurance agreement;[~~,~~] a group hospital service contract;[~~,~~] an individual or group evidence of coverage;[~~,~~] or any similar coverage document. The term does not include a plan that provides coverage only for accidental death or dismemberment, disability income, supplement to liability insurance, Medicare supplement, workers' [~~workers~~] compensation, medical payment insurance issued as a part of a motor vehicle insurance policy, or a long-term care policy.

(A) For the inpatient mastectomy coverage notice required by §21.2103(a)(1) [~~subsection (a)(1) of §21.2103~~] of this title (relating to Mandatory Benefit Notices), the definition of health benefit plan includes a plan that provides coverage only for a specific disease or condition for the treatment of breast cancer or for hospitalization. The term does not include a small employer health benefit plan issued under [~~the~~] Insurance Code Chapter 1501, Subchapters A - H (concerning Health Insurance Portability and Availability Act).

(B) For the reconstructive surgery after mastectomy notices required by §21.2103(a)(2) [~~subsection (a)(2) of §21.2103~~] of this title, the definition of health benefit plan does not include:

(i) a plan that provides coverage for a specified disease or another [~~other~~] limited benefit except for cancer;[~~,~~]

(ii) a plan that provides only credit insurance;[~~,~~]

(iii) a plan that provides coverage only for dental or vision care;[~~,~~] or

(iv) a plan that provides coverage only for [~~indemnity for~~] hospital indemnity or other fixed indemnity [~~confinement~~].

(C) For the prostate cancer examination notice required by §21.2103(a)(3) [~~subsection (a)(3) of §21.2103~~] of this title, the definition of health benefit plan does not include:

(i) a small employer health benefit plan written under [~~the~~] Insurance Code Chapter 1501, Subchapters A - H;[~~,~~]

(ii) a plan that provides coverage only for a specified disease or another [~~other~~] limited benefit;[~~,~~] or

(iii) a plan that provides coverage only for [~~indemnity for~~] hospital indemnity or other fixed indemnity [~~confinement~~].

(D) For the inpatient maternity and childbirth coverage notice required by §21.2103(a)(4) and (5) [~~subsection (a)(4) and (5) of §21.2103~~] of this title, the definition of health benefit plan does not include:

(i) a plan that provides only credit insurance;[~~,~~]

(ii) a plan that provides coverage only for a specified disease or another [~~other~~] limited benefit;[~~,~~]

(iii) a plan that provides coverage only for dental or vision care;[~~,~~] or

(iv) a plan that provides coverage only for [~~indemnity for~~] hospital indemnity or other fixed indemnity [~~confinement~~].

(E) For the detection of colorectal cancer screening coverage notice required by §21.2103(a)(6) [~~subsection (a)(6) of §21.2103~~] of this title, the definition of health benefit plan does not include:

(i) a small employer health benefit plan written under [~~the~~] Insurance Code Chapter 1501, Subchapters A - H;[~~, or~~]

(ii) a plan that provides coverage only for a specified disease or another [~~other~~] limited benefit; or

(iii) a plan that provides coverage only for [~~indemnity for~~] hospital indemnity or other fixed indemnity [~~confinement~~].

(F) For the detection of human papillomavirus and cervical cancer screening notice required by §21.2103(a)(7) [~~subsection (a)(7) of §21.2103~~] of this title, the definition of ["]health benefit plan["] includes a small employer health benefit plan written under Insurance Code Chapter 1501, but does not include:

(i) a plan that provides coverage only for a specified disease or another [~~other~~] limited benefit, other than a plan that provides benefits for cancer treatment or similar services;

(ii) a plan that provides coverage only for dental or vision care;

(iii) a plan that provides coverage only for indemnity or for hospital indemnity or other fixed indemnity [~~confinement~~];

(iv) a credit insurance policy; or

(v) a limited benefit policy that does not provide coverage for physical examinations or wellness exams.

[~~(4) Other limited benefit--A plan that provides coverage singularly or in combination, for benefits for a specifically named disease, accident or combination of diseases or accidents, including but~~

not limited to heart attack, stroke, AIDS, and travel, farm or occupational accident.]

(5) Primary Enrollee--For group coverage, the covered member or employee of the group. For individual coverage, the person first named on the application or [and/or] enrollment form.

§21.2103. Mandatory Benefit Notices.

(a) Prescribed mandatory benefit notices consist of the following:

(1) For a health benefit plan that provides coverage or [and/or] benefits for the treatment of breast cancer, a carrier must [shall] issue a notice that [which] includes the language provided in Figure 1 §21.2106(b) [of subsection (b) of §21.2106] of this title (relating to Forms, Form Number 349 Mastectomy).

(2) For a health benefit plan that provides coverage or [and/or] benefits for a mastectomy, a carrier must [shall] issue:

(A) an enrollment notice that [which] includes the language provided in Figure 2 §21.2106(b) [of subsection (b) of §21.2106] of this title (relating to Forms, Form Number 1764 Reconstructive Surgery After Mastectomy-Enrollment); and

(B) an annual notice, that [which] includes either:

(i) the language provided in Figure 3 §21.2106(b) [of subsection (b) of §21.2106] of this title (relating to Forms, Form Number 1764 Reconstructive Surgery After Mastectomy-Annual); or

(ii) the language provided in Figure 2 §21.2106(b) [of subsection (b) of §21.2106] of this title (relating to Forms, Form Number 1764 Reconstructive Surgery after Mastectomy-Enrollment).

(3) For a health benefit plan that provides coverage or [and/or] benefits for diagnostic medical procedures, a carrier must [shall] issue a notice that [which] includes the language provided in Figure 4 §21.2106(b) [of subsection (b) of §21.2106] of this title (relating to Forms, Form Number 258 Prostate).

(4) For a health benefit plan that provides coverage or [and/or] benefits for maternity, including benefits for childbirth, a carrier must [shall] issue a notice that [which] includes the language provided in Figure 5 §21.2106(b) [of subsection (b) of §21.2106] of this title (relating to Forms, Form Number 102 Maternity).

(5) If the health benefit plan described in paragraph 4 of this subsection includes benefits or [and/or] coverage for in-home postdelivery care, the following language, or substantially similar language, must [shall] be inserted immediately before the "Prohibitions" portion of the notice language in [at] Figure 5 §21.2106(b) [of subsection (b) of §21.2106] of this title [(relating to Forms)]: "Since we provide in-home postdelivery care, we are not required to provide the minimum number of hours outlined above unless (a) the mother's or child's physician determines the inpatient care is medically necessary or (b) the mother requests the inpatient stay."

(6) For a health benefit plan that provides coverage or [and/or] benefits for medical screening procedures, a carrier must [shall] issue a notice that [which] includes the language provided in Figure 6 §21.2106(b) [of subsection (b) of §21.2106] of this title (relating to Forms, Form Number 1467 Colorectal Cancer Screening).

(7) For a health benefit plan that provides coverage or [and/or] benefits for medical screening procedures, a carrier must [shall] issue a notice that [which] includes the language provided in Figure 7 §21.2106(b) [of subsection (b) of §21.2106] of this title (relating to Forms, Form Number LHL391 Human Papillomavirus, Ovarian Cancer, and Cervical Cancer Screening). If a plan is not required to provide a benefit for ovarian cancer screening due to the exception in Insurance Code §1370.002(b) (concerning Exceptions), the notice may be modified to omit the references to ovarian cancer and the CA 125 blood test.

(b) Instead [In lieu] of the prescribed notices outlined in subsection (a) of this section, a carrier may opt to provide notices with substantially similar language rather than the notices contained in §21.2106(b) [subsection (b) of §21.2106] of this title. Any substantially similar language notice issued after the effective date of this amendment must be filed for review and approval by the commissioner under Insurance Code Chapters 843 (concerning Health Maintenance Organizations), 1271 (concerning Benefits Provided by Health Maintenance Organizations; Evidence of Coverage; Charges), and 1701 (concerning Policy Forms). The substantially similar language must be in a readable and understandable format, and must include a clear, complete, and accurate description of these items in the following order:

(1) a heading in bold print and all capital letters indicating the information in the notice relates to mandated benefits;

(2) a statement that the notice is being provided to advise the enrollee of the appropriate coverage or [and/or] benefits, including the carrier's complete licensed name;

(3) a heading in bold print describing the coverage or [and/or] benefits being provided, for example, Examinations for Detection of Prostate Cancer;

(4) a description of the coverage or [and/or] benefits for which the notice is being provided;[.]

(5) for [For] a carrier who issues a health benefit plan that provides coverage or [and/or] benefits for a mastectomy, the following requirements [shall also] apply:

(A) the enrollment notice required by subsection (a)(2)(A) of this section must [shall] disclose that the coverage or [and/or] benefits must [shall] be provided in a manner determined to be appropriate, in consultation with the attending physician and the enrollee, and [shall] state the specific deductibles, copayments, and [and/or] coinsurance, which may not be greater than the deductibles, copayments, and [and/or] coinsurance applicable to other benefits under the health benefit plan; and

(B) the annual notice required by subsection (a)(2)(B) of this section must, [shall] at a minimum, describe that the health benefit plan provides coverage or [and/or] benefits for reconstructive surgery after mastectomy, surgery and reconstruction of the other breast for symmetry, prostheses, and treatment of complications resulting from a mastectomy (including lymphedema);[.]

(6) [(5)] for the notice required by subsection (a)(1), (2)(A), and (4) of this section, the heading "Prohibitions" in bold, followed by a summary of the prohibited acts by a carrier in providing the coverage or [and/or] benefits for which the notice is being provided; and

(7) [(6)] a statement identifying the carrier, and providing a phone number and address to which an enrollee may direct questions regarding the coverage or [and/or] benefits for which the notice is being provided.

(c) If a health benefit plan provides coverage or [and/or] benefits of more than one of the required notices described in subsection (a) of this section, the carrier may combine the language of the required notices into one notice.

(d) The notices must be printed in no less than 10-point type. [If, before the effective date of the amendments to this subchapter re-

lating to a notice listed in paragraphs (1) - (3) of this subsection, a carrier has provided to its enrollees notice(s) that contains the information concerning the required coverage or benefit, such notice(s) shall be deemed to comply with the requirements of this subchapter as to those enrollees;]

[(1) reconstructive surgery after mastectomy as required by subsection (a)(2) or (b) of this section;]

[(2) tests for detection of colorectal cancer as required by subsection (a)(6) or (b) of this section; and]

[(3) tests for detection of human papillomavirus and cervical cancer as required by subsection (a)(7) or (b) of this section.]

§21.2105. Delivery of Mandatory Benefit Notices.

(a) The notices required by §21.2103(a)(1), (3), and (4) of this title (relating to Mandatory Benefit Notices) must [shall] be issued to enrollees of a health benefit plan within 60 days of the plan's issuance or renewal. [that is delivered, issued for delivery, or renewed on or after January 1, 1998, and shall be provided according to the following paragraphs:]

[(1) The notice shall be provided:]

[(A) within 60 days of March 29, 1998 to enrollees whose plans were renewed or issued between January 1, 1998 and March 29, 1998;]

[(B) within 60 days of enrollment to new enrollees, whether in a newly issued or newly delivered health benefit plan, or an existing plan which is renewed after March 29, 1998; or]

[(C) within 60 days of renewal date to existing enrollees of an existing plan which is renewed after March 29, 1998.]

(1) [(2)] Except as specified in paragraph (5) [(6)] of this subsection, a carrier must [shall] deliver the notices to enrollees through the U.S. Postal Service or, as permitted by state law, electronically.

(2) [(3)] The notice may be delivered with other health benefit plan documents within 60 days of the plan's issuance or renewal [as long as the time frames set forth in paragraph (1) of this subsection are met.]. For example, the notice may be delivered with the policy, certificate, evidence of coverage, or the enrollment or insurance [enrollment/insurance] card.

(3) [(4)] If the notices are provided to the primary enrollee's last known address, the requirements of this section are satisfied with respect to all enrollees residing at that address.

(4) [(5)] If a covered spouse or dependent's last known address is different than the primary enrollee, separate notices are required to be provided to the spouse or the dependent at the spouse's or dependent's last known address.

(5) [(6)] For group health benefit plans, the notice may be provided to the group master contract holder for distribution to enrollees if the carrier has an agreement with the group master contract holder that the notice will be delivered within 60 days of the plan's issuance or renewal [in accordance with the timelines specified in paragraph (1) of this subsection]; however, TDI will hold the carrier [will be held] responsible for ensuring that notice is provided to the enrollees.

(b) The notices required by §21.2103(a)(2) of this title must [shall] be issued to enrollees of a health benefit plan and [shall] be provided according to the following paragraphs:[.]

(1) the [The] enrollment notice required by §21.2103(a)(2)(A) of this title must [shall] be issued to each enrollee upon enrollment in the health benefit plan;[.]

(2) the [The] annual notice required by §21.2103(a)(2)(B) of this title must [shall] be issued to each enrollee annually; and[.]

(3) notwithstanding [Notwithstanding] §21.2103(a)(2) of this title, a carrier may elect to issue the enrollment notice required by §21.2103(a)(2)(A) of this title to satisfy the annual notice requirements set forth in §21.2103(a)(2)(B) of this title.

[(4) The provisions of subsection (a)(2) - (6) of this section shall also apply to these notices, except for the timeline requirements of subsection (a)(1) of this section.]

[(c) A carrier shall issue the notices required by §21.2103(a)(6) and (7) of this title to enrollees of a health benefit plan, and subsections (a)(2) - (6) of this section shall also apply to the notices, except for the timeline requirements of subsection (a)(1) of this section.]

§21.2106. Forms.

(a) The forms identified in §21.2103 of this title (relating to Mandatory Benefit Notices) [for notices of mandatory benefits] are included in subsection (b) of this section in their entirety [and have been filed with the Office of the Secretary of State]. The forms can be obtained from the Texas Department of Insurance, [Life/Health Division, MC 106-1A,] P.O. Box 149104, Austin, Texas 78714-9104, or from the TDI website, www.tdi.texas.gov [department's Web site, www.tdi.state.tx.us].

(b) The forms referenced in this chapter are [as follow]:

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

(7) Figure Number 7: Form Number LHL391 Human Papillomavirus, Ovarian Cancer, and Cervical Cancer Screening: Figure: 28 TAC §21.2106(b)(7)

§21.2107. Right To Medicare Supplement Coverage Notice.

(a) At the time of an event described in §3.3312(b) of this title (relating to Guaranteed Issue for Eligible Persons) that causes [because of which] an individual to lose [loses] coverage or benefits due to the termination of a contract, agreement, policy, or plan, the entity, as defined in [and pursuant to] §3.3312 of this title, must: [shall]

(1) notify the individual of his or her rights under §3.3312(a), (c), (d), and (e) of this title, and of the obligations of issuers of Medicare supplement policies under §3.3312(a) of this title; and[. The entity shall]

(2) communicate this [such] notice at the same time as [contemporaneous with] the notification of termination.

(b) At the time of an event described in §3.3312(b) of this title that causes [because of which] an individual to cease [ceases] enrollment under a contract, agreement, policy, or plan, the entity, as defined in §3.3312 of this title, that [which] offers the contract or agreement, regardless of the basis for the cessation of enrollment, [the entity offering the plan,] or the licensed third party administrator of the plan, must: [respectively, shall]

(1) notify the individual of his or her rights under §3.3312(a), (c), (d), and (e) of this title, and of the obligations of issuers of Medicare supplement policies under §3.3312(a) of this title; and[. The entity shall]

(2) communicate this [such] notice within 10 working days of the entity's receipt of notification of disenrollment.

(c) The notices must be printed in no less than 10-point type.

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 May 2, 2016.

TRD-201602082
Norma Garcia
General Counsel
Texas Department of Insurance
Earliest possible date of adoption: June 12, 2016
For further information, please call: (512) 676-6584

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28 TAC §21.2104

STATUTORY AUTHORITY. The repeal is proposed under Insurance Code §1357.006, which requires notice of coverage for mastectomies; §1357.056, which requires notice of coverage required for hospital stays after mastectomies; §1362.004, which requires notice of coverage for detection of prostate cancer; §1363.004, which requires notice of coverage for detection of colorectal cancer; §1366.058, which requires notice of coverage for maternity, childbirth, and in-home postdelivery care; and §1370.004, which requires notice of coverage for human papillomavirus, ovarian cancer, and cervical cancer screening. Insurance Code §1201.104 requires TDI to adopt rules establishing minimum benefit standards for individual accident and health insurance policies. Insurance Code §36.001 provides that the commissioner of insurance may adopt any rules necessary and appropriate to implement the powers and duties of TDI under the Insurance Code and other laws of the state.

CROSS-REFERENCE TO STATUTE. The repeal implements Insurance Code §§1370.001, 1370.004, and 1201.104.

§21.2104. Print Size of Notices.
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 May 2, 2016.

TRD-201602081
Norma Garcia
General Counsel
Texas Department of Insurance
Earliest possible date of adoption: June 12, 2016
For further information, please call: (512) 676-6584

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SUBCHAPTER O. NOTICE OF AVAILABILITY OF COVERAGE UNDER THE TEXAS HEALTH INSURANCE RISK POOL

28 TAC §§21.2301 - 21.2306

The Texas Department of Insurance proposes the repeal of 28 TAC Chapter 21, Subchapter O, §§21.2301 - 21.2306, relating to Notice of Availability of Coverage under the Texas Health Insurance Risk Pool. The repeal is necessary because the Texas Health Insurance Risk Pool (THIP) was abolished by SB 1367, 83rd Legislature, Regular Session (2013), which repealed Insurance Code Chapter 1506, the THIP's enabling legislation, effective September 1, 2015.

EXPLANATION. SB 1367 obviated the purpose of Subchapter O, which was "to facilitate public awareness of coverage under and enrollment in" THIP. The subchapter is now unnecessary and should be repealed.

FISCAL NOTE AND LOCAL EMPLOYMENT IMPACT STATEMENT. Ms. Judy Wooten, project manager for the Life and Health Regulatory Initiatives Team, Regulatory Policy Division, has determined that during each year of the first five years that the proposed repeal is in effect, there will be no fiscal impact on state or local government as a result of enforcing or administering the sections. There will be no measurable effect on local employment or the local economy as a result of the proposal.

PUBLIC BENEFIT AND COST NOTE. Ms. Wooten has also determined that for each year of the first five years the repeal of the sections is in effect, the public benefit anticipated as a result of administration and enforcement of the repealed sections will be the elimination of provisions requiring notice of the availability of coverage that no longer exists. There is no anticipated economic cost to persons required to comply with the proposed repeal. There is no anticipated difference in cost of compliance between small and large businesses.

ECONOMIC IMPACT STATEMENT AND REGULATORY FLEXIBILITY ANALYSIS FOR SMALL AND MICRO BUSINESSES. In accordance with Government Code §2006.002(c), TDI has determined that this proposed repeal will not have an adverse economic effect on small or micro businesses because it is simply a repeal of an obsolete rule. Therefore, in accordance with Government Code §2006.002(c), TDI is not required to prepare a regulatory flexibility analysis.

TAKINGS IMPACT ASSESSMENT. TDI has determined that no private real property interests are affected by this proposal and that this proposal does not restrict or limit an owner's right to property that would otherwise exist in the absence of government action and, therefore, does not constitute a taking or require a takings impact assessment under Government Code §2007.043.

REQUEST FOR PUBLIC COMMENT. TDI invites the public and affected persons to comment on this proposal. Submit your written comments on the proposal no later than 5 p.m., Central time, on June 13, 2016. Send written comments by mail to the Office of the Chief Clerk, Mail Code 113-2A, Texas Department of Insurance, P.O. Box 149104, Austin, Texas 78714-9104, or by email to chiefclerk@tdi.texas.gov. You must simultaneously submit an additional copy of the comments by mail to Ms. Judy Wooten, Project Manager for Life and Health Regulatory Initiatives Team, Regulatory Policy Division, Mail Code 106-1A, Texas Department of Insurance, P.O. Box 149104, Austin, Texas 78714-9104, or by email to LHLComments@tdi.texas.gov. You must submit any request for a public hearing separately to the Office of the Chief Clerk, Mail Code 113-2A, Texas Department of Insurance, P.O. Box 149104, Austin, Texas 78714-9104, or by email to chiefclerk@tdi.texas.gov before the close of the public comment period. If a hearing is held, written comments and public testimony presented at the hearing will be considered.

STATUTORY AUTHORITY. The repeal of §§21.2301 - 21.2306 is proposed under SB 1367, 83rd Legislature, Regular Session (2013), and Insurance Code §36.001. SB 1367 abolished the THIP and repealed Insurance Code Chapter 1506. Section 36.001 provides that the commissioner of insurance may adopt any rules necessary and appropriate to implement the powers and duties of TDI under the Insurance Code and other laws of this state.

CROSS REFERENCE TO STATUTE. The proposed repeal of §§21.2301 - 21.2306 implements SB 1367, 83rd Legislature, Regular Session (2013).

§21.2301. Purpose.

§21.2302. Definitions.

§21.2303. Delivery of Notice.

§21.2304. Notice.

§21.2305. Form.

§21.2306. Compliance and Effective Date.

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 May 2, 2016.

TRD-201602079
Norma Garcia
General Counsel
Texas Department of Insurance
Earliest possible date of adoption: June 12, 2016
For further information, please call: (512) 676-6584

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TITLE 37. PUBLIC SAFETY AND CORRECTIONS

PART 11. TEXAS JUVENILE JUSTICE DEPARTMENT

CHAPTER 380. RULES FOR STATE-OPERATED PROGRAMS AND FACILITIES

SUBCHAPTER F. SECURITY AND CONTROL

37 TAC §380.9703

The Texas Juvenile Justice Department (TJJD) proposes the repeal of §380.9703, concerning Weapons and Concealed Handguns.

JUSTIFICATION FOR REPEAL

Portions of the rule that apply to agency personnel (i.e., employees, volunteers, and contractors) are separately addressed in TJJD's internal policies and procedures and in individual contracts and are therefore not needed in an agency rule.

Portions of the rule that apply to members of the public are governed by state laws concerning possession of firearms and other weapons. The substance of these laws does not need to be republished in an agency rule.

TJJD has adopted other rules, such as §380.9107 and §380.9710 of this title, that prohibit contraband, including weapons, in TJJD's residential facilities.

RULE REVIEW

Simultaneously with these proposed rulemaking actions, TJJD also publishes this notice of intent to review §380.9703 as required by Texas Government Code §2001.039. Comments on whether the reasons for originally adopting this rule continue to exist may be submitted to TJJD by following the instructions provided later in this notice.

FISCAL NOTE

Mike Meyer, Chief Financial Officer, has determined that for each year of the first five years the repeal is in effect, there will be no significant fiscal impact for state or local government as a result of enforcing or administering the repeal.

PUBLIC BENEFITS/COSTS

Chelsea Buchholtz, Chief of Staff, 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 repeal will be the elimination of an unnecessary agency rule.

Mr. Meyer has also determined that there will be no effect on small businesses or micro-businesses. There is no anticipated economic cost to persons who are required to comply with the repeal as proposed. No private real property rights are affected by adoption of this repeal.

PUBLIC COMMENTS

Comments on the proposal and/or rule review may be submitted within 30 days after publication of this notice to Steve Roman, Policy Coordinator, Texas Juvenile Justice Department, P.O. Box 12757, Austin, Texas 78711 or by email to *policy.proposals@tjjd.texas.gov.*

STATUTORY AUTHORITY

The repeal is proposed under Texas Human Resources Code §242.003, which authorizes TJJD to adopt rules appropriate to the proper accomplishment of its functions and to adopt rules for governing TJJD schools, facilities, and programs.

No other statute, code, or article is affected by this proposal.

§380.9703. Weapons and Concealed Handguns.

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 April 28, 2016.

TRD-201602011
Jill Mata
General Counsel
Texas Juvenile Justice Department
Earliest possible date of adoption: June 12, 2016
For further information, please call: (512) 490-7014

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TITLE 40. SOCIAL SERVICES AND ASSISTANCE

PART 2. DEPARTMENT OF ASSISTIVE AND REHABILITATIVE SERVICES

CHAPTER 104. INDEPENDENT LIVING SERVICES

The Texas Health and Human Services Commission (HHSC), on behalf of the Texas Department of Assistive and Rehabilitative Services (DARS), proposes to add new Subchapter A, General Rules, §104.101, concerning Purpose, §104.103, concerning Legal Authority, §104.105, concerning Definitions; new Subchapter B, Allocation of Funds, §104.201, concerning Allocation of Funds; new Subchapter C, Independent Living Services, §104.301, concerning Purpose, §104.305, concerning Eligibility, §104.307, concerning Independent Living Plan, §104.309, concerning Waiting list, §104.311, concerning

Scope of Services; new Subchapter D, Consumer Participation, §104.401, concerning Consumer Participation System, §104.403, concerning Fee Schedule Amount, §104.405, concerning Insurance Payments; new Subchapter E, Consumer Rights, §104.501, concerning Rights of Consumers, §104.503, concerning Complaint Process; new Subchapter F, Technical Assistance and Training §104.601, concerning Administering Agency's Role in Providing Technical Assistance; and new Subchapter G, Referrals, §104.701, concerning Expectations of Administering Agency's Employees.

BACKGROUND AND JUSTIFICATION

The new rules are being proposed pursuant to H.B. 2463, 84th Legislature, Regular Session, 2015. The bill requires the integration of independent living services for individuals who are blind or visually impaired and independent living services for individuals with significant disabilities. The bill further requires the independent living services program that DARS operates under Title VII of the federal Rehabilitation Act of 1973 (29 U.S.C. Section 796 et seq.) are directly provided by centers for independent living, except as provided by the Texas Human Resources Code, Section 117.080 (b), and are not directly provided by the department.

Effective September 1, 2016, responsibility for independent living services for individuals with significant disabilities will transfer to HHSC. Under Texas Government Code, §§531.0201, 531.02011, 531.02012, and 531.0202, a rule adopted by or on behalf of DARS that relate to a function that is transferred under one of those sections becomes a rule of the receiving state agency upon transfer of the related function and remains in effect:

• until altered by the commission or other receiving state agency, as applicable; or

• unless it conflicts with a rule, policy, or form of the receiving state agency.

SECTION-BY-SECTION SUMMARY

DARS proposes §104.101, Purpose, establishing the purpose of DARS independent living services.

DARS proposes §104.103, Legal Authority, establishing the legal authority under which independent living services are administered.

DARS proposes §104.105, Definitions, establishing definitions for Ability to pay, Act, Accessible format, Adjusted income, Allotment, Allowable deductions, Attendant care, Blind, Center for Independent Living (CIL), Client Assistance Program (CAP), Comparable services or benefits, Consumer, Consumer participation, Consumer participation system, Consumer representative, DARS, Fee, Federal poverty level guidelines, Independent living plan,

Nonprofit, Private, Service provider, Severe visual impairment, Significant disability, Sliding fee scale, Transition services, and Waived independent living plan.

DARS proposes §104.201, Allocation of Funds, establishing the method by which DARS allocates funds to a service provider. The section further establishes that service provider ensures comparable services or benefits are exhausted before using funds allocated under proposed Chapter 104.

DARS proposes §104.301, Purpose, establishing the purpose for the proposed Subchapter.

DARS proposes §104.305, Eligibility, establishing the eligibility criteria for independent living services. The section establishes that eligibility is determined by the service provider, based on the documented diagnosis of a licensed practitioner. The section establishes that consumers who are determined to be eligible for independent living services on or before August 31, 2016, remain eligible on September 1, 2016. The section further establishes requirements of the service provider when a consumer is determined eligible and when a consumer is determined ineligible.

DARS proposes §104.307, Independent Living Plan, establishing that services are provided in accordance with an independent living plan that is developed jointly between the service provider and the consumer, unless the consumer signs a waiver giving up their right to participate in the development of the independent plan, in which case services are provided in accordance with a waived independent living plan developed by the service provider. The section further establishes that the independent living plan must be coordinated, to the extent possible, with vocational rehabilitation, habilitation, and education services. The section further establishes under what conditions services are terminated.

DARS proposes §104.309, Waiting list, establishing that a consumer is placed on a waiting list by the service provider when the consumer is determined eligible, has a signed independent living plan or waived independent living plan, and there is no funding for a service on the independent living plan that must be purchased. The section establishes that the waiting list must be reviewed every six months by the service provider. The section further establishes that a consumer is removed from the waiting list when funding becomes available, the consumer is no longer eligible, or the consumer is no longer interested.

DARS proposes §104.311, Scope of Services, establishing that the service provider may provide independent living core services and independent living services under proposed Chapter 104.

DARS proposes §104.401, Consumer Participation System, establishing that the service provider administers the consumer participation system and establishes the elements of that system. The section establishes that a service provider must develop a process to reconsider and adjust the consumer's fee for service based on circumstances that are both extraordinary and documented, and establishes those extraordinary circumstances.

DARS proposes §104.403, Fee Schedule Amount, establishing the method for calculating the fee paid by the consumer for purchased services, including factors that affect the fee paid by the consumer for purchased services allowable deductions. The section establishes that consumer's fee for service is equal to the amount on the DARS sliding fee scale according to the household's annual adjusted income. The section establishes that the consumer is required to provide proof of annual gross income and allowable deductions. The section further establishes that if the consumer does not provide the service provider with supporting documentation for the household's allowable deductions, the service provider determines the consumer's fee for service based on the consumer's documented annual gross income with no allowable deductions.

DARS proposes §104.405, Insurance Payments, establishing that if the consumer has medical and dental insurance that covers an independent living service received by the consumer and

the agreement for in-network services made between the insurance company and the service provider or service provider's subcontractor requires that the service provider or subcontractor accept as payment in full the deductible, copayment, or coinsurance and insurance reimbursement, then the consumer's fee for service is either the deductible, copayment, or coinsurance, or the amount calculated by the DARS fee schedule, whichever is less. The section further establishes that the consumer pays the premiums for medical and dental insurance and that neither DARS nor the service provider pays the premiums.

DARS proposes §104.501, Rights of Consumers, establishing the rights of the consumer and when those rights must be provided to the consumer in writing.

DARS proposes §104.503, Complaint Process, establishing the process by which a consumer may file a complaint with DARS or the Client Assistance Program implemented in Texas by Disability Rights Texas.

DARS proposes §104.601, Administering Agency's Role in Providing Technical Assistance, establishing that DARS gives the service provider technical assistance, as needed, to help the service provider offer a full range of independent living services.

DARS proposes §104.701, Expectations of Administering Agency's Employees, establishing that when individuals contact DARS seeking independent living services, DARS will refer those individuals to the local service provider.

FISCAL NOTE

Rebecca Trevino, DARS Chief Financial Officer, has determined that for each year of the first five years that the proposed new rules will be in effect, there are no foreseeable fiscal implications to either cost or revenues of state or local governments because of enforcing or administering the rules.

SMALL AND MICRO-BUSINESS IMPACT ANALYSIS AND ECONOMIC COSTS TO PERSONS AND IMPACT ON LOCAL EMPLOYMENT

In accordance with Texas Government Code, §2001.022, Ms. Trevino has determined that the proposed new rules will not affect a local economy, so no local employment impact statement is required. Finally, Ms. Trevino has determined that the proposed new rules will have no adverse economic effect on small businesses or micro-businesses.

PUBLIC BENEFIT

Ms. Trevino also has determined that for each of the first five years that the proposed new rules will be in effect, the public benefits anticipated as a result of administering and enforcing the proposed new rules will be to assure the public that the necessary rules are in place to provide a clear and concise understanding of the services provided by DARS.

REGULATORY ANALYSIS

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

TAKINGS IMPACT ASSESSMENT

DARS has determined that these proposed new rules do not restrict or limit an owner's right to his or her property that would otherwise exist in the absence of government action and, therefore, do not constitute a taking under Texas Government Code §2007.043.

PUBLIC COMMENT

Written comments on the proposal may be submitted to the Department of Assistive and Rehabilitative Services, 4800 North Lamar Boulevard, Austin, Texas 78756; or emailed to *DARSrules@DARS.state.tx.us*. All comments must be submitted before June 13, 2016, at 5:00 p.m.

SUBCHAPTER A. GENERAL RULES

40 TAC §§104.101, 104.103, 104.105

STATUTORY AUTHORITY

The proposed new rules are authorized by the Texas Human Resources Code, Chapter 117. These new rules are proposed pursuant to HHSC's statutory rulemaking authority under Texas Government Code, Chapter 531, §531.0055(e), which provides the Executive Commissioner of HHSC with the authority to promulgate rules for the operation of and provision of health and human services by the health and human services agencies.

No other statute, article, or code is affected by this proposal.

§104.101. Purpose.

This program provides services that promote to the fullest extent the integration and inclusion of individuals with significant disabilities into society.

§104.103. Legal Authority.

(a) The legal authority for the program is published in the following federal regulations and state statutes:

(1) 34 Code of Federal Regulations, Parts 364, 365 and 366;

(2) 29 U.S.C. §§711(c) and 796a-796f-6; and

(3) Texas Human Resources Code, §117.079 and §117.080.

(b) In case of any conflict, federal regulations prevail.

§104.105. Definitions.

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

(1) Ability to pay--The determination that the consumer is able to contribute financially toward the cost of independent living services.

(2) Accessible format--An alternative way of providing to people with disabilities the same information, functionality, and services provided to people without disabilities. Examples of accessible formats include braille, ASCII text, large print, American Sign Language, and recorded audio.

(3) Act--The Rehabilitation Act of 1973, as amended.

(4) Adjusted income--The dollar amount that is equal to a household's annual gross income, minus allowable deductions.

(5) Allotment--Funds distributed to a service provider by DARS to provider services under this chapter.

(6) Allowable deductions--Certain unreimbursed household expenses that are subtracted from a household's annual gross income to calculate the adjusted income.

(7) Attendant care--A personal assistance service provided to help an individual with significant disabilities perform essential personal tasks, such as bathing, communicating, cooking, dressing, eating, homemaking, toileting, and transportation.

(8) Blind--A condition of having no more than 20/200 visual acuity in the better eye with correcting lenses or having visual acuity greater than 20/200 but with a field of vision in which the widest diameter subtends an angle no greater than 20 degrees.

(9) Center for Independent Living (CIL)--A private nonprofit agency for individuals with significant disabilities (regardless of age or income) that is not residential, is consumer-controlled, is community-based, takes a cross-disability approach, and:

(A) is designed and operated within a local community by individuals with disabilities; and

(B) provides an array of independent living services, including, at a minimum, independent living core services as they are defined in 29 U.S.C. §705(17).

(10) Client Assistance Program (CAP)--A federally funded program that provides information, assistance, and advocacy for people with disabilities who are seeking or receiving services from programs funded under the Act. The program is implemented by Disability Rights Texas (DRTx), a legal services organization whose mission is to protect the human, service, and legal rights of persons with disabilities in Texas.

(11) Comparable services or benefits--Services and benefits that are provided or paid for, in whole or part, by other federal, state, or local public programs; by health insurance, third-party payers, or other private sources; or by the employee benefits that are available to the consumer and are commensurate in quality and nature to the services that the consumer would otherwise receive from service providers.

(12) Consumer--An individual who has applied for or is receiving the independent living services that are referred to under this chapter.

(13) Consumer participation--The financial contribution that a consumer may be required to pay for receiving independent living services.

(14) Consumer participation system--The system for determining and collecting the financial contribution that a consumer may be required to pay for receiving independent living services.

(15) Consumer representative--Any person chosen by a consumer, including the consumer's parent, guardian, other family member, or advocate. If a court has appointed a guardian or representative, that person is the consumer's representative. Unless documentation is provided showing otherwise, a parent or court-appointed guardian is presumed to be the consumer representative for a minor who is:

(A) younger than 18 years old; and

(B) not emancipated; or

(C) married.

(16) DARS--The Department of Assistive and Rehabilitative Services.

(17) Federal poverty level guidelines--The poverty guidelines updated periodically in the Federal Register by the United States Department of Health and Human Services under the authority of 42 USC §9902(2).

(18) Fee--A percentage of the full cost for a purchased service that a consumer pays. The percentage is based on the DARS fee schedule and the fee does not exceed the maximum amount prescribed.

(19) Independent living plan--A written plan in which the consumer and service provider have collaboratively identified the services that are needed to achieve the consumer's goal of living independently.

(20) Nonprofit--An agency, organization, or institution that is owned and operated by one or more corporations or associations whose net earnings do not and cannot lawfully benefit a private shareholder or entity.

(21) Private--An agency, organization, or institution that is not under federal or public supervision or control.

(22) Service provider--A center for independent living, nonprofit organization, organization, or other person contracted or subcontracted to provide independent living services.

(23) Severe visual impairment--A condition of having a visual acuity with best correction of 20/70 or less in the better eye, a visual field of 30 degrees or less in the better eye, or having a combination of both.

(24) Significant disability--A severe physical, mental, cognitive, or sensory impairment that substantially limits an individual's ability to function independently in the family or community.

(25) Sliding fee scale--The fee scale DARS uses to determine the maximum financial contribution that a consumer may be required to pay for receiving independent living services. The scale is based on the federal poverty level guidelines.

(26) Transition services--Services that:

(A) facilitate the transition of individuals with significant disabilities from nursing homes and other institutions to home and community-based residences, with the requisite supports and services;

(B) provide assistance to individuals with significant disabilities who are at risk of entering institutions so that the individuals may remain in the community; and

(C) facilitate the transition of youth who are individuals with significant disabilities, who were eligible for individualized education programs under section 614(d) of the Individuals with Disabilities Education Act (20 U.S.C. 1414(d)), and who have completed their secondary education or otherwise left school, to postsecondary life.

(27) Waived independent living plan--A written plan in which the service provider identifies on the behalf of the consumer the services that are needed to achieve the consumer's goal of living independently. The service provider writes the plan because the consumer has signed a waiver giving up the consumer's right to participate in the development of such a written plan.

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

Filed with the Office of the Secretary of State on May 2, 2016.

TRD-201602054

Sylvia F. Hardman
General Counsel
Department of Assistive and Rehabilitative Services
Earliest possible date of adoption: June 12, 2016
For further information, please call: (512) 424-4050

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SUBCHAPTER B. ALLOCATING FUNDS

40 TAC §104.201

STATUTORY AUTHORITY

The proposed new rule is authorized by the Texas Human Resources Code, Chapter 117. These new rules are proposed pursuant to HHSC's statutory rulemaking authority under Texas Government Code, Chapter 531, §531.0055(e), which provides the Executive Commissioner of HHSC with the authority to promulgate rules for the operation of and provision of health and human services by the health and human services agencies.

No other statute, article, or code is affected by this proposal.

§104.201. Allocation of Funds.

(a) DARS allocates to each service provider the funds needed to carry out the rules in this chapter. DARS may consider the following when determining the amount allotted to each service provider:

(1) service area;

(2) population of the area served; and

(3) history of service delivery.

(b) The funds are administered by the designated service provider in accordance with the rules in this chapter.

(c) When DARS determines that a service provider will not spend all of the funds allotted for a fiscal year to carry out the rules in this chapter, DARS may allot the projected unused portion to other service providers to provide the covered services in this chapter. The extra allotment is considered an increase in the other service providers' allotments for that fiscal year.

(d) The service provider ensures comparable services or benefits are exhausted before using funds allocated under this chapter.

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 May 2, 2016.

TRD-201602055
Sylvia F. Hardman
General Counsel
Department of Assistive and Rehabilitative Services
Earliest possible date of adoption: June 12, 2016
For further information, please call: (512) 424-4050

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SUBCHAPTER C. INDEPENDENT LIVING SERVICES

40 TAC §§104.301, 104.305, 104.307, 104.309, 104.311

STATUTORY AUTHORITY

The proposed new rules are authorized by the Texas Human Resources Code, Chapter 117. These new rules are proposed pursuant to HHSC's statutory rulemaking authority under Texas Government Code, Chapter 531, §531.0055(e), which provides the Executive Commissioner of HHSC with the authority to promulgate rules for the operation of and provision of health and human services by the health and human services agencies.

No other statute, article, or code is affected by this proposal.

§104.301. Purpose.

This subchapter provides information on independent living services.

§104.305. Eligibility.

(a) To be eligible for independent living services, a consumer must:

(1) have a significant disability as defined in §104.105(24) of this chapter (relating to Definitions); and

(2) be present in Texas.

(b) Eligibility is determined by the service provider, based on the documented diagnosis of a licensed practitioner.

(c) Under Texas Government Code §531.02002, §531.02014, and Texas Labor Code §351.002, consumers who are determined to be eligible for independent living services on or before August 31, 2016, remain eligible on September 1, 2016, and are considered grandfathered under the former DARS independent living program and do not need to reapply for independent living services to the respective receiving agency on September 1, 2016.

(d) Eligibility requirements are applied without regard to a person's age, color, creed, gender, national origin, race, religion, or length of time present in Texas.

(e) Once a consumer is determined to be eligible for services, the service provider:

(1) notifies the consumer or the consumer's representative in writing about the consumer's fee for service, as described in §104.401 of this chapter (relating to Consumer Participation System); and

(2) verifies the benefits of all consumers who may be covered for independent living services by comparable services or benefits, as provided under this chapter, and maintains all related documentation.

(f) If a service provider determines that a consumer is not eligible based on the criteria explained in this section, the service provider documents the determination of ineligibility and provides DARS with a copy that is signed and dated by the service provider's executive director or designee.

(1) The service provider may determine a consumer to be ineligible for independent living services only after consultation with the consumer or after providing a clear opportunity for consultation.

(2) The service provider notifies the consumer in writing of the action taken and informs the consumer about the consumer's rights and the means by which the consumer may appeal the action taken or file a complaint.

(3) The service provider refers the consumer to other agencies and facilities, if appropriate, including referring the consumer to the State's vocational rehabilitation program.

(4) If a service provider determines that a consumer is ineligible for independent living services, the service provider reviews the consumer's status again within 12 months of the determination and whenever the service provider determines that the consumer's status has materially changed.

(5) A review of an ineligibility determination need not be conducted if the consumer has refused one, the consumer is no longer present in Texas, or the consumer's whereabouts are unknown.

§104.307. Independent Living Plan.

(a) General.

(1) Unless the consumer who will receive independent living services under this chapter signs a waiver in accordance with paragraph (2) of this subsection, the service provider works with the consumer to develop and periodically review an independent living plan in accordance with this section.

(2) If the consumer knowingly and voluntarily signs a waiver stating that the consumer's participation in developing an independent living plan is unnecessary, the service provider develops a waived independent living plan.

(3) The service provider provides each independent living service in accordance with the independent living plan or waived independent living plan.

(b) Initiation and development of an independent living plan.

(1) A consumer's independent living plan or waived independent living plan is created after the consumer's eligibility is documented according to §104.305 of this chapter (relating to Eligibility). The plan explains the goals or objectives established and the services to be provided. It indicates the anticipated duration of the service plan and the duration of each component service.

(2) Subject to subsection (a)(2) of this section, the independent living plan is developed by the service provider and the consumer or the consumer's representative.

(3) A copy of the independent living plan and any amendments is provided in an accessible format to the consumer or the consumer's representative.

(c) Review.

(1) The independent living plan or waived independent living plan is reviewed as often as necessary but at least annually to determine whether to continue, modify, or discontinue services or refer the consumer to a vocational rehabilitation program or other assistance program.

(2) The consumer reviews the independent living plan and, if necessary, revises it and agrees by signature to its terms.

(d) Coordinating services. The independent living plan or waived independent living plan must be coordinated, to the extent possible, with any of the following programs for the consumer:

(1) A vocational rehabilitation program;

(2) A habilitation program, prepared under the Developmental Disabilities Assistance and Bill of Rights Act; and

(3) An education program, prepared under part B of the Individuals with Disabilities Education Act.

(e) Termination of services. If the service provider intends to terminate services to a consumer, the service provider documents the reason on the independent living plan or waived independent living plan and follows the procedures explained in §104.305(f)(2) - (5) of this chapter.

§104.309. Waiting List.

(a) Independent living services are provided when funding is available.

(b) A consumer is placed on a waiting list by the service provider when:

(1) the consumer meets the eligibility requirements explained in §104.305 of this chapter (relating to Eligibility);

(2) the consumer has a signed independent living plan or a waiver stating that an independent living plan is unnecessary; and

(3) there is no funding for a service on the independent living plan that must be purchased.

(c) The waiting list is reviewed every six months by the service provider to determine whether consumers are still eligible for and interested in services.

(d) Consumers are removed from the waiting list when funding becomes available, the consumer is no longer eligible, or the consumer is no longer interested.

§104.311. Scope of Services.

(a) All services provided in this section are subject to §104.201(d) of this chapter (relating to Allocation of Funds).

(b) All services are available in an accessible format for consumers who rely on alternative modes of communication.

(c) The service provider provides each independent living service in accordance with the independent living plan or waived independent living plan.

(d) The service provider may provide the following independent living services under this chapter:

(1) Independent living core services, which are:

(A) information and referral services;

(B) independent living skills training;

(C) peer counseling (including cross-disability peer counseling);

(D) individual and systems advocacy; and

(E) transition services; and

(2) Independent living services, which are:

(A) counseling services, including psychological and psychotherapeutic services;

(B) services for securing housing or shelter (including community living) that support the purposes and titles of the Act, and services related to securing adaptive housing (including making appropriate modifications to spaces that serve or are occupied by individuals with disabilities);

(C) rehabilitation technology;

(D) mobility training;

(E) services and training for individuals with cognitive and sensory disabilities, including life skills training and interpreter and reader services;

(F) personal assistance services, including attendant care and the training of personnel providing such services;

(G) surveys, directories, and other materials that identify appropriate housing, recreation opportunities, accessible transportation, and other support services;

(H) consumer information programs on the rehabilitation and independent living services that are available under the Act, especially services that are available for minorities and other individ-

uals with disabilities who have traditionally been unserved or underserved by programs under the Act;

(I) education and training necessary for living in a community and participating in community activities;

(J) supported living;

(K) transportation, including referral services, personal assistance, and training on the use of public transportation vehicles and systems;

(L) physical rehabilitation;

(M) therapeutic treatment;

(N) the provision of needed prostheses and other appliances and devices;

(O) social and recreational services (individual and group);

(P) training for youth with disabilities that is designed to develop self-awareness, self-esteem and the ability to self-advocate, self-empower, and explore career options;

(Q) services for children;

(R) federal, state, or local training, counseling, or other assistance designed to help individuals with disabilities become independent and productive and live a good life;

(S) preventive services that encourage independence and reduce the need for the services that are provided under the Act;

(T) awareness programs that encourage an understanding of individuals with disabilities and help individuals integrate into the community; and

(U) other services, as needed, which are consistent with the provisions of the Act.

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

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Sylvia F. Hardman
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Department of Assistive and Rehabilitative Services
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SUBCHAPTER D. CONSUMER PARTICIPATION

40 TAC §§104.401, 104.403, 104.405

STATUTORY AUTHORITY

The proposed new rules are authorized by the Texas Human Resources Code, Chapter 117. These new rules are proposed pursuant to HHSC's statutory rulemaking authority under Texas Government Code, Chapter 531, §531.0055(e), which provides the Executive Commissioner of HHSC with the authority to promulgate rules for the operation of and provision of health and human services by the health and human services agencies.

No other statute, article, or code is affected by this proposal.

§104.401. Consumer Participation System.

(a) The service provider administers the consumer participation system in accordance with the rules in this chapter, the standards, and the contract requirements.

(b) The service provider provides independent living core services, as defined in §104.311(d)(1) of this chapter (relating to Scope of Services), at no cost to the consumer.

(c) Independent living services defined in §104.311(d)(2) of this chapter are subject to the rules in this subchapter.

(d) The service provider gathers financial information about the consumer to determine the consumer's adjusted gross income and the percentage of the federal poverty level for that income.

(e) The service provider charges the consumer a fee for each service provided in §104.311(d)(2) of this chapter, according to the consumer's percentage of the federal poverty level.

(f) The consumer or consumer's representative signs a consumer participation agreement. Signing the agreement acknowledges the amount of the consumer's fee for services and provides written agreement that:

(1) the information provided by the consumer or the consumer's representative about the consumer's household size, annual gross income, allowable deductions, and comparable services or benefits is true and accurate; or

(2) the consumer or the consumer's representative chooses not to provide information about the consumer's household size, annual gross income, allowable deductions, and comparable services or benefits.

(g) The service provider does not initiate or authorize independent living services subject to §104.311(d)(2) of this chapter until the consumer or the consumer's representative signs the consumer's participation agreement.

(h) If the consumer chooses not to provide information on the consumer's household size, annual gross income, allowable deductions, and comparable services or benefits, the consumer agrees to pay the entire cost of services.

(i) The consumer reports to the service provider as soon as possible all changes to household size, annual gross income, allowable deductions, and comparable services or benefits and signs a new consumer's participation agreement.

(j) When the consumer signs a new participation agreement, the new amount of the consumer's fee for service takes effect the beginning of the following month. The new amount is not retroactive.

(k) The service provider must develop a process to reconsider and adjust the consumer's fee for service based on circumstances that are both extraordinary and documented. This may include assessing the consumer's ability to pay the consumer's fee for service.

(l) Only the service provider's executive director or designee has authority to reconsider and adjust a consumer's fee for service.

(m) Extraordinary circumstances are:

(1) an increase or decrease in income;

(2) unexpected medical expenses;

(3) unanticipated disability related expenses;

(4) a change in family size;

(5) catastrophic loss, such as a fire, flood, or tornado;

(6) short-term financial hardship, such as a major repair to the consumer's home or personally owned vehicle; or

(7) other extenuating circumstances for which the consumer makes a request and provides supporting documentation.

(n) The consumer's calculated fee for service remains in effect during the reconsideration and adjustment process.

(o) The service provider:

(1) uses program income that is received from the consumer participation system only to provide the independent living services that are outlined in §104.311(d)(2) of this chapter; and

(2) reports fees collected to DARS as program income.

(p) The service provider does not use program income received from the consumer participation system to supplant any other fund sources.

(q) DARS does not pay any portion of the consumer's fee for service.

(r) The consumer's participation agreement and all financial information collected by the service provider are subject to any data use agreement between DARS and the service provider.

(s) The consumer's participation agreement and all financial information collected by the service provider are subject to subpoena.

§104.403. Fee Schedule Amount.

(a) The service provider is required to use the DARS fee schedule and instructions to calculate the consumer's fee for service.

(b) Factors that affect the consumer's fee for service are:

(1) household size;

(2) annual gross income; and

(3) allowable deductions.

(c) The household size equals any person living inside or outside of the home who is eligible to be claimed as a dependent of the consumer on the consumer's federal income tax return, or, if the consumer is a minor, any other person living inside or outside of the home who is eligible to be claimed as a dependent of the consumer's parent or guardian on the parent or guardian's federal income tax return.

(d) the consumer's annual gross income:

(1) equals the total annual gross income received by the household; and

(2) includes all income classified as taxable income by the Internal Revenue Service before federally allowable deductions are applied.

(e) The consumer's allowable deductions are limited to the consumer's expenses in the following categories:

(1) attendant care;

(2) rent or home mortgage payments;

(3) court-ordered child support payments made by the consumer for financially dependent children who were not included in the calculation of household size; and

(4) medical or dental expenses for treatment primarily intended to alleviate or prevent a physical or mental illness or manage a disability, with the expenses limited to the cost of:

(A) diagnosis, cure, alleviation, treatment, or prevention of disease;

(B) treatment of any affected body part or function;

(C) medical services legally delivered by physicians, surgeons, dentists, and other medical practitioners;

(D) medications, medical supplies, and diagnostic devices;

(E) medical and dental health care insurance premiums;

(F) transportation to receive medical or dental care; and

(G) medical or dental debt that the family is paying on an established payment plan.

(f) The service provider calculates the allowable deductions using the actual amounts the consumer paid during the previous 12-month period.

(g) The consumer provides the most recent tax return available as proof of annual gross income and allowable deductions. If the consumer has no tax return, the consumer provides bank statements, medical records, receipts, proof of benefits awards, and other documentation to demonstrate annual gross income and allowable deductions.

(h) If the consumer does not provide documentation supporting the household's allowable deductions, the service provider determines the consumer's fee for service based on the consumer's documented annual gross income with no allowable deductions.

(i) The consumer's fee for service is equal to the amount on the DARS sliding fee scale according to the household's annual adjusted income (that is, the annual gross income minus the allowable deductions).

(j) The service provider uses the most current sliding fee scale and instructions published by DARS to determine the consumer's fee for service.

(k) The procedures, fee schedule, and instructions that DARS uses to calculate a consumer's fee for service is available from DARS, between 8:00 a.m. and 5:00 p.m. on business days.

§104.405. Insurance Payments.

(a) If the consumer has medical and dental insurance that covers an independent living service received by the consumer and the agreement for in-network services made between the insurance company and the service provider or service provider's subcontractor requires that the service provider or subcontractor accept as payment in full the deductible, copayment, or coinsurance and insurance reimbursement, then the consumer's fee for service is either the deductible, copayment, or coinsurance, or the amount calculated by the DARS fee schedule, whichever is less.

(b) The consumer pays the premiums for medical and dental insurance. Neither DARS nor the service provider pays the premiums.

(c) The premiums for medical and dental insurance do not count toward meeting the consumer's fee for service.

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 May 2, 2016.

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Sylvia F. Hardman
General Counsel
Department of Assistive and Rehabilitative Services
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SUBCHAPTER E. CONSUMER RIGHTS

40 TAC §104.501, §104.503

STATUTORY AUTHORITY

The proposed new rules are authorized by the Texas Human Resources Code, Chapter 117. These new rules are proposed pursuant to HHSC's statutory rulemaking authority under Texas Government Code, Chapter 531, §531.0055(e), which provides the Executive Commissioner of HHSC with the authority to promulgate rules for the operation of and provision of health and human services by the health and human services agencies.

No other statute, article, or code is affected by this proposal.

§104.501. Rights of Consumers.

(a) In accordance with applicable legal provisions, DARS does not, directly or through contractual or other arrangements, exclude, deny benefits to, limit the participation of, or otherwise discriminate against any individual on the basis of age, color, disability, national origin, political belief, race, religion, sex, or sexual orientation. For the purposes of receiving independent living services, the consumer must have a significant disability; however, that requirement is not considered discrimination against any individual on the basis of disability.

(b) The service provider notifies the consumer in writing about the rights included in subsection (a) of this section; §104.503 of this chapter (relating to Complaint Process); and §104.401 of this chapter (relating to Consumer Participation System):

(1) when a consumer applies for services;

(2) when the service provider determines that a consumer is ineligible for services; and

(3) when the service provider intends to terminate services.

(c) Consumer rights are available in an accessible format for consumers who rely on alternative modes of communication.

§104.503. Complaint Process.

(a) Filing a complaint with DARS through the Health and Human Services Commission Office of Ombudsman.

(1) A consumer may file a complaint with DARS alleging that a requirement of independent living services was violated. A complaint may be filed directly with DARS without having been filed with the service provider.

(2) A complaint may be filed by:

(A) mail to DARS: Texas Health and Human Services Commission, Office of the Ombudsman, MC H-700, P.O. Box 13247, Austin, Texas 78711-3247;

(B) phone: 1-877-787-8999 or Relay Texas for people with a hearing or speech disability: 7-1-1 or 1-800-735-2989;

(C) fax: 1-888-780-8099; or

(D) online: *http://www.hhsc.state.tx.us/ombudsman/contact.shtml*

(3) More information regarding the complaint process may be obtained by calling the Office of the Ombudsman at 1-877-787-8999 or Relay Texas for people with a hearing or speech disability: 7-1-1 or 1-800-735-2989.

(b) Filing a complaint with the Client Assistance Program (CAP).

(1) The CAP is implemented by Disability Rights Texas (DRTx), a legal services organization whose mission is to protect the human, service, and legal rights of persons with disabilities in Texas.

(2) DRTx advocates are not employees of DARS. There are no fees for CAP services, which are provided by advocates and attorneys when necessary. Services are confidential.

(3) A consumer enrolled in independent living services or the consumer's representative may file a complaint with DRTx alleging that a requirement of independent living services was violated. The complaint need not be filed with the service provider.

(4) A complaint may be filed by:

(A) phone: 1-800-252-9108; or

(B) videophone: 1-866-362-2851.

(5) More information about the complaint process is available by calling DRTx at 1-800-252-9108 or videophone at 1-866-362-2851.

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 May 2, 2016.

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Sylvia F. Hardman
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SUBCHAPTER F. TECHNICAL ASSISTANCE AND TRAINING

40 TAC §104.601

STATUTORY AUTHORITY

The proposed new rule is authorized by the Texas Human Resources Code, Chapter 117. These new rules are proposed pursuant to HHSC's statutory rulemaking authority under Texas Government Code, Chapter 531, §531.0055(e), which provides the Executive Commissioner of HHSC with the authority to promulgate rules for the operation of and provision of health and human services by the health and human services agencies.

No other statute, article, or code is affected by this proposal.

§104.601. Administering Agency's Role in Providing Technical Assistance.

(a) DARS gives the service provider technical assistance, as needed, to help the service provider offer a full range of independent living services.

(b) Technical assistance may include:

(1) help to expand a service provider's capacity to provide a full range of independent living services; and

(2) training on:

(A) the independent living philosophy; and

(B) the administration, operation, evaluation, and performance of independent living services according to the rules in this chapter, the standards, and the contract requirements.

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

Filed with the Office of the Secretary of State on May 2, 2016.

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Sylvia F. Hardman
General Counsel
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SUBCHAPTER G. REFERRALS

40 TAC §104.701

STATUTORY AUTHORITY

The proposed new rule is authorized by the Texas Human Resources Code, Chapter 117. These new rules are proposed pursuant to HHSC's statutory rulemaking authority under Texas Government Code, Chapter 531, §531.0055(e), which provides the Executive Commissioner of HHSC with the authority to promulgate rules for the operation of and provision of health and human services by the health and human services agencies.

No other statute, article, or code is affected by this proposal.

§104.701. Expectations of Administering Agency's Employees.

(a) Individuals seeking independent living services are referred to the local service provider.

(b) If an individual calls DARS to request independent living services, DARS:

(1) gives the individual the contact information for the service provider;

(2) obtains the individual's permission to forward the individual's name and contact information to the service provider; and

(3) forwards the individual's name and contact information.

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

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CHAPTER 106. DIVISION FOR BLIND SERVICES

SUBCHAPTER C. INDEPENDENT LIVING PROGRAM

The Texas Health and Human Services Commission (HHSC), on behalf of the Department of Assistive and Rehabilitative Services (DARS), proposes the repeal of Chapter 106, Division for Blind Services, Subchapter C, Independent Living Program, Division 1, General Information, §§106.901, 106.903, 106.905, and 106.907; Division 2, Program Requirements, §§106.1007, 106.1009, 106.1011, 106.1013, 106.1015, and 106.1017; Division 3, Independent Living Services, §106.1107 and §106.1109; Division 4, Consumer Participation, §§106.1207, 106.1209, 106.1211, 106.1213, 106.1215, and 106.1217; and Division 5, Maximum Affordable Payment, §106.1307.

The repeal is being proposed pursuant to H.B. 2463, 84th Legislature, Regular Session, 2015. The bill requires the integration of independent living services for individuals who are blind or visually impaired and independent living services for individuals with significant disabilities. The bill further requires the independent living services program that DARS operates under Title VII of the federal Rehabilitation Act of 1973 (29 U.S.C. Section 796 et seq.) are directly provided by centers for independent living, except as provided by the Texas Human Resources Code, §117.080 (b), and are not directly provided by the department.

SECTION-BY-SECTION SUMMARY

The sections are being repealed to create a new Subchapter D, Independent Living Services for Older Individuals who are Blind, which will implement the integration of the independent living services. The repeals include the following:

• Division 1, General Information

• Division 2, Program Requirements

• Division 3, Independent Living Services

• Division 4, Consumer Participation

• Division 5, Maximum Affordable Payment

FISCAL NOTE

Rebecca Trevino, DARS Chief Financial Officer, has determined that for each year of the first five years that the proposed repeals will be in effect, there are no foreseeable fiscal implications to either cost or revenues of state or local governments because of repealing the rules.

SMALL AND MICRO-BUSINESS IMPACT ANALYSIS AND ECONOMIC COSTS TO PERSONS AND IMPACT ON LOCAL EMPLOYMENT

In accordance with Texas Government Code, §2001.022, Ms. Trevino has determined that the proposed repeals will not affect a local economy, so no local employment impact statement is required. Finally, Ms. Trevino has determined that the proposed repeals will have no adverse economic effect on small businesses or micro-businesses.

PUBLIC BENEFIT

Ms. Trevino also has determined that for each of the first five years that the proposed repeals will be in effect, the public benefits anticipated as a result of administering and enforcing the proposed repeals will be to assure the public that the necessary rules are in place to provide a clear and concise understanding of the services provided by DARS.

REGULATORY ANALYSIS

DARS has determined that this proposal is not a "major environmental rule" as defined by §2001.0225 of the Texas Government Code. A "major environmental rule" is defined to mean a rule the specific intent of which is to protect the environment or reduce

risk to human health from environmental exposure and that may adversely affect, in a material way, the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of a state or a sector of the state. This proposal is not specifically intended to protect the environment or reduce risks to human health from environmental exposure.

TAKINGS IMPACT ASSESSMENT

DARS has determined that these proposed repeals do not restrict or limit an owner's right to his or her property that would otherwise exist in the absence of government action and, therefore, do not constitute a taking under Texas Government Code §2007.043.

PUBLIC COMMENT

Written comments on the proposal may be submitted to the Department of Assistive and Rehabilitative Services, 4800 North Lamar Boulevard, Austin, Texas 78756; or emailed to *DARSrules@DARS.state.tx.us.* All comments must be submitted before June 13, 2016, at 5:00 p.m.

DIVISION 1. GENERAL INFORMATION

40 TAC §§106.901, 106.903, 106.905, 106.907

STATUTORY AUTHORITY

The proposed repeals are authorized by the Texas Human Resources Code, Chapter 117. These repeals are proposed pursuant to HHSC's statutory rulemaking authority under Texas Government Code, Chapter 531, §531.0055(e), which provides the Executive Commissioner of HHSC with the authority to promulgate rules for the operation of and provision of health and human services by the health and human services agencies.

No other statute, article, or code is affected by this proposal.

§106.901. Purpose.

§106.903. Legal Authority.

§106.905. Definitions.

§106.907. Service Delivery.

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

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DIVISION 2. PROGRAM REQUIREMENTS

40 TAC §§106.1007, 106.1009, 106.1011, 106.1013, 106.1015, 106.1017

STATUTORY AUTHORITY

The proposed repeals are authorized by the Texas Human Resources Code, Chapter 117. These repeals are proposed pursuant to HHSC's statutory rulemaking authority under Texas Government Code, Chapter 531, §531.0055(e), which provides the Executive Commissioner of HHSC with the authority to promulgate rules for the operation of and provision of health and human services by the health and human services agencies.

No other statute, article, or code is affected by this proposal.

§106.1007. Application.

§106.1009. Eligibility.

§106.1011. Data for Eligibility Determination.

§106.1013. Ineligibility Determination.

§106.1015. Case Closure.

§106.1017. Independent Living (IL) Plan.

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

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DIVISION 3. INDEPENDENT LIVING SERVICES

40 TAC §106.1107, §106.1109

STATUTORY AUTHORITY

The proposed repeals are authorized by the Texas Human Resources Code, Chapter 117. These repeals are proposed pursuant to HHSC's statutory rulemaking authority under Texas Government Code, Chapter 531, §531.0055(e), which provides the Executive Commissioner of HHSC with the authority to promulgate rules for the operation of and provision of health and human services by the health and human services agencies.

No other statute, article, or code is affected by this proposal.

§106.1107. Goods and Services.

§106.1109. Transportation.

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

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DIVISION 4. CONSUMER PARTICIPATION

40 TAC §§106.1207, 106.1209, 106.1211, 106.1213, 106.1215, 106.1217

STATUTORY AUTHORITY

The proposed repeals are authorized by the Texas Human Resources Code, Chapter 117. These repeals are proposed pursuant to HHSC's statutory rulemaking authority under Texas Government Code, Chapter 531, §531.0055(e), which provides the Executive Commissioner of HHSC with the authority to promulgate rules for the operation of and provision of health and human services by the health and human services agencies.

No other statute, article, or code is affected by this proposal.

§106.1207. Consumer Participation.
§106.1209. Scope.
§106.1211. General Procedures.
§106.1213. Maximum Allowable Amount.
§106.1215. Allowed Adjustments to Calculate Net Monthly Income.
§106.1217. Refusal to Disclose Economic Resources.

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 May 2, 2016.

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Sylvia F. Hardman
General Counsel
Department of Assistive and Rehabilitative Services
Earliest possible date of adoption: June 12, 2016
For further information, please call: (512) 424-4050

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DIVISION 5. MAXIMUM AFFORDABLE PAYMENT

40 TAC §106.1307

STATUTORY AUTHORITY

The proposed repeal is authorized by the Texas Human Resources Code, Chapter 117. These repeals are proposed pursuant to HHSC's statutory rulemaking authority under Texas Government Code, Chapter 531, §531.0055(e), which provides the Executive Commissioner of HHSC with the authority to promulgate rules for the operation of and provision of health and human services by the health and human services agencies.

No other statute, article, or code is affected by this proposal.

§106.1307. Scope of 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 May 2, 2016.

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Sylvia F. Hardman
General Counsel
Department of Assistive and Rehabilitative Services
Earliest possible date of adoption: June 12, 2016
For further information, please call: (512) 424-4050

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SUBCHAPTER D. INDEPENDENT LIVING SERVICES FOR OLDER INDIVIDUALS WHO ARE BLIND

The Texas Health and Human Services Commission (HHSC), on behalf of the Texas Department of Assistive and Rehabilitative Services (DARS), proposes to add new Subchapter D, Independent Living Services for Older Individuals who are Blind. The subchapter consists of Division 1, General Rules: §106.901, concerning Purpose; §106.903, concerning Legal Authority; and §106.905, concerning Definitions; Division 2, Allocation of Funds: §106.1001, concerning Allocation of Funds; Division 3, Independent Living Services for Older Individuals Who are Blind: §106.1101, concerning Purpose; §106.1105, concerning Eligibility; §106.1107, concerning Independent Living Plan; §106.1109, concerning Waiting List, and §106.1111; concerning Scope of Services; Division 4, Consumer Participation: §106.1201, concerning Consumer Participation System; §106.1203, concerning Fee Schedule Amount; and §106.1205, concerning Insurance Payments; Division 5, Consumer Rights: §106.1301, concerning Rights of Consumers, and §106.1303, concerning Complaint Process; Division 6, Technical Assistance and Training: §106.1351, concerning Administering Agency's Role in Providing Technical Assistance; and Division 7, Referrals: §106.1371, concerning Expectations of Administering Agency's Employees.

BACKGROUND AND JUSTIFICATION

The new rules are being proposed pursuant to H.B. 2463, 84th Legislature, Regular Session, 2015. The bill requires the integration of independent living services for individuals who are blind or visually impaired and independent living services for individuals with significant disabilities. The bill further requires the independent living services program that DARS operates under Title VII of the federal Rehabilitation Act of 1973 (29 U.S.C. §796 et seq.) are directly provided by centers for independent living, except as provided by the Texas Human Resources Code, §117.080 (b), and are not directly provided by the department.

Effective September 1, 2016, responsibility for independent living services for older individuals who are blind will transfer to the Texas Workforce Commission. Under Texas Government Code, §§531.0201, 531.02011, 531.02012, and 531.0202, a rule adopted by or on behalf of DARS that relate to a function that is transferred under one of those sections becomes a rule of the receiving state agency upon transfer of the related function and remains in effect:

• until altered by the commission or other receiving state agency, as applicable; or

• unless it conflicts with a rule, policy, or form of the receiving state agency.

SECTION-BY-SECTION SUMMARY

DARS proposes §106.901, Purpose, establishing the purpose of DARS independent living services for older individuals who are blind.

DARS proposes §106.903, Legal Authority, establishing the legal authority under which independent living services for older individuals who are blind are administered.

DARS proposes §106.905, Definitions, establishing definitions for Ability to pay, Act, Accessible format, Adjusted income, Allotment, Allowable deductions, Attendant care, Blind, Center for Independent Living (CIL), Client Assistance Program (CAP), Comparable services or benefits, Consumer, Consumer participation, Consumer participation system, Consumer representative, DARS, Fee, Federal poverty level guidelines, Independent living plan, Nonprofit, Older individual who is blind, Private, Service

provider, Severe visual impairment, Significant disability, Sliding fee scale, Transition services, and Waived independent living plan.

DARS proposes §106.1001, Allocation of Funds, establishing the method by which DARS allocates funds to a service provider. The section further establishes that service provider ensures comparable services or benefits are exhausted before using funds allocated under proposed Chapter 106, Subchapter D.

DARS proposes §106.1101, Purpose, establishing the purpose for the proposed Division.

DARS proposes §106.1105, Eligibility, establishing the eligibility criteria for independent living services for older individuals who are blind. The section establishes that eligibility is determined by the service provider, based on the documented diagnosis of a licensed practitioner. The section establishes that consumers who are determined to be eligible for independent living services for older individuals who are blind on or before August 31, 2016, remain eligible on September 1, 2016. The section further establishes requirements of the service provider when a consumer is determined eligible and when a consumer is determined ineligible.

DARS proposes §106.1107, Independent Living Plan, establishing that services are provided in accordance with an independent living plan that is developed jointly between the service provider and the consumer, unless the consumer signs a waiver giving up their right to participate in the development of the independent plan, in which case services are provided in accordance with a waived independent living plan developed by the service provider. The section further establishes that the independent living plan and services must be coordinated, to the extent possible, with vocational rehabilitation, habilitation, and education services. The section further establishes under what conditions services are terminated.

DARS proposes §106.1109, Waiting list, establishing that a consumer is placed on a waiting list by the service provider when the consumer is determined eligible, has a signed independent living plan or waived independent living plan, and there is no funding for a service on the independent living plan that must be purchased. The section establishes that the waiting list must be reviewed every six months by the service provider. The section further establishes that a consumer is removed from the waiting list when funding becomes available, the consumer is no longer eligible, or the consumer is no longer interested.

DARS proposes §106.1111, Scope of Services, establishing that the service provider may provide independent living core services, independent living services, and independent living services for older individuals who are blind under proposed Chapter 106, Subchapter D.

DARS proposes §106.1201, Consumer Participation System, establishing that the service provider administers the consumer participation system and establishes the elements of that system. The section establishes that a service provider must develop a process to reconsider and adjust the consumer's fee for service based on circumstances that are both extraordinary and documented, and establishes those extraordinary circumstances.

DARS proposes §106.1203, Fee Schedule Amount, establishing the method for calculating the fee paid by the consumer for purchased services, including factors that affect the fee paid by the consumer for purchased services allowable deductions. The section establishes that consumer's fee for service is equal to the amount on the DARS sliding fee scale according to the household's annual adjusted income. The section establishes that the consumer is required to provide proof of annual gross income and allowable deductions. The section further establishes that if the consumer does not provide the service provider with supporting documentation for the household's allowable deductions, the service provider determines the consumer's fee for service based on the consumer's documented annual gross income with no allowable deductions.

DARS proposes §106.1205, Insurance Payments, establishing that if the consumer has medical and dental insurance that covers an independent living service received by the consumer and the agreement for in-network services made between the insurance company and the service provider or service provider's subcontractor requires that the service provider or subcontractor accept as payment in full the deductible, copayment, or coinsurance and insurance reimbursement, then the consumer's fee for service is either the deductible, copayment, or coinsurance, or the amount calculated by the DARS fee schedule, whichever is less. The section further establishes that the consumer pays the premiums for medical and dental insurance and that neither DARS nor the service provider pays the premiums.

DARS proposes §106.1301, Rights of Consumers, establishing the rights of the consumer and when those rights must be provided to the consumer in writing.

DARS proposes §106.1303, Complaint Process, establishing the process by which a consumer may file a complaint with DARS or the Client Assistance Program implemented in Texas by Disability Rights Texas.

DARS proposes §106.1351, Administering Agency's Role in Providing Technical Assistance, establishing that DARS gives the service provider technical assistance, as needed, to help the service provider offer a full range of independent living services for older individuals who are blind.

DARS proposes §106.1371, Expectations of Administering Agency's Employees, establishing that when individuals contact DARS seeking independent living services for older individuals who are blind, DARS will refer those individuals to the local service provider.

FISCAL NOTE

Rebecca Trevino, DARS Chief Financial Officer, has determined that for each year of the first five years that the proposed new rules will be in effect, there are no foreseeable fiscal implications to either cost or revenues of state or local governments because of enforcing or administering the rules.

SMALL AND MICRO-BUSINESS IMPACT ANALYSIS AND ECONOMIC COSTS TO PERSONS AND IMPACT ON LOCAL EMPLOYMENT

In accordance with Texas Government Code, §2001.022, Ms. Trevino has determined that the proposed new rules will not affect a local economy, so no local employment impact statement is required. Finally, Ms. Trevino has determined that the proposed new rules will have no adverse economic effect on small businesses or micro-businesses.

PUBLIC BENEFIT

Ms. Trevino also has determined that for each of the first five years that the proposed new rules will be in effect, the public benefits anticipated as a result of administering and enforcing

the proposed new rules will be to assure the public that the necessary rules are in place to provide a clear and concise understanding of the services provided by DARS.

REGULATORY ANALYSIS

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

TAKINGS IMPACT ASSESSMENT

DARS has determined that these proposed new rules do not restrict or limit an owner's right to his or her property that would otherwise exist in the absence of government action and, therefore, do not constitute a taking under Texas Government Code §2007.043.

PUBLIC COMMENT

Written comments on the proposal may be submitted to the Department of Assistive and Rehabilitative Services, 4800 North Lamar Boulevard, Austin, Texas 78756; or emailed to *DARSrules@DARS.state.tx.us.* All comments must be submitted by 5:00 p.m., June 13, 2016.

DIVISION 1. GENERAL RULES

40 TAC §§106.901, 106.903, 106.905

STATUTORY AUTHORITY

The proposed new rules are authorized by the Texas Human Resources Code, Chapter 117. These new rules are proposed pursuant to HHSC's statutory rulemaking authority under Texas Government Code, Chapter 531, §531.0055(e), which provides the Executive Commissioner of HHSC with the authority to promulgate rules for the operation of and provision of health and human services by the health and human services agencies.

No other statute, article, or code is affected by this proposal.

§106.901. Purpose.

This program provides services that promote to the fullest extent the integration and inclusion of older individuals who are blind into society.

§106.903. Legal Authority.

(a) The legal authority for the program is published in the following federal regulations and state statutes:

(1) 34 Code of Federal Regulations, Parts 364, 365, 366 and 367;

(2) 29 U.S.C. §§711(c) and 796j-796l; and

(3) Texas Human Resources Code, §117.079 and §117.080.

(b) In case of any conflict, federal regulations prevail.

§106.905. Definitions.

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

(1) Ability to pay--The determination that the consumer is able to contribute financially toward the cost of independent living services for older individuals who are blind.

(2) Accessible format--An alternative way of providing to people with disabilities the same information, functionality, and services provided to people without disabilities. Examples of accessible formats include braille, ASCII text, large print, American Sign Language, and recorded audio.

(3) Act--The Rehabilitation Act of 1973, as amended.

(4) Adjusted income--The dollar amount that is equal to a household's annual gross income, minus allowable deductions.

(5) Allotment--Funds distributed to a service provider by DARS to provider services under this subchapter.

(6) Allowable deductions--Certain unreimbursed household expenses that are subtracted from a household's annual gross income to calculate the adjusted income.

(7) Attendant care--A personal assistance service provided to an individual with significant disabilities perform essential personal tasks, such as bathing, communicating, cooking, dressing, eating, homemaking, toileting, and transportation.

(8) Blind--A condition of having no more than 20/200 visual acuity in the better eye with correcting lenses or having visual acuity greater than 20/200 but with a field of vision in which the widest diameter subtends an angle no greater than 20 degrees.

(9) Center for Independent Living (CIL)--A private nonprofit agency for individuals with significant disabilities (regardless of age or income) that is not residential, is consumer-controlled, is community-based, takes a cross-disability approach, and:

(A) is designed and operated within a local community by individuals with disabilities; and

(B) provides an array of independent living services, including, at a minimum, independent living core services as they are defined in 29 U.S.C. §705(17).

(10) Client Assistance Program (CAP)--A federally funded program that provides information, assistance, and advocacy for people with disabilities who are seeking or receiving services from programs funded under the Act. The program is implemented by Disability Rights Texas (DRTx), a legal services organization whose mission is to protect the human, service, and legal rights of persons with disabilities in Texas.

(11) Comparable services or benefits--Services and benefits that are provided or paid for, in whole or part, by other federal, state, or local public programs; by health insurance, third-party payers, or other private sources; or by the employee benefits that are available to the consumer and are commensurate in quality and nature to the services that the consumer would otherwise receive from service providers.

(12) Consumer--An individual who has applied for or is receiving the independent living services for older individuals who are blind that are referred to under this subchapter.

(13) Consumer participation--The financial contribution that a consumer may be required to pay for receiving independent living services for older individuals who are blind.

(14) Consumer participation system--The system for determining and collecting the financial contribution that a consumer may be required to pay for receiving independent living services for older individuals who are blind.

(15) Consumer representative--Any person chosen by a consumer, including the consumer's parent, guardian, other family

member, or advocate. If a court has appointed a guardian or representative, that person is the consumer's representative.

(16) DARS--The Department of Assistive and Rehabilitative Services

(17) Federal poverty level guidelines--The poverty guidelines updated periodically in the Federal Register by the United States Department of Health and Human Services under the authority of 42 USC §9902(2).

(18) Fee--A percentage of the full cost for a purchased service that a consumer pays. The percentage is based on the DARS fee schedule and the fee does not exceed the maximum amount prescribed.

(19) Independent living plan--A written plan in which the consumer and service provider have collaboratively identified the services for older individuals who are blind that are needed to achieve the consumer's goal of living independently.

(20) Nonprofit--An agency, organization, or institution that is owned and operated by one or more corporations or associations whose net earnings do not and cannot lawfully benefit a private shareholder or entity.

(21) Older individual who is blind--An individual age 55 or older whose significant visual impairment makes competitive employment extremely difficult to attain but for whom independent living goals are feasible.

(22) Private--An agency, organization, or institution that is not under federal or public supervision or control.

(23) Service provider--A center for independent living, nonprofit organization, organization, or other person contracted or subcontracted to provide independent living services for older individuals who are blind.

(24) Severe visual impairment--A condition of having a visual acuity with best correction of 20/70 or less in the better eye, a visual field of 30 degrees or less in the better eye, or having a combination of both.

(25) Significant disability--A severe physical, mental, cognitive, or sensory impairment that substantially limits an individual's ability to function independently in the family or community.

(26) Sliding fee scale--The fee scale DARS uses to determine the maximum financial contribution that a consumer may be required to pay for receiving independent living services for older individuals who are blind. The scale is based on the federal poverty level guidelines.

(27) Transition services--Services that:

(A) facilitate the transition of individuals with significant disabilities from nursing homes and other institutions to home and community-based residences, with the requisite supports and services; and

(B) provide assistance to individuals with significant disabilities who are at risk of entering institutions so that the individuals may remain in the community.

(28) Waived independent living plan--A written plan in which the service provider identifies on the behalf of the consumer the services that are needed to achieve the consumer's goal of living independently. The service provider writes the plan because the consumer has signed a waiver giving up the consumer's right to participate in the development of such a written plan.

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

Filed with the Office of the Secretary of State on May 2, 2016.

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Sylvia F. Hardman
General Counsel
Department of Assistive and Rehabilitative Services
Earliest possible date of adoption: June 12, 2016
For further information, please call: (512) 424-4050

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DIVISION 2. ALLOCATION OF FUNDS

40 TAC §106.1001

STATUTORY AUTHORITY

The proposed new rule is authorized by the Texas Human Resources Code, Chapter 117. These new rules are proposed pursuant to HHSC's statutory rulemaking authority under Texas Government Code, Chapter 531, §531.0055(e), which provides the Executive Commissioner of HHSC with the authority to promulgate rules for the operation of and provision of health and human services by the health and human services agencies.

No other statute, article, or code is affected by this proposal.

§106.1001. Allocation of Funds.

(a) DARS allocates to each service provider the funds needed to carry out the rules in this subchapter. DARS may consider the following when determining the amount allotted to each service provider:

(1) service area;

(2) population of the area served; and

(3) history of service delivery.

(b) The funds are administered by the designated service provider in accordance with the rules in this subchapter.

(c) When DARS determines that a service provider will not spend all of the funds allotted for a fiscal year to carry out the rules in this subchapter, DARS may allot the projected unused portion to other service providers to provide the covered services in this subchapter. The extra allotment is considered an increase in the other service providers' allotments for that fiscal year.

(d) The service provider ensures comparable services or benefits are exhausted before using funds allocated under 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.

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Sylvia F. Hardman
General Counsel
Department of Assistive and Rehabilitative Services
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For further information, please call: (512) 424-4050

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DIVISION 3. INDEPENDENT LIVING SERVICES FOR OLDER INDIVIDUALS WHO ARE BLIND

40 TAC §§106.1101, 106.1105, 106.1107, 106.1109, 106.1111

STATUTORY AUTHORITY

The proposed new rules are authorized by the Texas Human Resources Code, Chapter 117. These new rules are proposed pursuant to HHSC's statutory rulemaking authority under Texas Government Code, Chapter 531, §531.0055(e), which provides the Executive Commissioner of HHSC with the authority to promulgate rules for the operation of and provision of health and human services by the health and human services agencies.

No other statute, article, or code is affected by this proposal.

§106.1101. Purpose.

This division provides information on independent living services for older individuals who are blind.

§106.1105. Eligibility.

(a) To be eligible for independent living services for older individuals who are blind, a consumer must:

(1) be 55 years old or older;

(2) be blind as defined in §106.905(8) of this subchapter (relating to Definitions) or have a severe visual impairment as defined in §106.905(24) of this subchapter that makes competitive employment extremely difficult but for whom independent living goals are feasible; and

(3) be present in Texas.

(b) Eligibility is determined by the service provider, based on the documented diagnosis of a licensed practitioner.

(c) Under Texas Government Code §531.02002, §531.02014, and Texas Labor Code §351.002, consumers who are determined to be eligible for independent living services for older individuals who are blind on or before August 31, 2016, remain eligible on September 1, 2016, and are considered grandfathered under the former DARS independent living program and do not need to reapply for independent living services for older individuals who are blind to the respective receiving agency on September 1, 2016.

(d) Eligibility requirements are applied without regard to a person's age, color, creed, gender, national origin, race, religion, or length of time present in Texas.

(e) Once a consumer is determined to be eligible for services, the service provider:

(1) notifies the consumer or the consumer's representative in writing about the consumer's fee for service, as described in §106.1201 of this subchapter (relating to Consumer Participation System); and

(2) verifies the benefits of all consumers who may be covered for independent living services for older individuals who are blind by comparable services or benefits, as provided under this subchapter, and maintains all related documentation.

(f) If a service provider determines that a consumer is not eligible based on the criteria explained in this section, the service provider documents the determination of ineligibility and provides DARS with a copy that is signed and dated by the service provider's executive director or designee.

(1) The service provider may determine a consumer to be ineligible for independent living services for older individuals who are blind only after consultation with the consumer or after providing a clear opportunity for this consultation.

(2) The service provider notifies the consumer in writing of the action taken and informs the consumer about the consumer's rights and the means by which the consumer may appeal the action taken or file a complaint.

(3) The service provider refers the consumer to other agencies and facilities, if appropriate, including referring the consumer to the State's vocational rehabilitation program.

(4) If a service provider determines that a consumer is ineligible for independent living services for older individuals who are blind, the service provider reviews the consumer's status again within 12 months of the determination and whenever the service provider determines that the consumer's status has materially changed.

(5) A review of an ineligibility determination need not be conducted if the consumer has refused one, the consumer is no longer present in Texas, or the consumer's whereabouts are unknown.

§106.1107. Independent Living Plan.

(a) General.

(1) Unless the consumer who will receive independent living services for older individuals who are blind under this subchapter signs a waiver in accordance with paragraph (2) of this subsection, the service provider works with the consumer to develop and periodically review an independent living plan in accordance with this section.

(2) If the consumer knowingly and voluntarily signs a waiver stating that the consumer's participation in developing an independent living plan is unnecessary, the service provider develops a waived independent living plan.

(3) The service provider provides each independent living service in accordance with the independent living plan or waived independent living plan.

(b) Initiation and development of an independent living plan.

(1) A consumer's independent living plan or waived independent living plan is created after the consumer's eligibility is documented according to §106.1105 of this division (relating to Eligibility). The plan explains the goals or objectives established and the services to be provided. It indicates the anticipated duration of the service plan and the duration of each component service.

(2) Subject to subsection (a)(2) of this section, the independent living plan is developed by the service provider and the consumer or the consumer's representative.

(3) A copy of the independent living plan and any amendments must be provided in an accessible format to the consumer or the consumer's representative.

(c) Review.

(1) The independent living plan or waived independent living plan is reviewed as often as necessary but at least annually to determine whether to continue, modify, or discontinue services or refer the consumer to a vocational rehabilitation program or other assistance program.

(2) The consumer reviews the independent living plan and, if necessary, revises it and agrees by signature to its terms.

(d) Coordinating services. The independent living plan or waived independent living plan must be coordinated, to the extent possible, with any of the following programs for the consumer:

(1) A vocational rehabilitation program;

(2) A habilitation program, prepared under the Developmental Disabilities Assistance and Bill of Rights Act; and

(3) An education program, prepared under part B of the Individuals with Disabilities Education Act.

(e) Termination of services. If the service provider intends to terminate services to a consumer, the service provider documents the reason on the independent living plan or waived independent living plan and follows the procedures explained in §106.1105(f)(2) - (5) of this subchapter (relating to Eligibility).

§106.1109. Waiting List.

(a) Independent living services for older individuals who are blind are provided when funding is available.

(b) A consumer is placed on a waiting list by the service provider when:

(1) the consumer meets the eligibility requirements explained in §106.1105 of this subchapter (relating to Eligibility);

(2) the consumer has a signed independent living plan or a waiver stating that an independent living plan is unnecessary; and

(3) there is no funding for a service on the independent living plan that must be purchased.

(c) The waiting list is reviewed every six months by the service provider to determine whether consumers are still eligible for and interested in services.

(d) Consumers are removed from the waiting list when funding becomes available, the consumer is no longer eligible, or the consumer is no longer interested.

§106.1111. Scope of Services.

(a) All services provided in this section are subject to §106.1001(d) of this subchapter (relating to Allocation of Funds).

(b) All services are available in an accessible format for consumers who rely on alternative modes of communication.

(c) The service provider provides each independent living service for older individuals who are blind in accordance with the independent living plan or a waived independent living plan.

(d) The service provider may provide the following independent living services for older individuals who are blind under this subchapter:

(1) independent living core services, which are:

(A) information and referral services;

(B) independent living skills training;

(C) peer counseling (including cross-disability peer counseling)

(D) individual and systems advocacy; and

(E) transition services; and

(2) Independent living services, which are:

(A) counseling services, including psychological and psychotherapeutic services;

(B) services for securing housing or shelter (including community living) that support the purposes and titles of the Act, and services related to securing adaptive housing (including making appropriate modifications to spaces that serve or are occupied by individuals with disabilities);

(C) rehabilitation technology;

(D) mobility training;

(E) services and training for individuals with cognitive and sensory disabilities, including life skills training and interpreter and reader services;

(F) personal assistance services, including attendant care and the training of personnel providing such services;

(G) surveys, directories, and other materials that identify appropriate housing, recreation opportunities, accessible transportation, and other support services;

(H) consumer information programs on the rehabilitation and independent living services that are available under the Act, especially services that are available for minorities and other individuals with disabilities who have traditionally been unserved or underserved by programs under the Act;

(I) education and training necessary for living in a community and participating in community activities;

(J) supported living;

(K) transportation, including referral services, personal assistance, and training in the use of public transportation vehicles and systems;

(L) physical rehabilitation;

(M) therapeutic treatment;

(N) the provision of needed prostheses and other appliances and devices;

(O) social and recreational services (individual and group);

(P) training for youth with disabilities that is designed to develop self-awareness, self-esteem and the ability to self-advocate, self-empower, and explore career options;

(Q) services for children;

(R) federal, state, or local training, counseling, or other assistance designed to help individuals with disabilities become independent and productive and live a good life;

(S) preventive services that encourage independence and reduce the need for the services that are provided under the Act;

(T) awareness programs that encourage an understanding of individuals with disabilities and help individuals integrate into the community; and

(U) other services, as needed, which are consistent with the provisions of the Act; and

(3) independent living services for older individuals who are blind, which are:

(A) the provision of eyeglasses and other visual aids;

(B) the provision of services and equipment to help an older individual who is blind become mobile and self-sufficient;

(C) mobility training, braille instruction, and other services and equipment to help an older individual who is blind adjust to blindness;

(D) guide services, reader services, and transportation; and

(E) any other appropriate services which are consistent with the provisions of the Act to help an older individual who is blind cope with the activities of daily living, including supportive services and rehabilitation teaching services.

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

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Sylvia F. Hardman
General Counsel
Department of Assistive and Rehabilitative Services
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For further information, please call: (512) 424-4050

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DIVISION 4. CONSUMER PARTICIPATION

40 TAC §§106.1201, 106.1203, 106.1205

STATUTORY AUTHORITY

The proposed new rules are authorized by the Texas Human Resources Code, Chapter 117. These new rules are proposed pursuant to HHSC's statutory rulemaking authority under Texas Government Code, Chapter 531, §531.0055(e), which provides the Executive Commissioner of HHSC with the authority to promulgate rules for the operation of and provision of health and human services by the health and human services agencies.

No other statute, article, or code is affected by this proposal.

§106.1201. Consumer Participation System.

(a) The service provider administers the consumer participation system in accordance with the rules in this subchapter, the standards, and the contract requirements.

(b) The service provider provides independent living core services, as defined in §106.1111(d)(1) of this subchapter (relating to Scope of Services), at no cost to the consumer.

(c) Independent living services defined in §106.1111(d)(2) of this subchapter and independent living services for older individuals who are blind as defined in §106.1111(d)(3) of this subchapter are subject to the rules in this division.

(d) The service provider gathers financial information about the consumer to determine the consumer's adjusted gross income and the percentage of the federal poverty level for that income.

(e) The service provider charges the consumer a fee for each service provided in §106.1111(d)(2) and (3) of this subchapter, according to the consumer's percentage of the federal poverty level.

(f) The consumer or consumer's representative signs a consumer participation agreement. Signing the agreement acknowledges the amount of the consumer's fee for services and provides written agreement that:

(1) the information provided by the consumer or the consumer's representative about the consumer's household size, annual gross income, allowable deductions, and comparable services or benefits is true and accurate; or

(2) the consumer or the consumer's representative chooses not to provide information about the consumer's household size, annual gross income, allowable deductions, and comparable services or benefits.

(g) The service provider does not initiate or authorize services subject to §106.1111(d)(2) or (3) of this subchapter until the consumer or the consumer's representative signs the consumer's participation agreement.

(h) If the consumer chooses not to provide information on the consumer's household size, annual gross income, allowable deductions, and comparable services or benefits, the consumer agrees to pay the entire cost of services.

(i) The consumer reports to the service provider as soon as possible all changes to household size, annual gross income, allowable deductions, and comparable services or benefits and signs a new consumer's participation agreement.

(j) When the consumer signs a new participation agreement, the new amount of the consumer's fee for service takes effect the beginning of the following month. The new amount is not retroactive.

(k) The service provider must develop a process to reconsider and adjust the consumer's fee for service based on circumstances that are both extraordinary and documented. This may include assessing the consumer's ability to pay the consumer's fee for service.

(l) Only the service provider's executive director or designee has authority to reconsider and adjust a consumer's fee for service.

(m) Extraordinary circumstances are:

(1) an increase or decrease in income;

(2) unexpected medical expenses;

(3) unanticipated disability related expenses;

(4) a change in family size;

(5) catastrophic loss, such as fire, flood, or tornado;

(6) short-term financial hardship, such as a major repair to the consumer's home or personally owned vehicle; or

(7) other extenuating circumstances for which the consumer makes a request and provides supporting documentation.

(n) The consumer's calculated fee for service remains in effect during the reconsideration and adjustment process.

(o) The service provider:

(1) uses program income that is received from the consumer participation system only to provide services that are outlined in §106.1111(d)(2) and (3) of this subchapter; and

(2) reports fees collected to DARS as program income.

(p) The service provider does not use program income received from the consumer participation system to supplant any other fund sources.

(q) DARS does not pay any portion of the consumer's fee for service.

(r) The consumer's participation agreement and all financial information collected by the service provider are subject to any data use agreement between DARS and the service provider.

(s) The consumer's participation agreement and all financial information collected by the service provider are subject to subpoena.

§106.1203. Fee Schedule Amount.

(a) The service provider is required to use the DARS fee schedule and instructions to calculate the consumer's fee for service.

(b) Factors that affect the consumer's fee for service are:

(1) household size;

(2) annual gross income; and

(3) allowable deductions.

(c) The household size equals any person living inside or outside of the home who is eligible to be claimed as a dependent of the consumer on the consumer's federal income tax return, or, if the consumer is a minor, any other person living inside or outside of the home who is eligible to be claimed as a dependent of the consumer's parent or guardian on the parent or guardian's federal income tax return.

(d) the consumer's annual gross income:

(1) equals the total annual gross income received by the household; and

(2) includes all income classified as taxable income by the Internal Revenue Service before federally allowable deductions are applied.

(e) The consumer's allowable deductions are limited to the consumer's expenses in the following categories:

(1) attendant care;

(2) rent or home mortgage payments;

(3) court-ordered child support payments made by the consumer for financially dependent children who were not included in the calculation of household size; and

(4) medical or dental expenses for treatment primarily intended to alleviate or prevent a physical or mental illness or manage a disability, with the expenses limited to the cost of:

(A) diagnosis, cure, alleviation, treatment, or prevention of disease;

(B) treatment of any affected body part or function;

(C) medical services legally delivered by physicians, surgeons, dentists, and other medical practitioners;

(D) medications, medical supplies, and diagnostic devices;

(E) medical and dental health care insurance premiums;

(F) transportation to receive medical or dental care; and

(G) medical or dental debt that the family is paying on an established payment plan.

(f) The service provider calculates the allowable deductions using the actual amounts the consumer paid during the previous 12-month period.

(g) The consumer provides the most recent tax return available as proof of annual gross income and allowable deductions. If the consumer has no tax return, the consumer provides bank statements, medical records, receipts, proof of benefits awards, and other documentation to demonstrate annual gross income and allowable deductions.

(h) If the consumer does not provide documentation supporting the household's allowable deductions, the service provider determines the consumer's fee for service based on the consumer's documented annual gross income with no allowable deductions.

(i) The consumer's fee for service is equal to the amount on the DARS sliding fee scale according to the household's annual adjusted income (that is, the annual gross income minus the allowable deductions).

(j) The service provider uses the most current sliding fee scale and instructions published by DARS to determine the consumer's fee for service.

(k) The procedures, fee schedule, and instructions that DARS uses to calculate a consumer's fee for service is available from DARS, between 8:00 a.m. and 5:00 p.m. on business days.

§106.1205. Insurance Payments.

(a) If the consumer has medical and dental insurance that covers an independent living service for older individuals who are blind received by the consumer and the agreement for in-network services made between the insurance company and the service provider or service provider's subcontractor requires that the service provider or subcontractor accept as payment in full the deductible, copayment, or coinsurance and insurance reimbursement, then the consumer's fee for service is either the deductible, copayment, or coinsurance, or the amount calculated by the DARS fee schedule, whichever is less.

(b) The consumer pays the premiums for medical and dental insurance. Neither DARS nor the service provider pays the premiums.

(c) The premiums for medical and dental insurance do not count toward meeting the consumer's fee for service.

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 May 2, 2016.

TRD-201602073
Sylvia F. Hardman
General Counsel
Department of Assistive and Rehabilitative Services
Earliest possible date of adoption: June 12, 2016
For further information, please call: (512) 424-4050

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DIVISION 5. CONSUMER RIGHTS

40 TAC §106.1301, §106.1303

STATUTORY AUTHORITY

The proposed new rules are authorized by the Texas Human Resources Code, Chapter 117. These new rules are proposed pursuant to HHSC's statutory rulemaking authority under Texas Government Code, Chapter 531, §531.0055(e), which provides the Executive Commissioner of HHSC with the authority to promulgate rules for the operation of and provision of health and human services by the health and human services agencies.

No other statute, article, or code is affected by this proposal.

§106.1301. Rights of Consumers.

(a) In accordance with applicable legal provisions, DARS does not, directly or through contractual or other arrangements, exclude, deny benefits to, limit the participation of, or otherwise discriminate against any individual on the basis of age, color, disability, national origin, political belief, race, religion, sex, or sexual orientation. For the purposes of receiving independent living services for

older individuals who are blind, the consumer must be blind or have a severe visual impairment; however, that requirement is not considered discrimination against any individual on the basis of disability.

(b) The service provider notifies the consumer in writing about the rights included in subsection (a) of this section; §106.1303 of this division (relating to Complaint Process); and §106.1201 of this subchapter (relating to Consumer Participation System):

(1) when a consumer applies for services;

(2) when the service provider determines that a consumer is ineligible for services; and

(3) when the service provider intends to terminate services.

(c) Consumer rights are available in an accessible format for consumers who rely on alternative modes of communication.

§106.1303. Complaint Process.

(a) Filing a complaint with DARS.

(1) A consumer may file a complaint with DARS alleging that a requirement of independent living services for older individuals who are blind was violated. A complaint may be filed directly with DARS without having been filed with the service provider.

(2) A complaint may be filed by:

(A) mail to DARS: Texas Health and Human Services Commission, Office of the Ombudsman, MC H-700, P.O. Box 13247, Austin, Texas 78711-3247;

(B) phone: 1-877-787-8999 or Relay Texas for people with a hearing or speech disability: 7-1-1 or 1-800-735-2989;

(C) fax: 1-888-780-8099; or

(D) online: *http://www.hhsc.state.tx.us/ombudsman/contact.shtml*

(3) More information regarding the complaint process may be obtained by calling the Office of the Ombudsman at 1-877-787-8999 or Relay Texas for people with a hearing or speech disability: 7-1-1 or 1-800-735-2989.

(b) Filing a complaint with the Client Assistance Program (CAP).

(1) The CAP is implemented by Disability Rights Texas (DRTx), a legal services organization whose mission is to protect the human, service, and legal rights of persons with disabilities in Texas.

(2) DRTx advocates are not employees of DARS. There are no fees for CAP services, which are provided by advocates and attorneys when necessary. Services are confidential.

(3) A consumer who is enrolled in independent living services for older individuals who are blind or the consumer's representative may file a complaint with DRTx alleging that a requirement of independent living services for older individuals who are blind was violated. The complaint need not be filed with the service provider.

(4) A complaint may be filed by:

(A) phone: 1-800-252-9108; or

(B) videophone: 1-866-362-2851.

(5) More information about the complaint process is available by calling DRTx at 1-800-252-9108 or videophone at 1-866-362-2851.

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 May 2, 2016.

TRD-201602074
Sylvia F. Hardman
General Counsel
Department of Assistive and Rehabilitative Services
Earliest possible date of adoption: June 12, 2016
For further information, please call: (512) 424-4050

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DIVISION 6. TECHNICAL ASSISTANCE AND TRAINING

40 TAC §106.1351

STATUTORY AUTHORITY

The proposed new rule is authorized by the Texas Human Resources Code, Chapter 117. These new rules are proposed pursuant to HHSC's statutory rulemaking authority under Texas Government Code, Chapter 531, §531.0055(e), which provides the Executive Commissioner of HHSC with the authority to promulgate rules for the operation of and provision of health and human services by the health and human services agencies.

No other statute, article, or code is affected by this proposal.

§106.1351. Administering Agency's Role in Providing Technical Assistance.

(a) DARS gives the service provider technical assistance, as needed, to help the service provider offer a full range of independent living services for older individuals who are blind.

(b) Technical assistance may include:

(1) help to expand a service provider's capacity to provide a full range of independent living services; and

(2) training on:

(A) the independent living philosophy; and

(B) the administration, operation, evaluation, and performance of independent living services for older individuals who are blind according to the rules in this subchapter, the standards, and the contract requirements.

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

Filed with the Office of the Secretary of State on May 2, 2016.

TRD-201602075
Sylvia F. Hardman
General Counsel
Department of Assistive and Rehabilitative Services
Earliest possible date of adoption: June 12, 2016
For further information, please call: (512) 424-4050

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DIVISION 7. REFERRALS

40 TAC §106.1371

STATUTORY AUTHORITY

The proposed new rule is authorized by the Texas Human Resources Code, Chapter 117. These new rules are proposed pursuant to HHSC's statutory rulemaking authority under Texas Government Code, Chapter 531, §531.0055(e), which provides the Executive Commissioner of HHSC with the authority to promulgate rules for the operation of and provision of health and human services by the health and human services agencies.

No other statute, article, or code is affected by this proposal.

§106.1371. Expectations of Administering Agency's Employees.

(a) Individuals seeking independent living services for older individuals who are blind are referred to the local service provider.

(b) If an individual calls DARS to request independent living services for older individuals who are blind, DARS:

(1) gives the individual the contact information for the service provider;

(2) obtains the individual's permission to forward the individual's name and contact information to the service provider; and

(3) forwards the individual's name and contact information.

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 May 2, 2016.

TRD-201602076
Sylvia F. Hardman
General Counsel
Department of Assistive and Rehabilitative Services
Earliest possible date of adoption: June 12, 2016
For further information, please call: (512) 424-4050

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CHAPTER 107. DIVISION FOR REHABILITATION SERVICES SUBCHAPTER E. INDEPENDENT LIVING SERVICES PROGRAM

The Texas Health and Human Services Commission (HHSC), on behalf of the Department of Assistive and Rehabilitative Services (DARS), proposes the repeal of Chapter 107, Division for Rehabilitation Services, Subchapter E, Independent Living Services Program, Division 1, General Information, §§107.801, 107.803, and 107.805; Division 2, Program Requirements, §§107.907, 107.909, and 107.911; Division 3, Independent Living Services, §107.1007 and §107.1009; and, Division 4, Consumer Participation, §107.1107.

The repeal is being proposed pursuant to H.B. 2463, 84th Legislature, Regular Session, 2015. The bill requires the integration of independent living services for individuals who are blind or visually impaired and independent living services for individuals with significant disabilities. The bill further requires the independent living services program that DARS operates under Title VII of the federal Rehabilitation Act of 1973 (29 U.S.C. Section 796 et seq.) are directly provided by centers for independent living, except as provided by the Texas Human Resources Code, Section 117.080(b), and are not directly provided by the department.

SECTION-BY-SECTION SUMMARY

The sections are being repealed to create a new Chapter 104, Independent Living Services, which will implement the integration of the independent living services. The repeals include the following:

• Division 1, General Information

• Division 2, Program Requirements

• Division 3, Independent Living Services

• Division 4, Consumer Participation

FISCAL NOTE

Rebecca Trevino, DARS Chief Financial Officer, has determined that for each year of the first five years that the proposed repeals will be in effect, there are no foreseeable fiscal implications to either cost or revenues of state or local governments because of repealing the rules.

SMALL AND MICRO-BUSINESS IMPACT ANALYSIS AND ECONOMIC COSTS TO PERSONS AND IMPACT ON LOCAL EMPLOYMENT

In accordance with Texas Government Code, §2001.022, Ms. Trevino has determined that the proposed repeals will not affect a local economy, so no local employment impact statement is required. Finally, Ms. Trevino has determined that the proposed repeals will have no adverse economic effect on small businesses or micro-businesses.

PUBLIC BENEFIT

Ms. Trevino also has determined that for each of the first five years that the proposed repeals will be in effect, the public benefits anticipated as a result of administering and enforcing the proposed repeals will be to assure the public that the necessary rules are in place to provide a clear and concise understanding of the services provided by DARS.

REGULATORY ANALYSIS

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

TAKINGS IMPACT ASSESSMENT

DARS has determined that these proposed repeals do not restrict or limit an owner's right to his or her property that would otherwise exist in the absence of government action and, therefore, do not constitute a taking under Texas Government Code §2007.043.

PUBLIC COMMENT

Written comments on the proposal may be submitted to the Department of Assistive and Rehabilitative Services, 4800 North Lamar Boulevard, Austin, Texas 78756; or emailed to *DARSrules@DARS.state.tx.us.* All comments must be submitted before June 13, 2016, at 5:00 p.m.

DIVISION 1. GENERAL INFORMATION

40 TAC §§107.801, 107.803, 107.805

STATUTORY AUTHORITY

The proposed repeals are authorized by the Texas Human Resources Code, Chapter 117. These repeals are proposed pursuant to HHSC's statutory rulemaking authority under Texas Government Code, Chapter 531, §531.0055(e), which provides the Executive Commissioner of HHSC with the authority to promulgate rules for the operation of and provision of health and human services by the health and human services agencies.

No other statute, article, or code is affected by this proposal.

§107.801. Purpose.

§107.803. Legal Authority.

§107.805. Definitions.

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

Filed with the Office of the Secretary of State on May 2, 2016.

TRD-201602066
Sylvia F. Hardman
General Counsel
Department of Assistive and Rehabilitative Services
Earliest possible date of adoption: June 12, 2016
For further information, please call: (512) 424-4050

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DIVISION 2. PROGRAM REQUIREMENTS

40 TAC §§107.907, 107.909, 107.911

STATUTORY AUTHORITY

The proposed repeals are authorized by the Texas Human Resources Code, Chapter 117. These repeals are proposed pursuant to HHSC's statutory rulemaking authority under Texas Government Code, Chapter 531, §531.0055(e), which provides the Executive Commissioner of HHSC with the authority to promulgate rules for the operation of and provision of health and human services by the health and human services agencies.

No other statute, article, or code is affected by this proposal.

§107.907. Eligibility.

§107.909. Review of Ineligibility Determination.

§107.911. Independent Living Plan.

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

Filed with the Office of the Secretary of State on May 2, 2016.

TRD-201602067
Sylvia F. Hardman
General Counsel
Department of Assistive and Rehabilitative Services
Earliest possible date of adoption: June 12, 2016
For further information, please call: (512) 424-4050

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DIVISION 3. INDEPENDENT LIVING SERVICES

40 TAC §107.1007, §107.1009

STATUTORY AUTHORITY

The proposed repeals are authorized by the Texas Human Resources Code, Chapter 117. These repeals are proposed pursuant to HHSC's statutory rulemaking authority under Texas Government Code, Chapter 531, §531.0055(e), which provides the Executive Commissioner of HHSC with the authority to promulgate rules for the operation of and provision of health and human services by the health and human services agencies.

No other statute, article, or code is affected by this proposal.

§107.1007. Services Provided.

§107.1009. Availability of Services.

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

Filed with the Office of the Secretary of State on May 2, 2016.

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Sylvia F. Hardman
General Counsel
Department of Assistive and Rehabilitative Services
Earliest possible date of adoption: June 12, 2016
For further information, please call: (512) 424-4050

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DIVISION 4. CONSUMER PARTICIPATION

40 TAC §107.1107

STATUTORY AUTHORITY

The proposed repeals are authorized by the Texas Human Resources Code, Chapter 117. These repeals are proposed pursuant to HHSC's statutory rulemaking authority under Texas Government Code, Chapter 531, §531.0055(e), which provides the Executive Commissioner of HHSC with the authority to promulgate rules for the operation of and provision of health and human services by the health and human services agencies.

No other statute, article, or code is affected by this proposal.

§107.1107. Consumer Participation.

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 May 2, 2016.

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Sylvia F. Hardman
General Counsel
Department of Assistive and Rehabilitative Services
Earliest possible date of adoption: June 12, 2016
For further information, please call: (512) 424-4050

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TITLE 43. TRANSPORTATION

PART 1. TEXAS DEPARTMENT OF TRANSPORTATION

CHAPTER 1. MANAGEMENT

The Texas Department of Transportation (department) proposes amendments to §1.4, Public Access to Commission Meetings, §1.5, Public Hearings, and §1.11, Petition, concerning management of the department.

EXPLANATION OF PROPOSED AMENDMENTS

Government Code, §2001.039 requires a state agency to review each of its rules every four years or more frequently and, as the result of the review, to decide whether to readopt, amend, or repeal the rule. In the course of reviewing 43 TAC Chapter 1, the department identified several changes that need to be made as technical corrections of the rules or to accurately reflect procedures currently being followed by the department.

Amendments to §1.4, Public Access to Commission Meetings, correct information related to special accommodations. Subsection (e) is amended to clarify that requests for disability accommodations should be made to the person or office specified in the notice of the hearing and to extend the period of prior notice to the department, so that appropriate arrangements can be made for such a request. Each notice contains information for making a request for a disability accommodation.

Amendments to §1.5, Public Hearings, correct the listing of reasons for which the commission may hold public hearings. Currently, subsection (a)(6) provides that the commission may hold hearings to receive comments before converting a segment of the non-tolled state highway system to a toll project under Transportation Code, §228.203. Section 228.203 was repealed by S.B. No. 1029, Acts of the 83rd Legislature, Regular Session, 2013; therefore, subsection (a)(6) is deleted, the paragraphs of subsection (a) are redesignated accordingly, and references to the redesignated paragraphs are changed.

The amendments also change subsection (e) relating to disability accommodations to correspond to the changes made to §1.4(e). The changes relate to where requests for accommodations should be directed and the period for making such a request.

Amendments to §1.11, Petition, clarify the term "interested person" is subject to the limitations provided by Government Code, §2001.021, the provision in the Administrative Procedure Act relating to a petition to a state agency to request the adoption of a rule. Under §2001.021, an interested person must be a Texas resident or a business entity, governmental subdivision, or public or private organization located in this state. The amendments also correct the term used for the administrative head of the department.

FISCAL NOTE

Brian Ragland, Chief Financial Officer, has determined that for each of the first five years in which the amendments as proposed are in effect, there will be no fiscal implications for state or local governments as a result of enforcing or administering the amendments.

Mr. Jeff Graham, General Counsel, has certified that there will be no significant impact on local economies or overall employment as a result of enforcing or administering the amendments.

PUBLIC BENEFIT AND COST

Mr. Graham has also determined that for each year of the first five years in which the sections are in effect, the public benefit anticipated as a result of enforcing or administering the amendments will be increased efficiency and transparency resulting from the accuracy of the rules. There are no anticipated economic costs for persons required to comply with the sections as proposed. There will be no adverse economic effect on small businesses.

SUBMITTAL OF COMMENTS

Written comments on the proposed amendments to §§1.4, 1.5, and 1.11 may be submitted to Rule Comments, Office of General Counsel, Texas Department of Transportation, 125 East 11th Street, Austin, Texas 78701-2483 or to RuleComments@txdot.gov with the subject line "Chapter 1 rule changes." The deadline for receipt of comments is 5:00 p.m. on June 13, 2016. In accordance with Transportation Code, §201.811(a)(5), a person who submits comments must disclose, in writing with the comments, whether the person does business with the department, may benefit monetarily from the proposed amendments, or is an employee of the department.

SUBCHAPTER B. PUBLIC MEETINGS AND HEARINGS

43 TAC §1.4, §1.5

STATUTORY AUTHORITY

The amendments are proposed under Transportation Code, §201.101, which provides the Texas Transportation Commission (commission) with the authority to establish rules for the conduct of the work of the department.

CROSS REFERENCE TO STATUTE

Government Code, Chapter 2001, Subchapter B. Transportation Code, §228.204.

§1.4. Public Access to Commission Meetings.

(a) Purpose. This section provides policies and procedures governing public access to the commission in order to facilitate that access and maximize public participation in the decision-making process, while ensuring orderly and effective conduct of meetings.

(b) Posted agenda items. A person may speak before the commission on any matter on a posted agenda by submitting a request, in a form and manner as prescribed by the department, prior to the matter being taken up by the commission. A person speaking before the commission on an agenda item will be allowed an opportunity to speak:

(1) prior to a vote by the commission on the item; and

(2) for a maximum of three minutes, except as provided in subsection (g)(6) of this section.

(c) New agenda items.

(1) A person may request the addition of an item to the commission agenda by submitting, no less than 20 days prior to the date which has been set for the next meeting, the following information:

(A) the name and address of the person making the request;

(B) a clear and concise statement of the subject of the proposed agenda item; and

(C) a brief summary of the action sought.

(2) If the chair determines that the proposed item is within the jurisdiction of the department and that the proposed item concerns a matter in which there is sufficient public interest to warrant consideration by the commission as an agenda item, the chair may place the matter on the posted agenda for the next or a subsequent meeting, consistent with available time.

(d) Open comment period.

(1) At the conclusion of the posted agenda of each regular business meeting the commission will allow an open comment period, not to exceed one hour, to receive public comment on any other matter that is under the jurisdiction of the department.

(2) A person desiring to appear under this subsection must complete a registration form, as provided by the department, prior to the beginning of the open comment period.

(3) Except as provided in subsection (g)(6) of this section, each person will be allowed to speak for a maximum of three minutes for each presentation in the order in which he or she registered.

(e) Disability accommodation. Persons with disabilities who have special communication or accommodation needs and who plan to attend a meeting may contact the person or office specified in the notice of the meeting [~~of the secretary to the commission in Austin~~]. Requests should be made at least three working [~~two~~] days before a meeting. The department will make every reasonable effort to accommodate these needs.

(f) Notice. For each commission meeting an agenda will be filed with the Office of the Secretary of State in accordance with the requirements of the Open Meetings Act, Government Code, Chapter 551.

(g) Conduct and decorum. The commission will receive public input as authorized by this section, subject to the following guidelines.

(1) Questioning of those making presentations will be reserved to commissioners and the department's administrative staff.

(2) Organizations, associations, or groups are encouraged to present their commonly held views, and same or similar comments, through a representative member where possible.

(3) Presentations shall remain pertinent to the issue being discussed.

(4) A person who disrupts a meeting must leave the meeting room if ordered to do so by the chair.

(5) Time allotted to one speaker may not be reassigned to another speaker.

(6) The time allotted for presentations or comments under this section may be increased or further limited by the chair, or, in the chair's absence, the acting chair, as may be appropriate to assure opportunity for the maximum number of persons to appear.

(h) Waiver. Subject to the approval of the chair, a requirement of this section may be waived in the public interest if necessary for the performance of the responsibilities of the commission or the department.

§1.5. Public Hearings.

(a) Subject of hearings. The commission may hold public hearings to:

(1) consider the adoption of rules, in accordance with the Administrative Procedure Act, Government Code, Chapter 2001;

(2) receive evidence and testimony concerning the desirability of acquiring dredge material disposal sites and of any widening, relocation, or alteration of the main channel of the Gulf Intracoastal Waterway, in accordance with Transportation Code, §51.006 and Chapter 2 of this title (relating to Environmental Review of Transportation Projects);

(3) provide for public input regarding the design, schematic layout, and environmental impact of transportation projects, in accordance with Transportation Code, §203.021, and Chapter 2 of this title;

(4) consider maximum prima facie speed limits on highways in the state highway system that are near public or private elementary or secondary schools or institutions of higher education, in accordance with Transportation Code, §545.357;

(5) annually receive public input on the commission's highway project selection process and the relative importance of the various criteria on which the commission bases its project selection decisions, in accordance with Transportation Code, §201.602;

[~~(6) receive comments from interested persons prior to converting a segment of the non-tolled state highway system to a toll project under Transportation Code, §228.203;~~]

(6) [~~(7)~~] receive comments from interested parties prior to approving any financial assistance under Transportation Code, §21.111, relating to aviation facilities development; and

(7) [~~(8)~~] provide, when deemed appropriate by the commission or when otherwise required by law, for public input regarding any other issue under the jurisdiction of the department.

(b) Authorized representative. The executive director or an employee of the department designated by the executive director may conduct public hearings held under subsection (a)(1), (3), (6), and (7)[~~, and (8)~~] of this section.

(c) Conduct and decorum. Public hearings will be conducted in a manner that maximizes public access and input while maintaining proper decorum and orderliness, and will be governed by the following guidelines.

(1) Questioning of those making presentations will be reserved to commissioners, the executive director, or, if applicable, the presiding officer.

(2) Organizations, associations, or groups are encouraged to present their commonly held views and same or similar comments through a representative member where possible.

(3) Presentations shall remain pertinent to the issue being discussed.

(4) A person who disrupts a public hearing must leave the hearing room if ordered to do so by the chair or the presiding officer.

(5) Time allotted to one speaker may not be reassigned to another speaker.

(d) Disability accommodation. Persons with disabilities who have special communication or accommodation needs and who plan to attend a hearing to be held by the commission may contact the person or office specified in the notice of the hearing [~~of the secretary to the commission in Austin~~]. In the case of a hearing to be conducted by the department, those persons may contact the public affairs officer whose address and telephone number appear in the public notice for that hearing. Requests should be made at least three working [~~two~~] days before the hearing. The department will make every reasonable effort to accommodate these needs.

(e) Language accommodation. For a hearing held in an area with a substantial Spanish speaking population, the department will provide:

(1) notice of the hearing in both English and Spanish; and

(2) upon request, Spanish translation.

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 April 28, 2016.

TRD-201602013
Joanne Wright
Deputy General Counsel
Texas Department of Transportation
Earliest possible date of adoption: June 12, 2016
For further information, please call: (512) 463-8630

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SUBCHAPTER D. PROCEDURE FOR ADOPTION OF RULES

43 TAC §1.11

STATUTORY AUTHORITY

The amendments are proposed under Transportation Code, §201.101, which provides the Texas Transportation Commission (commission) with the authority to establish rules for the conduct of the work of the department.

CROSS REFERENCE TO STATUTE

Government Code, Chapter 2001, Subchapter B. Transportation Code, §228.204.

§1.11. Petition.

Any interested person, as described by Government Code, §2001.021, may petition the department requesting the adoption of a rule. Such petition must be in writing directed to the executive director [~~engineer-director~~] at the department's headquarters building in Austin and shall contain a clear and concise statement of the substance of the proposed rule, together with a brief explanation of the purpose to be accomplished through such adoption. Within 60 days after receipt, the department will either deny the petition in writing, stating its reasons therefor, or will initiate rulemaking proceedings in accordance with the Administrative Procedure Act (Government Code, Chapter 2001, Subchapter 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.

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Joanne Wright
Deputy General Counsel
Texas Department of Transportation
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For further information, please call: (512) 463-8630

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CHAPTER 9. CONTRACT AND GRANT MANAGEMENT

SUBCHAPTER I. DESIGN-BUILD CONTRACTS

43 TAC §§9.150 - 9.153, 9.155

The Texas Department of Transportation (department) proposes amendments to §§9.150 - 9.153 and §9.155, concerning Design-Build Contracts.

EXPLANATION OF PROPOSED AMENDMENTS

House Bill 20, 84th Legislature, 2015, amended Transportation Code, Chapter 223, Subchapter F, which authorizes the department to enter into a design-build contract for a highway project, and prescribes the procurement process to be followed by the department for a design-build contract.

House Bill 20 made permanent the limitation to entering into no more than three design-build contracts each fiscal year and increased to $150 million the minimum construction cost estimate for a project to be eligible for delivery under a design-build contract. The bill defined a highway project eligible for delivery under a design-build contract to mean a single highway between two defined points in a corridor or two or more contiguous highway facilities, and precluded the department from including in the procurement documents for a design-build project a schematic design that is more than approximately 30% complete. If maintenance of the project is required, House Bill 20 requires the department to require proposers to provide pricing for the maintenance work for each maintenance term.

In a separate rulemaking, §10.5 of the department's rules, relating to ethical conduct by entities doing business with the department, is being amended to expand the definition of impermissible benefits an entity is prohibited from offering, giving, or agreeing to give to a member of the commission or to a department employee. Those changes, and the amendments to §9.155 in this rulemaking, are consistent with the provisions in the department's Ethics Policy that prohibit a department employee from accepting any gift, favor, or service that the employee knows or should know is being offered with the intent to influence the employee's official conduct.

The amendments to §§9.150 - 9.153 and §9.155 implement changes made by House Bill 20 and implement current department practices regarding gifts and benefits to department officials and employees.

Section §9.150 is amended because of the changes made in HB 20 to the minimum construction cost estimate for a project eligible for delivery under a design-build contract.

Transportation Code, Chapter 223, Subchapter F, as amended by House Bill 20, authorizes a design-build contract entered into by the department to include a maintenance agreement requiring a design-build contractor to maintain a project for an initial term of not longer than five years, and authorizing the department, in its sole discretion, to exercise options extending the term of the maintenance agreement for additional periods beyond the initial maintenance term, with each additional period being not longer than five years. That subchapter does not limit the maintenance services that may be included in a maintenance agreement.

Amendments to §9.151 amend the definition of design-build contract to clarify that inclusion of maintenance services is permissive, and to maintenance services other than capital maintenance may be required. The amendments also add the definition of highway project required by House Bill 20.

Amendments to §9.152 clarify that maintenance services other than capital maintenance may be required.

Amendments to §9.153 implement changes required by House Bill 20 by providing that if maintenance of a highway project is

required, the request for proposals must require a proposal to include pricing for the maintenance work for each maintenance term.

Section 9.155 prohibits a proposer, design-build contractor, consultant, or subconsultant participating in the design-build program, or an affiliate of any of those entities, from, except as provided in that section, offering, giving, or agreeing to give a gift or benefit to a member of the commission or to a department employee whose work for the department includes the performance of procurement services relating to a project under this subchapter, or who participates in the administration of a design-build contract. The amendments to §9.155 remove the exception to that prohibition that allow a consultant or subconsultant, unless a member of a proposer or design-build contractor team, to pay for certain working meals.

FISCAL NOTE

Brian Ragland, Chief Financial Officer, has determined that for each of the first five years in which the amendments as proposed are in effect, there will be fiscal implications for state or local governments as a result of enforcing or administering the amendments. The fiscal impact cannot be quantified with any certainty as it will depend on the number and type of highway projects developed by the department under a design-build contract, and whether maintenance of the project is required.

Mr. Frank P. Holzmann, P.E., Interim Director, Strategic Contract Management Division, has certified that there will be no significant impact on local economies or overall employment as a result of enforcing or administering the amendments.

PUBLIC BENEFIT AND COST

Mr. Holzmann has also determined that for each year of the first five years in which the sections are in effect, the public benefit anticipated as a result of enforcing or administering the amendments will be to provide an efficient procurement process for design-build contracts, thereby allowing the department to enhance competition in procurements and to obtain the best value for the department, as well as to reduce highway congestion and expedite project delivery. There are no anticipated economic costs for persons required to comply with the sections as proposed. There will be no adverse economic effect on small businesses.

SUBMITTAL OF COMMENTS

Written comments on the proposed amendments to §§9.150 - 9.153 and §9.155 may be submitted to Rule Comments, Office of General Counsel, Texas Department of Transportation, 125 East 11th Street, Austin, Texas 78701-2483 or to *RuleComments@txdot.gov* with the subject line "Design-Build Rules." The deadline for receipt of comments is 5:00 p.m. on June 13, 2016. In accordance with Transportation Code, §201.811(a)(5), a person who submits comments must disclose, in writing with the comments, whether the person does business with the department, may benefit monetarily from the proposed amendments, or is an employee of the department.

STATUTORY AUTHORITY

The amendments are proposed under Transportation Code, §201.101, which provides the Texas Transportation Commission (commission) with the authority to establish rules for the conduct of the work of the department.

CROSS REFERENCE TO STATUTE

Transportation Code, Chapter 223, Subchapter F.

§9.150. Purpose.

[~~Senate Bill 1420, 82nd Legislature, Regular Session, 2011, added~~] Transportation Code, Chapter 223, Subchapter F, authorizes [~~authorizing~~] the department to enter into[~~, in each fiscal year, up to three~~] design-build contracts for highway projects [~~with a construction cost estimate of $50 million or more for each project,~~] and prescribes [~~prescribing~~] the requirements for entering into such a [~~design-build~~] contract. This subchapter prescribes the procurement process to be followed by the department for a design-build contract and conditions on private participation in design-build contracts.

§9.151. Definitions.

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

(1) Affiliate--An entity that directly or indirectly controls, is controlled by, or is under common control with a private entity.

(2) Commission--The Texas Transportation Commission.

(3) Conflict of interest--A circumstance arising out of the existing or past activities, business interests, contractual relationships, or organizational structure of a consultant, proposer, or design-build contractor, where:

(A) the private entity is or may be unable to give impartial assistance or advice to the department;

(B) the private entity's objectivity in performing the scope of work sought by the department is or might be otherwise impaired;

(C) the private entity has an unfair competitive advantage;

(D) the private entity's performance of services on behalf of the department provides or may provide an unfair competitive advantage to a third party; or

(E) there is a reasonable perception or appearance of impropriety or unfair competitive advantage benefiting the private entity or a third party as a result of the private entity's participation in a design-build project.

(4) Consultant--An individual or business entity, including any division or affiliate of the entity, retained by the department to provide consultant services in connection with a design-build project. The term includes an individual or business entity providing or that has provided services under contract to a consultant, either directly or through a subconsultant, at any level.

(5) Consultant services--All services provided to the department by an independent contractor under a best value or qualifications based procurement method, including architectural and engineering services, right-of-way acquisition services, environmental services, procurement services, traffic and revenue services, project oversight services, financial services including financial advisory and banking services, and legal services.

(6) Control--The possession, directly or indirectly, of the power to cause the direction of the management of the entity, whether through voting securities, by contract, family relationship, or otherwise.

(7) Department--The Texas Department of Transportation.

(8) Design--Includes planning services, technical assistance, and technical studies provided in support of the environmental review process undertaken with respect to a highway project, as well as surveys, investigations, the development of reports, studies, plans

and specifications, and other professional services provided for a highway project.

(9) Design-build contract--An agreement that includes both design and construction services for the construction, expansion, extension, [~~related capital maintenance,~~] rehabilitation, alteration, or repair of a highway project, and that may include the maintenance of a highway project.

(10) Design-build contractor--A partnership, corporation, or other legal entity or team that includes at a minimum an engineering firm and a construction contractor qualified to engage in the construction of highway projects in Texas.

(11) Design-build program--The department's program for the procurement, implementation, and administration of design-build contracts under this subchapter.

(12) Environmental services--Some or all of the following services provided to the department with respect to a project developed under a design-build contract:

(A) the study and evaluation of alternatives and potential environmental impacts of the proposed project;

(B) preparation of environmental analysis and impact documents relating to the project, including facility and corridor analyses and draft and final environmental assessments and environmental impact statements; and

(C) planning associated with the environmental approval, permitting, and clearance process for the project.

(13) Executive director--The executive director of the department or designee not below the level of a person in a senior leadership position who reports directly to the executive director.

(14) Financial services--Some or all of the following services provided to the department with respect to a project developed under a design-build contract:

(A) acting in the capacity of financial advisor to the department by providing advice on finance-related issues, including development of short-term or long-term finance strategy and plans of finance for individual projects or on an ongoing basis;

(B) identifying and pursuing sources of funds; and

(C) acting as underwriter, either lead or co-lead for a revenue bond issuance on a project or facility, but excluding underwriters for bonds that are not related to a project developed under a design-build contract.

(15) Gift or benefit--Anything reasonably regarded as pecuniary gain or pecuniary advantage, including any benefit or favor to another person in whose welfare the beneficiary has a direct and substantial interest, regardless of whether the donor is reimbursed. The term includes, but is not limited to, cash, loans, meals, lodging, services, tickets, door prizes, free entry to entertainment or sporting events, transportation, or hunting or fishing trips.

(16) Highway project--A single highway facility between two defined points in a corridor, or two or more contiguous highway facilities.

(17) [~~(16)~~] Legal services--Some or all of the following services with respect to a project developed under a design-build contract:

(A) providing advice on legal issues and strategies relating to project environmental approvals, planning, procurement, financing, contract administration, risk management, and disputes, claims, or litigation; and

(B) reviewing, drafting, and negotiating procurement documents, project contracts, and other documents.

(18) [~~(17)~~] Preliminary engineering and architectural services--Preparation of preliminary design and architectural documents and reports, utility and right-of-way mapping, and provision of similar technical documents that will be incorporated by others into a request for qualifications or request for proposals, but not including the evaluation or selection of alignments in connection with the development of environmental documents, assistance with development of the solicitation documents, design-build contractor scope of work/technical provisions, evaluation criteria for a procurement, or other items that would constitute environmental services or procurement services.

(19) [~~(18)~~] Procurement services--Some or all of the following services provided to the department with respect to a project developed under a design-build contract:

(A) development of procurement strategy;

(B) development and preparation of the solicitation documents, design-build contractor scope of work/technical provisions, or contract documents;

(C) implementation and administration of the solicitation;

(D) preparation or implementation of any evaluation criteria, process, or procedures;

(E) evaluation of proposer submissions (e.g., qualification submittals and proposals);

(F) negotiation of the contract; and

(G) any other activities determined by the department as related to a procurement.

(20) [~~(19)~~] Project oversight services--Some or all of the following services provided to the department with respect to a project developed under a design-build contract after award of the contract:

(A) design review;

(B) construction oversight and inspection;

(C) quality control and quality assurance;

(D) project management and overview;

(E) contract administration;

(F) claims management;

(G) public relations and community outreach;

(H) right of way acquisition services; and

(I) appraisal, legal description, condemnation package, and utility assembly review.

(21) [~~(20)~~] Proposer--A private entity, including any division or affiliate of the entity, that has submitted a statement of qualifications, proposal, or other submission in order to participate in an ongoing procurement for the design, construction, expansion, extension, related [~~capital~~] maintenance, rehabilitation, alteration, or repair of a project developed under a design-build contract.

(22) [~~(21)~~] Request for proposals--A request for submittal of a detailed proposal from private entities to design, develop, construct, expand, extend, provide [~~capital~~] maintenance, rehabilitate, alter, or repair a highway project.

(23) [~~(22)~~] Request for qualifications--A request for submission by a private entity of a description of that entity's experience,

technical competence and ability to develop a highway project, and such other information as the department considers relevant or necessary.

(24) [~~(23)~~] Subconsultant--An individual or business entity that performs or performed work on behalf of a consultant as part of the performance of the consultant's work for the department, either directly or through a subconsultant at any level.

(25) [~~(24)~~] Traffic and revenue services--Some or all of the following services provided to the department with respect to a project developed under a design-build contract:

(A) conducting draft and investment grade traffic and revenue studies, toll elasticity studies, toll feasibility studies, toll pricing studies, or studies or analyses of a similar nature, including peer review studies; and

(B) data mining and preparation of reports, analyses, and projections in connection with the traffic and projected revenues.

§9.152. General Rules for Design-Build Contracts.

(a) Applicability. The rules in this subchapter address the manner by which the department intends to evaluate submissions received from private entities in response to requests for qualifications and requests for proposals issued by the department.

(b) Reservation of rights. The department reserves all rights available to it by law in administering this subchapter, including without limitation the right in its sole discretion to:

(1) withdraw a request for qualifications or a request for proposals at any time, and issue a new request;

(2) reject any and all qualifications submittals or proposals at any time;

(3) terminate evaluation of any and all qualifications submittals or proposals at any time;

(4) suspend, discontinue, or terminate negotiations with any proposer at any time prior to the actual authorized execution of a design-build contract by all parties;

(5) negotiate with a proposer without being bound by any provision in its proposal;

(6) negotiate with a proposer to include aspects of unsuccessful proposals for that project in the design-build contract;

(7) request or obtain additional information about any proposal from any source;

(8) modify, issue addenda to, or cancel any request for qualifications or request for proposals;

(9) waive deficiencies in a qualifications submittal or proposal, accept and review a non-conforming qualifications submittal or proposal, or permit clarifications or supplements to a qualifications submittal or proposal; or

(10) revise, supplement, or make substitutions for all or any part of this subchapter.

(c) Costs incurred by proposers. Except as provided in §9.153(f) of this subchapter (relating to Solicitation of Proposals), under no circumstances will the state, the department, or any of their agents, representatives, consultants, directors, officers, or employees be liable for, or otherwise obligated to reimburse, the costs incurred by proposers, whether or not selected for negotiations, in developing proposals or in negotiating agreements.

(d) Department information. Any and all information the department makes available to proposers shall be as a convenience to the proposer and without representation or warranty of any kind except as may be expressly specified in the request for qualifications or request for proposals. Proposers may not rely upon any oral responses to inquiries.

(e) Procedure for communications. If a proposer has a question or request for clarification regarding this subchapter or any request for qualifications or request for proposals issued by the department, the proposer shall submit the question or request for clarification in writing to the person responsible for receiving those submissions, as designated in the request for qualifications or request for proposals, and the department will provide the responses in writing. The proposer shall also comply with any other provisions in the request for qualifications or request for proposals regulating communications.

(f) Compliance with rules. In submitting any proposal, the proposer shall be deemed to have unconditionally and irrevocably consented and agreed to the foregoing provisions and all other provisions of this subchapter.

(g) Proposer information submitted to department. All qualifications submittals or proposals submitted to the department become the property of the department and may be subject to the Public Information Act, Government Code, Chapter 552. Proposers should familiarize themselves with the provisions of the Public Information Act. In no event shall the state, the department, or any of their agents, representatives, consultants, directors, officers, or employees be liable to a proposer for the disclosure of all or a portion of a proposal submitted under this subchapter. Except as otherwise expressly specified in the request for qualifications or request for proposals, if the department receives a request for public disclosure of all or any portion of a qualifications submittal or proposal, the department will notify the applicable proposer of the request and inform that proposer that it has an opportunity to assert, in writing, a claimed exception under the Public Information Act or other applicable law within the time period specified in the department's notice and allowed under the Public Information Act. If a proposer has special concerns about information it desires to make available to the department, but which it believes constitutes a trade secret, proprietary information or other information excepted from disclosure, the proposer should specifically and conspicuously designate that information as such in its qualifications submittal or proposal. The proposer's designation shall not be dispositive of the trade secret, proprietary, or exempted nature of the information so designated.

(h) Sufficiency of proposal. All proposals, whether solicited or unsolicited, should be as thorough and detailed as possible so that the department may properly evaluate the potential feasibility of the proposed project as well as the capabilities of the proposer and its team members to provide the proposed services and complete the proposed project.

(i) Project studies. Studies that the department deems necessary as to route designation, civil engineering, environmental compliance, and any other matters will be assigned, conducted, and paid for as negotiated between the department and the successful proposer and set forth in the design-build contract.

(j) Proposer's additional responsibilities. The department, in its sole discretion, may authorize the successful proposer to seek licensing, permitting, approvals, and participation required from other governmental entities and private parties, subject to such oversight and review by the department as specified in the design-build contract.

(k) Proposer's work on environmental review of eligible project. The department may solicit proposals in which the proposer is responsible for providing assistance in the environmental review and

clearance of an eligible project, including the provision of technical assistance and technical studies to the department or its environmental consultant relating to the environmental review and clearance of the proposed project. The environmental review and the documentation of that review shall at all times be conducted as directed by the department and subject to the oversight of the department, and shall comply with all requirements of state and federal law, applicable federal regulations, and the National Environmental Policy Act (42 U.S.C. §4321 et seq.), if applicable, including but not limited to the study of alternatives to the proposed project and any proposed alignments, procedural requirements, and the completion of any and all environmental documents required to be completed by the department and any federal agency acting as a lead agency. The department:

(1) shall determine the scope of work to be performed by the private entity or its consultants or subcontractors;

(2) shall specify the level of design and other information to be provided by the private entity or its consultants or subcontractors; and

(3) shall independently review any studies and conclusions reached by the private entity or its consultants or subcontractors before their inclusion in an environmental document.

(l) Effect of environmental requirements on design-build contract. Completion of the environmental review, including obtaining approvals required under the National Environmental Policy Act, is required before the private entity may be authorized to conduct and complete the final design and start construction of a project. Additionally, all applicable state and federal environmental permits and approvals must be obtained before the private entity may start construction of the portion of a project requiring the permit or approval. Unless and until that occurs, the department is not bound to any further development of the project. The department, and any federal agency acting as a lead agency, may select an alternative other than the one in the proposed project, including the "no-build" alternative. A design-build contract shall provide that the agreement will be modified as necessary to address requirements in the final environmental documents, and shall provide that the agreement may be terminated if the "no-build" alternative is selected or if another alternative is selected that is incompatible with the requirements of the agreement.

(m) Public meetings and hearings. All public meetings or hearings required to be held under applicable law or regulation will be directed and overseen by the department, with participation by such other parties as it deems appropriate.

(n) Additional matters. Any matter not specifically addressed in this subchapter that pertains to the construction, expansion, extension, related [~~capital~~] maintenance, rehabilitation, alteration, or repair of a highway project pursuant to this subchapter, shall be deemed to be within the primary purview of the commission, and all decisions pertaining thereto, whether or not addressed in this subchapter, shall be as determined by the commission, subject to the provisions of applicable law.

(o) Performance and payment security. The department shall require a private entity entering into a design-build contract to provide a performance and payment bond or an alternative form of security, or a combination of bonds and other forms of security, in an amount equal to the cost of constructing the project, unless the department determines that it is impracticable for a private entity to provide security in that amount, in which case the department will set the amount of security. The security will be in the amount that, in the department's sole determination, is sufficient to ensure the proper performance of the agreement, and to protect the department and payment bond beneficiaries supplying labor or materials to the private entity or a subcontractor of the private entity. Bonds and alternate forms of security shall be in the form and contain the provisions required in the request for proposals or the design-build contract, with such changes or modifications as the department determines to be in the best interest of the state. In addition to, or in lieu of, performance and payment bonds, the department may require:

(1) a cashier's check drawn on a federally insured financial institution, and drawn to the order of the department;

(2) United States bonds or notes, accompanied by a duly executed power of attorney and agreement authorizing the collection or sale of the bonds or notes in the event of the default of the private entity or a subcontractor of the private entity, or such other act or event that, under the terms of the design-build contract, would allow the department to draw upon or access that security;

(3) an irrevocable letter of credit issued or confirmed by a financial institution to the benefit of the department, meeting the credit rating and other requirements prescribed by the department, and providing coverage for a period of at least one year following final acceptance of the project or, if there is a warranty period, at least one year following completion of the warranty period;

(4) an irrevocable letter signed by a guarantor meeting the net worth or other financial requirements prescribed in the request for proposals or design-build contract, and which guarantees, to the extent required under the request for proposals or design-build contract, the full and prompt payment and performance when due of the private entity's obligations under the design-build contract; or

(5) any other form of security deemed suitable by the department.

(p) Performance evaluations. The department will evaluate the performance of a private entity that enters into a design-build contract, and will evaluate the performance of the private entity's major team members, consultants, and subcontractors, in accordance with the requirements of this subsection. Evaluations will be conducted annually at twelve month intervals during the term of the design-build contract, upon termination of the design-build contract, and when the department determines that work is materially behind schedule or not being performed according to the requirements of the design-build contract. Optional evaluations may be conducted as provided in the design-build contract. Acts or omissions that are the subject of a good faith dispute will not be considered. After a performance evaluation is conducted, and for at least 30 days before the evaluation becomes final and is used by the department, the department will provide for review and comment a copy of the performance evaluation report to the entity being evaluated and, if that entity is a consultant or subcontractor, to the entity that entered into the design-build contract. The department will consider and take into account any submitted comments before the department finalizes the performance evaluation report. The results of performance evaluations will be provided to the entity that was evaluated and may be used in the evaluation of qualifications submittals and proposals submitted under §9.153 of this subchapter and §27.4 of this title (relating to Solicited Proposals) by proposers that include the major team members, consultants, and subcontractors evaluated.

§9.153. Solicitation of Proposals.

(a) Request for qualifications - notice. If authorized by the commission to issue a request for qualifications for a highway project, the department will set forth the basic criteria for qualifications, experience, technical competence and ability to develop the project, and such other information as the department considers relevant or necessary in the request for qualifications. The department will publish notice advertising the issuance of the request for qualifications in the *Texas Register* and will post the notice and the request for qualifica-

tions on the department's Internet website. The department may also elect to furnish the request for qualifications to businesses in the private sector that the department otherwise believes might be interested and qualified to participate in the project that is the subject of the request for qualifications.

(b) Request for qualifications - content. At its sole option, the department may elect to furnish conceptual designs, fundamental details, technical studies and reports or detailed plans of the proposed project in the request for qualifications, and may request conceptual approaches to bringing the project to fruition. A request for qualifications must include:

(1) information regarding the proposed project's location, scope, and limits;

(2) information regarding funding that may be available for the project;

(3) criteria that will be used to evaluate the qualifications submittals;

(4) the relative weight to be given to the criteria;

(5) the deadline by which qualifications submittals must be received by the department; and

(6) any other information the department considers relevant or necessary.

(c) Request for qualifications - evaluation. The department, after evaluating the qualification submittals received in response to a request for qualifications, will identify and approve a "short-list" that is composed of those entities that are considered most qualified to submit detailed proposals for a proposed project. In evaluating the qualification submittals, the department will consider the results of performance evaluations conducted by the department under §9.152 of this subchapter (relating to General Rules for Design-Build Contracts) and §27.3 of this title (relating to General Rules for Private Involvement) determined by the department to be relevant to the project, the results of other performance evaluations determined by the department to be relevant to the project, and other objective evaluation criteria that the department considers relevant to the project, including a proposer's qualifications, experience, technical competence, and ability to develop the project, and that may include the private entity's financial condition, management stability, staffing, and organizational structure. The department may interview entities responding to a request for qualifications. The department shall short-list at least two private entities to submit proposals, but may not short-list more private entities than the number of private entities designated in the request for qualifications if a maximum number is designated. The department shall advise each entity providing a qualifications submittal whether it is on the short-list of qualified entities.

(d) Requests for proposals. If authorized by the commission, the department will issue a request for proposals from all private entities qualified for the short-list, consisting of the submission of detailed documentation regarding the project. A request for proposals must include:

(1) information on the overall project goals;

(2) publicly available cost estimates for the design-build portion of the project;

(3) materials specifications;

(4) special material requirements;

(5) a schematic design approximately 30 percent complete;

(6) known utilities;

(7) quality assurance and quality control requirements;

(8) the location of relevant structures;

(9) notice of any rules or goals adopted by the department relating to awarding contracts to disadvantaged business enterprises or small business enterprises;

(10) available geotechnical or other information related to the project;

(11) the status of any environmental review of the project;

(12) detailed instructions for preparing the technical proposal, including a description of the form and level of completeness of drawings expected;

(13) the relative weighting of the technical and cost proposals and the formula by which the proposals will be evaluated and ranked, which must allocate at least 70 percent of weighting to the cost proposal;

(14) the criteria to be used in evaluating the technical proposals, and the relative weighting of those criteria;

(15) the proposed form of design-build contract; and

(16) any other information the department considers relevant or necessary.

(e) Request for proposals-submittal requirements. The request for proposals must require the submission of a sealed technical proposal and a separate sealed cost proposal no later than the 180th day after the issuance of the request for proposals, and that provide information relating to:

(1) the feasibility of developing the project as proposed;

(2) the proposed solutions to anticipated problems;

(3) the ability of the proposer to meet schedules;

(4) the engineering design proposed;

(5) the cost of delivering the project;

(6) if maintenance of the project is required, pricing for the maintenance work for each maintenance term;

(7) [~~(6)~~] the estimated number of days required to complete the project; and

(8) [~~(7)~~] any other information requested by the department.

(f) Requests for proposals - payment for work product. The request for proposals shall stipulate an amount of money, as authorized under Transportation Code, §223.249, that the department will pay to an unsuccessful proposer that submits a proposal that is responsive to the requirements of the request for proposals. The commission shall approve the amount of the payment to be stipulated in the request for proposals, which must be a minimum of twenty-five hundredths of one percent of the contract amount. The request for proposals shall provide for the payment of a partial amount in the event the procurement is terminated. In determining the amount of the payment, the commission shall consider:

(1) the effect of a payment on the department's ability to attract meaningful proposals and to generate competition;

(2) the work product expected to be included in the proposal and the anticipated value of that work product; and

(3) the costs anticipated to be incurred by a private entity in preparing a proposal.

(g) Request for proposals - evaluation. The proposals will be evaluated by the department based on the results of performance evaluations conducted by the department under §9.152 of this subchapter and §27.3 of this title determined by the department to be relevant to the project, the results of other performance evaluations determined by the department to be relevant to the project, and other objective evaluation criteria the department deems appropriate for the project, including those criteria deemed appropriate by the department to maximize the overall performance of the project and the resulting benefits to the state. Specific evaluation criteria and requests for pertinent information will be set forth in the request for proposals. The department shall first open, evaluate, and score each responsive technical proposal, and shall subsequently open, evaluate, and score the cost proposals from proposers that submitted a responsive technical proposal and assign points on the basis of the weighting specified in the request for proposals.

(h) Apparent best value proposal. Based on the evaluation using the evaluation criteria described under subsection (g) of this section and set forth in the request for proposals, the department will rank all proposals that are complete, responsive to the request for proposals, and in conformance with the requirements of this subchapter, in accordance with the formula provided in the request for proposals. The department may select the private entity whose proposal offers the apparent best value to the department.

(i) Selection of entity. The department shall submit a recommendation to the commission regarding approval of the proposal determined to provide the apparent best value to the department. The commission may approve or disapprove the recommendation, and if approved, will award the design-build contract to the apparent best value proposer. Award may be subject to the successful completion of negotiations, any necessary federal action, execution by the executive director of the design-build contract, and satisfaction of such other conditions that are identified in the request for proposals or by the commission. The proposers will be notified in writing of the department's rankings. The department shall also make the rankings available to the public.

(j) Negotiations with selected entity. If authorized by the commission, the department will attempt to negotiate a design-build contract with the apparent best value proposer. If a design-build contract satisfactory to the department cannot be negotiated with that proposer, or if, in the course of negotiations, it appears that the proposal will not provide the department with the overall best value, the department will formally and in writing end negotiations with that proposer and, in its sole discretion, either:

(1) reject all proposals;

(2) modify the request for proposals and begin again the submission of proposals; or

(3) proceed to the next most highly ranked proposal and attempt to negotiate a design-build contract with that entity in accordance with this paragraph.

§9.155. Conflict of Interest and Ethics Policies.

(a) Purpose. This section prescribes ethical standards of conduct applicable to private entities, including consultants and subconsultants, participating in the department's design-build program. A private entity's failure to comply with these standards of conduct may result in the private entity's preclusion from participation in a project or sanctions being imposed under Chapter 10 of this title (relating to Ethical Conduct by Entities Doing Business with the Department).

(b) Gifts and benefits. A proposer, design-build contractor, consultant, or subconsultant participating in the design-build program, or an affiliate of any of those entities, may not offer, give, or agree to give a gift or benefit to a member of the commission or to a department employee whose work for the department includes the performance of procurement services relating to a project under this subchapter, or who participates in the administration of a design-build contract. Notwithstanding this prohibition, a consultant or subconsultant, unless a member of a proposer or design-build contractor team, if authorized under subsection (c) of this section may[~~:~~]

[~~(1) pay for a working meal on an occasional basis, provided that the payment for a working meal is reciprocated to the extent practical, and the meal is not lavish or extravagant; and~~]

[~~(2)~~] offer, give, or agree to give a token item that does not exceed an estimated value of $25 (excluding cash, checks, stocks, bonds, or similar items), where the item is distributed generally as a normal means of advertising.

(c) Conflicts of interest.

(1) Purpose. This subsection prescribes department policy on conflicts of interest relating to consultants and subconsultants participating in the design-build program, and thereby:

(A) protects the integrity and fairness of the program and all procurements carried out by the department as part of the program;

(B) avoids circumstances where a consultant, proposer, or design-build contractor obtains, or appears to obtain, an unfair competitive advantage as a result of work performed by a consultant or subconsultant;

(C) provides guidance to private entities so they may assess and make informed business decisions concerning their participation in the program; and

(D) protects the department's interests and confidential and sensitive project-specific and programmatic information.

(2) Applicability. This subsection applies to all projects undertaken by the department under this subchapter. This subsection applies to consultants and subconsultants, and to individual employees of consultants and subconsultants who participated in the performance of services for the department. A reference in this subsection to a consultant or subconsultant also means individual employees of a consultant or subconsultant who participated in the performance of services for the department. To the extent that the department has previously consented in writing to a consultant's or subconsultant's performance of services that are in conflict with this subsection, participation on a proposer team as an equity owner or team member, acting as a consultant or subconsultant to a proposer, or having a financial interest in a proposer or an equity owner or team member of a proposer, this subsection does not modify or alter the prior consent. The foregoing does not prevent, however, the application of this subsection to the consultant or subconsultant for other projects, including taking into account the performance of services on the project for which consent was obtained. This subsection may by extension prohibit or restrict the ability of a proposer to have a consultant or subconsultant participate on the proposer team as an equity owner or team member, act as a consultant or subconsultant to the proposer, or have a financial interest in the proposer or an equity owner or team member of the proposer.

(3) Period in which a conflict of interest applies. If a determination is made under this subsection that the performance of services by a consultant or subconsultant raises a conflict of interest, the resulting prohibition or restriction provided in this subsection continues, both for the private entity and any individual that is an employee of or was employed by the private entity and participated in the performance of services for the department, until the date the performance of services

ends and all work product prepared by the entity and other information and data provided to the entity in the performance of services is publicly available, provided that, for a private entity or individual performing procurement services, the resulting prohibition or restriction shall end no earlier than the execution of the design-build contract or cancellation of the procurement for the project for which the private entity or individual is performing services.

(4) Application to new firm. If a conflict of interest is determined to apply to an individual under paragraph (3) of this subsection and the individual changes employers, the conflict of interest and prohibition with respect to the individual will not apply to the individual's new employer. If the new employer is otherwise eligible to perform consultant services, the new employer will remain eligible despite the employment of the individual. This paragraph does not apply to an individual employed by an affiliate of its previous employer, and the conflict of interest and prohibition with respect to the individual will apply to that affiliate.

(5) Federal requirements. For federal-aid projects, the department must comply with the Federal Highway Administration's organizational conflict of interest regulations (found in 23 C.F.R. §636.116). The requirements of this subsection do not limit, modify, or otherwise alter the effect of those regulations, and will be applied consistent with those regulations.

(6) General conflict of interest standards. Except as provided in paragraph (7) of this subsection, a consultant that is providing consultant services to the department with respect to a design-build project may not be a proposer or participate as an equity owner, team member, consultant, or subconsultant of or to a proposer for that project, or have a financial interest in any of the foregoing entities with respect to that project. Subject to the requirements of paragraph (8) of this subsection, a consultant that is performing consultant services for a design-build project will not be prohibited from participating on a different design-build project as a proposer or participating as an equity owner, team member, consultant, or subconsultant of or to a proposer for the different project, or having a financial interest in any of the foregoing entities with respect to the different project.

(7) Providing services for the same project. A consultant that is actively providing preliminary engineering and architectural services to the department with respect to a design-build project, or that performed and completed environmental or traffic and revenue services for a design-build project, may be a proposer or participate as an equity owner, team member, consultant, or subconsultant of or to a proposer for the same project, or have a financial interest in any of the foregoing entities with respect to that project, provided:

(A) with respect to a consultant providing preliminary engineering and architectural services, all work product prepared by the consultant and other information and data provided to the consultant in the performance of services is made available to all proposers prior to the issuance of the final request for proposals for that project; or

(B) the executive director issues a written determination under paragraph (9) of this subsection that:

(i) the consultant will not, or in the case of the previous performance of consultant services did not, have access to or obtain knowledge of confidential or sensitive information, procedures, policies, and processes that could provide an unfair competitive advantage with respect to the procurement for that project;

(ii) the data and information provided to the consultant in the performance of the consultant services is either irrelevant to the procurement for that project or is available on an equal and timely basis to all proposers;

(iii) the work products from the consultant incorporated into or relevant to the procurement for that project are generally available on an equal and timely basis to all proposers; and

(iv) with respect to environmental services, a record of decision or finding of no significant impact has been issued for the project.

(8) Procurement and financial services. A consultant actively engaged and performing procurement services or financial services with respect to a design-build project may be a proposer or participate as an equity owner, team member, consultant, or subconsultant of or to a proposer for another design-build project, or may have a financial interest in any of the foregoing entities with respect to another design-build project, provided that, beginning at the time that the consultant becomes a proposer or participates as part of or acquires a financial interest in a proposer with respect to the other design-build project, as described by this paragraph, the consultant is prohibited from reviewing alternative technical concepts and proposals for the project for which the consultant is providing services to the department until a contract for the project is entered into, and the consultant must institute ethical walls or other safeguards required by the department.

(9) Requests for determinations or exceptions. A consultant, proposer, or design-build contractor may submit a request to the executive director for a determination whether participation in a design-build project or the performance of particular services with respect to a design-build project would constitute a conflict of interest, or for approval of an exception to the applicability of this subsection to those services. A request for approval of an exception may be made if a consultant, proposer, or design-build contractor desires to appeal a previous determination that a conflict of interest exists. The executive director will forward a request to the department's Office of General Counsel for analysis and recommendation prior to issuing a decision. In determining whether a conflict of interest exists, or whether to approve an exception, the executive director shall consider:

(A) the extent to which the firm or individual employee obtained access to or the ability to gain knowledge of confidential or sensitive information, procedures, policies, and processes concerning the design-build program or a particular project or procurement that could provide an unfair competitive advantage with respect to the procurement or project at issue;

(B) the type of consulting services at issue;

(C) the particular circumstances of each procurement;

(D) the specialized expertise needed by the department and proposers to implement the procurement;

(E) the past, current, or future working relationship between the consultant and the department;

(F) the period of time between the potential conflict situation and the project at issue; and

(G) the potential impact on the procurement and project at issue, including competition.

(10) Multiple services. If a consultant is providing more than one category of consultant services to the department and there are differences in the standards, restrictions, and limitations applicable to those categories, the standards, restrictions, and limitations applicable to a category that are more stringent apply.

(11) Participation on proposer or design-build contractor team. A consultant participating with respect to a design-build project as a proposer or design-build contractor, or as an equity owner, team member, consultant, or subconsultant of or to a proposer or design-

build contractor, or having a financial interest in any of the foregoing entities, is eligible to provide consultant services to the department for another design-build project, provided that, when the consultant is retained to perform consultant services for the department, the restrictions in this subsection shall apply.

(12) Restriction of services and conditions to approvals and exceptions. In instances where a written determination under paragraph (9) of this subsection that a conflict of interest does not exist, including, in particular, where the conditions prescribed in paragraph (7) of this subsection have been met, or that grants an exception to the application of this subsection, the department may still, in its discretion:

(A) restrict the scope of services the consultant or subconsultant may be eligible to perform for the department in order to further the intent and goals of this subsection; and

(B) condition an approval, determination, or exception as the executive director determines appropriate to further the intent and goals of this subsection, including by requiring the consultant, subconsultant, proposer, or design-build contractor to execute confidentiality agreements, institute ethical walls, or segregate certain personnel from participation in a project or the performance of consultant services.

(13) Provisions are nonexclusive. The provisions in this subsection do not address every situation that may arise in the context of the department's design-build program nor require a particular decision or determination when faced with facts similar to those described in this subsection. The department retains the ultimate and sole discretion to determine on a case-by-case basis whether a conflict of interest exists and what actions may be appropriate to avoid, neutralize, or mitigate any actual or potential conflict, or the appearance of any conflict. Except as provided in paragraph (14) of this subsection, the provisions of this subsection shall not be construed to preclude or condone any conduct with regard to projects other than projects under a design-build contract. The department will continue to evaluate other projects based on applicable rules and its traditional conflict of interest standards.

(14) Comprehensive development agreement projects. A consultant providing procurement or financial services with respect to a comprehensive development agreement project described in Chapter 27, Subchapter A of this title (relating to Comprehensive Development Agreements) may be a proposer or participate as an equity owner, team member, consultant, or subconsultant of or to a proposer for a design-build project, or may have a financial interest in any of the foregoing entities with respect to a design-build project, under the conditions described in paragraph (8) of this subsection.

(d) Rules of contact. In order to provide a fair and unbiased procurement process, a request for qualifications will contain rules of contact regulating communications between proposers or any of its team members and the commission, the department, and third parties involved in the procurement. Communication includes face-to-face, telephone, facsimile, electronic-mail (e-mail), or formal written communication. The rules of contact become effective upon the issuance of the request for qualifications and may be modified in the request for proposals. The rules of contact will include provisions:

(1) prohibiting a proposer or any of its team members from communicating with another proposer or its team members with regard to the project, request for qualifications, or request for proposals, or either team's qualifications submittal or proposal;

(2) requiring each proposer to designate one or more representatives responsible for contact with the department, and requiring the proposer to correspond with the department regarding the project, request for qualifications, or request for proposals only through the department's authorized representatives and the proposer's designated representatives;

(3) prohibiting any ex parte communication regarding the project, request for qualifications, or request for proposals or the procurement with any member of the commission or with any department staff, advisors, contractors, or consultants involved in the procurement until the earliest of the execution and delivery of the design-build contract, the rejection of all qualifications submittals or proposals by the department, or the cancellation of the procurement;

(4) permitting communications in exceptional circumstances and designating department personnel authorized to approve those communications, and providing that the restrictions on communications shall not preclude or restrict communications with regard to matters unrelated to the project, request for qualifications or request for proposals, or participation in public meetings of the commission or any public or proposer workshop related to the project, request for qualifications, or request for proposals;

(5) designating a department employee not involved in the procurement to act as an ombudsman who is authorized to receive confidential communications, including questions, comments, or complaints regarding the procurement and who, after removing, to the extent practicable, any information identifying the proposer, forwards the communications to the employees designated as the department's authorized representatives; and

(6) authorizing the executive director to disqualify a proposer from the procurement and participation in the project at issue or to impose another sanction under Chapter 10 of this title if it is determined that a proposer has engaged in any improper communications in violation of the rules of contact.

(e) Exceptions to rules of contact. Notwithstanding subsection (d)(1) of this section:

(1) minor or specialty subcontractors that are shared between two or more proposer teams may communicate with members of each of those teams so long as those proposers establish a protocol to ensure that the subcontractor will not act as a conduit of information between the teams; and

(2) the prohibition provided by that subsection does not apply to public discussions regarding the project, request for qualifications, or request for proposals at any department sponsored informational meetings.

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 April 28, 2016.

TRD-201602015
Joanne Wright
Deputy General Counsel
Texas Department of Transportation
Earliest possible date of adoption: June 12, 2016
For further information, please call: (512) 463-8360

CHAPTER 10. ETHICAL CONDUCT BY ENTITIES DOING BUSINESS WITH THE DEPARTMENT

SUBCHAPTER A. GENERAL PROVISIONS

43 TAC §10.5

The Texas Department of Transportation (department) proposes amendments to §10.5, concerning Benefit.

EXPLANATION OF PROPOSED AMENDMENTS

Amendments to §10.5, Benefit, expand the definition of "benefit" by deleting the exclusion for ordinary working meals. The department expects entities doing business with the department to adhere to ethical standards of conduct. Section 10.101, Required Conduct, requires that an entity that does business with the department refrain from offering, giving, or agreeing to give a benefit to a member of the commission or to a department employee. The amendments align the definition of benefit in §10.5 with the department's ethics policy, which requires that a department employee not accept or solicit any gift, favor, or service that might reasonably tend to influence the employee in the discharge of official duties, or that the employee knows or should know is being offered with the intent to influence the employee's official conduct.

FISCAL NOTE

Brian Ragland, Chief Financial Officer, has determined that for each of the first five years in which the amendments as proposed are in effect, there will be no fiscal implications for state or local governments as a result of enforcing or administering the amendments.

Ms. Kristin Alexander, Director, Compliance Division, has certified that there will be no significant impact on local economies or overall employment as a result of enforcing or administering the amendments.

PUBLIC BENEFIT AND COST

Ms. Alexander has also determined that for each year of the first five years in which the sections are in effect, the public benefit anticipated as a result of enforcing or administering the amendments will be improved standards of ethics and fairness in the administration of the department's programs. There are no anticipated economic costs for persons required to comply with the sections as proposed. There will be no adverse economic effect on small businesses.

SUBMITTAL OF COMMENTS

Written comments on the proposed amendments to §10.5 may be submitted to Rule Comments, Office of General Counsel, Texas Department of Transportation, 125 East 11th Street, Austin, Texas 78701-2483 or to RuleComments@txdot.gov with the subject line "Benefit Rules." The deadline for receipt of comments is 5:00 p.m. on June 13, 2016. In accordance with Transportation Code, §201.811(a)(5), a person who submits comments must disclose, in writing with the comments, whether the person does business with the department, may benefit monetarily from the proposed amendments, or is an employee of the department.

STATUTORY AUTHORITY

The amendments are proposed under Transportation Code, §201.101, which provides the Texas Transportation Commission (commission) with the authority to establish rules for the conduct of the work of the department.

CROSS REFERENCE TO STATUTE

None.

§10.5. Benefit.

(a) Except as provided by subsection (b) of this section, a benefit, for the purposes of this chapter, is anything that is reasonably regarded as financial gain or financial advantage, including a benefit to another person in whose welfare the beneficiary has a direct and substantial interest, regardless of whether the donor is reimbursed. Examples are cash, loans, meals [~~other than ordinary working meals~~], lodging, services, tickets, door prizes, free entry to entertainment or sporting events, transportation, hunting or fishing trips, or discounts on goods or services.

(b) The following are not benefits for the purposes of this chapter:

[~~(1) an ordinary working meal;~~]

(1) [~~(2)~~] a token item, other than cash, a check, stock, bond, or similar item, that is distributed generally as a normal means of advertising and that does not exceed an estimated value of $25;

(2) [~~(3)~~] an honorarium in the form of a meal served at an official, department-related event such as a conference, workshop, seminar, or symposium; or

(3) [~~(4)~~] reimbursement for food, travel, or lodging to an event described by paragraph (2) [~~(3)~~] of this subsection in an amount allowable under department policy if the recipient were to seek reimbursement from the department, or a greater amount if preapproved by the assistant executive director.

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 April 28, 2016.

TRD-201602016
Joanne Wright
Deputy General Counsel
Texas Department of Transportation
Earliest possible date of adoption: June 12, 2016
For further information, please call: (512) 463-8360

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CHAPTER 27. TOLL PROJECTS

The Texas Department of Transportation (department) proposes amendments to §27.8, Conflict of Interest and Ethics Policies, concerning Comprehensive Development Agreements, and to §27.91, Definitions, and §27.92, Financial Terms, concerning Determination of Terms for Certain Toll Projects.

EXPLANATION OF PROPOSED AMENDMENTS

In a separate rulemaking, §10.5 of the department's rules, relating to ethical conduct by entities doing business with the department, is being amended to expand the definition of impermissible benefits an entity is prohibited from offering, giving, or agreeing to give to a member of the commission or to a department employee. Those changes, and the amendments to §27.8 in this rulemaking, are consistent with the provisions in the department's Ethics Policy that prohibit a department employee from accepting any gift, favor, or service that the employee knows or should know is being offered with the intent to influence the employee's official conduct. The amendments to §27.8 implement current department practices regarding gifts and benefits to department officials and employees.

The department does not currently have the statutory authority to enter into availability payment contracts. The amendments to §27.91 and §27.92 implement changes necessary to align those rules with the department's existing contracting authority.

Section 27.8 prohibits a proposer, developer, consultant, or subconsultant participating in the comprehensive development agreement program, or an affiliate of any of those entities, from, except as provided in that section, offering, giving, or agreeing to give a gift or benefit to a member of the commission or to a department employee whose work for the department includes the performance of procurement services relating to a comprehensive development agreement project, or who participates in the administration of a comprehensive development agreement. The amendments to §27.8 remove the exception to that prohibition that allows a consultant or subconsultant, unless a member of a proposer or developer team, to pay for an ordinary business lunch.

Amendments to §27.91 remove the definition for availability payment contract. Amendments to §27.92 remove references in that section to an availability payment contract.

FISCAL NOTE

Brian Ragland, Chief Financial Officer, has determined that for each of the first five years in which the amendments as proposed are in effect, there will be no fiscal implications for state or local governments as a result of enforcing or administering the amendments.

Mr. Frank P. Holzmann, P.E., Interim Director, Strategic Contract Management Division, has certified that there will be no significant impact on local economies or overall employment as a result of enforcing or administering the amendments.

PUBLIC BENEFIT AND COST

Mr. Holzmann has also determined that for each year of the first five years in which the sections are in effect, the public benefit anticipated as a result of enforcing or administering the amendments will be to ensure there is a fair and unbiased comprehensive development agreement procurement process, to ensure high standards of ethics and fairness in the administration of the comprehensive development agreement program, and to ensure the process for developing toll projects is consistent with the department's existing contracting authority. There are no anticipated economic costs for persons required to comply with the sections as proposed. There will be no adverse economic effect on small businesses.

SUBMITTAL OF COMMENTS

Written comments on the proposed amendments to §27.8, §27.91, and §27.92 may be submitted to Rule Comments, Office of General Counsel, Texas Department of Transportation, 125 East 11th Street, Austin, Texas 78701-2483 or to *RuleComments@txdot.gov* with the subject line "Toll Project Rules." The deadline for receipt of comments is 5:00 p.m. on June 13, 2016. In accordance with Transportation Code, §201.811(a)(5), a person who submits comments must disclose, in writing with the comments, whether the person does business with the department, may benefit monetarily from the proposed amendments, or is an employee of the department.

SUBCHAPTER A. COMPREHENSIVE DEVELOPMENT AGREEMENTS

43 TAC §27.8

STATUTORY AUTHORITY

The amendments are proposed under Transportation Code, §201.101, which provides the Texas Transportation Commission (commission) with the authority to establish rules for the conduct of the work of the department, and more specifically, Transportation Code, §223.209, which requires the commission to adopt rules, procedures, and guidelines governing the selection and negotiation process for comprehensive development agreements.

CROSS REFERENCE TO STATUTE

Transportation Code, Chapters 223 and 228.

§27.8. Conflict of Interest and Ethics Policies.

(a) Purpose. This section prescribes ethical standards of conduct applicable to private entities, including consultants and subconsultants, participating in the department's comprehensive development agreement program. A private entity's failure to comply with these standards of conduct may result in the private entity's preclusion from participation in a project or sanctions being imposed under §27.9 of this subchapter (relating to Sanctions).

(b) Gifts and benefits. A proposer, developer, consultant, or subconsultant participating in the comprehensive development agreement program, or an affiliate of any of those entities, may not offer, give, or agree to give a gift or benefit to a member of the commission or to a department employee whose work for the department includes the performance of procurement services relating to a project under this subchapter, or who participates in the administration of a comprehensive development agreement. Notwithstanding this prohibition, a consultant or subconsultant (unless a member of a proposer or developer team, if authorized under subsection (c) of this section) may[:]

~~[(1) pay for an ordinary business lunch; and]~~

[~~(2)~~] offer, give, or agree to give a token item that does not exceed an estimated value of $25 (excluding cash, checks, stocks, bonds, or similar items), where the item is distributed generally as a normal means of advertising.

(c) Conflicts of interest.

(1) Purpose. This subsection prescribes department policy on conflicts of interest relating to consultants and subconsultants participating in the comprehensive development agreement program, and thereby:

(A) protects the integrity and fairness of the program and all procurements carried out by the department as part of the program;

(B) avoids circumstances where a consultant, proposer, or developer obtains, or appears to obtain, an unfair competitive advantage as a result of work performed by a consultant or subconsultant;

(C) provides guidance to private entities so they may assess, and make informed business decisions concerning their participation in the program; and

(D) protects the department's interests and confidential and sensitive project-specific and programmatic information.

(2) Applicability. This subsection applies to all comprehensive development agreement projects undertaken by the department. This subsection applies to consultants and subconsultants, and to individual employees of consultants and subconsultants who participated in the performance of services for the department. A reference in this subsection to a consultant or subconsultant also means individual employees of a consultant or subconsultant who

participated in the performance of services for the department. To the extent that the department has previously consented in writing to a consultant's or subconsultant's performance of services that are in conflict with this subsection, participation on a proposer team as an equity owner or team member, acting as a consultant or subconsultant to a proposer, or having a financial interest in a proposer or an equity owner or team member of a proposer, this subsection does not modify or alter the prior consent. The foregoing does not prevent, however, the application of this subsection to the consultant or subconsultant for other projects, including taking into account the performance of services on the project for which consent was obtained. This subsection may by extension prohibit or restrict the ability of a proposer to have a consultant or subconsultant participate on the proposer team as an equity owner or team member, act as a consultant or subconsultant to the proposer, or have a financial interest in the proposer or an equity owner or team member of the proposer.

(3) Period in which a conflict of interest applies. If a determination is made under this subsection that the performance of services by a consultant or subconsultant raises a conflict of interest, the resulting prohibition or restriction provided in this subsection continues:

(A) for the private entity until the date the performance of services ends and all work product prepared by the entity and other information and data provided to the entity in the performance of services is publicly available; and

(B) for an individual that is an employee of or was employed by the consultant or subconsultant and who participated in the performance of services for the department:

(i) until five years after the date the performance of services ends for those projects for which the individual was materially involved in providing services to the department; and

(ii) until one year from the date the performance of services ends for projects for which the individual was not materially involved in providing services to the department.

(4) Application to new firm. If a conflict of interest is determined to apply to an individual pursuant to paragraph (3)(B) of this subsection, the conflict of interest and prohibition with respect to the individual will not apply to the individual's new place of employment. If the new employer is otherwise eligible to perform consultant services, the new employer will remain eligible despite the employment of the individual. This paragraph does not apply to an individual employed by an affiliate of its previous employer, and the conflict of interest and prohibition with respect to the individual will apply to such affiliate.

(5) Federal requirements. For federal-aid projects, the department must comply with the Federal Highway Administration's organizational conflict of interest regulations (found in 23 CFR §636.116). The requirements of this subsection do not limit, modify, or otherwise alter the effect of those regulations, and will be applied consistent with those regulations.

(6) General conflict of interest standards. Except as provided in paragraph (7) of this subsection, no consultant providing consultant services to the department with respect to a comprehensive development agreement project may be a proposer or participate as an equity owner, team member, consultant, or subconsultant of or to a proposer for that project, or have a financial interest in any of the foregoing entities with respect to that project. Except as provided in paragraph (8) of this subsection, a consultant performing consultant services for a comprehensive development agreement project will not be prohibited from participating on a different comprehensive development agreement project as a proposer or participating as an equity owner, team member, consultant, or subconsultant of or to a proposer for the different project, or having a financial interest in any of the foregoing entities with respect to the different project.

(7) Providing services for the same project. A consultant that is actively providing preliminary engineering and architectural services to the department with respect to a comprehensive development agreement project, or that performed and completed environmental or traffic and revenue services for a comprehensive development agreement project, may be a proposer or participate as an equity owner, team member, consultant, or subconsultant of or to a proposer for the same project, or have a financial interest in any of the foregoing entities with respect to that project, provided:

(A) with respect to a consultant providing preliminary engineering and architectural services, all work product prepared by the consultant and other information and data provided to the consultant in the performance of services is made available to all proposers prior to the issuance of the request for proposals for that project; or

(B) the executive director issues a written determination under paragraph (9) of this subsection that:

(i) the consultant will not, or in the case of the previous performance of consultant services did not, have access to or obtain knowledge of confidential or sensitive information, procedures, policies and processes that could provide an unfair competitive advantage with respect to the procurement for that project;

(ii) the data and information provided to the consultant in the performance of the consultant services is either irrelevant to the procurement for that project or is available on an equal and timely basis to all proposers;

(iii) the work products from the consultant incorporated into or relevant to the procurement for that project are generally available on an equal and timely basis to all proposers;

(iv) with respect to environmental services, a record of decision or finding of no significant impact has been issued for the project; and

(v) with respect to traffic and revenue services, there will be no impact on the project's plan of finance, including the ability to obtain and close funding and potential sources of funding.

(8) Procurement and financial services. A consultant actively engaged and performing procurement services or financial services with respect to a comprehensive development agreement project may not be a proposer or participate as an equity owner, team member, consultant, or subconsultant of or to a proposer for that project, or have a financial interest in any of the foregoing entities with respect to that project. A consultant actively engaged and performing procurement services or financial services with respect to a comprehensive development agreement project may be a proposer or participate as an equity owner, team member, consultant, or subconsultant of or to a proposer for another comprehensive development agreement project, or may have a financial interest in any of the foregoing entities with respect to another comprehensive development agreement project, provided the consultant submits a request for a written determination under paragraph (9) of this subsection that establishes to the commission's satisfaction that such participation or interest would not constitute a conflict of interest or create the appearance of a conflict of interest, and the consultant institutes ethical walls or other safeguards required by the department.

(9) Requests for determinations or exceptions. A consultant, proposer, or developer may submit a request to the executive director for a determination whether participation in a comprehensive development agreement project or the performance of particular services

with respect to a comprehensive development agreement project would constitute a conflict of interest, or to request approval of an exception to the applicability of this subsection to those services. A request for approval of an exception may be made if a consultant, proposer, or developer desires to appeal a previous determination that a conflict of interest exists. The executive director will forward a request to the department's Office of General Counsel for analysis and recommendation prior to issuing a decision. In determining whether a conflict of interest exists, or whether to approve an exception, the commission or executive director, as appropriate, shall consider the executive director's recommendation and:

(A) the extent to which the firm or individual employee obtained access to or the ability to gain knowledge of confidential or sensitive information, procedures, policies, and processes concerning the comprehensive development agreement program or a particular project or procurement that could provide an unfair competitive advantage with respect to the procurement or project at issue;

(B) the type of consulting services at issue;

(C) the particular circumstances of each procurement;

(D) the specialized expertise needed by the department and proposers to implement the procurement;

(E) the past, current, or future working relationship between the consultant and the department;

(F) the period of time between the potential conflict situation and the project at issue; and

(G) the potential impact on the procurement and project at issue, including competition.

(10) Multiple services. If a consultant is providing more than one category of consultant services to the department and there are differences in the standards, restrictions, and limitations applicable to those categories, the standards, restrictions, and limitations applicable to a category that are more stringent will be applied.

(11) Participation on proposer or developer team. A consultant participating with respect to a comprehensive development agreement project as a proposer or developer, or as an equity owner, team member, consultant, or subconsultant of or to a proposer or developer, or having a financial interest in any of the foregoing entities, is eligible to provide consultant services (other than procurement services) to the department for another comprehensive development agreement project, provided that, once the consultant is retained to perform consultant services for the department, the restrictions in this subsection shall apply.

(12) Restriction of services and conditions to approvals and exceptions. In instances where a written determination under paragraph (9) of this subsection that a conflict of interest does not exist (including, in particular, where the conditions prescribed in paragraph (7) of this subsection has been met), or grants an exception to the application of this subsection under paragraph (9), the department may still, in its discretion:

(A) restrict the scope of services the consultant or subconsultant may be eligible to perform for the department in order to further the intent and goals of this subsection; and

(B) condition an approval, determination, or exception as the commission or executive director determines appropriate to further the intent and goals of this subsection, including by requiring the consultant, subconsultant, proposer, or developer to execute confidentiality agreements, institute ethical walls, or segregate certain personnel from participation in a project or the performance of consultant services.

(13) Provisions are nonexclusive. The provisions in this subsection do not address every situation that may arise in the context of the department's comprehensive development agreement program nor require a particular decision or determination when faced with facts similar to those described in this subsection. The department retains the ultimate and sole discretion to determine on a case-by-case basis whether a conflict of interest exists and what actions may be appropriate to avoid, neutralize, or mitigate any actual or potential conflict, or the appearance of any conflict. The provisions of this subsection shall not be construed to preclude or condone any conduct with regard to projects other than projects under a comprehensive development agreement. The department will continue to evaluate other projects based on its traditional conflict of interest standards.

(d) Rules of contact. In order to provide a fair and unbiased procurement process, a request for qualifications, request for proposals, or request for competing proposals and qualifications will contain rules of contact regulating communications between proposers or any of its team members and the commission, the department, and third parties involved in the procurement. Communication includes face-to-face, telephone, facsimile, electronic-mail (e-mail), or formal written communication. The rules of contact become effective upon the issuance of the request for qualifications, request for proposals, or request for competing proposals and qualifications. The rules of contact will include provisions:

(1) prohibiting a proposer or any of its team members from communicating with another proposer or its team members with regard to the project, request for qualifications, request for proposals, or request for competing proposals and qualifications, or either team's qualifications submittal or proposal;

(2) requiring each proposer to designate one or more representatives responsible for contact with the department, and requiring the proposer to correspond with the department regarding the project, request for qualifications, request for proposals, or request for competing proposals and qualifications only through the department's authorized representatives and the proposer's designated representatives;

(3) prohibiting any ex parte communication regarding the project, request for qualifications, request for proposals, or request for competing proposals and qualifications or the procurement with any member of the commission or with any department staff, advisors, contractors, or consultants involved in the procurement until the earliest of the execution and delivery of the comprehensive development agreement, the rejection of all qualifications submittals or proposals by the department, or the cancellation of the procurement;

(4) permitting communications in exceptional circumstances and designating department personnel authorized to approve such communications, and providing that the restrictions on communications shall not preclude or restrict communications with regard to matters unrelated to the request for qualifications, request for proposals, or request for competing proposals and qualifications, or participation in public meetings of the commission or any public or proposer workshop related to the project, request for qualifications, request for proposals, or request for competing proposals and qualifications;

(5) designating a department employee not involved in the procurement to act as an ombudsman who is authorized to receive confidential communications (including questions, comments, or complaints regarding the procurement) and who, after removing, to the extent practicable, any information identifying the proposer, forwards the

communications to the employees designated as the department's authorized representatives; and

(6) authorizing the executive director to disqualify a proposer from the procurement and participation in the project at issue or to impose another sanction under §27.9 of this subchapter if it is determined that a proposer has engaged in any improper communications in violation of the rules of contact.

(e) Exceptions to rules of contact. Notwithstanding subsection (d)(1) of this section:

(1) subcontractors that are shared between two or more proposer teams may communicate with members of each of those teams so long as those proposers establish a protocol to ensure that the subcontractor will not act as a conduit of information between the teams; and

(2) the prohibition provided by that subsection does not apply to public discussions regarding the project, request for qualifications, request for proposals, or request for competing proposals and qualifications at any department sponsored informational meetings.

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

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Joanne Wright
Deputy General Counsel
Texas Department of Transportation
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For further information, please call: (512) 463-8360

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SUBCHAPTER H. DETERMINATION OF TERMS FOR CERTAIN TOLL PROJECTS

43 TAC §27.91, §27.92

STATUTORY AUTHORITY

The amendments are proposed under Transportation Code, §201.101, which provides the Texas Transportation Commission (commission) with the authority to establish rules for the conduct of the work of the department, and more specifically, Transportation Code, §223.209, which requires the commission to adopt rules, procedures, and guidelines governing the selection and negotiation process for comprehensive development agreements.

CROSS REFERENCE TO STATUTE

Transportation Code, Chapters 223 and 228.

§27.91. Definitions.

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

~~[(1) Availability payment contract--A comprehensive development agreement under which payments are made to a private entity from project and other revenue to compensate the private entity for capital, operating, and financial costs, which may be based on the private entity's performance under the agreement.]~~

(1) [~~(2)~~] Commission--The Texas Transportation Commission.

(2) [~~(3)~~] Committee--A committee established under this subchapter.

(3) [~~(4)~~] Comprehensive development agreement--An agreement with a private entity authorized under Transportation Code, Chapter 223, Subchapter E that, at a minimum, provides for the design and construction, reconstruction, extension, expansion, or improvement of a toll project and may also provide for the financing, acquisition, maintenance, or operation of a toll project.

(4) [~~(5)~~] Concession agreement--A comprehensive development agreement under which a private entity agrees to develop, finance, and construct a toll project, and to assume operation or maintenance responsibilities for a toll project, in exchange for rights to revenue of the project.

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

(6) [~~(7)~~] Executive director--The executive director of the department or the executive director's designee.

(7) [~~(8)~~] Local funds--Funds of a city or county, any other funds paid by a city or county to meet local participation requirements, and money deposited in a subaccount created under Transportation Code, §228.012.

(8) [~~(9)~~] Local toll project entity--Has the meaning assigned by Transportation Code, §373.001.

(9) [~~(10)~~] Metropolitan planning organization--The organization or policy board of an organization created and designated under 23 U.S.C. §134 and 49 U.S.C. §5303, as amended, to make transportation planning decisions for a metropolitan planning area in which a toll project is located and to carry out the metropolitan transportation planning process.

(10) [~~(11)~~] Toll project--Has the meaning assigned by Transportation Code, §201.001.

§27.92. Financial Terms.

(a) Applicability. This subchapter applies only to a department toll project that will be developed under a concession agreement [~~or an availability payment contract~~], and for which:

(1) funds allocated to a metropolitan planning organization are expected to be used to pay for project costs;

(2) local funds are expected to be used to pay for project costs; or

(3) property of a city or county is expected to be used as project right of way or a city or county is expected to pay for the acquisition of right of way for the project.

(b) Formation and membership of committee. For a project subject to Transportation Code, Chapter 373, Subchapter B, the committee shall be formed after the department exercises its option under that subchapter to develop, finance, construct, and operate the project. The membership of a committee shall be determined after the commission authorizes the department to initiate a procurement for a toll project that provides for the potential delivery of the project through a concession agreement [~~or an availability payment contract~~]. To be eligible to serve as a committee member, a person must be an elected official or a full-time employee of the represented entity. A committee consists of the following members:

(1) one member appointed by each metropolitan planning organization within whose boundaries all or part of the proposed project may be located;

(2) one member appointed by each local toll project entity within whose boundaries all or part of the proposed project may be located;

(3) one member appointed by each city and county which has:

(A) provided local funds to pay for right of way acquisition or other project costs or to acquire right of way for the project, or has provided property of the city or county for use as project right of way; or

(B) submitted to the department an order or resolution adopted by the city council or county commissioners court committing local funds or property to the project; and

(4) one member appointed by the executive director to represent the department.

(c) Officers. The committee will, subject to the concurrence of the commission, elect a chair and vice-chair by majority vote of the members of the committee.

(d) Duties. A committee established under this subchapter shall submit a report to the executive director before the date the department issues a request for qualifications for the toll project, except for a project for which the department and a local toll project entity have agreed on the terms and conditions for the project under Transportation Code, §228.0111, or for which a local toll project entity has waived its option to develop, construct, and operate the project, in which case the report shall be submitted before the date the department issues a request for proposals for the project. If the project is subject to a market valuation agreement, market valuation waiver agreement, or similar agreement entered into under Transportation Code, §228.0111, or a toll project agreement entered into under Transportation Code, §373.006, the report may not include determinations that are inconsistent with the provisions of the agreement that relate to the determinations to be included in the report. A report shall contain the following determinations:

(1) the distribution of project financial risk, which is the allocation of revenue risk for a toll project between the department and the private entity with which the department enters into an agreement for the project;

(2) the method of financing for the project, which is a determination of whether the project should be funded with private or public funding or a combination of private and public funding; and

(3) unless the project is subject to a regional tolling policy, the project's tolling structure and methodology.

(e) Failure to submit report. All members of a committee will utilize their best efforts to support the generation of a report. If a committee does not submit a report by the date the department is scheduled to issue a request for qualifications or request for proposals, as applicable, for a project, the department will use any business terms applicable to the project that have been adopted by the metropolitan planning organization and that relate to the determinations to be included in the report.

(f) Meetings.

(1) Meeting requirements. The department's Office of General Counsel will submit to the Office of the Secretary of State notice of a meeting of the committee at least eight days before the date of the meeting. The notice will provide the date, time, place, and purpose of the meeting. A meeting of a committee will be open to the public. A committee will follow the agenda set for each meeting under paragraph (2) of this subsection.

(2) Scheduling of meetings. Meeting dates, times, places, and agendas will be set by the office designated under subsection (g) of this section. Any committee member may suggest an agenda item, provided that the agenda item must be approved by the chair of the committee and the department. A committee's report may only discuss items that are within the committee's jurisdiction. The office designated under subsection (g) of this section will provide notice of the time, date, place, and purpose of meetings to the members, by mail, email, telephone, or any combination of the three, at least eight calendar days before each meeting. All meetings must take place in Texas and must be held in a location that is readily accessible to the general public.

(3) Committee action. A quorum of the committee is one half or more of the number of members appointed to the committee. A committee may act only by majority vote of the members present at the meeting and voting.

(4) Record. Minutes of all committee meetings shall be prepared and filed with the executive director. The complete proceedings of all committee meetings must also be recorded by electronic means.

(5) Public information. All minutes, transcripts, and other records of the committees are records of the department and as such, are subject to disclosure under the provisions of Government Code, Chapter 552.

(g) Administrative support. For each committee, the executive director will designate an office or division of the department that will be responsible for providing any necessary administrative support essential to the functions of the committee. The department will provide project information and other information to the committee to assist the committee in carrying out its duties, including the project procurement schedule.

(h) Duration. After a committee submits the report described in subsection (d) of this section, the committee ceases to exist. The department may, in its discretion, reconvene a committee if changed circumstances may result in a change in the committee's determinations.

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

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Joanne Wright
Deputy General Counsel
Texas Department of Transportation
Earliest possible date of adoption: June 12, 2016
For further information, please call: (512) 463-8360

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Ariana Castereno
12th Grade

ADOPTED RULES

Adopted rules include new rules, amendments to existing rules, and repeals of existing rules. A rule adopted by a state agency takes effect 20 days after the date on which it is filed with the Secretary of State unless a later date is required by statute or specified in the rule (Government Code, §2001.036). If a rule is adopted without change to the text of the proposed rule, then the *Texas Register* does not republish the rule text here. If a rule is adopted with change to the text of the proposed rule, then the final rule text is included here. The final rule text will appear in the Texas Administrative Code on the effective date.

TITLE 1. ADMINISTRATION

PART 15. TEXAS HEALTH AND HUMAN SERVICES COMMISSION

CHAPTER 353. MEDICAID MANAGED CARE
SUBCHAPTER G. STAR+PLUS

1 TAC §353.608

The Texas Health and Human Services Commission (HHSC) adopts amendments to §353.608, concerning Minimum Payment Amounts to Qualified Nursing Facilities, with changes to the proposed text as published in the March 4, 2016, issue of the *Texas Register* (41 TexReg 1553). The text of the rule will be republished.

BACKGROUND AND JUSTIFICATION

During its 84th Session, the Texas Legislature, through the 2016-2017 General Appropriations Act (Article II, House Bill 1, 84th Legislature, Regular Session, 2015, Rider 97), directed HHSC to transition the Nursing Facility Minimum Payment Amounts Program (MPAP) from a program solely based on enhanced payment rates to publically owned nursing facilities to a Quality Incentive Payment Program (QIPP) for all nursing facilities that have a source of public funding for the non-federal share. The additional payments to nursing facilities through the QIPP were to be based on improvements in quality and innovation in the provision of nursing facility services.

Proposed new §353.609 (41 TexReg 11), concerning Quality Incentive Payment Program for Nursing Facilities, described the QIPP.

The proposed amendments to §353.608 allowed a transition period for existing MPAP participants to make the shift to QIPP. In this transition period, current MPAP participants would be allowed to receive MPAP payments at approximately 50 percent of their current MPAP payment level. Facilities not currently enrolled in MPAP would not be eligible for transition MPAP payments.

The proposed amendment added a new eligibility period; described eligibility requirements for the new eligibility period; and indicated that, for the new eligibility period, the MPAP payment was to be equal to that calculated as per the existing MPAP methodology divided by two. Additionally, this proposed amendment changed the time period in which reconciliations would occur, added the option for HHSC to perform interim reconciliations for the new eligibility period only, and updated the consequences to participants that do not timely provide the non-federal share of the MPAP payment.

HHSC submitted a QIPP concept paper to the Centers for Medicare and Medicaid Services (CMS) for review and comment on October 30, 2015. In February and March of 2016, HHSC began to receive feedback from CMS regarding the concept paper.

HHSC was unable to resolve CMS concerns to allow for implementation of QIPP on September 1, 2016. HHSC is continuing to work with CMS with a goal of resolving their concerns in time to enable a March 1, 2017, rollout of QIPP. In the interim, the initiation of a transition period for QIPP is no longer necessary. As a result, the proposed amendments to §353.608 are being adopted with the following changes to the proposed text.

Proposed subsection (b)(9) is amended to indicate that Eligibility Period Three will end February 28, 2017, rather than August 31, 2017.

Proposed subsection (d)(4) is deleted. This paragraph indicated that the MPAP payment for Eligibility Period Three would be equal to the MPAP payment calculated under the existing methodology divided by two. MPAP participants will instead be eligible for the entire amount available under the existing methodology. Therefore, MPAP participants will receive roughly the same amount in the six-month extension as they would receive under the original proposal.

Proposed subsection (g)(4)(B) is amended to indicate that HHSC may complete interim reconciliations for Eligibility Period Three between February 28, 2017, and February 28, 2019, rather than between August 31, 2017, and August 31, 2019.

Proposed subsection (j) is amended to indicate that the MPAP program will expire on February 28, 2017.

The end result of these changes upon adoption will be to extend the existing MPAP program for current participants who chose to re-enroll for Eligibility Period Three through February 28, 2017, allowing MPAP payments to continue flowing to these participants while HHSC continues negotiations with CMS regarding QIPP. In effect, the status quo with regard to the MPAP program will be maintained for six more months.

COMMENTS

The 30-day comment period ended April 4, 2016. During this period, HHSC received no comments regarding the proposed amendments to this rule.

STATUTORY AUTHORITY

The amendment is adopted under Texas Government Code §531.033, which provides the Executive Commissioner of HHSC with broad rulemaking authority; Texas Human Resources Code §32.021 and Texas Government Code §531.021(a), which provide HHSC with the authority to administer the federal medical assistance (Medicaid) program in Texas; and Texas Government Code §531.021(b), which establishes HHSC as the

agency responsible for adopting reasonable rules governing the determination of fees, charges, and rates for medical assistance (Medicaid) payments under Texas Human Resources Code Chapter 32.

§355.608. Minimum Payment Amounts to Qualified Nursing Facilities.

(a) Introduction. This section establishes minimum payment amounts for certain non-state government-owned nursing facility providers participating in the STAR+PLUS Program, or other Medicaid managed care programs offering nursing facility services, and the conditions for receipt of these amounts.

(b) Definitions.

(1) Calculation Period--A month used to calculate the Minimum Payment Amount. There are six calculation periods in Eligibility Period One and twelve calculation periods in Eligibility Period Two.

(2) CHOW Application--An application filed with the Department of Aging and Disability Services for a nursing facility change of ownership.

(3) Clean Claim--A claim submitted by a provider for health care services rendered to an enrollee with the data necessary for the managed care organization to adjudicate and accurately report the claim. Claims for Nursing Facility Unit Rate services that meet the Department of Aging and Disability Services' criteria for clean claims submission are considered Clean Claims. Additional information regarding Department of Aging and Disability Services' criteria for clean claims submission is included in HHSC's Uniform Managed Care Manual, which is available on HHSC's website.

(4) DADS--The Texas Department of Aging and Disability Services.

(5) Eligibility Period--A period of time for which a Qualified Nursing Facility may receive the Minimum Payment Amounts described in this section.

(6) Eligibility Period One--The first period of time for which a Qualified Nursing Facility may receive the Minimum Payment Amounts described in this section, covering dates of service from the later of March 1, 2015, or the date on which nursing facility services become managed care services, to August 31, 2015.

(7) Eligibility Period Two--The second period of time for which a Qualified Nursing Facility may receive the Minimum Payment Amounts described in this section, covering dates of service from September 1, 2015, to August 31, 2016.

(8) Eligibility Period Two-A--The third period of time for which a Qualified Nursing Facility may receive the Minimum Payment Amounts described in this section, covering dates of service from December 1, 2015, to August 31, 2016.

(9) Eligibility Period Three--The fourth period of time for which a Qualified Nursing Facility may receive the Minimum Payment Amounts described in this section, covering dates of service from September 1, 2016, to February 28, 2017.

(10) First Payment--The payment made in the ordinary course of business by MCOs to Qualified Nursing Facilities for the provision of covered services to Medicaid recipients.

(11) HHSC--The Texas Health and Human Services Commission or its designee.

(12) Intergovernmental transfer (IGT)--A transfer of public funds from a non-state governmental entity to HHSC.

(13) IGT Responsibility--The IGT owed by a non-state governmental entity, as determined by HHSC, for funding the non-federal share of the increase in the payments to the MCOs due to the Minimum Payment Amount program.

(14) MCO--A Medicaid managed care organization contracted with HHSC to provide nursing facility services to Medicaid recipients.

(15) Minimum Payment Amount--The minimum payment amount for a Qualified Nursing Facility, as calculated under subsection (d) of this section.

(16) Network Nursing Facility--A nursing facility that has a contract with an MCO for the delivery of Medicaid covered benefits to the MCO's enrollees.

(17) Non-state Governmental Entity--A hospital authority, hospital district, health district, city or county.

(18) Non-state Government-owned Nursing Facility--A network nursing facility where a non-state governmental entity holds the license and is a party to the nursing facility's Medicaid provider enrollment agreement with the state.

(19) Nursing Facility Add-on Services--The types of services that are provided in the nursing facility setting by a provider, but are not included in the Nursing Facility Unit Rate, including but not limited to emergency dental services, physician-ordered rehabilitative services, customized power wheel chairs, and augmentative communication devices.

(20) Nursing Facility Unit Rate--The types of services included in the DADS daily rate for nursing facility providers, such as room and board, medical supplies and equipment, personal needs items, social services, and over-the-counter drugs. The Nursing Facility Unit Rate also includes applicable nursing facility rate enhancements as described in §355.308 of this title (relating to Direct Care Staff Rate Component), and professional and general liability insurance. Nursing Facility Unit Rates exclude Nursing Facility Add-on Services.

(21) Qualified Nursing Facility--A Non-state Government-Owned Network Nursing Facility that meets the eligibility requirements described in subsection (e) of this section.

(22) Public Funds--Funds derived from taxes, assessments, levies, investments, and other public revenues within the sole and unrestricted control of a non-state governmental entity that holds the license and is party to the Medicaid provider enrollment agreement with the state. Public funds do not include gifts, grants, trusts, or donations, the use of which is conditioned on supplying a benefit solely to the donor or grantor of the funds.

(23) Regional Healthcare Partnership (RHP)--A collaboration of interested participants that work collectively to develop and submit to the state a regional plan for health care delivery system reform as defined and established under Chapter 354, Subchapter D of this title (relating to Texas Healthcare Transformation and Quality Improvement Program).

(24) RUG--For the purpose of calculations described in subsection (d)(1) of this section, a resource utilization group under Medicare Part A as established by the Centers for Medicare & Medicaid Services (CMS). For the purpose of calculations described in subsection (d)(2) of this section, a resource utilization group under the RUG-III 34 group classification system, Version 5.20, index maximizing, as established by the state and CMS.

(25) Second Payment--The amount a Qualified Nursing Facility can receive that is equal to the Minimum Payment Amount less adjustments to that amount, as described in subsection (d) of this section.

(c) Payment of Minimum Payment Amount to Qualified Nursing Facilities.

(1) An MCO must pay a Qualified Nursing Facility at or above the Minimum Payment Amount in two installment payments for a Calculation Period, using the calculation methodology described in subsection (d) of this section.

(A) The MCO must make the First Payment no later than ten calendar days after a Qualified Nursing Facility or its agent submits a Clean Claim for a Nursing Facility Unit Rate to the HHSC-designated portal or the MCO's portal, whichever occurs first. The MCO will make the First Payment for the Nursing Facility Unit Rate at or above the prevailing rate established by HHSC for the date of service. HHSC's website includes information concerning HHSC's prevailing rates. The MCO must make the Second Payment no later than 10 calendar days after being notified of the Second Payment amount by HHSC. The Second Payment will be the difference between the Minimum Payment Amount and the adjustment to the Minimum Payment Amount, as calculated by HHSC and described in subsection (d) of this section.

(B) For purposes of illustration only, if a Qualified Nursing Facility provider files a Clean Claim for a Nursing Facility Unit Rate on March 6, 2015, the MCO must make the First Payment no later than March 16, 2015, and the Second Payment no later than 10 calendar days after being notified of the Second Payment amount by HHSC.

(2) HHSC will provide each MCO with a list of its Qualified Nursing Facilities for each Calculation Period as well as the Second Payment amount, as calculated by HHSC and described in subsection (d) of this section, associated with the MCO's members for each of its Qualified Nursing Facilities.

(d) Calculation of the Second Payment. HHSC will calculate the Second Payment for each Qualified Nursing Facility using the methodology detailed in this subsection. If a Qualified Nursing Facility is contracted with more than one MCO, HHSC will calculate a separate Second Payment for each MCO with which the Qualified Nursing Facility is contracted.

(1) Calculate the Minimum Payment Amount. The Minimum Payment Amount is made up of multiple subsidiary amounts. There is a subsidiary amount for each RUG.

(A) To determine the subsidiary amount for a particular RUG, use the formula: Subsidiary Amount = Days of Service x Medicare Rate, where:

(i) "Days of Service" is the total Medicaid days of service for a particular RUG for clean claims for services that were provided during the Calculation Period; and

(ii) "Medicare Rate" is the Medicare skilled nursing facility payment rate for the RUG in effect on the date of service.

(B) The Minimum Payment Amount is equal to the sum of all subsidiary amounts calculated in accordance with subparagraph (A) of this paragraph.

(2) Calculate the Adjustment to the Minimum Payment Amount. The adjustment to the Minimum Payment Amount is equal to the sum of all adjustments for each RUG. The adjustment to the Minimum Payment Amount is determined as follows:

(A) First, determine the amount of the First Payment to the nursing facility using the formula: First Payment = Days of Service x MCO Rate, where:

(i) "Days of Service" is the total Medicaid days of service for a particular RUG for clean claims for services that were provided during the Calculation Period; and

(ii) "MCO Rate" is the rate paid by the MCO for the particular RUG.

(B) Second, sum the result in subparagraph (A) of this paragraph for each RUG.

(C) Third, add or subtract, as necessary, the amount of payment adjustments to Nursing Facility Unit Rate claims for services that were provided during the Calculation Period from the result in subparagraph (B) of this paragraph.

(D) Fourth, determine the amount related to the Nursing Facility Add-on Services using the formula: Nursing Facility Add-on Amount = Days of Service x Per Diem, where:

(i) "Days of Service" equals the number used in subparagraph (A)(i) of this paragraph; and

(ii) "Per Diem" is an estimate, as determined by HHSC, of the weighted average per diem payment amount for Nursing Facility Add-on Services provided to Medicaid recipients in Qualified Nursing Facilities.

(I) For Eligibility Period One, the per diem will equal $3.48.

(II) For Eligibility Period Two, the per diem will equal $3.48 plus medical inflation between the mid-point of Eligibility Period One and the mid-point of Eligibility Period Two, as determined by HHSC.

(III) For Eligibility Period Two-A, the per diem will equal $3.48 plus medical inflation between the mid-point of Eligibility Period One and the mid-point of Eligibility Period Two-A, as determined by HHSC.

(IV) For Eligibility Period Three, the per diem will equal $3.48 plus medical inflation between the mid-point of Eligibility Period One and the mid-point of Eligibility Period Three, as determined by HHSC.

(E) Fifth, sum the result in subparagraph (D) of this paragraph for each RUG.

(F) Sixth, determine the adjustment to the Minimum Payment Amount by subtracting the result from subparagraph (E) of this paragraph from the result from subparagraph (C) of this paragraph.

(3) Calculate the Second Payment. To determine the Second Payment, subtract the adjustment to the Minimum Payment Amount described in paragraph (2)(F) of this subsection from the Minimum Payment Amount described in paragraph (1) of this subsection.

(e) Eligibility for Receipt of Minimum Payment Amounts.

(1) A nursing facility is eligible to receive the Minimum Payment Amounts described in this section if it complies with the requirements described in this subsection for each Eligibility Period.

(2) Eligibility Period One. A nursing facility is eligible to receive Minimum Payment Amounts for Eligibility Period One if it meets the following requirements:

(A) The nursing facility must be a Non-state Government-owned Nursing Facility with a Medicaid contract effective date

of October 1, 2014, or earlier. HHSC will finalize its list of eligible facilities on November 1, 2014. A facility may only be eligible if its contract is assigned by DADS to a non-state government entity by October 31, 2014, with an effective date of October 1, 2014, or earlier.

(B) The Non-state Governmental Entity that owns the nursing facility must have entered into an IGT Responsibility agreement with HHSC by November 3, 2014. The IGT Responsibility agreement will cover the estimated IGT Responsibility for the nursing facility for the Eligibility Period.

(C) The Non-state Governmental Entity that owns the nursing facility must certify the following facts on a form prescribed by HHSC and the form must be received by HHSC by November 3, 2014.

(i) That it is a Non-state Government-owned Nursing Facility where a Non-state Governmental Entity holds the license and is party to the facility's Medicaid contract.

(ii) That all funds transferred to HHSC via IGT for use as the state share of payments are Public Funds.

(iii) That no part of any payment made under the Minimum Payment Amount program under this section will be used to pay a contingent fee, consulting fee, or legal fee associated with the nursing facility's receipt of the Minimum Payment Amount funds.

(3) Eligibility Period Two. A nursing facility is eligible to receive the Minimum Payment Amounts for Eligibility Period Two if it has met the following requirements:

(A) The nursing facility must be a Non-state Government-owned Nursing Facility with a Medicaid contract effective date of March 1, 2015, or earlier. HHSC will finalize its list of eligible facilities on March 1, 2015. A facility may only be eligible if its contract is assigned by DADS to a non-state government entity by February 28, 2015, with an effective date of March 1, 2015, or earlier.

(B) The Non-state Governmental Entity that owns the nursing facility must have entered into an IGT Responsibility agreement with HHSC by February 28, 2015. The IGT Responsibility agreement will cover the estimated IGT Responsibility for the nursing facility for the Eligibility Period.

(C) The Non-state Governmental Entity that owns the nursing facility must certify the following facts on a form prescribed by HHSC and the form must be received by HHSC by February 28, 2014.

(i) That it is a Non-state Government-owned Nursing Facility where a Non-state Governmental Entity holds the license and is party to the facility's Medicaid contract.

(ii) That all funds transferred to HHSC via IGT for use as the state share of payments are Public Funds.

(iii) That no part of any payment made under the Minimum Payment Amount program under this section will be used to pay a contingent fee, consulting fee, or legal fee associated with the nursing facility's receipt of the Minimum Payment Amount funds.

(D) The Non-state Governmental Entity that owns the nursing facility must submit to HHSC, upon demand, copies of any contracts it has with third parties that reference the administration of, or payments from, the Minimum Payment Amount program.

(4) Eligibility Period Two-A. A nursing facility is eligible to receive the Minimum Payment Amounts for Eligibility Period Two-A if it has met the following requirements:

(A) The nursing facility must not be eligible to receive the Minimum Payment Amounts for Eligibility Period Two.

(B) The nursing facility must be a Non-state Government-owned Nursing Facility with a Medicaid contract effective date of June 1, 2015, or earlier. HHSC will finalize its list of eligible facilities on June 1, 2015. A facility may only be eligible if its contract is assigned by DADS to a non-state government entity by May 31, 2015, with an effective date of June 1, 2015, or earlier.

(C) The nursing facility must have given DADS written notice of the change of ownership on or before February 1, 2015, but have not qualified for Eligibility Period Two because its contract was not assigned by DADS to a non-state government entity by February 28, 2015.

(D) DADS must have received all required documents pertaining to the change of ownership (i.e., DADS must have a complete application for a change of ownership license as described under 40 TAC §19.201(b) (relating to Criteria for Licensing)) by April 15, 2015.

(E) The Non-state Governmental Entity that owns the nursing facility must have entered into an IGT Responsibility agreement with HHSC by May 31, 2015. The IGT Responsibility agreement must cover the estimated IGT Responsibility for the nursing facility for the Eligibility Period.

(F) The Non-state Governmental Entity that owns the nursing facility must certify the following facts on a form prescribed by HHSC and the form must be received by HHSC by May 31, 2015:

(i) that it is a Non-state Government-owned Nursing Facility where a Non-state Governmental Entity holds the license and is party to the facility's Medicaid contract;

(ii) that all funds transferred to HHSC via IGT for use as the state share of payments are Public Funds; and

(iii) that no part of any payment made under the Minimum Payment Amount program under this section will be used to pay a contingent fee, consulting fee, or legal fee associated with the nursing facility's receipt of the Minimum Payment Amount funds.

(G) The Non-state Governmental Entity that owns the nursing facility must submit to HHSC, upon demand, copies of any contracts it has with third parties that reference the administration of, or payments from, the Minimum Payment Amount program.

(5) Eligibility Period Three. A nursing facility is eligible to receive the Minimum Payment Amounts for Eligibility Period Three if it has met the following requirements:

(A) The nursing facility was eligible to receive the Minimum Payment Amounts for Eligibility Period Two or Eligibility Period Two-A.

(B) The Non-state Governmental Entity that owns the nursing facility must have entered into an IGT Responsibility agreement with HHSC by a date determined by HHSC. The IGT Responsibility agreement must cover the estimated IGT Responsibility for the nursing facility for the Eligibility Period.

(C) The Non-state Governmental Entity that owns the nursing facility must certify the following facts on a form prescribed by HHSC and the form must be received by HHSC by a date determined by HHSC:

(i) that it is a Non-state Government-owned Nursing Facility where a Non-state Governmental Entity holds the license and is party to the facility's Medicaid contract;

(ii) that all funds transferred to HHSC via IGT for use as the state share of payments are Public Funds; and

(iii) that no part of any payment made under the Minimum Payment Amount program under this section will be used to pay a contingent fee, consulting fee, or legal fee associated with the nursing facility's receipt of the Minimum Payment Amount funds.

(D) The Non-state Governmental Entity that owns the nursing facility must submit to HHSC, upon demand, copies of any contracts it has with third parties that reference the administration of, or payments from, the Minimum Payment Amount program.

(6) Geographic Proximity to Nursing Facility.

(A) For eligibility period one, any nursing facility with a CHOW Application approved by DADS with an effective date on or after October 1, 2014, must be located in the same Regional Healthcare Partnership (RHP) as the Non-state Governmental Entity taking ownership of the nursing facility.

(B) For eligibility periods two, two-A, and three, any nursing facility with a CHOW Application approved by DADS with an effective date on or after October 1, 2014, must be located in the same RHP as, or within 150 miles of, the Non-state Governmental Entity taking ownership of the nursing facility.

(f) Claims Filing Deadline. A Qualified Nursing Facility must file a Clean Claim for a Nursing Facility Unit Rate no later than 60 calendar days after the end of the Calculation Period within which the service is provided for the claim to qualify for the Minimum Payment Amount described in this section. The MCO must pay a Clean Claim that is filed after this deadline but within 365 calendar days of the date of service, at the standard rate established in the network provider agreement for Nursing Facility Unit Services; however, claims filed after the 60 deadline will not be incorporated in the calculation of the Minimum Payment Amount.

(g) IGT Responsibility.

(1) Timing. HHSC will determine IGT responsibilities prior to the first day of the Eligibility Period.

(2) Aggregate IGT Responsibility. The aggregate IGT responsibility for all Qualified Nursing Facilities for an Eligibility Period will be equal to the non-federal share of the increase in the MCOs' capitation rates due to the Minimum Payment Amount program multiplied by the estimated number of member months for which the MCOs will receive the capitation rate during the eligibility period multiplied by 1.1.

(3) Allocation of Aggregate IGT Responsibility to Individual Nursing Facilities. HHSC will allocate the aggregate IGT responsibility to each qualified nursing facility based on the percentage of the total increase in the MCOs' capitation rates due to the Minimum Payment Amount program associated with the nursing facility in the base period data used to develop the capitation rates.

(4) Reconciliation. HHSC will complete the reconciliation in two parts.

(A) The first reconciliation will occur no later than 120 days after the end of the eligibility period.

(i) HHSC will compare the amount transferred by the Non-state Governmental Entity to HHSC for the eligibility period to the non-federal amount expended during the eligibility period by HHSC for all Qualified Nursing Facilities owned by the Non-state Governmental Entity.

(ii) The calculation of the non-federal amount expended during the eligibility period by HHSC for all Qualified Nursing Facilities owned by the Non-state Governmental Entity will be the same as the calculation of allocated aggregate IGT responsibility to all Qualified Nursing Facilities owned by the Non-state Governmental Entity as described in paragraphs (2) and (3) of this subsection with two exceptions:

(I) "Member months" will be revised to reflect actual known member months for the eligibility period. The revision will be conducted no sooner than the day after the last day of the eligibility period and no later than 120 days after the end of the eligibility period.

(II) The "Aggregate IGT Responsibility" described in paragraph (2) of this subsection will be equal to the non-federal share of the increase in the MCO's capitation rates due to the Minimum Payment Amount program multiplied by the revised member months. The calculation will not include the additional ten percent included in the calculation of the original aggregate IGT responsibility.

(III) No other changes will be made to the calculation of the allocated aggregate IGT responsibility and no other data points included in the calculation will be updated for purposes of this reconciliation.

(iii) If the amount transferred by the Non-state Governmental Entity exceeds the non-federal amount expended during the eligibility period by HHSC for all Qualified Nursing Facilities owned by the Non-state Governmental Entity, HHSC will refund the excess amount to the Non-state Governmental Entity, less two percent of the amount expended during the eligibility period by HHSC for all Qualified Nursing Facilities owned by the Non-state Governmental Entity.

(iv) If the amount transferred by the Non-state Governmental Entity is less than the non-federal amount expended during the eligibility period by HHSC for all Qualified Nursing Facilities owned by the Non-state Governmental Entity, HHSC will notify the Non-state Governmental Entity of the amount of the shortfall and of a deadline for the Non-state Governmental Entity to transfer the shortfall plus two percent of the amount expended during the eligibility period by HHSC for all Qualified Nursing Facilities owned by the Non-state Governmental Entity.

(B) For Eligibility Period Three only, HHSC may complete interim reconciliations between February 28, 2017, and February 28, 2019, as updated enrollment data for the Program Period, as reflected in adjusted member months, becomes available. HHSC will follow the process described in subparagraph (A) of this paragraph for such interim reconciliations.

(C) The second reconciliation will occur no later than 25 months after the end of the eligibility period.

(i) HHSC will compare the amount transferred by the Non-state Governmental Entity to HHSC for the eligibility period to the non-federal amount expended during the eligibility period by HHSC for all Qualified Nursing Facilities owned by the Non-state Governmental Entity.

(ii) The calculation of the non-federal amount expended during the eligibility period by HHSC for all Qualified Nursing Facilities owned by the Non-state Governmental Entity will be the same as the calculation of allocated aggregate IGT responsibility to all Qualified Nursing Facilities owned by the Non-state Governmental Entity as described in subparagraph (A) of this paragraph except that member months will be revised to reflect updated actual known mem-

ber months for the eligibility period. The revision will be conducted sometime during the 25th month after the end of the eligibility period.

(iii) If the amount transferred by the Non-state Governmental Entity exceeds the non-federal amount expended during the eligibility period by HHSC for all Qualified Nursing Facilities owned by the Non-state Governmental Entity, HHSC will refund the excess amount to the Non-state Governmental Entity.

(iv) If the amount transferred by the Non-state Governmental Entity is less than the non-federal amount expended during the eligibility period by HHSC for all Qualified Nursing Facilities owned by the Non-state Governmental Entity, HHSC will notify the Non-state Governmental Entity of the amount of the shortfall and of a deadline for the Non-state Governmental Entity to transfer the shortfall.

(D) If the Non-state Governmental Entity does not timely complete the transfer described in subparagraph (A), (B), or (C) of this paragraph, HHSC may:

(i) determine that all nursing facilities owned by the Non-state Governmental Entity are ineligible to receive the Minimum Payment Amount for future eligibility periods;

(ii) withhold any or all future Medicaid payments from the Non-state Governmental Entity until HHSC has recovered an amount equal to the shortfall; and

(iii) retain any funds that would normally be returned to the Non-state Governmental Entity as part of the reconciliation process.

(5) All IGT calculations are solely at the discretion of HHSC and are not open to desk review or appeal.

(h) Changes of Ownership. If a Qualified Nursing Facility changes ownership to another non-state government entity during either of the eligibility periods described in subsection (e) of this section, then the data used for the calculations described in subsection (d) of this section will include data from the facility for the entire Calculation Period, including data relating to payments for days of service provided under the prior owner.

(i) Recoupment.

(1) If payments under this section result in an overpayment to a nursing facility, or in the event of a disallowance by CMS of federal participation related to a nursing facility's receipt of or use of payment amounts authorized under subsection (d) of this section, the MCO(s) may recoup an amount equivalent to the amount of the second payment amount that was overpaid or disallowed.

(2) Second payment amount payments under this section may be subject to any adjustments for payments made in error, including, without limitation, adjustments made under the Texas Administrative Code, the Code of Federal Regulations and state and federal statutes. The MCO(s) may recoup an amount equivalent to any such adjustment from the nursing facility in question.

(3) If HHSC determines that part of any payment made under the Minimum Payment Amount program was used to pay a contingent fee, consulting fee, or legal fee associated with the nursing facility's receipt of the Minimum Payment Amount funds, the MCO(s) may recoup an amount equal to the second payment amount from the nursing facility in question.

(4) If HHSC determines that an ownership change to a Non-state Governmental Entity was based on fraudulent or misleading statements on a nursing facility CHOW application or during the CHOW process, the MCO(s) may recoup an amount equal to the second payment amount from the nursing facility in question for any eligibility period affected by the fraudulent or misleading statement.

(j) Dates the Minimum Payment Amount is available. The minimum payment requirements described in this section will only cover dates of service from the later of March 1, 2015, or the date on which nursing facility services become managed care services, to February 28, 2017.

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 May 2, 2016.

TRD-201602089
Karen Ray
Chief Counsel
Texas Health and Human Services Commission
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Proposal publication date: March 4, 2016
For further information, please call: (512) 424-6900

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TITLE 19. EDUCATION

PART 2. TEXAS EDUCATION AGENCY

CHAPTER 61. SCHOOL DISTRICTS
SUBCHAPTER BB. COMMISSIONER'S RULES ON REPORTING REQUIREMENTS

19 TAC §61.1027

The Texas Education Agency adopts an amendment to §61.1027, concerning reporting requirements. The amendment is adopted without changes to the proposed text as published in the January 1, 2016 issue of the *Texas Register* (41 TexReg 73) and will not be republished. The section addresses the report on the number of disadvantaged students. The adopted amendment modifies the rule to reflect changes in statute made by House Bill (HB) 1305, 84th Texas Legislature, 2015.

REASONED JUSTIFICATION. The Texas Education Code (TEC), §33.901, provides requirements for certain school districts and open-enrollment charter schools to provide a free or reduced-price breakfast program for eligible students. HB 1305, 84th Texas Legislature, 2015, amended the TEC, §33.901, to allow a school district or charter school that would otherwise be required to participate in the national School Breakfast Program (SBP) to instead develop and implement a locally funded program to provide free or reduced-price meals to all students in the school(s) who are eligible for the national program.

The TEC, §42.152, establishes the state compensatory education (SCE) allotment and provides the methods for determining the number of educationally disadvantaged students in a district. Before amendment by HB 1305, the TEC, §42.152(b), allowed school districts and open-enrollment charter schools to use the alternative reporting method only if no campuses participated in the NSLP or SBP. HB 1305 amended the statute to permit districts and open-enrollment charter schools to generate SCE funding both for students who participate in the NSLP or SBP at one or more campuses in the district and for students who participate in a locally funded program at one or more campuses in the district.

HB 1305 also amended the TEC, §42.152, to change the calculation of the number of educationally disadvantaged students for purposes of calculating the SCE allotment within the Foundation School Program (FSP) from averaging the best six months' enrollment in the NSLP for the preceding school year to averaging the best six months' number of students eligible for enrollment in the NSLP.

Finally, the TEC, §42.152, was changed by HB 1305 to allow a student receiving a full-time virtual education to be included in the determination of the number of educationally disadvantaged students in a district if the school district submits a plan to the commissioner detailing the enhanced services that will be provided to the students and the plan is approved by the commissioner.

The adopted amendment to 19 TAC §61.1027 reflects the changes made by HB 1305. Subsection (a) was amended to clarify which school districts and open-enrollment charter schools may use the alternative method of calculating the number of disadvantaged students. In addition, language was added to subsection (b) to specify the requirements school districts and charter schools must follow in order to count students receiving a full-time virtual education in the number of disadvantaged students.

SUMMARY OF COMMENTS AND AGENCY RESPONSES. The public comment period on the proposal began January 1, 2016, and ended February 1, 2016. Following is a summary of the comment received and the corresponding agency response regarding the proposed amendment to 19 TAC Chapter 61, School Districts, Subchapter BB, Commissioner's Rules on Reporting Requirements, §61.1027, Report on the Number of Disadvantaged Students.

Comment: Texas State Senator Larry Taylor and State Representative Greg Bonnen proposed using August 2015 and September 2015 local data for districts with one or more campuses that discontinued participation in the NSLP or SBP in anticipation of the bill's implementation when calculating fiscal year (FY) 2016 SCE funding.

Agency Response: The agency agrees. Using the FSP payment system's existing SCE module, the agency will coordinate the collection and submission of local SCE data for August 2015 and September 2015 for the school districts and open-enrollment charter schools that discontinued participation in the NSLP or SBP in anticipation of the bill's implementation. The data will be captured in the SCE module's Alternative Basic Monthly Claims reporting mechanism, and FY 2016 SCE funding will be adjusted accordingly on the summary of finances. Since this comment relates to agency processes rather than the rule itself, no changes to the proposed amendment are necessary.

STATUTORY AUTHORITY. The amendment is adopted under the Texas Education Code, §42.152, as amended by House Bill 1305, 84th Texas Legislature, 2015, which authorizes the commissioner to adopt rules to provide a method other than participation in the National School Lunch Program for school districts to count their educationally disadvantaged students in order to qualify for compensatory education program funding.

CROSS REFERENCE TO STATUTE. The amendment implements the Texas Education Code, §42.152, as amended by House Bill 1305, 84th Texas Legislature, 2015.

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 April 27, 2016.

TRD-201602004
Cristina De La Fuente-Valadez
Director, Rulemaking
Texas Education Agency
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For further information, please call: (512) 475-1497

TITLE 28. INSURANCE

PART 1. TEXAS DEPARTMENT OF INSURANCE

CHAPTER 13. MISCELLANEOUS INSURERS AND OTHER REGULATED ENTITIES SUBCHAPTER F. PROFESSIONAL EMPLOYER ORGANIZATIONS SPONSORING SELF-FUNDED EMPLOYEE HEALTH BENEFIT PLANS

The Texas Department of Insurance adopts new 28 TAC Subchapter F, §§13.510 - 13.513, 13.520 - 13.524, 13.530 - 13.534, 13.540 - 13.545, 13.550 - 13.557, 13.560 - 13.568, 13.570 - 13.573, and 13.580 - 13.583 concerning the regulation of self-funded employee health benefit plans (plans) sponsored by professional employer organizations (PEOs) under Labor Code Chapter 91, concerning Professional Employer Associations. The commissioner also adopts by reference the Statutory Deposit Transaction Form, Form No. FIN407; the Declaration of Trust Form, Form No. FIN453; the Texas PEO Annual Report, Form No. FIN410, and the Texas PEO Quarterly Report, Form No. FIN409, including all instructions and requirements included on those forms. These new sections are adopted with changes to the proposed text published in the December 25, 2015, issue of the *Texas Register* (40 TexReg 9460). The changes from the proposal are nonsubstantive and reflect the TDI style guidelines.

A nonsubstantive change is made to §13.523 removing subsection (a)(4) which references Insurance Code Chapter 38, Subchapter C, concerning Data Collection and Reporting Relating to HIV and AIDS. This statute was repealed by SB 784, 84th Leg., Regular Session (2015), Effective September 1, 2015. All paragraphs from (5) to (107) were renumbered to reflect the removal of the provision citing the repealed statute.

Nonsubstantive changes are made to §§13.523(a)(38); 13.523(a)(83); 13.523(a)(101); 13.524(a), and (a)(8), (21), and (43); 13.534(f); 13.561; 13.572; 13.573(b); 13.580(d); and §13.582(a) and (c) as adopted to correct errors in the headings of statutes and rules that are cited in these provisions. A nonsubstantive edit is made to §13.552(a) to update the new title of the TDI section responsible for a plan amendment filing.

A nonsubstantive change is made to §13.532(a)(10) to add a parenthetical reference to the heading of a section the provision cites, and another nonsubstantive edit is made to §13.532(b)(1)

to clarify that a reference in the paragraph is to Division 6 of 28 TAC Chapter 13, Subchapter F.

Nonsubstantive changes are made to §13.542 and §13.582(e) to correct punctuation.

A nonsubstantive change is made to §13.553(d) to correct the use of section symbols in a citation.

REASONED JUSTIFICATION. The adopted sections are necessary to augment and implement the regulation of plans that are not fully insured and are sponsored by PEOs licensed by the Texas Department of Licensing and Regulation (TDLR), as required by Labor Code §91.0411, enacted under Senate Bill 1286, 83rd Legislature, Regular Session (2013), effective September 1, 2013.

Division 1 - Purpose and Definitions

This division addresses the purpose and application of the rule and provides definitions.

Section 13.510 states that the purpose of the new subchapter is to augment and implement the regulation of a PEO-sponsored self-funded employee health benefit plan, in compliance with Labor Code Chapter 91.

Section 13.511 identifies the PEO's sponsoring benefit plans that are and are not subject to the subchapter, and specifies that a PEO subject to the subchapter must be licensed by both TDLR and the department before offering a self-funded employee health benefit plan.

Section 13.512 states that the subchapter applies to a PEO and its plan and trust to the extent permitted by ERISA, and the section includes a severability provision.

Section 13.513 defines terms relevant to the subchapter. Where appropriate, definitions are drawn from Labor Code Chapter 91, from the Insurance Code, and from ERISA.

Division 2 - Applicability of Insurance Code and Administrative Code Provisions

This division provides a list of Insurance Code and Administrative Code provisions regulating a self-funded PEO-sponsored plan.

Section 13.521 establishes that the department will consider an approved PEO to be a large employer and will regulate its plan as a large employer health benefit plan for purposes of applying the Insurance and Administrative Codes.

Section 13.522 authorizes an approved PEO to delegate by contract to other entities regulated by the department (such as a third party administrator (TPA)) the performance of the PEO's or trust's statutory and regulatory requirements. The PEO or trust and the contracting regulated entity may be held jointly and severally liable by the department for noncompliance with respect to the delegated responsibilities. A PEO or trust must give the department notice of its intent to enter into, terminate, or replace a delegated contract. Notice must include pertinent information about the proposed contracting regulated entity, or other relevant information, such as whether on contract termination the functions performed under that contract will be performed by the PEO or trust, or by another contracted regulated entity. The section also includes procedures to be followed when a contracting regulated entity is terminated for cause. Day-to-day operations of the plan and trust must be performed by a TPA.

The balance of Division 2, §13.522 and §13.523, lists the sections of the Insurance Code and Administrative Code with which an approved PEO must comply. These are provisions which apply, almost without exception, to a fully insured large employer health benefit plan regulated by the department. Section 13.522 and §13.523 each include subsections to clarify whether the approved PEO is considered an issuer or an employer for purposes of applicable Insurance Code and Administrative Code provisions where both entities are referenced.

Division 3 - Certificate of Approval

Division 3 sets out the certificate of approval requirements.

Section 13.530 requires a PEO to receive a certificate of approval from the department before sponsoring a plan in Texas. A PEO sponsoring a plan without approval will be considered an unauthorized insurer. This requirement, and the balance of the application requirements, are similar to those applied to risk-bearing entities seeking to do the business of health insurance in Texas.

Section 13.531 establishes that a PEO must apply for a certificate of approval by providing the information required by the division and must include an application fee of $5,050.

Section 13.532 lists the information to be provided by an applicant seeking a certificate of approval.

Section 13.533 requires that an applicant include an independent actuarial opinion that describes the extent to which projected plan contributions are:

* not excessive or discriminatory;

* adequate to pay all plan benefits and expenses; and

* sufficient to maintain adequate plan reserves and surplus.

The independent actuarial opinion will also show the expected allocation of client employers' contributions to fund the plan's administrative expenses, reserves, and other expenses.

Section 13.534 provides for the commissioner's review and approval or denial of a PEO's application for a certificate of approval, and the process to appeal a denial.

Division 4 - Conduct of Approved PEO

Division 4 sets out the requirements for management of the PEO and administration of the plan and trust.

Section 13.540 addresses the qualifications of the individuals responsible for the management of the PEO and the administration of the plan and trust. The section permits the PEO to maintain its books and records outside the state as permitted by Insurance Code Chapter 803, concerning Location of Books, Records, Accounts, and Offices Outside of This State.

Section 13.541 requires an approved PEO plan sponsor to contract for stop-loss insurance covering the plan and trust until a board of trustees has been established to manage the plan and trust.

Section 13.542 requires an approved PEO to maintain a fidelity bond or a zero-deductible crime policy to cover all individuals responsible for handling or administering plan funds or servicing the plan. This requirement remains in effect even after a board of trustees has been established to administer the plan and trust, because the PEO will be responsible for collecting and remitting contributions to the trust.

Section 13.543 regulates the approved PEO's conduct with respect to the plan and trust, including the establishment of plan contribution amounts, payments to the trust from PEO assets

and accounts, and reimbursement to the PEO from plan assets for its costs to establish and initially administer the plan and to comply with the subchapter's requirements. The section prohibits PEO transactions affecting the plan and trust and its assets that would violate state or federal law.

Section 13.544 regulates an approved PEO's marketing materials and offers of enrollment, and it requires guaranteed renewability in compliance with applicable state and federal law. Only employees of the PEO's clients and their dependents are eligible to enroll in an approved PEO's plan.

Section 13.545 governs an approved PEO's representations to clients and plan participants about pricing, billing, and notices of increased contributions. The section also requires the PEO to accept sole responsibility, without obligating its clients, for funding any asset amount needed to equal the liabilities owed by the plan should there be a shortfall in trust assets, and it renders unenforceable any client services agreement provision in conflict with the subchapter. Finally, the section prescribes certain language to be included in the summary plan description provided to plan participants.

Division 5 - Formation, Governance and Operation of Plan and Trust

Division 5 addresses the administration of an approved PEO's plan and trust.

Section 13.550 requires an approved PEO's plan to be established in compliance with ERISA and to contain specified provisions. The section authorizes an approved PEO to amend its plan without approval by the plan's trustees. All plan amendments must be submitted to the department for review and approval by the commissioner as described by §13.552 before becoming effective.

Section 13.551 requires an approved PEO's plan trust, in which all funds used to administer and pay claims are to be held, be established in compliance with the Trust Code and with ERISA. The trust must be governed by a board of trustees under a trust agreement, terms of which are set out in the subchapter. The trustees are authorized to amend the trust agreement without the approval of the approved PEO. All trust amendments must be submitted to the department for review and approval by the commissioner as described by §13.552 before becoming effective.

Section 13.552 specifies that the approved PEO must submit for approval by the commissioner to designated TDI offices all amendments to the documents of both the plan and the trust. The approved PEO must certify that the approved PEO and the plan will remain in compliance with the subchapter and with ERISA if a proposed plan amendment is approved and adopted. The trustees must certify that the trust will remain in compliance with the subchapter and with ERISA if a proposed trust amendment is approved and adopted. Transactions between affiliated parties are subject to Insurance Code Chapter 823, Subchapters B and C.

Section 13.553 establishes a plan fiduciary's duty, consistent with a fiduciary's duty under ERISA, and provides that the standard may change if the federal standard is modified. The section provides standards of conduct for a plan fiduciary involved in a transaction involving the plan or trust, and it requires that all plan and trust expenses be paid from plan assets. Finally, the section establishes the requirements for a voluntary trust termination, including a requirement that assets remaining in the trust may not be distributed until the commissioner has cancelled the approved PEO's certificate of approval.

Section 13.554 regulates the appointment and number of plan trustees by the approved PEO, and it specifies that a person who is receiving or has received compensation from the trust is ineligible to serve as a board member.

Section 13.555 establishes the trustees' responsibilities and authority, including the duty of prudence, the responsibility for all operations of the plan, and the safeguarding of plan assets. Within 12 months of the board's formation, the trustees, either directly or through an appointed agent, must contract with a TPA and with a stop-loss carrier. Members of the board serve without compensation.

Section 13.556 requires that the trustees protect the plan's assets by buying fidelity coverage for those responsible for handling or administering plan assets, by buying errors and omissions insurance for the trustees' performance of their duties, and by annually reviewing documentation that the approved PEO has maintained and is maintaining its own fidelity coverage required under this subchapter.

Section 13.557 provides that all claims or other disputes arising under an approved PEO's plan are subject to the Insurance Code and other relevant state law, to the extent the Insurance Code and state law are not inconsistent with ERISA.

Division 6 - Financial Solvency Requirements for PEO Plans

Division 6 provides for financial requirements for approved PEO plans.

Section 13.560 establishes the methodology to be used to calculate claim reserves maintained in the plan's trust.

Section 13.561 requires that the trust invest its assets in compliance with Insurance Code Chapter 425, Subchapter C.

Section 13.562 requires an approved PEO to establish a deposit or letter of credit that represents at least 25 percent of the aggregate limit attachment point in the plan and trust's stop-loss agreement before beginning to enroll participants. The deposit or letter of credit must be maintained continually, and any deposit or letter of credit must be held for TDI's control.

In §13.562 TDI adopts by reference the Statutory Deposit Transaction Form, Form No. FIN407. This form requires information necessary for the department to record the deposit, substitution, or withdrawal of securities, including: the name and address of the PEO establishing the deposit; whether the transaction establishes, substitutes, or withdraws securities; the authority under which the deposited securities are held; the name of the designated custodian; security specific information, including the identification number, description, interest rate, par value amount, maturity date, and rating information; the total deposit or withdrawal amount for the transaction; a dated signature of an authorized officer of the entity establishing the deposit; and the total deposit, total withdrawal, and net balance after the transaction.

In §13.562 TDI also adopts by reference the Declaration of Trust Form, Form No. FIN453, which affirms that securities are unencumbered assets of the person or entity making a deposit and are pledged to the commissioner by reasons of law. This form requires information necessary to identify: the entity or person making a deposit, its principal place of business, its custodian or bank, and security specific information including the CUSIP number; interest rate; maturity date; and par value amount.

Section 13.563 specifies the form of the required deposit.

Section 13.564 requires that the amount of the deposit be recalculated annually, and it prescribes how changes to the deposit are to be made.

Section 13.565 provides the requirements for a letter of credit that can be used to replace or supplement a deposit to meet financial responsibility standards.

Section 13.566 requires that the amount of the letter of credit be recalculated annually, and discusses the consequences if a letter of credit is replaced, is not renewed, or is suspended.

Section 13.567 addresses the requirements for the stop-loss insurance that the plan trustees, or the approved PEO acting on the trustees' behalf, must maintain in the name of and for the benefit of the trust. The section regulates the issuer's qualifications and directs that certain terms be included in the stop-loss contract. It also establishes the trust's maximum retention of expected claims. The section permits the trustees to request from the commissioner a waiver or reduction in coverage amount. The commissioner will grant a waiver if the commissioner determines that the interests of the PEO's clients and the plan participants are adequately protected.

Section 13.568 provides the requirements for the fidelity bond or crime policy required under §13.542 and §13.556, which direct an approved PEO and a plan's board of trustees to maintain fidelity coverage for each person responsible for handling or administering plan assets. The requirements are consistent with similar requirements included in ERISA.

Division 7 - Quarterly and Annual Filings; Examinations; Hazardous Conditions

Division 7 addresses financial reporting, examination by TDI, and hazardous condition regulation. Section 13.570 describes both the quarterly and annual filings of the plan and trust's financial statement to be submitted by an approved PEO using generally accepted accounting principles of the United States as modified by the subchapter. The section states that the PEO must submit quarterly a certified unaudited financial statement, and annually both a certified unaudited financial statement for the previous four financial quarters and by June 1 of each year an audited financial statement meeting requirements set out in Insurance Code Chapter 401.

In §13.570 TDI adopts by reference the Texas PEO Annual Report, Form No. FIN410, and the Texas PEO Quarterly Report, Form No. FIN409, which are spreadsheets the PEO will file with information for TDI to assess facts about the PEO's financial condition. These forms may be requested by emailing PEO@tdi.texas.gov, and they are also available for inspection on TDI's website at www.tdi.texas.gov/rules/2015/index.html. The PEO must also file an annual actuarial opinion completed by a qualified actuary which includes a description of the actuarial soundness of the plan, a calculation of reserves as required by §13.560, and a recommendation on the level of specific and aggregate stop-loss insurance the trust should maintain.

Section 13.571 requires the PEO submit a fee with its annual statement filings.

Section 13.572 addresses the commissioner's examination of the affairs of an approved PEO and the plan and trust to the same extent that the commissioner can examine the affairs of a licensed domestic insurer.

Section 13.573 outlines what will be considered hazardous conditions for the plan and trust, and it identifies the regulatory actions the commissioner will order to correct or address those hazardous conditions.

Division 8 - Market Exit

Division 8 provides the requirements for approved PEO plans to exit the market.

Section 13.580 requires an approved PEO to file a withdrawal plan for review by the commissioner if it wants to voluntarily terminate its plan or is directed by the department to terminate its plan. The section details the contents of a withdrawal plan, and establishes conditions that must be met before the commissioner will approve such a plan. These requirements and conditions are designed to ensure the benefit plan's participants are protected from disruption by its dissolution. The commissioner has authority to modify or deny the withdrawal plan and take actions authorized under the Insurance Code if the approved PEO is unable to meet its contractual and financial obligations. The section also provides for the appeal of a commissioner's denial of a withdrawal plan.

Section 13.581 provides that the commissioner will limit, suspend, or cancel an approved PEO's certificate of approval in response to notice that TDLR has taken action against its license to operate in Texas. An approved PEO must notify the department within 10 days of receiving notice that TDLR is contemplating taking action against its license. While its license is suspended, an approved PEO cannot contract with a new client to allow the enrollment of new plan participants. If TDLR terminates a PEO's license, the PEO must file a withdrawal plan under §13.580 within 30 days; when the PEO has fulfilled its withdrawal plan, the commissioner will cancel the PEO's license. If TDLR reinstates a PEO's license or grants a new license, the PEO may reapply to TDI for a license.

Section 13.582 provides that the commissioner will limit, suspend, or cancel an approved PEO's certificate of approval if the commissioner finds that the approved PEO or its plan or trust do not meet the requirements of applicable Insurance Code provisions or of the subchapter. The section also provides for the appeal of an action by the commissioner.

Section 13.583 requires that an approved PEO must file a withdrawal plan within 30 days of receiving a notice of suspension. If the commissioner determines an approved PEO's certificate should be canceled, the PEO must file a withdrawal plan under §13.580, and upon the plan's completion, the commissioner will cancel the PEO's certificate of approval.

TDI adopts by reference the Statutory Deposit Transaction Form, Form No. FIN407; the Declaration of Trust Form, Form No. FIN453; the Texas PEO Annual Report, Form No. FIN410; and the Texas PEO Quarterly Report, Form No. FIN409, including all instructions and requirements included in those forms. These forms are available on TDI's website.

SUMMARY OF COMMENTS AND AGENCY RESPONSE. TDI received oral comments from two people. TDI did not receive any written comments. Commenters in support of the proposal were: Employer Flexible and the National Association of Professional Employer Organizations. TDI did not receive any comments in opposition to the proposal.

Two commenters provided general comments supportive of the rule and commended TDI staff's efforts on the rule. TDI is appreciative of the supportive comments.

One commenter requested that TDI continue to be willing to work with the industry as unexpected issues can arise out of the most well intentioned rules. TDI acknowledges the request.

DIVISION 1. PURPOSE AND DEFINITIONS

28 TAC §§13.510 - 13.513

STATUTORY AUTHORITY. The new sections are adopted under Labor Code §91.0411 and Insurance Code §36.001.

Labor Code §91.0411 provides for the commissioner of insurance to adopt rules necessary to augment and implement the regulation of benefit plans sponsored by PEOs licensed by TDLR, which include requirements that must be met by the licensed PEO and plan. The rules must include initial and final approval requirements, authority to prescribe forms and items to be submitted to the commissioner by the license holder, a fidelity bond, use of an independent actuary, use of a third-party administrator, authority for the commissioner to examine an application or plan, the minimum number of clients and covered employees covered by the plan, standards for those natural persons managing the plan, the minimum amount of gross contributions, the minimum amount of written commitment, binder, or policy for stop-loss insurance, the minimum amount of reserves, and a fee in the amount reasonable and necessary to defray the costs of administering the section to be deposited to the credit of the operating fund of the Texas Department of Insurance.

Insurance Code §36.001 provides that the commissioner of insurance may adopt any rules necessary and appropriate to implement the powers and duties of the Texas Department of Insurance under the Insurance Code and other laws of this state.

§13.510. Purpose.

The purpose of this subchapter is to augment and implement the regulation of an employee health benefit plan that is not fully insured and is sponsored by a PEO as permitted by Texas Labor Code Chapter 91, concerning Professional Employer Organizations.

§13.511. Regulated PEOs; Approval Required.

(a) PEOs subject to this subchapter. This subchapter applies to a PEO sponsoring a self-funded employee health benefit plan if:

(1) its primary business location is in this state; or

(2) a majority of the eligible employees of at least one of its clients are employed in this state; or

(3) the primary business location of at least one of its clients is in this state, where no other state contains a majority of that employer's eligible employees.

(b) PEOs not subject to this subchapter. This subchapter does not apply to a PEO sponsoring an employee health benefit plan that consists only of benefits provided through a group insurance policy or evidence of coverage that guarantees the payment of claims for all eligible benefits issued by a carrier authorized to do business in this state.

(c) License and certificate of approval required. A PEO to which this subchapter applies may not offer a self-funded employee health benefit plan unless the PEO is:

(1) licensed and in good standing with TDLR; and

(2) has a certificate of approval from TDI issued under this subchapter.

(d) Insurance Code Chapter 846. Insurance Code Chapter 846, concerning Multiple Employer Welfare Arrangements, does not apply to a plan sponsored by a PEO unless:

(1) a PEO that does not have a certificate of approval to sponsor a PEO plan under this subchapter performs activities that require a certificate of authority under Chapter 846; or

(2) an approved PEO files a withdrawal plan that is approved by the commissioner, and relinquishes its certificate of approval as a PEO plan sponsor under this subchapter.

§13.512. ERISA's Applicability; Severability of Subchapter's Provisions.

(a) This subchapter applies to an approved PEO and its plan and trust to the extent permitted by the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. §§1001-1191c.

(b) If a court of competent jurisdiction holds that any provision of this subchapter or its application to any person or circumstance is invalid for any reason, the invalidity does not affect other provisions or applications of this subchapter that can be given effect without the invalid provision or application. To this end, the provisions of this subchapter are severable.

§13.513. Definitions.

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

(1) Affiliate--A person is defined as an affiliate under §7.202(a)(2) of this title (relating to Definitions).

(2) Approved PEO--A PEO that has received a certificate of approval from TDI to sponsor a plan.

(3) Cash--Currency and demand deposits with banks and other financial institutions.

(4) Client--A person who enters into a professional employer services agreement with a licensed PEO.

(5) Coemployment relationship--A contractual relationship between a client and a PEO that involves the sharing of employment responsibilities with or allocation of employment responsibilities to covered employees in compliance with the professional employer services agreement and Labor Code Chapter 91, concerning Professional Employment Organizations.

(6) Commissioner--The commissioner of insurance.

(7) Contracting regulated entity--An entity regulated by TDI that has contracted with an approved PEO to accept responsibility for the performance of any requirement of this subchapter.

(8) Controlling person--A person that directly or indirectly and alone or under an agreement with one or more other persons, exercises such a controlling influence over the management or policies of the PEO that it is necessary or appropriate in the public interest or for the protection of the PEO's covered employees that the person be considered to control the PEO. A person is presumed to be a controlling person if:

(A) the person or a person and members of the person's immediate family directly or indirectly, own, control, or hold with the power to vote 10 percent or more of the voting securities or authority of the PEO; or

(B) the person holds proxies representing 10 percent or more of the voting securities or authority of the PEO, but is not a corporate officer or director of the PEO.

(9) Covered employee--An individual having a coemployment relationship with a PEO and a client.

(10) Dependent--A person eligible to enroll in a plan because of the person's relationship to a covered employee.

(11) Fiduciary--To the extent not inconsistent with the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. §1002, concerning Definitions, a person is a plan fiduciary to the extent that the person:

(A) exercises any discretionary authority or discretionary control with respect to management of the plan, or exercises any authority or control with respect to management or disposition of plan assets; or

(B) has any discretionary authority or discretionary responsibility in the administration of the plan.

(12) Health status-related factor--Health status; medical condition, including both physical and mental illnesses; claims experience; receipt of health care; medical history; genetic information; evidence of insurability, including conditions arising out of acts of domestic violence; and disability, to the extent not inconsistent with ERISA, 29 U.S.C. §1182, concerning Prohibiting Discrimination Against Individual Participants and Beneficiaries Based on Health Status.

(13) Organizational documents--With respect to the plan and trust, the contracts, articles, bylaws, agreements, plan documents, trust agreements, or other documents or instruments describing the rights and obligations of:

(A) the PEO, its clients and coemployees; and

(B) the plan sponsor, its plan, plan trustees, administrators, and participants.

(14) Participant--A covered employee or dependent enrolled in a plan, to the extent not inconsistent with ERISA, 29 U.S.C. §1002 and §1144, concerning Other Laws.

(15) Person--An individual, corporation, partnership, association, joint stock company, trust, or unincorporated organization, or a similar entity or a combination of the listed entities acting in concert. The term does not include a securities broker while performing no more than a function that is usual and customary for a securities broker.

(16) Professional employer organization or PEO--A business entity that offers professional employer services, as defined in Labor Code Chapter 91.

(17) Plan--A self-funded employee health benefit plan established under Labor Code Chapter 91.

(18) Qualified financial institution--An institution that:

(A) is organized or, in the case of a United States branch or agency office of a foreign banking organization, licensed under the laws of the United States or any state of the United States; and

(B) is regulated, supervised, and examined by a federal or state authority that has regulatory authority over banks and trust companies.

(19) Reserves--A liability representing plan benefit obligations that have been incurred, whether known or unknown.

(20) TDI--The Texas Department of Insurance.

(21) TDLR--The Texas Department of Licensing and Regulation.

(22) Third party administrator--A person that holds a certificate of authority under Insurance Code Chapter 4151, Third Party Administrators.

(23) Trust--A trust established under Texas Property Code Title 9, Subtitle B, and ERISA, 29 U.S.C. §1103, concerning Establishment of Trust.

(24) Trustee--A person defined as a trustee under Texas Property Code Title 9, Subtitle B, to the extent not inconsistent with ERISA as provided in ERISA, 29 U.S.C. §1144, concerning Other Laws.

(25) Ultimate controlling person--A person that is not controlled by another person.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

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Norma Garcia
General Counsel
Texas Department of Insurance
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For further information, please call: (512) 676-6584

DIVISION 2. APPLICABILITY OF INSURANCE CODE AND ADMINISTRATIVE CODE PROVISIONS

28 TAC §§13.520 - 13.524

STATUTORY AUTHORITY. The new sections are adopted under Labor Code §91.0411 and Insurance Code §36.001.

Labor Code §91.0411 provides for the commissioner of insurance to adopt rules necessary to augment and implement the regulation of benefit plans sponsored by PEOs licensed by TDLR, which include requirements that must be met by the licensed PEO and plan. The rules must include initial and final approval requirements, authority to prescribe forms and items to be submitted to the commissioner by the license holder, a fidelity bond, use of an independent actuary, use of a third-party administrator, authority for the commissioner to examine an application or plan, the minimum number of clients and covered employees covered by the plan, standards for those natural persons managing the plan, the minimum amount of gross contributions, the minimum amount of written commitment, binder, or policy for stop-loss insurance, the minimum amount of reserves, and a fee in the amount reasonable and necessary to defray the costs of administering the section to be deposited to the credit of the operating fund of the Texas Department of Insurance.

Insurance Code §36.001 provides that the commissioner of insurance may adopt any rules necessary and appropriate to implement the powers and duties of the Texas Department of Insurance under the Insurance Code and other laws of this state.

§13.520. Applicability of Insurance Code Provisions to an Approved PEO, Plan, or Trust.

Under Labor Code §91.0411, this division lists Insurance Code and Administrative Code provisions that are necessary to augment and implement the regulation of a plan that is not fully insured.

§13.521. Applicable Insurance Code and Administrative Code Terms.

For purposes of this subchapter and for purposes of regulation by TDI:

(1) PEO as large employer. An approved PEO is a large employer as defined in Insurance Code Chapter 1501, concerning the Health Insurance Portability and Availability Act, unless a provision in this subchapter clearly indicates otherwise.

(2) PEO plan as large employer health benefit plan. An approved PEO's plan is a large employer health benefit plan as defined in Insurance Code Chapter 1501 unless a provision in this subchapter clearly indicates otherwise.

(3) Provisions applicable to both small and large employer plans. An Insurance Code or Administrative Code provision that refers to both small and large employer health benefit plans or their issuers applies to an approved PEO as a large employer health benefit plan issuer and to its plan as a large employer health benefit plan unless a provision in this subchapter clearly indicates otherwise.

(4) Plan document is group policy. An approved PEO's plan document is a group policy unless a provision in this subchapter clearly indicates otherwise.

(5) Certificate of coverage is certificate of insurance. An approved PEO's certificate of coverage is a certificate of insurance. An approved PEO's certificate of coverage must comply with ERISA, 29 U.S.C. §1022 (Summary plan description).

§13.522. Delegation of Functions to a Contracting Regulated Entity.

(a) Delegation to regulated entity. An approved PEO or the plan trustees may delegate to a contracting regulated entity the responsibility to perform any requirement of this subchapter that the contracting regulated entity is authorized by law to perform.

(b) Joint and several liability. If an approved PEO or the plan trustees delegate responsibility to perform any requirement of this subchapter, TDI in its sole discretion may hold the PEO, the plan trustees, and the contracting regulated entity jointly or severally liable for noncompliance with respect to the responsibilities delegated.

(c) Notice of contract with regulated entities. An approved PEO or the plan trustees must give the commissioner a written notice of intent to enter into a contract with a regulated entity at least 30 days before the effective date of that contract. A notice of intent must include the information about the contracting regulated entity required by §13.532(b)(6) of this title (relating to Application Requirements).

(d) Notice of termination of contract with regulated entity. Except as provided in subsection (g) of this section, an approved PEO or the plan trustees must give the commissioner a written notice of intent to terminate a contract with a regulated entity at least 30 days before the effective date of that termination.

(e) Third party administrator. An approved PEO or the plan trustees may not terminate under any circumstances a contract with the plan's third party administrator unless they have contracted with a replacement third party administrator to perform the day-to-day operations of the plan with no lapse in administrative services to the plan.

(f) Notice of replacement contracting regulated entity. Except as provided in subsection (h) of this section, if an approved PEO or the plan trustees intend to enter into a contract with a regulated entity to perform the functions for which a terminating contracting regulated entity was responsible, the approved PEO or the plan trustees must provide the commissioner notice that complies with subsection (c) of this section.

(g) Notice of contract termination for cause. If an approved PEO or the plan trustees terminate a contract with a regulated entity for cause as permitted by the terms of that contract, the approved PEO or the plan trustees must give the commissioner written notice of the contract's termination not later than five days after the effective date of that termination, including a statement explaining whether the functions for which the terminating contracting regulated entity is responsible will be performed by the approved PEO or by another contracting regulated entity.

(h) Notice of intent to contract with replacement regulated entity. After a termination under subsection (g) of this section, if the plan and trust functions will be performed by another contracting regulated entity, the approved PEO or the plan trustees must give the commissioner written notice of intent to enter into a contract with that new regulated entity as soon as is practicable, but not later than 10 days after the effective date of that contract. The notice of intent must include the information about the contracting regulated entity required by §13.532(b)(6) of this title.

§13.523. Applicable Insurance Code Provisions.

(a) The following provisions of the Insurance Code are applicable to an approved PEO to the same extent as the provisions apply to any entity TDI regulates under those provisions:

(1) Insurance Code Chapter 36, Subchapter C, concerning General Subpoena Powers; Witnesses and Production of Records;

(2) Insurance Code Chapter 36, Subchapter D, concerning Judicial Review;

(3) Insurance Code §38.001, concerning Inquiries;

(4) Insurance Code Chapter 38, Subchapter F, concerning Data Collecting and Reporting Relating to Mandated Health Benefits and Mandated Offers of Coverage;

(5) Insurance Code Chapter 38, Subchapter H, concerning Health Care Reimbursement Rate Information;

(6) Insurance Code Chapter 40, concerning Duties of State Office of Administrative Hearings and Commissioner in Certain Proceedings; Rate Setting Proceedings;

(7) Insurance Code Chapters 82, concerning Sanctions;

(8) Insurance Code Chapter 83, concerning Emergency Cease and Desist Orders;

(9) Insurance Code Chapter 84, concerning Administrative Penalties;

(10) Insurance Code Chapter 101, concerning Unauthorized Insurance;

(11) Insurance Code Chapter 461, concerning General Provisions;

(12) Insurance Code §521.005, concerning Notice to Accompany Policy;

(13) Insurance Code Chapter 541, Subchapter A, concerning General Provisions;

(14) Insurance Code Chapter 541, Subchapter B, concerning Unfair Methods of Competition and Unfair or Deceptive Acts or Practices Defined;

(15) Insurance Code Chapter 541, Subchapter B-1, concerning Advertising Requirements;

(16) Insurance Code Chapter 542, concerning Processing and Settlement of Claims;

(17) Insurance Code Chapter 543, concerning Prohibited Practices Related to Policy or Certificate of Membership;

(18) Insurance Code Chapter 544, Subchapter A, concerning General Prohibitions Against Discrimination by an Insurer or Health Maintenance Organization;

(19) Insurance Code Chapter 544, Subchapter B, concerning Other General Prohibitions Against Discrimination by Insurers;

(20) Insurance Code Chapter 544, Subchapter C, concerning English Fluency;

(21) Insurance Code Chapter 544, Subchapter D, concerning Family Violence;

(22) Insurance Code Chapter 544, Subchapter E, concerning Fibrocystic Breast Condition;

(23) Insurance Code Chapter 545, concerning HIV Testing;

(24) Insurance Code Chapter 546, concerning Use of Genetic Testing Information;

(25) Insurance Code §550.002, concerning Increase in Certain Premium Payments;

(26) Insurance Code Chapter 558, concerning Refund of Unearned Premium;

(27) Insurance Code Chapter 560, concerning Prohibited Rates;

(28) Insurance Code Chapter 601, concerning Privacy;

(29) Insurance Code Chapter 602, concerning Privacy of Health Information;

(30) Insurance Code Chapter 701, concerning Insurance Fraud Investigations;

(31) Insurance Code Chapter 705, concerning Misrepresentations by Policyholders;

(32) Insurance Code Chapter 801, concerning Certificate of Authority;

(33) Insurance Code Chapter 803, concerning Location of Books, Records, Accounts, and Offices Outside of this State;

(34) Insurance Code Chapter 804, concerning Service of Process;

(35) Insurance Code Chapter 823, Subchapter B, concerning Registration;

(36) Insurance Code Chapter 823, Subchapter C, concerning Transactions of Registered Insurer;

(37) Insurance Code Chapter 823, Subchapter D, concerning Control of Domestic Insurer; Acquisition or Merger;

(38) Insurance Code §1201.013, concerning Programs Promoting Disease Prevention, Wellness, and Health;

(39) Insurance Code §1201.059, concerning Termination of Coverage Based on Age of Child in Individual, Blanket, or Group Policy;

(40) Insurance Code §1201.062, concerning Coverage for Certain Children in Individual or Group Policy or in Plan or Program;

(41) Insurance Code §1201.063, concerning Prohibition of Certain Criteria Relating to a Child's Coverage in Individual or Group Policy;

(42) Insurance Code §1201.064, concerning Coverage for Child of Spouse in Individual or Group Policy;

(43) Insurance Code Chapter 1203, concerning Coordination of Benefits Provisions;

(44) Insurance Code Chapter 1204, Subchapter A, concerning Payments to Certain Public Hospitals;

(45) Insurance Code Chapter 1204, Subchapter B, concerning Assignment of Benefit Payments;

(46) Insurance Code Chapter 1204, Subchapter D, concerning Payments for Certain Publicly Provided Services;

(47) Insurance Code Chapter 1204, Subchapter E, concerning Exclusionary Clauses;

(48) Insurance Code Chapter 1204, Subchapter F, concerning Payment of Benefits to Conservator of Minor;

(49) Insurance Code Chapter 1205, concerning Certificate of Creditable Coverage;

(50) Insurance Code Chapter 1206, concerning Denial of Health Benefit Plan Enrollment Based on Existing Coverage Prohibited;

(51) Insurance Code Chapter 1207, concerning Enrollment of Medical Assistance Recipients and Children Eligible for State Child Health Plan;

(52) Insurance Code Chapter 1208, concerning Identity of Available Employee of Health Benefit Plan Issuer;

(53) Insurance Code Chapter 1210, concerning Notice of Certain Policy Provisions;

(54) Insurance Code Chapter 1213, concerning Electronic Health Care Transactions;

(55) Insurance Code Chapter 1214, concerning Advertising for Certain Health Benefits;

(56) Insurance Code Chapter 1215, concerning Reporting of Claims Information;

(57) Insurance Code Chapter 1216, concerning Out-of-Country Coverage Prohibited;

(58) Insurance Code Chapter 1251, Subchapter C, concerning Group Accident and Health Insurance: Required Provisions;

(59) Insurance Code Chapter 1251, Subchapter D, concerning Group Accident and Health Insurance: Coverage for Dependents;

(60) Insurance Code Chapter 1251, Subchapter E, concerning Group Accident and Health Insurance: General Provisions;

(61) Insurance Code Chapter 1251, Subchapter F, concerning Continuation or Conversion Privilege on Termination of Coverage under Group Policy, except that an approved PEO may not offer a conversion policy under Insurance Code §1251.256, concerning Conversion of Group Policy;

(62) Insurance Code Chapter 1251, Subchapter G, concerning Continuation of Group Coverage for Certain Family Members and Dependents;

(63) Insurance Code Chapter 1252, concerning Discontinuation and Replacement of Group and Group-Type Health Benefit Plan Coverage;

(64) Insurance Code Chapter 1274, concerning Electronic Transmission of Eligibility and Payment Status;

(65) Insurance Code Chapter 1301, concerning Preferred Provider Benefit Plans, except that a small PEO plan is not subject to §1301.009, concerning Annual Report;

(66) Insurance Code Chapter 1351, concerning Home Health Services;

(67) Insurance Code Chapter 1352, concerning Brain Injury;

(68) Insurance Code Chapter 1355, concerning Benefits for Certain Mental Disorders;

(69) Insurance Code Chapter 1356, concerning Low-Dose Mammography;

(70) Insurance Code Chapter 1357, concerning Mastectomy;

(71) Insurance Code Chapter 1358, concerning Diabetes;

(72) Insurance Code Chapter 1359, concerning Formulas for Individuals with Phenylketonuria or Other Heritable Diseases;

(73) Insurance Code Chapter 1360, concerning Diagnosis and Treatment Affecting Temporomandibular Joint;

(74) Insurance Code Chapter 1361, concerning Detection and Prevention of Osteoporosis;

(75) Insurance Code Chapter 1362, concerning Certain Tests for Detection of Prostate Cancer;

(76) Insurance Code Chapter 1363, concerning Certain Tests for Detection of Colorectal Cancer;

(77) Insurance Code Chapter 1364, concerning Coverage Provisions Relating to HIV, Aids, or HIV-Related Illnesses;

(78) Insurance Code Chapter 1365, concerning Loss or Impairment of Speech or Hearing;

(79) Insurance Code Chapter 1366, concerning Benefits Related to Fertility and Childbirth;

(80) Insurance Code Chapter 1367, concerning Coverage of Children;

(81) Insurance Code Chapter 1368, concerning Availability of Chemical Dependency Coverage;

(82) Insurance Code Chapter 1369, concerning Benefits Related to Prescription Drugs and Devices and Related Services;

(83) Insurance Code Chapter 1370, concerning Certain Tests for Detection of Human Papillomavirus, Ovarian Cancer, and Cervical Cancer;

(84) Insurance Code Chapter 1371, concerning Coverage for Certain Prosthetic Devices, Orthotic Devices, and Related Services;

(85) Insurance Code Chapter 1376, concerning Certain Tests for Early Detection of Cardiovascular Disease;

(86) Insurance Code Chapter 1377, concerning Coverage for Certain Amino Acid-Based Elemental Formulas;

(87) Insurance Code Chapter 1379, concerning Coverage for Routine Patient Care Costs for Enrollees Participating in Certain Medical Trials;

(88) Insurance Code Chapter 1451, concerning Access to Certain Practitioners and Facilities;

(89) Insurance Code Chapter 1453, concerning Disclosure of Reimbursement Guidelines under Managed Care Plan;

(90) Insurance Code Chapter 1454, concerning Equal Health Care for Women;

(91) Insurance Code Chapter 1455, concerning Telemedicine and Telehealth;

(92) Insurance Code Chapter 1456, concerning Disclosure of Provider Status;

(93) Insurance Code Chapter 1460, concerning Standards Required Regarding Certain Physician Rankings by Health Benefit Plans;

(94) Insurance Code Chapter 1467, concerning Out-of-Network Claim Dispute Resolution;

(95) Insurance Code Chapter 1501, Subchapter A, concerning General Provisions;

(96) Insurance Code Chapter 1501, Subchapter C, concerning Provision of Coverage;

(97) Insurance Code Chapter 1501, Subchapter M, concerning Large Employer Health Benefit Plans;

(98) Insurance Code Chapter 1502, concerning Health Benefit Plans for Children;

(99) Insurance Code Chapter 1503, concerning Coverage of Certain Students;

(100) Insurance Code Chapter 1504, concerning Medical Child Support;

(101) Insurance Code Chapter 1507, Subchapter A, concerning Consumer Choice of Benefits Health Insurance Plans;

(102) Insurance Code Chapter 1653, concerning High Deductible Health Plan;

(103) Insurance Code Chapter 1661, concerning Information Technology;

(104) Insurance Code Chapter 1701, concerning Policy Forms;

(105) Insurance Code Chapter 4201, concerning Utilization Review Agents; and

(106) Insurance Code Chapter 4202, concerning Independent Review Organizations.

(b) Approved PEO as insurer; client as policyholder. For purposes of applying provisions addressing refunds of unearned premiums in Insurance Code Chapter 558, an approved PEO is the equivalent of an insurer, and the approved PEO's client is the equivalent of a policyholder.

(c) Client as plan sponsor. For purposes of applying Insurance Code Chapter 1215, a client is the equivalent of a plan sponsor as defined by Insurance Code §1215.001, concerning Definitions.

(d) Approved PEO as insurer and employer. For purposes of applying Insurance Code Chapter 1251, Subchapters E, F, and G, an approved PEO is the equivalent of both an insurer and an employer.

(e) Approved PEO as insurer; client as group policyholder. For purposes of applying Insurance Code §1301.0061, an approved PEO is the equivalent of an insurer, and the approved PEO's client is the equivalent of a group policyholder.

(f) Approved PEO as employer. For purposes of applying provisions addressing required offers of coverage in Insurance Code Title 8, Subtitle E, concerning Benefits Payable under Health Coverages, an approved PEO is the equivalent of an employer entitled to elect or decline an offer of coverage required by the Insurance Code.

(g) Approved PEO as carrier; client as policyholder. For purposes of applying Insurance Code Chapter 1501, Subchapter A, an approved PEO is the equivalent of a health insurance carrier, and the approved PEO's client is the equivalent of a policyholder.

(h) Approved PEO as large employer issuer; client as employer. For purposes of applying Insurance Code Chapter 1501, Subchapter C, an approved PEO is the equivalent of a large employer health benefit plan issuer, and the approved PEO's client is the equivalent of an employer.

(i) Approved PEO as issuer; client as group contract holder. For purposes of applying provisions in Insurance Code Chapter 1365 addressing required offers of coverage, an approved PEO is the equivalent of a group health benefit plan issuer, and the approved PEO's client is the equivalent of a group contract holder.

§13.524. Applicability of Administrative Code Provisions to an Approved PEO, Plan, or Trust.

(a) Applicable Administrative Code provisions. The following provisions of this title are applicable to an approved PEO, or to its plan and trust, as appropriate, to the same extent as the provisions apply to any entity TDI regulates under those provisions:

(1) Chapter 1 of this title (relating to General Administration);

(2) Chapter 3, Subchapter A of this title (relating to Submission Requirements for Filings and Departmental Actions Related to Such Filings);

(3) Chapter 3, Subchapter E of this title (relating to Group Life, and/or Accident and Health Insurance Policies and Certificates);

(4) Chapter 3, Subchapter G of this title (relating to Plain Language Requirements for Health Benefit Policies);

(5) Chapter 3, Subchapter M of this title (relating to Discretionary Clauses);

(6) Chapter 3, Subchapter U of this title (relating to Newborn Children Coverage);

(7) Section 3.3601 of this title (relating to Orthodontic Coverages);

(8) Chapter 3, Subchapter V of this title (relating to Coordination of Benefits);

(9) Chapter 3, Subchapter X of this title (relating to Preferred and Exclusive Provider Plans);

(10) Chapter 3, Subchapter BB of this title (relating to Pharmaceutical Services);

(11) Chapter 3, Subchapter HH of this title (relating to Standards for Reasonable Cost Control and Utilization Review for Chemical Dependency Treatment Centers);

(12) Chapter 7, Subchapter B of this title (relating to Insurance Holding Company Systems);

(13) Chapter 12 of this title (relating to Independent Review Organizations);

(14) Chapter 19, Subchapter R of this title (relating to Utilization Review for Health Care Provided Under a Health Benefit Plan or Health Insurance Policy);

(15) Chapter 21, Subchapter A of this title (relating to Unfair Competition and Unfair Practices of Insurers, and Misrepresentation of Policies);

(16) Chapter 21, Subchapter B of this title (relating to Advertising, Certain Trade Practices, and Solicitation);

(17) Chapter 21, Subchapter C of this title (relating to Unfair Claims Settlement Practices);

(18) Chapter 21, Subchapter E of this title (relating to Unfair Discrimination Based on Sex or Marital Status);

(19) Chapter 21, Subchapter H of this title (relating to Unfair Discrimination);

(20) Chapter 21, Subchapter K of this title (relating to Certification of Creditable Coverage);

(21) Chapter 21, Subchapter L of this title (relating to Medical Child Support, Unfair Practices);

(22) Chapter 21, Subchapter M of this title (relating to Mandatory Benefit Notice Requirements);

(23) Chapter 21, Subchapter P of this title (relating to Mental Health Parity);

(24) Chapter 21, Subchapter Q of this title (relating to Complaint Records to be Maintained);

(25) Chapter 21, Subchapter R of this title (relating to Diabetes);

(26) Chapter 21, Subchapter T of this title (relating to Submission of Clean Claims);

(27) Chapter 21, Subchapter V of this title (relating to Pharmacy Benefits);

(28) Chapter 21, Subchapter W of this title (relating to Coverage for Acquired Brain Injury);

(29) Chapter 21, Subchapter Y of this title (relating to Unfair Discrimination in Compensation for Women's Healthcare);

(30) Chapter 21, Subchapter Z of this title (relating to Data Collecting and Reporting Relating to Mandated Health Benefits and Mandated Offers of Coverage);

(31) Chapter 21, Subchapter AA of this title (relating to Consumer Choice Health Benefit Plans);

(32) Chapter 21, Subchapter BB of this title (relating to Dental Care Benefits);

(33) Chapter 21, Subchapter CC of this title (relating to Electronic Health Care Transactions);

(34) Chapter 21, Subchapter DD of this title (relating to Eligibility Statements);

(35) Chapter 21, Subchapter EE of this title (relating to High Deductible Health Plans);

(36) Chapter 21, Subchapter FF of this title (relating to Obligation to Continue Premium Payment and Coverage After Notice of Lost Group Eligibility);

(37) Chapter 21, Subchapter II of this title (relating to Recognition of National Certifying Organizations for Noninvasive Screening of Cardiovascular Disease);

(38) Chapter 21, Subchapter JJ of this title (relating to Autism Spectrum Disorder Coverage);

(39) Chapter 21, Subchapter KK of this title (relating to Health Care Reimbursement Rate Information);

(40) Chapter 21, Subchapter MM of this title (relating to Wellness Programs);

(41) Chapter 21, Subchapter NN of this title (relating to Noninsurance Benefits and Features);

(42) Chapter 21, Subchapter PP of this title (relating to Out-Of-Network Claim Dispute Resolution);

(43) Chapter 21, Subchapter RR of this title (relating to Standard Proof of Health Insurance for Medical Benefits for Injuries Incurred as a Result of a Motorcycle Accident);

(44) Chapter 21, Subchapter SS of this title (relating to Continuation and Conversion Provisions);

(45) Chapter 22 of this title (relating to Privacy); and

(46) Chapter 26 of this title (relating to Small Employer Health Insurance Regulations).

(b) Plan as large employer plan. For purposes of applying Chapter 21, Subchapter P or W of this title, a plan sponsored by an approved PEO is the equivalent of a large employer health benefit plan, regardless of the size of any of the approved PEO's clients.

(c) Approved PEO as insurer; client as group policyholder. For purposes of applying Chapter 21, Subchapter FF of this title, an approved PEO is the equivalent of a health insurer, and the approved PEO's client is the equivalent of a group policyholder.

(d) Approved PEO as large employer carrier and large employer. Except as provided in subsection (e) of this section, for purposes of applying Chapter 26 of this title, an approved PEO is the equivalent of both a large employer carrier and a large employer.

(e) Approved PEO as large employer carrier; client as large employer. For purposes of applying §26.303 and §§26.307 - 26.309 of this title, (relating to Coverage Requirements, Fair Marketing, Renewability of Coverage and Cancellation, and Refusal to Renew and Application to Reenter Large Employer Market), an approved PEO is the equivalent of a large employer carrier, and the approved PEO's client is the equivalent of a large employer.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

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DIVISION 3. CERTIFICATE OF APPROVAL

28 TAC §§13.530 - 13.534

STATUTORY AUTHORITY. The new sections are adopted under Labor Code §91.0411 and Insurance Code §36.001.

Labor Code §91.0411 provides for the commissioner of insurance to adopt rules necessary to augment and implement the regulation of benefit plans sponsored by PEOs licensed by TDLR, which include requirements that must be met by the licensed PEO and plan. The rules must include initial and final approval requirements, authority to prescribe forms and items to be submitted to the commissioner by the license holder, a fidelity bond, use of an independent actuary, use of a third-party administrator, authority for the commissioner to examine an application or plan, the minimum number of clients and covered employees covered by the plan, standards for those natural persons managing the plan, the minimum amount of gross contributions, the minimum amount of written commitment, binder, or policy for stop-loss insurance, the minimum amount of reserves, and a fee in the amount reasonable and necessary to defray the costs of administering the section to be deposited to the credit of the operating fund of the Texas Department of Insurance.

Insurance Code §36.001 provides that the commissioner of insurance may adopt any rules necessary and appropriate to implement the powers and duties of the Texas Department of Insurance under the Insurance Code and other laws of this state.

§13.530. Certificate of Approval Required.

A PEO may not sponsor a plan in Texas unless the PEO has received a certificate of approval issued under this subchapter and is operating its plan and trust as required by this subchapter. If a PEO receives and maintains a certificate of approval under this subchapter, it will not be considered an unauthorized insurer for purposes of Insurance Code Chapter 101, concerning Unauthorized Insurance.

§13.531. Forms and Fees.

(a) Form of application. A PEO must apply for a certificate of approval by providing the information required by this division.

(b) Application fee. Each application for a certificate of approval must be accompanied by a nonrefundable application fee of $5,050.

§13.532. Application Requirements.

(a) Organizational information. An applicant must provide the following information and documentation about its structure and operations:

(1) its name, federal employer identification number, location, and a means for contacting its representative for purposes of the application;

(2) the physical location of the plan and trust's books and records, and its means of maintaining the books and records;

(3) the name of the applicant's ultimate controlling person or persons;

(4) the documents or instruments describing the rights and obligations between the applicant and its clients, including but not limited to all forms of its professional employer services agreement;

(5) a description of the applicant's basic organizational structure, including organizational charts or lists that show:

(A) the relationships and contracts between the applicant and any affiliates of the applicant that affect the plan; and

(B) the internal organizational structure of the applicant's management and administrative staff;

(6) disclosure of any suit or judgment filed in a matter involving dishonesty, breach of trust, or a financial dispute within the last 10 years against the applicant, an ultimate controlling person, or any other persons from whom biographical information is provided under paragraph (10) of this subsection;

(7) a copy of its most recent TDLR license;

(8) a financial statement of the applicant covering a period ending not more than 180 days prior to the date of the application, that is prepared using generally accepted accounting principles of the United States and includes:

(A) a balance sheet that reflects a solvent financial position;

(B) an income statement;

(C) a cash flow statement; and

(D) the sources and uses of all funds;

(9) evidence that the applicant has engaged or will engage a sufficient number of competent persons to:

(A) administer the plan; and

(B) provide claims adjusting and underwriting services to the plan;

(10) evidence of the PEO's fidelity coverage that complies with §13.542 of this title (relating to PEO's Fidelity Coverage); and

(11) for all plans sponsored by the applicant, whether operating in Texas or in any other state, a list of and access to all reports for the last three years created and filed with the United States Department of Labor in compliance with Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. §§1021(g), concerning Reporting by Certain Arrangements; 1023, concerning Annual Reports; and 1024, concerning Filing and Furnishing of Information.

(b) Plan and trust information and documentation. An applicant must provide the following information and documentation about its plan and trust:

(1) proof of deposit or letter of credit satisfying the financial solvency requirements of Division 6 of this subchapter;

(2) financial projections of the trust covering three full years of operation that are prepared using generally accepted accounting principles of the United States and include:

(A) a balance sheet that reflects a solvent financial position;

(B) an income statement;

(C) a cash flow statement; and

(D) the sources and uses of all funds;

(3) a written investment plan in compliance with Insurance Code §425.105, concerning Written Investment Plan;

(4) an actuarial opinion supporting the structure of the plan meeting the requirements of §13.533 of this title (relating to Actuarial Opinion Requirements);

(5) a description of the applicant's plan to service plan billings, claims, and underwriting;

(6) the name and Texas license number of each contracted regulated entity the trust proposes to engage to service the plan, and a copy of each agreement or proposed agreement with a contracted regulated entity;

(7) each organizational document of the plan and trust, including:

(A) the plan document;

(B) the plan's summary plan description, created in compliance with ERISA, 29 U.S.C. §1022, concerning Summary Plan Description; and

(C) the trust agreement;

(8) the name of the named fiduciary or fiduciaries who jointly or severally will have authority to control and manage the operation and administration of the plan, as required by ERISA, 29 U.S.C. §1102(a), concerning Establishment of Plan;

(9) the name of the administrator designated by the terms of the instrument under which the plan is operated, as defined by ERISA, 29 U.S.C. §1002(16)(A);

(10) biographical information about each person who governs or manages the affairs of the applicant or the plan and trust, accompanied by information sufficient to allow the commissioner to determine the competence, fitness, and reputation of each officer or director of the applicant or other controlling person, and including disclosure of whether the person is prohibited from serving in any capacity under ERISA, 29 U.S.C. §1111, (concerning Persons Prohibited from Holding Certain Positions). An applicant must provide the required biographical information on TDI form number FIN311, Biographical Affidavit, available on TDI's website, and must list the full name and address of the PEO where the form requires "Full Name and Address of Company/HMO;"

(11) a complete set of fingerprints for the individuals described in paragraph (10) of this subsection using the procedures set out in Chapter 1, Subchapter D of this title (relating to Effect of Criminal Conduct), unless the individual meets the exemption in that subchapter or provides evidence that the individual has successfully completed the fingerprinting process conducted during the applicant's licensing or license renewal process through TDLR;

(12) evidence of the trustees' fidelity coverage and errors and omissions policy that comply with §13.556 of this title (relating to Protection of Plan and Trust Assets); and

(13) an attestation that the plan and trust have been established in compliance with §13.550 and §13.551 of this title (relating to Plan Formation and Trust Formation).

(c) Officers' attestation. An applicant must provide a written attestation signed by two principal officers of the applicant who have submitted biographical affidavits that the information and documentation provided in compliance with subsections (a) and (b) of this section is true and correct and complies with applicable federal and state laws and regulations, including this subchapter, to the best of their knowledge and belief.

(d) Service of Process. An applicant must appoint the commissioner as its resident agent for purposes of service of process as provided in Insurance Code Chapter 804, concerning Service of Process, in the same manner as a domestic company.

§13.533. Actuarial Opinion Requirements.

The independent actuarial opinion submitted with the application must:

(1) describe the extent to which projected plan contributions:

(A) are not excessive;

(B) are not unfairly discriminatory;

(C) are adequate to pay all of the plan's:

(i) benefit payments;

(ii) administrative expenses;

(iii) other operational expenses; and

(D) are sufficient to maintain the required reserves and surplus to be held in trust for the plan's participants; and

(2) include a statement allocating the projected plan contributions to be charged to clients for plan coverage for:

(A) the plan's administrative expenses;

(B) plan reserves; and

(C) all other expenses associated with operation of the applicant's plan.

§13.534. Application Review, Approval, and Denial.

(a) Commissioner's review. The commissioner will review the applicant's submission and other pertinent information, including information from TDLR, to ensure the applicant's compliance with applicable statutes and regulations, and:

(1) conduct any investigation that the commissioner considers necessary to determine whether the applicant has obtained an appropriate license or has delegated to contracting regulated entities, adequate facilities, resources, and competent personnel, as determined by the commissioner, to administer the plan and trust;

(2) examine under oath any person interested in or connected with the applicant or its plan or trust; or

(3) perform an examination to confirm compliance with applicable Texas statutes and rules, including funding of the trust.

(b) Application approval. After completing the review, the commissioner will approve an application for a certificate of approval if the commissioner has determined there is no cause for denial as listed in subsection (d) of this section and if the application for certificate of approval meets the requirements of §13.532 of this title (relating to Application Requirements).

(c) Term of certificate of approval. A certificate of approval remains in effect until terminated at the request of the approved PEO or canceled by the commissioner.

(d) Application denial. The commissioner will deny the application in writing in the following circumstances:

(1) if the applicant does not meet the requirements of §13.532 of this title; or

(2) if the applicant, any person representing the applicant, a member of the board of trustees, or any person that has a fiduciary relationship with the trust:

(A) makes a material misstatement or omission in the application for a certificate of approval;

(B) obtains or attempts to obtain at any time a certificate of approval or license for an insurance entity through intentional misrepresentation or fraud;

(C) misappropriates or converts to the person's own use or improperly withholds money under any fiduciary relationship;

(D) is prohibited from serving in any capacity under Employee Retirement Income Security Act of 1974, 29 U.S.C. §1111;

(E) without reasonable cause or excuse, fails to appear in response to a subpoena, examination, or any other order lawfully issued by the commissioner;

(F) has previously been subject to a determination by the commissioner resulting in:

(i) suspension or revocation of a certificate of approval or license; or

(ii) denial of a certificate of approval or license on grounds that would be sufficient for suspension or revocation; or

(G) is not eligible for licensure under Chapter 1, Subchapter D of this title (relating to Effect of Criminal Conduct).

(e) Notice of denial. If the commissioner denies the application, the commissioner will issue a written notice of denial to the applicant. The notice will state the basis for the denial.

(f) Hearing on denial. If, within 30 days of receiving a notice under subsection (e) of this section, the applicant submits a written request for a hearing, the commissioner will file a request to set a hearing at the State Office of Administrative Hearings, at which the applicant will be given an opportunity to show compliance with the related Insurance Code provisions and regulations. Hearings described in this subchapter will be conducted as required by Government Code Chapter 2001, concerning Administrative Procedure; Insurance Code Chapter 40, concerning Duties of State Office of Administrative Hearings and Commissioner in Certain Proceedings; Rate Setting Proceedings; TDI's and State Office of Administrative Hearing's rules of procedure; and any other applicable law and regulations.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

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DIVISION 4. CONDUCT OF APPROVED PEO

28 TAC §§13.540 - 13.545

STATUTORY AUTHORITY. The new sections are adopted under Labor Code §91.0411 and Insurance Code §36.001.

Labor Code §91.0411 provides for the commissioner of insurance to adopt rules necessary to augment and implement the regulation of benefit plans sponsored by PEOs licensed by TDLR, which include requirements that must be met by the licensed PEO and plan. The rules must include initial and final approval requirements, authority to prescribe forms and items to be submitted to the commissioner by the license holder, a fidelity bond, use of an independent actuary, use of a third-party administrator, authority for the commissioner to examine an application or plan, the minimum number of clients and covered employees covered by the plan, standards for those natural persons managing the plan, the minimum amount of gross contributions, the minimum amount of written commitment, binder, or policy for stop-loss insurance, the minimum amount

of reserves, and a fee in the amount reasonable and necessary to defray the costs of administering the section to be deposited to the credit of the operating fund of the Texas Department of Insurance.

Insurance Code §36.001 provides that the commissioner of insurance may adopt any rules necessary and appropriate to implement the powers and duties of the Texas Department of Insurance under the Insurance Code and other laws of this state.

§13.540. Governance and Operation of Approved PEO.

(a) Management of approved PEO. An approved PEO must be managed by competent and trustworthy individuals. An individual responsible for risk management, financial reporting, underwriting, claims, or investment functions of the plan and trust must be eligible for licensure based on the guidelines established in Chapter 1, Subchapter D of this title (relating to Effect of Criminal Conduct) and hold any necessary licenses as required by the Insurance Code.

(b) Initial plan administration. An approved PEO must contract with a third party administrator to perform the day-to-day operations of the plan until the plan's trustees have contracted with a third party administrator to perform the day-to-day operations of the plan as provided in §13.555 of this title (relating to Trustees' Responsibility and Authority).

(c) Location of books and records. An approved PEO may request to maintain the plan and trust's books and records outside this state in compliance with Insurance Code Chapter 803.

§13.541. Stop-Loss Insurance.

An approved PEO must contract for stop-loss insurance in the name of and on behalf of the plan and trust that complies with §13.567 of this title (relating to Stop-Loss Insurance), until the trustees have contracted for stop-loss insurance as provided in §13.555 of this subchapter.

§13.542. PEO's Fidelity Coverage.

An approved PEO must maintain a fidelity bond or a zero-deductible crime policy that complies with the requirements of §13.568 of this title (relating to Standards for Fidelity Coverage). The fidelity bond or zero-deductible crime policy must cover each person responsible for handling or administering plan assets, including: the approved PEO; its directors, officers, and employees; or any other individual responsible for servicing the plan.

§13.543. Approved PEO's Conduct with Respect to the Plan and Trust.

(a) Assessed contributions. Contributions assessed by the approved PEO from clients for coverage for their participants must be sufficient to fund at least 100 percent of the plan and trust's aggregate stop-loss retention, as provided in Division 6 of this subchapter, plus all other expenses of the plan and trust.

(b) Payments to the trust. An approved PEO must transfer to the trust all payments from clients or participants that represent or that are intended as contributions to the trust as soon as those amounts can reasonably be segregated from the approved PEO's general assets, but no later than 15 days after receipt. These payments are plan assets.

(c) Reimbursement from plan assets. An approved PEO may be reimbursed by the trust for its reasonable expenses incurred to:

(1) establish and initially administer the plan and trust; and

(2) comply with this subchapter, including contracting for stop-loss insurance and fidelity coverage.

(d) Transactions with respect to plan and trust. An approved PEO in its transactions with respect to the plan and trust must not:

(1) deal with plan assets in its own interest or for its own account;

(2) act on behalf of or represent a person whose interests are adverse to the interests of the plan or the interests of its participants; or

(3) receive any consideration from any person dealing with the plan and trust in connection with a transaction involving plan assets.

(e) Conduct with respect to plan and trust. An approved PEO's conduct with respect to the plan and trust must remain in compliance with applicable federal and state laws.

§13.544. Marketing Materials; Offers of Enrollment.

(a) Marketing material. An approved PEO's marketing material discussing the plan and trust must be fair and accurate, and must not represent the plan or a prospective client's projected contributions to be assessed for coverage under the plan in a way that is materially inaccurate or misleading.

(b) Offer of enrollment. An approved PEO must offer enrollment in the plan to the covered employees of any client that agrees to meet the terms and conditions of the PEO's professional employer services agreement and elects to enroll its covered employees in the plan.

(c) Guaranteed renewability. A PEO may not deny a client whose employees are covered under the plan continued access to coverage under the terms of the plan, other than:

(1) for nonpayment of contributions;

(2) for fraud or other intentional misrepresentation of material fact by the client;

(3) for noncompliance with material plan provisions;

(4) because the plan is ceasing to offer any coverage in a geographic area;

(5) in the case of a plan that offers benefits through a network plan, there is no longer any individual enrolled through the client who lives, resides, or works in the service area of the network plan and the plan applies this paragraph uniformly without regard to the claims experience of clients or any health status-related factor in relation to such individuals or their dependents; or

(6) for failure to meet the terms of an applicable collective bargaining agreement, to renew a collective bargaining or other agreement requiring or authorizing contributions to the plan, or to employ employees covered by such an agreement.

§13.545. Representations to Clients and Participants.

(a) Pricing and billing. An approved PEO must be fair and accurate in its pricing and billings with respect to the plan, and may not make any materially inaccurate, knowingly or recklessly misleading, or fraudulent misrepresentations of the projected contributions to be assessed for plan coverage for a client's covered employees or participants.

(b) Notice of increased contribution. An approved PEO may not increase a client's contribution amount without giving the client at least 60 days' advance notice of the amount of the increase.

(c) PEO solely responsible if trust assets insufficient. An approved PEO's professional employer services agreement must provide that the PEO, and not the client, will be responsible for funding any additional asset amount needed to equal the liabilities owed by the plan. An approved PEO may not contractually obligate its clients to make up any shortfall in trust assets.

(d) Agreement in conflict with this subchapter. An approved PEO's professional employer services agreement is unenforceable to the extent that it conflicts with the requirements of this subchapter.

(e) Summary plan description. An approved PEO must provide each participant an evidence of coverage and a summary plan description specific to the participant's plan. The summary plan description must contain the following statement: "The benefits and coverages described in this document are provided through a self-funded health benefit plan and trust fund established and funded by your employers, {insert the name of the covered employer and the approved PEO}. The plan and trust are established in compliance with Chapter 91 of the Texas Labor Code and the Employee Retirement Income Security Act of 1974, 29 U.S.C. §§1001-1191c. This is not an insurance contract, and you are not protected by an insurance guarantee fund or other protective governmental program."

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DIVISION 5. FORMATION, GOVERNANCE, AND OPERATION OF PLAN AND TRUST

28 TAC §§13.550 - 13.557

STATUTORY AUTHORITY. The new sections are adopted under Labor Code §91.0411 and Insurance Code §36.001.

Labor Code §91.0411 provides for the commissioner of insurance to adopt rules necessary to augment and implement the regulation of benefit plans sponsored by PEOs licensed by TDLR, which include requirements that must be met by the licensed PEO and plan. The rules must include initial and final approval requirements, authority to prescribe forms and items to be submitted to the commissioner by the license holder, a fidelity bond, use of an independent actuary, use of a third-party administrator, authority for the commissioner to examine an application or plan, the minimum number of clients and covered employees covered by the plan, standards for those natural persons managing the plan, the minimum amount of gross contributions, the minimum amount of written commitment, binder, or policy for stop-loss insurance, the minimum amount of reserves, and a fee in the amount reasonable and necessary to defray the costs of administering the section to be deposited to the credit of the operating fund of the Texas Department of Insurance.

Insurance Code §36.001 provides that the commissioner of insurance may adopt any rules necessary and appropriate to implement the powers and duties of the Texas Department of Insurance under the Insurance Code and other laws of this state.

§13.550. Plan Formation.

(a) Establishing the plan. A PEO applying for a certificate of approval must establish its plan in compliance with the Employee Retirement Income Security Act of 1974, 29 U.S.C. §1102, concerning Establishment of Plan.

(b) Required plan provisions. The plan:

(1) must be a nonprofit entity;

(2) must hold all plan assets in a trust as established under §13.551 of this title (relating to Trust Formation);

(3) must accept as participants the covered employees or dependents of covered employees of every client that elects to allow its covered employees to participate in the plan; and

(4) may not condition participation on a client's claims history or its covered employees' health status-related factors.

(c) Plan amendment. An approved PEO may amend the terms of its plan without the approval of the plan's trustees; the trustees may not amend the terms of the plan.

(d) Approval of plan amendment. A plan amendment must be submitted to TDI as provided in §13.552 of this title (relating to Required Filings) for review and approval by the commissioner before becoming effective.

§13.551. Trust Formation.

(a) Establishing the trust. A PEO applying for a certificate of approval must establish a trust in compliance with both Texas Property Code Title 9, Subtitle B, concerning Texas Trust Code: Creation, Operation, and Termination of Trusts; and the Employee Retirement Income Security Act of 1974, 29 U.S.C. §1103, concerning Establishment of Trust, in which all funds used to administer and pay claims and expenses arising from the plan must be held.

(b) Powers of the trust. Except as otherwise provided in the trust document, the powers of the trust must be exercised by a board of trustees elected to carry out the purposes established by the organizational documents of the trust.

(c) Trust agreement. The trust agreement or other document establishing the trust must:

(1) include the names of the persons creating the trust and the names and signatures of each of the initial trustees;

(2) state that all plan assets will be kept continuously in a qualified financial institution;

(3) outline the powers and duties of the board of trustees;

(4) provide that board decisions must be made by at least a simple majority;

(5) give the trustees exclusive authority and discretion to manage and control plan assets;

(6) provide that the trustees will not be subject to the direction of a named fiduciary; and

(7) provide that plan assets will never inure to the benefit of any employer and will be held for the exclusive purposes of providing benefits to plan participants and defraying reasonable expenses of administering the plan.

(d) Trust amendment. The trust agreement or other document establishing the trust must provide that:

(1) only the plan's trustees may amend the terms of the trust, and may do so without the approval of the approved PEO;

(2) an amendment to the trust document must be approved by at least a simple majority of the trustees; and

(3) a trust amendment must be submitted to TDI as provided in §13.552 of this title (relating to Required Filings) for review and approval by the commissioner before becoming effective.

§13.552. Required Filings.

(a) Plan amendment. An approved PEO must file each plan amendment with the Life and Health Lines Office of TDI for prior approval by the commissioner. An amendment will not be effective until approved by the commissioner. The approved PEO's filing must include a statement by the approved PEO certifying that, to the best of the signer's knowledge and belief, in adopting the plan amendment, the approved PEO and the plan will remain in compliance with this subchapter and all applicable provisions of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. §§1001-1191c.

(b) Trust amendment. An approved PEO must file each amendment to the trust agreement or any other organizational document of the trust with the Company Licensing and Registration Office of TDI for prior approval by the commissioner. An amendment will not be effective until approved by the commissioner. The approved PEO's filing must include a statement by the plan's trustees certifying that, to the best of the trustees' knowledge and belief, in adopting the trust amendment the plan and the trust will remain in compliance with this subchapter and all applicable provisions of ERISA, 29 U.S.C. §§1001-1191c.

(c) Transactions between parties. Agreements and transactions between or among the approved PEO, an affiliate, and the trust are subject to Insurance Code Chapter 823, Subchapters B and C, including the filing requirements of these subchapters. For the purposes of this subchapter, an affiliate and a trust are each considered members of an insurance holding company system as described in Insurance Code §823.006, concerning Description of Insurance Holding Company System.

§13.553. Plan and Trust Governance and Operation.

(a) Fiduciary duty. A fiduciary must discharge his or her duties with respect to a plan solely in the interest of the participants, and:

(1) for the exclusive purposes of:

(A) providing benefits to participants; and

(B) defraying reasonable expenses of administering the plan;

(2) with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent person acting in like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims; and

(3) in compliance with the documents and instruments governing the plan so long as those documents and instruments are consistent with this subchapter and with all other applicable state and federal laws.

(b) Transactions between fiduciary and plan. A fiduciary in its transactions with respect to the plan and trust must not:

(1) deal with plan assets in its own interest or for its own account;

(2) act on behalf of or represent a person whose interests are adverse to the interests of the plan or the interests of its participants; or

(3) receive any consideration from any party dealing with the plan and trust in connection with a transaction involving plan assets.

(c) Plan and trust expenses. All expenses of the plan and trust must be paid from plan assets. Expenses include but are not limited to:

(1) administration of the plan and trust; and

(2) the plan and trust's reasonable expenses incurred to comply with this subchapter, including contracting for stop-loss insurance, fidelity coverage, and errors and omissions insurance.

(d) Voluntary termination of trust. The trust agreement must provide for the distribution of plan assets on dissolution of the trust. The distribution of assets must be consistent with of the Employee Retirement Income Security Act of 1974, 29 U.S.C. §1103 and §1104, concerning Fiduciary Duties, and related guidance by the U.S. Department of Labor. The trust's assets may not be distributed until the commissioner has canceled the approved PEO's certificate of approval under Division 8 of this title (relating to Market Exit).

§13.554. Board of Trustees.

(a) Appointment. An approved PEO may appoint members of the board of trustees.

(b) Number of members. The board of trustees must have no fewer than three members.

(c) Ineligible individuals. An owner, officer, or employee of a third party administrator or contracted regulated entity that provides services to the approved PEO, or any other person that has received compensation from the plan or trust may not serve as a board member.

§13.555. Trustees' Responsibility and Authority.

(a) Responsible for operations and assets. Members of the board of trustees are responsible for all operations of the trust and must take all necessary precautions to safeguard plan assets.

(b) Contract for plan administration. Within 12 months of the establishment of the initial board of trustees, the board of trustees must contract with a third party administrator to perform the day-to-day operations of the plan.

(c) Insure payment of claims. Within 12 months of the establishment of the initial board of trustees, the board of trustees, or an approved PEO acting as their agent, will contract for, and pay for with plan assets, a stop-loss insurance agreement in the name of and for the benefit of the plan and trust that complies with the requirements of §13.567 of this title (relating to Stop-Loss Insurance) to insure payment of all claims arising under the terms of the plan.

(d) Appointment of agents. The trustees may appoint agents for the trust as necessary to meet the obligations of the plan and trust. Each agent may only exercise the authority and perform the duties required in the management of the trust and the affairs of the plan that is delegated to them by the board of trustees.

(e) Service without compensation. A member of the board of trustees serves without compensation except for actual and necessary expenses.

§13.556. Protection of Plan and Trust Assets.

(a) Trustees' fidelity coverage. The board of trustees must maintain a fidelity bond or a zero-deductible crime policy that complies with the requirements of §13.568 of this title (relating to Standards for Fidelity Coverage). The fidelity bond or zero-deductible crime policy must cover each person responsible for handling or administering plan assets, including the board of trustees, the approved PEO, its directors, officers, agents and employees, or any other individual responsible for servicing the plan.

(b) Errors and omissions insurance. The board of trustees must purchase an errors and omissions policy in the amount of $500,000 to cover the performance of their duties to the plan and trust. The policy must be purchased from a company that satisfies the requirements of §13.568(a)(2) of this title.

(c) Ensuring existence of PEO's fidelity coverage. The trustees must annually require that the approved PEO provide them with documentation that it has maintained and is maintaining in effect fidelity coverage that complies with §13.542 of this title (relating to PEO's Fidelity Coverage).

§13.557. Disputes Arising Under the Plan or Trust.

Benefit claims or other disputes arising under an approved PEO's plan are subject to the Insurance Code, including utilization review and independent review under Insurance Code Title 14, concerning Utilization Review and Independent Review, and to resolution under state law in the same manner as are benefit claims or disputes arising under a large employer health benefit plan issued under Insurance Code Chapter 1501, concerning the Health Insurance Portability and Availability Act, to the extent not inconsistent with the Employee Retirement Income Security Act of 1974 (ERISA) as provided in ERISA, 29 U.S.C. §1144.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

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DIVISION 6. FINANCIAL SOLVENCY REQUIREMENTS FOR PEO PLANS

28 TAC §§13.560 - 13.568

STATUTORY AUTHORITY. The new sections are adopted under Labor Code §91.0411 and Insurance Code §36.001.

Labor Code §91.0411 provides for the commissioner of insurance to adopt rules necessary to augment and implement the regulation of benefit plans sponsored by PEOs licensed by TDLR, which include requirements that must be met by the licensed PEO and plan. The rules must include initial and final approval requirements, authority to prescribe forms and items to be submitted to the commissioner by the license holder, a fidelity bond, use of an independent actuary, use of a third-party administrator, authority for the commissioner to examine an application or plan, the minimum number of clients and covered employees covered by the plan, standards for those natural persons managing the plan, the minimum amount of gross contributions, the minimum amount of written commitment, binder, or policy for stop-loss insurance, the minimum amount of reserves, and a fee in the amount reasonable and necessary to defray the costs of administering the section to be deposited to the credit of the operating fund of the Texas Department of Insurance.

Insurance Code §36.001 provides that the commissioner of insurance may adopt any rules necessary and appropriate to implement the powers and duties of the Texas Department of Insurance under the Insurance Code and other laws of this state.

§13.560. Annual and Quarterly Reserves.

The financial statements filed by an approved PEO under §13.570 of this title (relating to Financial Filing Requirements) must report the trust's reserves as described below:

(1) the trust's year-end reserves must be calculated as the difference between the trust's total claim distributions and the aggregate limit attachment point of its stop-loss insurance agreement for each plan year;

(2) the total claim distributions number used in paragraph (1) of this section must be the amount of paid claims reduced by any amount either received or recoverable by the trust associated with the specific attachment point included in its stop-loss insurance agreement;

(3) the trust's quarterly reserves must equal the total amount of its known unpaid claims as the end of the respective calendar quarter; and

(4) the known unpaid claims number used in paragraph (3) of this section is the amount of reserve established for a claim when it is received, reduced by any amount recoverable by the trust associated with the specific attachment point included in its stop-loss insurance agreement.

§13.561. Authorized Investments.

The trust must invest its assets in compliance with Insurance Code Chapter 425, Subchapter C, concerning Authorized Investments and Transactions for Capital Stock, Life, Health, and Accident Insurers.

§13.562. Deposit or Letter of Credit Required.

(a) Initial deposit or letter of credit. Before receiving a certificate of approval, a PEO applying for a certificate of approval must establish a deposit of at least 25 percent of the attachment point of the aggregate limit included in the plan's stop-loss insurance agreement or establish a letter of credit for that amount.

(b) Proof of deposit. The commissioner adopts by reference both Statutory Deposit Transaction Form, Form No. FIN407 (rev.1115), and Declaration of Trust Form, Form No. FIN453 (rev.1115). Both forms are available on TDI's website. An applicant must give proof of its deposit on both TDI's Statutory Deposit Transaction Form and TDI's Declaration of Trust Form.

(c) Continuing deposit or letter of credit. An approved PEO sponsoring a plan must maintain a deposit or letter of credit of at least 25 percent of the attachment point of the aggregate limit included in the plan's stop-loss insurance agreement.

(d) Deposit to be held for TDI's control. Any deposit must be held for TDI's control and may not be withdrawn or substituted without the commissioner's approval.

§13.563. Form of Deposit.

A deposit must consist of funds in the form of:

(1) money of the United States including certificates of deposit issued by a qualified financial institution, but the amount of total deposits by the approved PEO in the qualified financial institution may not exceed the greater of:

(A) the limits of federal insurance coverage for the deposits; or

(B) ten percent of the issuing qualified financial institution's net worth, provided that its net worth is in excess of $25 million;

(2) bonds of Texas;

(3) bonds or other evidences of indebtedness of the United States that are guaranteed as to principal and interest by the United States government; or

(4) bonds or other interest-bearing evidences of indebtedness of a county or municipality of this state.

§13.564. Annual Recalculation; Changes to Deposit.

(a) Annual recalculation. An approved PEO must recalculate its deposit required every year, not later than 60 days after negotiating the plan's stop-loss insurance agreement for the current plan year, using the formula stated in §13.562(b) of this title (relating to Deposit or Letter of Credit Required).

(b) Changes to deposit.

(1) An approved PEO may request to change its deposit by submitting both the Statutory Deposit Transaction Form, Form No. FIN407 (rev.1115), and the Declaration of Trust Form, Form No. FIN453 (rev.1115), and must submit a safekeeping receipt showing that the securities are pledged to TDI.

(2) If the commissioner approves the release of any portion of a deposit, TDI's bond and securities officer will execute a release of any pledge, and the funds will be returned to the approved PEO.

(3) An approved PEO that requests a release of any part of its deposit because the deposit amount exceeds the amount calculated under §13.562(b) of this title must provide supporting documentation that justifies the release, including:

(A) the reasons for the release; and

(B) evidence satisfactory to the commissioner that its deposit exceeds the amount required in §13.562(b) of this title.

(4) All interest income due on its deposit funds may be paid directly to the approved PEO by the bank.

§13.565. Letter of Credit.

(a) Requirements. Instead of a deposit, an approved PEO may maintain a letter of credit. A letter of credit must comply with the following requirements:

(1) the letter of credit cannot be supported or collateralized by a guaranty;

(2) the letter of credit and all amendments to the letter of credit must be filed with TDI; and

(A) be clean, irrevocable, unconditional, and issued by a qualified financial institution;

(B) contain an issue date;

(C) stipulate that the beneficiary is the commissioner, that the commissioner need only draw a draft under the letter of credit and present it to obtain funds, and that no other document need be presented;

(D) show only one amount on the letter of credit;

(E) state that the letter of credit is not subject to any conditions or qualifications outside of the letter of credit and must not contain reference to any other agreements, documents, or entities;

(F) contain a statement to the effect that the obligation of the qualified financial institution under the letter of credit is in no way contingent on reimbursement; and

(G) state that the letter of credit is subject to and governed by either the laws of this state or the laws of the state in which the issuing qualified financial institution is domiciled, and that all drafts drawn on the letter of credit will be presentable at any office in the United States of the issuing qualified financial institution.

(b) Conditions not permitted. The letter of credit must not:

(1) have a schedule of periodic payments;

(2) name any beneficiary other than the commissioner; and

(3) in aggregate of all letters of credit issued to the approved PEO by one qualified financial institution, exceed 10 percent of the financial institution's total equity capital, as shown in the qualified financial institution's most recent report of condition as filed with the appropriate federal or state financial institution regulatory agency.

(c) Term of letter of credit. The term of the letter of credit must be for at least one year and must contain an evergreen clause that prevents the expiration of the letter of credit without written notice from the issuer. The evergreen clause must provide for a period of no less than 30 days' written notice to the commissioner prior to the expiration date or nonrenewal.

§13.566. Annual Recalculation; Changes to Letter of Credit.

(a) Annual recalculation. An approved PEO must recalculate the required amount of its letter of credit every year, not later than 60 days after negotiating the plan's stop-loss insurance agreement for the current plan year, using the formula stated in §13.562(b) of this title (relating to Deposit or Letter of Credit Required).

(b) Changes to letter of credit.

(1) If a letter of credit is not renewed or replaced, the commissioner must not be prevented from withdrawing the balance of the letter of credit and placing that sum in trust to secure continuing obligations until the commissioner has received a renewal letter of credit or an acceptable substitute.

(2) If a letter of credit is not renewed or replaced, or if it is suspended, the approved PEO and the issuing qualified financial institution must give the commissioner immediate notice of the nonrenewal, replacement, or suspension.

§13.567. Stop-Loss Insurance.

(a) Minimum specific and aggregate coverage. The plan and trust must maintain specific and aggregate stop-loss insurance that is not less than the recommended minimum level included in the annual actuarial opinion required by §13.570(c)(2) of this title (relating to Financial Filing Requirements).

(b) Terms of contract for stop-loss insurance. The trustees, or an approved PEO acting on behalf of the trustees, must contract for stop-loss insurance in the name of and for the benefit of the plan and trust, as evidenced by a written commitment, binder, or policy for stop-loss insurance issued by an unaffiliated insurer authorized to do business in this state, which must include the following:

(1) no less than 30 days' notice to the commissioner of any amendment, cancellation, or nonrenewal of coverage;

(2) provide both specific and aggregate coverage with an aggregate retention of no more than 125 percent of the amount of expected claims for the subsequent plan year and the specific retention amount as determined by the actuarial opinion required by §13.570(c)(2) of this title;

(3) both the specific and aggregate coverage must require all claims to be submitted within 90 days after the claim is reported; and

(4) a requirement that the stop-loss carrier provide the trustees and the PEO any renewal quote at least 90 days before the expiration of the current policy.

(c) Request for waiver. The trustees, or an approved PEO acting on behalf of the trustees, may request in writing, including supporting documentation, that the commissioner waive or reduce the requirement for aggregate stop-loss insurance. The commissioner, after reviewing the request and documentation, and any additional information requested by and provided to TDI, will approve the request if the commissioner determines that the interests of the clients and participants are adequately protected.

§13.568. Standards for Fidelity Coverage.

(a) Fidelity bond or crime policy. A fidelity bond or crime policy required by any section of this rule must be for an amount of at least $500,000. The commissioner will consider information of all interested parties and determine any amount required in excess of $500,000. The bond or policy must:

(1) obligate the surety to pay any loss of money or other property the plan or trust sustains because of an act of fraud or dishonesty by a person covered by the bond or policy, acting alone or in concert with others; and

(2) be issued by an unaffiliated insurer that holds a certificate of authority in this state, and that is a corporate surety company that is an acceptable surety on Federal bonds under authority granted by the Secretary of the Treasury under 31 U.S. Code Chapter 93. If the commissioner determines, after reviewing information from the approved PEO or the plan and trust's board of trustees, that a fidelity bond or a zero-deductible crime policy is not available from a qualified unaffiliated insurer that holds a certificate of authority in this state, the approved PEO or board of trustees may obtain a fidelity bond or a zero-deductible crime policy from a surplus lines agent in this state in compliance with Insurance Code Chapter 981, concerning Surplus Lines Insurance, or from a corporate surety company which is an acceptable surety on Federal bonds under authority granted by the Secretary of the Treasury under 31 U.S. Code Chapter 93.

(b) Cash deposit. Instead of a fidelity bond or zero-deductible crime policy, the approved PEO or board of trustees may place on deposit with a qualified financial institution securities meeting the requirements of §13.564 of this title (relating to Annual Recalculation; Changes to Deposit) for the benefit of the commissioner. The deposit must be maintained in the amount and is subject to the same conditions required for fidelity coverage under this section. The deposit must be held for TDI's control and may not be withdrawn or substituted without the commissioner's approval.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

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DIVISION 7. QUARTERLY AND ANNUAL FILINGS; EXAMINATIONS; HAZARDOUS CONDITIONS

28 TAC §§13.570 - 13.573

STATUTORY AUTHORITY. The new sections are adopted under Labor Code §91.0411 and Insurance Code §36.001.

Labor Code §91.0411 provides for the commissioner of insurance to adopt rules necessary to augment and implement the regulation of benefit plans sponsored by PEOs licensed by TDLR, which include requirements that must be met by the licensed PEO and plan. The rules must include initial and final approval requirements, authority to prescribe forms and items to be submitted to the commissioner by the license holder, a fidelity bond, use of an independent actuary, use of a third-party administrator, authority for the commissioner to examine an application or plan, the minimum number of clients and covered employees covered by the plan, standards for those natural persons managing the plan, the minimum amount of gross contributions, the minimum amount of written commitment, binder, or policy for stop-loss insurance, the minimum amount of reserves, and a fee in the amount reasonable and necessary to defray the costs of administering the section to be deposited to the credit of the operating fund of the Texas Department of Insurance.

Insurance Code §36.001 provides that the commissioner of insurance may adopt any rules necessary and appropriate to implement the powers and duties of the Texas Department of Insurance under the Insurance Code and other laws of this state.

§13.570. Financial Filing Requirements.

(a) Approved quarterly filing form. TDI adopts by reference PEO Quarterly Report, Form No. FIN409 (rev. 1115). The form is available on TDI's website. An approved PEO must submit its quarterly filings as described in subsection (c) of this section on PEO Quarterly Report, Form No. FIN409, using generally accepted accounting principles of the United States as modified by this subchapter.

(b) Approved annual filing form. TDI adopts by reference PEO Annual Report, Form No. FIN410 (rev. 1115). The form is available on TDI's website. An approved PEO must submit its annual filings as described in subsection (d)(1) of this section on PEO Annual Report, Form No. FIN410, using generally accepted accounting principles of the United States as modified by this subchapter.

(c) Quarterly filings. An approved PEO must file electronically with the commissioner within 45 days of the end of each calendar quarter an unaudited quarterly financial statement of the plan and trust, certified by an appropriate officer or agent of:

(1) the trustees; or

(2) the approved PEO.

(d) Annual filings. An approved PEO must file electronically with the commissioner by March 1 of each year:

(1) an unaudited financial statement of the plan and trust reflecting the financial transactions and results of the four previous quarters, certified by an appropriate officer or agent of:

(A) the trustees; or

(B) the approved PEO; and

(2) an annual actuarial opinion prepared and certified by an actuary who is not an employee of the approved PEO, and who is a fellow of the Society of Actuaries, a member of the American Academy of Actuaries, or an enrolled actuary approved by the Joint Board for the Enrollment of Actuaries to perform actuarial services required under ERISA, 29 U.S.C. §§1001-1191c. The annual actuarial opinion must include:

(A) a description of the actuarial soundness of the plan and trust, including any recommended actions that the approved PEO should take to improve the plan and trust's actuarial soundness;

(B) a calculation of reserves as required by §13.560 of this title (relating to Annual and Quarterly Reserves); and

(C) a recommended minimum level of specific and aggregate stop-loss insurance the plan and trust should maintain.

(3) Audited financial statements for the plan and trust must be filed annually by June 1 of each year and meet the requirements of Insurance Code Chapter 401, Subchapter A, concerning Independent Audit of Financial Statements, and §7.88 of this title (relating to Independent Audits of Insurer and HMO Financial Statements and Insurer and HMO Internal Control Over Financial Reporting) using generally accepted accounting principles of the United States as modified by this subchapter.

§13.571. Annual Fee.

With its annual filings an approved PEO must pay to TDI an annual statement filing fee of $500. This fee does not include the form filing fees required under §13.521 of this title (relating to Applicable Insurance Code and Administrative Code Terms).

§13.572. Examination of Approved PEO, Plan, and Trust.

The commissioner or any person appointed by the commissioner has the power to examine the affairs of the approved PEO and the plan and trust as set forth in Insurance Code Chapter 401, concerning Audits and Examinations and §7.83 and §7.84 of this title (relating to Appeal of Examination Reports and Examination Frequency), as those provisions apply to domestic insurers licensed to transact the business of insurance in this state.

§13.573. Hazardous Condition; Violations of Statute.

(a) Hazardous conditions. An approved PEO's plan and trust are considered to be in hazardous condition if any of the following conditions exist with respect to the plan and trust:

(1) assets to liability ratio less than 1:1;

(2) negative financial position;

(3) negative net income combined with negative retained earnings;

(4) negative cash flow;

(5) failing to maintain minimum reserves;

(6) the trust failing to receive all monthly contributions paid by clients to the approved PEO;

(7) transfers of funds between the trust and the approved PEO not authorized under the trust agreement; or

(8) mismanagement by the third party administrator, trustees, or approved PEO that endanger the solvency or operations of the plan and trust.

(b) Regulation of solvency. An approved PEO and its plan and trust are subject to Insurance Code Chapters 404, concerning Financial Condition; 406, concerning Special Deposits Required Under Potentially Hazardous Conditions; 441, concerning Supervision and Conservatorship; and 443, concerning the Insurer Receivership Act.

(c) Order of actuarial review. On finding of good cause, the commissioner will order an actuarial review of an approved PEO in addition to the actuarial opinion. The approved PEO must pay the cost of any additional actuarial review ordered by the commissioner.

(d) Order to correct deficiencies. If the commissioner determines that the approved PEO's plan and trust do not comply with this section or are found to be in hazardous condition, the commissioner will order the approved PEO to correct the deficiencies. The commissioner will take action authorized by the Insurance Code and other applicable laws against the approved PEO and its plan and trust if the approved PEO does not initiate immediate corrective action.

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DIVISION 8. MARKET EXIT

28 TAC §§13.580 - 13.583

STATUTORY AUTHORITY. The new sections are adopted under Labor Code §91.0411 and Insurance Code §36.001.

Labor Code §91.0411 provides for the commissioner of insurance to adopt rules necessary to augment and implement the regulation of benefit plans sponsored by PEOs licensed by TDLR, which include requirements that must be met by the licensed PEO and plan. The rules must include initial and final approval requirements, authority to prescribe forms and items to be submitted to the commissioner by the license holder, a fidelity bond, use of an independent actuary, use of a third-party administrator, authority for the commissioner to examine an application or plan, the minimum number of clients and covered employees covered by the plan, standards for those natural persons managing the plan, the minimum amount of gross contributions, the minimum amount of written commitment, binder, or policy for stop-loss insurance, the minimum amount of reserves, and a fee in the amount reasonable and necessary to defray the costs of administering the section to be deposited to the credit of the operating fund of the Texas Department of Insurance.

Insurance Code §36.001 provides that the commissioner of insurance may adopt any rules necessary and appropriate to implement the powers and duties of the Texas Department of Insurance under the Insurance Code and other laws of this state.

§13.580. Withdrawal from Market.

(a) Withdrawal plan. An approved PEO that undertakes of its own initiative or is required by §13.581 or §13.582 of this title (relating to Limitation, Suspension, or Cancellation of Certificate of Approval in Response to TDLR Action and Limitation, Suspension, or Cancellation of Certificate of Approval in Response to TDI Action) to terminate its health benefit plan must file a withdrawal plan for review by the commissioner prior to terminating the plan. The withdrawal plan must include:

(1) the approved PEO's reasons for the withdrawal;

(2) a timeline for withdrawal, including the date on which the approved PEO intends to complete the withdrawal process;

(3) a copy of the proposed notice to be sent to client employers and plan participants giving them at least 180 days' notice of the plan's termination;

(4) the number and names of clients and the number of plan participants affected by the proposed withdrawal;

(5) a procedure for handling plan participants' claims for benefits;

(6) a procedure for identifying plan participants with special circumstances, as defined in Insurance Code §1301.153, concerning Continuity of Care;

(7) provisions for meeting all contractual obligations of the approved PEO;

(8) provisions for meeting any applicable statutory obligations; and

(9) verification of reserves to complete a solvent resolution of the plan's obligations.

(b) Novation and resolution of plan claim obligations. The commissioner will not grant the request of an approved PEO to cancel its certificate of approval unless the approved PEO novates its remaining plan obligations with an unaffiliated authorized insurer or satisfies its remaining plan obligations under an agreement filed with and approved in writing by the commissioner. For purposes of this subsection, those obligations are:

(1) known claims and expenses associated with those claims; and

(2) incurred but not reported claims and expenses associated with those claims.

(c) Approval of withdrawal plan. Except as provided by subsection (d) of this section, the commissioner will approve a withdrawal plan that satisfies the requirements of subsections (a) and (b) of this section.

(d) Modification or denial of withdrawal plan. If the approved PEO is unable to meet its contractual and financial obligations in a solvent and compliant manner, the commissioner will modify or deny an approved PEO's filed withdrawal plan, and take action authorized under Insurance Code Chapters 404, Financial Condition; 406, concerning Special Deposits Required Under Potentially Hazardous Conditions; 441, concerning Supervision and Conservatorship; 443, concerning the Insurer Receivership Act; or all other applicable law.

(e) Notice of modification. The commissioner will issue a written notice to an approved PEO stating the basis for a modification under subsection (d) of this section. If within 30 days of receiving a notice of modification the approved PEO submits a written request for review by the commissioner and submits additional information that its withdrawal plan satisfies the requirements of subsections (a) and (b) of this section, the commissioner will reconsider the modification and give the PEO written notice of his decision.

(f) Notice of denial; State Office of Administrative Hearings hearing request. The commissioner will issue a written notice of denial to an approved PEO stating the basis for a denial under subsection (d) of this section. If within 30 days of receiving the commissioner's notice the approved PEO submits a written request for a hearing on denial of withdrawal plan, the commissioner will file a request to set a hearing at the State Office of Administrative Hearings under Government Code Chapter 2001, concerning Administrative Procedure; and Insurance Code Chapter 40, concerning Duties of State Office of Administrative Hearings and Commissioner in Certain Proceedings; Rate Setting Proceedings. At the hearing the approved PEO will be given an opportunity to show compliance with this section.

§13.581. Limitation, Suspension, or Cancellation of Certificate of Approval in Response to TDLR Action.

(a) Notice of TDLR action against approved PEO's license. The commissioner will limit, suspend, or cancel an approved PEO's certificate of approval in response to an action by TDLR against the approved PEO's license.

(b) Notice of TDLR's contemplated action. An approved PEO must notify the commissioner through TDI's licensing section within 10 business days of first receiving notice that TDLR is contemplating taking action against its license. The approved PEO's notice to the commissioner must include a copy of TDLR's notice.

(c) Limitation or suspension of certificate of approval. If the commissioner receives notice that TDLR is contemplating taking action against an approved PEO's license, at the commissioner's discretion the approved PEO's certificate of approval may be limited or suspended. While an approved PEO's certificate of approval is suspended, the approved PEO cannot contract with a new client to allow enrollment of new plan participants. When the commissioner receives satisfactory notice that all outstanding issues between TDLR and the approved PEO are resolved to TDLR's satisfaction, TDI will remove the limitation or suspension of the approved PEO's certificate of approval.

(d) Notice of TDLR action terminating license. If TDLR revokes an approved PEO's license, the approved PEO must terminate its health benefit plan in compliance with §13.580 of this title (relating to Withdrawal from Market). An approved PEO must notify the commissioner through TDI's licensing section within 10 business days of receiving notice that TDLR has revoked its license. The approved PEO's notice to the commissioner must include:

(1) a copy of TDLR's notice of termination; and

(2) confirmation that the approved PEO will file its withdrawal plan within 30 days.

(e) Cancellation. When an approved PEO has fulfilled all requirements of its withdrawal plan, the commissioner will cancel the approved PEO's certificate of approval.

(f) Reapplication. If TDLR later reinstates the PEO's license or grants the PEO a new license in good standing, the PEO may reapply to TDI for a certificate of approval in order to sponsor another plan under this subchapter.

§13.582. Limitation, Suspension, or Cancellation of Certificate of Approval in Response to TDI Action.

(a) Commissioner's authority. Nothing in this section limits the commissioner's authority under Insurance Code Chapters 404, Financial Condition; 406, Special Deposits Required Under Potentially Hazardous Conditions; 441, Supervision and Conservatorship; or 443, the Insurer Receivership Act.

(b) Limitation, suspension, or cancellation of certificate. The commissioner will limit, suspend, or cancel an approved PEO's certificate of approval if the commissioner finds that the approved PEO or its plan or trust do not meet the requirements of applicable Insurance Code provisions or this subchapter.

(c) Notice of limitation; commissioner's hearing. The commissioner will issue a written notice to an approved PEO stating the basis for a limitation under subsection (b) of this section. If within 30 days of receiving a notice of limitation the approved PEO submits a written request for review by the commissioner, the commissioner will schedule a hearing under Insurance Code Chapter 40, at which the approved PEO will be given an opportunity to show compliance with this

subchapter. Hearings described in this subchapter will be conducted as required by Government Code Chapter 2001, concerning Administrative Procedure; Insurance Code Chapter 40, concerning Duties of State Office of Administrative Hearings and Commissioner in Certain Proceedings; Rate Setting Proceedings; TDI's and State Office of Administrative Hearing's rules of procedure; and any other applicable law and regulations.

(d) Notice of suspension or cancellation. The commissioner will issue a written notice of suspension or of intent to cancel to an approved PEO stating the basis for the suspension or cancellation under subsection (b) of this section.

(e) Hearing request in contested case. An approved PEO may submit a written request to the commissioner for a hearing at the State Office of Administrative Hearings under Government Code Chapter 2001, Administrative Procedure, within 30 days of receiving notice that its certificate of approval:

(1) remains limited after a commissioner's hearing under subsection (c) of this section,

(2) is suspended under subsection (d) of this section, or

(3) will be canceled under subsection (d) of this section.

(f) At that hearing the approved PEO will be given an opportunity to show compliance with this subchapter.

§13.583. Cancellation of Certificate of Approval.

(a) Plan termination. If the commissioner determines that an approved PEO's certificate of approval should be canceled, the approved PEO must terminate its health benefit plan in compliance with §13.580 of this title (relating to Withdrawal from Market). The approved PEO must file its withdrawal plan within 30 days of receiving the commissioner's written notice of suspension.

(b) Cancellation of certificate of approval. When an approved PEO has fulfilled all requirements of its approved withdrawal plan, the commissioner will cancel the approved PEO's certificate of approval.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on April 27, 2016.

TRD-201601993
Norma Garcia
General Counsel
Texas Department of Insurance
Effective date: May 17, 2016
Proposal publication date: December 25, 2015
For further information, please call: (512) 676-6584

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TITLE 30. ENVIRONMENTAL QUALITY

PART 1. TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

CHAPTER 39. PUBLIC NOTICE
SUBCHAPTER L. PUBLIC NOTICE OF INJECTION WELL AND OTHER SPECIFIC APPLICATIONS

30 TAC §39.651

The Texas Commission on Environmental Quality (TCEQ, agency, or commission) adopts the amendment to §39.651, *with change* to the proposed text as published in the December 25, 2015, issue of the *Texas Register* (40 TexReg 9487).

Background and Summary of the Factual Basis for the Adopted Rule

This rulemaking implements House Bill (HB) 655, 84th Texas Legislature, 2015, addressing the commission's regulation of aquifer storage and recovery (ASR) projects in Texas. ASR involves the use of one or more injection wells for the purpose of placing a water supply into a subsurface geologic formation, or aquifer, for storage so that the water may be subsequently recovered and used by the project operator. The adopted amendment to §39.651 implements the requirements of HB 655 for providing public notice for an individual injection well permit application for an ASR injection well. There are no requirements for providing individual public notice on ASR injection wells that are authorized by rule.

In corresponding rulemaking published in this issue of the *Texas Register,* the commission also adopts revisions to 30 TAC Chapter 295, Water Rights, Procedural; 30 TAC Chapter 297, Water Rights, Substantive; and 30 TAC Chapter 331, Underground Injection Control.

Section Discussion

The commission adopts the amendment of §39.651 to implement the public notice requirements in Texas Water Code (TWC), §27.153(d). Section 39.651(d)(6) is amended to add "Class V" to establish a 30-day comment period for Class V injection well permit applications in the requirements for the Notice of Application and Preliminary Decision. In response to comments, §39.651(h) is added to address the specific notice of application requirements for an application for an individual permit for an injection well for an ASR project as required in HB 655 and as required to maintain requirements for an authorized Underground Injection Control (UIC) program under the federal Safe Drinking Water Act.

Final Regulatory Impact Analysis Determination

The commission reviewed the adopted rulemaking action in light of the regulatory analysis requirements of 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 the statute. "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. The adopted action implements legislative requirements in HB 655, which revises the requirements for the commission's regulation of injection wells associated with ASR projects. The adoption does not meet the definition of "major environmental rule" because the rulemaking does not affect in a material way 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 adopted rule implements public notice requirements for certain injection well permit applications associated with ASR projects, consistent with the requirements of HB 655 and Texas statutes.

Furthermore, the adopted rule does not meet any of the four applicability requirements listed in Texas Government Code, §2001.0225(a). The adopted rule does not exceed a standard set by federal law, because the adopted rule is consistent with applicable federal standards regarding public notice required for injection well permit applications. The adopted rule does not exceed an express requirement of state law because it is consistent with the express requirements of HB 655 and TWC, Chapter 27, Subchapter G. The adopted rule does not exceed requirements set out in the commission's UIC program authorized for the state of Texas under the federal Safe Drinking Water Act. The rulemaking is not adopted under the general powers of the agency and is adopted under the express requirements of HB 655 and TWC, §§27.019, 27.153, and 27.154.

The commission invited public comment regarding the Draft Regulatory Impact Analysis Determination during the public comment period. The commission did receive comments on the Draft Regulatory Impact Analysis Determination from Benbrook Water Authority (Benbrook) and Prairielands Groundwater Conservation District (Prairielands GWCD).

Comment

Benbrook and Prairielands GWCD refer to Texas Government Code, §2001.0225 to claim that state regulations may exceed federal requirements as long as the additional requirements are authorized by state law. Prairielands GWCD contends that the amendments to §39.651 exceed federal requirements and the notice requirements in HB 655.

Response

The commission stands by its determination that the amendment to public notice requirements in §39.651 is not a "major environmental rule" as defined in Texas Government Code, §2001.0225. The public notice requirements are procedural rules and do not protect the environment or reduce risks to human health from environmental exposure. A state agency is required to perform a regulatory analysis of rulemaking under Texas Government Code, §2001.0225 only for a major environmental rule. Further, under Texas Government Code, §2001.0225(a)(1), the state agency is required to perform the regulatory analysis of a major environmental rule with the result to exceed a standard set by federal law, unless the rule is specifically required by state law. However, as discussed in the Response to Comments section of this preamble, the adopted rule has been revised to include the public notice requirements for an application for an individual Class V injection well permit in adopted §39.651(h) consistent with the requirements of HB 655 and requirements to maintain an authorized UIC program under the federal Safe Drinking Water Act.

Comment

Benbrook questions statements from the commission's draft regulatory impact analysis that the proposed rule regarding public notice requirements do not exceed a standard set by federal law. Benbrook contends that the proposed rule appears to exceed federal standards as set out in 40 Code of Federal Regulations (CFR) §124.10. Prairielands GWCD contends that the amendments to §39.651 exceed federal requirements and the notice requirements in HB 655.

Response

The amendment to §39.651 establishes requirements for providing public notice for individual permit applications to authorize Class V injection wells associated with ASR projects. These include requirements for the method of providing notice and the designated recipients of the notice. These provisions do not exceed any numerical or measured standard set by federal law because they are procedural requirements and not environmental protection standards. The permitting requirements for a state UIC program, including the provision of public notice, are identified in 40 CFR §145.11. TCEQ is not required to implement identical provisions to the United States Environmental Protection Agency's public notice requirements in 40 CFR Part 124. The public notice requirements in adopted §39.651(h) for applications for individual Class V injection well permits for ASR projects are consistent with the public notice requirements in HB 655 and requirements to maintain an authorized UIC program under the federal Safe Drinking Water Act. Therefore, the public notice requirements in §39.651 do not exceed a standard established by federal law and are specifically required by state law as provided in Texas Government Code, §2001.0225(a)(1).

Takings Impact Assessment

The commission evaluated this rulemaking action and performed a preliminary assessment of whether Texas Government Code, Chapter 2007 is applicable. The adopted action implements legislative requirements in HB 655, which revises the requirements for the commission's regulation of injection wells associated with ASR projects.

The adopted rule would be neither a statutory nor a constitutional taking of private real property. The adopted rule is procedural and would establish public notice requirements for certain injection well permit applications associated with ASR projects, consistent with the requirements of HB 655 and Texas statutes. The adopted rule does not affect a landowner's rights in private real property because this rulemaking action does not burden (constitutionally), nor restrict or limit, the owner's right to property and reduce its value by 25% or more beyond which would otherwise exist in the absence of the regulations.

Consistency with the Coastal Management Program

The commission reviewed the adopted rule and found that it is neither identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11(b)(2) or (4), nor will it affect any action/authorization identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11(a)(6). Therefore, the adopted rule is not subject to the Texas Coastal Management Program (CMP).

The commission invited public comment regarding the consistency with the CMP during the public comment period. No comments were received regarding the consistency with the CMP.

Public Comment

The commission held a public hearing on January 22, 2016. The comment period closed on February 8, 2016. The commission received comments from Benbrook; Brazos Valley Groundwater Conservation District (Brazos Valley GWCD); Clearwater Underground Water Conservation District (Clearwater Underground WCD); Hemphill Underground Water Conservation District (Hemphill Underground WCD); High Plains Underground Water Conservation District (High Plains Underground WCD); the Honorable Lyle Larson, Texas State Representative, District 122, who authored HB 655 (Representative Larson); Llano Estacado Underground Water Conservation District (Llano Estacado Underground WCD); Lone Star Groundwater Conservation District (Lone Star GWCD); Mesa Underground Water Conservation District (Mesa Underground WCD); Permian Basin Un-

derground Water Conservation District (Permian Basin Underground WCD); Prairielands GWCD; Sandy Land Underground Water Conservation District (Sandy Land Underground WCD); Sledge Law and Public Strategies (Sledge Law); South Plains Underground Water Conservation District (South Plains Underground WCD); Texas Alliance of Groundwater Districts; Texas Farm Bureau; and the Upper Trinity Groundwater Conservation District (Upper Trinity GWCD).

All commenters generally were in support of the proposed rules, although a common comment was that certain rules were not consistent with HB 655.

Response to Comments

Comment

Hemphill Underground WCD, High Plains Underground WCD, Llano Estacado Underground WCD, Mesa Underground WCD, Permian Basin Underground WCD, Sandy Land Underground WCD, and South Plains Underground WCD supports the proposed language added to §39.651(c)(4); (d)(4) and (6); and (f)(3)(B) with respect to Notice of Receipt of Application and Intent to Obtain a Permit, Notice of Application and Preliminary Decision, and Notice of Contested Case Hearing.

Response

The commission acknowledges the support for the rule as proposed. However, in consideration of comments submitted on the proposed rule as discussed later in this Response to Comments section, the commission is amending §39.651 and adding subsection (h) to specify the public notice requirements for an application for an individual permit for an injection well for an ASR project, consistent with the public notice requirements specified in HB 655 and requirements to maintain an authorized UIC program under the federal Safe Drinking Water Act.

Comment

Prairielands GWCD and Benbrook commented that the proposed notice requirements for ASR projects authorized by individual permits exceed both federal requirements and TWC, §27.153(d) as provided in HB 655. Prairielands GWCD and Benbrook also commented that the notice requirements for individual permits should be revised to exclude requirements that are not mandated by federal requirements or HB 655. Prairielands GWCD commented that requirements for public notice that are more expansive than what is required by the legislature are illogical. Benbrook commented that the proposed notice requirements for individual permit applications are burdensome and not consistent with HB 655. Texas Alliance of Groundwater Districts and Clearwater Underground WCD commented that the notice requirements for an ASR project under an individual permit exceed the requirements established in TWC, §27.153(d) of HB 655. Lone Star GWCD commented that the notice requirements for ASR projects seeking an individual permit are not consistent with the notice requirements in HB 655. Sledge Law commented that requiring mailed notice to individual landowners and mineral interest owners can be onerous and also that the commission should use the specific notice requirements established in HB 655. Texas Alliance of Groundwater Districts and Clearwater Underground WCD questioned whether the cost and extent to which a permit applicant must provide notice under the proposed rule is reasonable. The Upper Trinity GWCD and Representative Larson commented that the proposed notice requirements for ASR projects authorized by an individual permit are inconsistent with the notice requirements provided in HB 655.

Response

The commission regrets any confusion regarding the proposed rule on public notice requirements for ASR projects authorized by an individual permit. The commission had proposed that the requirements for public notice for ASR projects to be authorized by an individual permit in §39.651 be consistent with state statutory requirements, including specific public notice requirements in HB 655 and general requirements applicable to other injection well permit applications. Upon consideration of these comments and as discussed later in this Response to Comments section, the commission is revising §39.651 by creating new subsection (h) to apply the specific public notice requirements for an individual Class V injection well permit application for an ASR project as provided in HB 655 and as required as part of the TCEQ's authorized UIC program under 40 CFR §145.11. The adopted rule will require only one notice of the application, the Notice of Application and Preliminary Decision, which will be mailed after technical review is complete to the groundwater conservation district (GWCD) in which the injection wells will be located, as required by HB 655, and to the persons listed in §39.413(7) - (9), which are the local, state and federal governmental entities for which notice is required under 40 CFR §124.10(c), persons who have requested to be on a mailing list developed and maintained in accordance with 40 CFR §124.10(c)(1)(ix), and the applicant.

Under the Code Construction Act a later enacted statute generally prevails over an earlier enacted statute that conflicts, and specific statute generally prevails over a general statute that conflicts. Therefore, although there are general notice requirements for an application for an individual UIC permit in TWC, Chapters 5 and 27 that were previously enacted, it is reasonable to interpret HB 655, which specifically addresses notice requirements for ASR projects, as providing the exclusive state notice of application requirements for an individual UIC permit for an ASR project. In addition, a statute should be interpreted so that all words are given effect and meaning. If the general notice requirements for UIC individual permits were applicable, there would have been no need for HB 655 to require that notice be given by first class mail to a GWCD in which the wells will be located, because such notice would have already been required under the general requirements for notice of UIC individual permits in TWC, Chapter 27. Furthermore, if the general statutory requirements for notice were applicable, the requirement in HB 655 that notice be published in a newspaper of general circulation in the county in which the wells are located would be superfluous, because the general requirements for notice of UIC individual permits, as implemented in commission rule, already require that notice be published in the largest newspaper of general circulation in the county. While HB 655 provides the exclusive state notice of application requirements for an individual UIC permit for an ASR project, additional federal notice requirements must be met in order to meet requirements to maintain an authorized UIC program under the federal Safe Drinking Water Act.

Comment

Brazos Valley GWCD commented that public notice should be provided to GWCDs and adjacent landowners, when the ASR project is authorized under a general permit, individual permit, *or by rule*. Hemphill Underground WCD, High Plains Underground WCD, Llano Estacado Underground WCD, Mesa Underground WCD, Permian Basin Underground WCD, Sandy Land Underground WCD, and South Plains Underground WCD commented

that the proposed rule violates the intent of HB 655 because there is no public notice requirement for ASR projects that are authorized by rule. Texas Farm Bureau commented that it expected that all ASR projects would be subject to public notice.

Response

HB 655 does not specify that notice must be provided to adjacent landowners and does not establish any public notice requirements for ASR projects authorized by rule. Authorization by rule is fulfilled by complying with the requirements of the applicable rules in Chapter 331. Class V injection wells may be authorized by rule under the requirements of the federal Safe Drinking Water Act. ASR projects may be authorized by rule as established in HB 655. There are no public notice requirements in the federal regulations or in state statutes that are applicable to ASR projects authorized by rule. No changes were made directly in response to these comments. However, as noted later in this Response to Comments section, the commission is revising 30 TAC §331.7(h) to require that the executive director inform a GWCD of any ASR project proposed to be authorized by rule for a project that is located within that district. Although the executive director will inform GWCDs of such projects as provided in §331.7, the public notice requirements in §39.651 will not be revised.

Comment

Texas Alliance of Groundwater Districts, Clearwater Underground WCD, Lone Star GWCD, Upper Trinity GWCD, and Representative Larson requested that the rule be amended to require that TCEQ's executive director forward notice to a GWCD for a proposed ASR project authorized by rule that is located within the jurisdiction of the district. Brazos Valley GWCD commented that the rule should be amended to require TCEQ's executive director to notify GWCDs of any pending ASR project within the district's boundaries. Brazos Valley GWCD and Representative Larson commented that the rule fails to require notice to GWCDs for ASR projects authorized by rule.

Response

The commission expects that ASR project operators will work closely with GWCDs, landowners, and local authorities *before* seeking any requisite approvals from TCEQ. The commission believes that ASR project operators will benefit from information sharing and the coordination in the planning of their projects with these local interests. While HB 655, other state laws, and federal UIC program requirements do not require the provision of public notice for injection wells that are authorized by rule, the commission is revising §331.7(h) to require that the executive director inform a GWCD of any ASR project proposed to be authorized by rule for a project that is located within that district. Although the executive director will inform GWCDs of such projects as provided in §331.7, the public notice requirements in §39.651 will not be revised.

Comment

Hemphill Underground WCD, High Plains Underground WCD, Llano Estacado Underground WCD, Mesa Underground WCD, Permian Basin Underground WCD, Sandy Land Underground WCD, and South Plains Underground WCD commented that all ASR projects should be required to obtain an individual permit and that authorization by rule should only be used in a dire emergency, such as declared disaster area or systematic drought. Texas Farm Bureau commented that all ASR projects should be authorized by an individual permit so that property owners can participate in the permit process.

Response

HB 655 provided that the commission may authorize the use of a Class V injection well as an ASR injection well by rule, under an individual permit, or under a general permit. Class V injection wells are typically authorized by rule as allowed under federal UIC program requirements and state statute. The commission is not going to require all ASR projects to be authorized by an individual permit at this time. The executive director has the authority in 30 TAC §331.9 to require any operator of an injection well authorized by rule to apply for and obtain an injection well permit. The commission expects that the executive director will exercise this discretion carefully. The commission may decide to re-evaluate the suitability of the authorization by rule process for ASR projects at some future point. No changes were made in response to the comments.

Statutory Authority

The amendment is adopted under Texas Water Code (TWC), §5.103, which provides the commission the authority to adopt any rules necessary to carry out its powers and duties under TWC and other laws of this state; TWC, §5.105, which authorizes the commission to establish and approve all general policy of the commission by rule; TWC, §5.120, which authorizes the commission to administer the law so as to promote the judicious use and maximum conservation and protection of the environment and natural resources of the state; TWC, §27.019, which requires the commission to adopt rules reasonably required for the regulation of injection wells; and TWC, §27.153, which requires the commission to adopt rules for authorization of aquifer storage and recovery injection wells by rule or by permit.

The adopted amendment implements House Bill 655, 84th Texas Legislature, 2015, and TWC, Chapter 27, Subchapter G.

§39.651. Application for Injection Well Permit.

(a) Applicability. This subchapter applies to applications for injection well permits that are declared administratively complete on or after September 1, 1999.

(b) Preapplication local review committee process. If an applicant decides to participate in a local review committee process under Texas Health and Safety Code, §361.063, the applicant shall submit a notice of intent to file an application to the executive director, setting forth the proposed location and type of facility. The applicant shall mail notice to the county judge of the county in which the facility is to be located. In addition, if the proposed facility is to be located in a municipality or the extraterritorial jurisdiction of a municipality, a copy of the notice must be mailed to the mayor of the municipality.

(c) Notice of Receipt of Application and Intent to Obtain Permit.

(1) On the executive director's receipt of an application, or notice of intent to file an application, the chief clerk shall mail notice to the state senator and representative who represent the area in which the facility is or will be located.

(2) After the executive director determines that the application is administratively complete, notice must be given as required by §39.418 of this title (relating to Notice of Receipt of Application and Intent to Obtain Permit). This notice must contain the text as required by §39.411(b)(1) - (9) and (11) of this title (relating to Text of Public Notice). Notice under §39.418 of this title will satisfy the notice of receipt of application required by §281.17(d) of this title (relating

to Notice of Receipt of Application and Declaration of Administrative Completeness).

(3) After the executive director determines that the application is administratively complete, in addition to the requirements of §39.418 of this title, notice must be given to the School Land Board, if the application will affect lands dedicated to the permanent school fund. The notice must be in the form required by Texas Water Code, §5.115(c).

(4) For Notice of Receipt of Application and Intent to Obtain a Permit concerning Class I or Class III underground injection wells, the chief clerk shall also mail notice to:

(A) persons who own the property on which the existing or proposed injection well facility is or will be located, if different from the applicant;

(B) landowners adjacent to the property on which the existing or proposed injection well facility is or will be located;

(C) persons who own mineral rights underlying the existing or proposed injection well facility;

(D) persons who own mineral rights underlying the tracts of land adjacent to the property on which the existing or proposed injection well facility is or will be located; and

(E) any groundwater conservation district established in the county in which the existing or proposed injection well facility is or will be located.

(5) The chief clerk or executive director shall also mail a copy of the application or a summary of its contents to the mayor and health authority of a municipality in whose territorial limits or extraterritorial jurisdiction the solid waste facility is located and to the county judge and the health authority of the county in which the facility is located.

(6) For Class I underground injection wells, the published notice must be at least 15 square inches (96.8 square centimeters) with a shortest dimension of at least three inches (7.6 centimeters) and the notice must appear in the section of the newspaper containing state or local news items.

(d) Notice of Application and Preliminary Decision. The notice required by §39.419 of this title (relating to Notice of Application and Preliminary Decision) must be published once under §39.405(f)(2) of this title (relating to General Notice Provisions) after the chief clerk has mailed the preliminary decision and the Notice of Application and Preliminary Decision to the applicant. This notice must contain the text as required by §39.411(c)(1) - (6) of this title. In addition to the requirements of §39.405(h) and §39.419 of this title, the following requirements apply.

(1) The applicant shall publish notice at least once in a newspaper of general circulation in each county that is adjacent or contiguous to each county in which the proposed facility is located. One notice may satisfy the requirements of §39.405(f)(2) of this title and of this subsection, if the newspaper meets the requirements of both rules.

(2) For Class I underground injection wells, the published notice must be at least 15 square inches (96.8 square centimeters) with a shortest dimension of at least three inches (7.6 centimeters) and the notice must appear in the section of the newspaper containing state or local news items.

(3) The chief clerk shall mail notice to the persons listed in §39.413 of this title (relating to Mailed Notice) and to local governments located in the county of the facility. "Local governments" have the meaning as defined in Texas Water Code, Chapter 26.

(4) For Notice of Application and Preliminary Decision concerning Class I or Class III underground injection wells, the chief clerk shall also mail notice to:

(A) persons who own the property on which the existing or proposed injection well facility is or will be located, if different from the applicant;

(B) landowners adjacent to the property on which the existing or proposed injection well facility is or will be located;

(C) persons who own mineral rights underlying the existing or proposed injection well facility;

(D) persons who own mineral rights underlying the tracts of land adjacent to the property on which the existing or proposed injection well facility is or will be located; and

(E) any groundwater conservation district established in the county in which the existing or proposed injection well facility is or will be located.

(5) If the application concerns a hazardous waste facility, the applicant shall broadcast notice under §39.503(d)(2) of this title (relating to Application for Industrial or Hazardous Waste Facility Permit).

(6) The deadline for public comments on industrial solid waste, Class III, or Class V injection well permit applications will be not less than 30 days after newspaper publication, and for hazardous waste applications, not less than 45 days after newspaper publication.

(e) Notice of public meeting.

(1) If an application for a new hazardous waste facility is filed:

(A) before September 1, 2005, the agency shall hold a public meeting in the county in which the facility is proposed to be located to receive public comment concerning the application; or

(B) on or after September 1, 2005, the agency:

(i) may hold a public meeting under §55.154 of this title (relating to Public Meetings) in the county in which the facility is proposed to be located to receive public comment concerning the application; but

(ii) shall hold a public meeting under §55.154 of this title in the county in which the facility is proposed to be located to receive public comment concerning the application:

(I) on the request of a member of the legislature who represents the general area in which the facility is proposed to be located; or

(II) if the executive director determines that there is substantial public interest in the proposed facility.

(2) If an application for a major amendment to or a Class 3 modification of an existing hazardous waste facility permit is filed:

(A) before September 1, 2005, the agency shall hold a public meeting in the county in which the facility is located to receive public comment on the application if a person affected files with the chief clerk a request for a public meeting concerning the application before the deadline to file public comment or to file requests for reconsideration or hearing; or

(B) on or after September 1, 2005, the agency:

(i) may hold a public meeting under §55.154 of this title in the county in which the facility is located to receive public comment on the application; but

(ii) shall hold a public meeting under §55.154 of this title in the county in which the facility is located to receive public comment concerning the application:

(I) on the request of a member of the legislature who represents the general area in which the facility is located; or

(II) if the executive director determines that there is substantial public interest in the facility.

(3) For purposes of this subsection, "substantial public interest" is demonstrated if a request for a public meeting is filed by:

(A) a local governmental entity with jurisdiction over the location in which the facility is located or proposed to be located by formal resolution of the entity's governing body;

(B) a council of governments with jurisdiction over the location in which the facility is located or proposed to be located by formal request of either the council's solid waste advisory committee, executive committee, or governing board;

(C) a homeowners' or property owners' association formally organized or chartered and having at least ten members located in the general area in which the facility is located or proposed to be located; or

(D) a group of ten or more local residents, property owners, or businesses located in the general area in which the facility is located or proposed to be located.

(4) A public meeting is not a contested case proceeding under the Administrative Procedure Act. A public meeting held as part of a local review committee process under subsection (b) of this section meets the requirements of this subsection if public notice is provided in accordance with this subsection.

(5) The applicant shall publish notice of the public meeting once each week during the three weeks preceding a public meeting under §39.405(f)(2) of this title. The published notice must be at least 15 square inches (96.8 square centimeters) with a shortest dimension of at least three inches (7.6 centimeters).

(6) The chief clerk shall mail notice to the persons listed in §39.413 of this title.

(f) Notice of contested case hearing.

(1) Applicability. This subsection applies if an application is referred to the State Office of Administrative Hearings for a contested case hearing under Chapter 80 of this title (relating to Contested Case Hearings).

(2) Newspaper notice.

(A) If the application concerns a facility other than a hazardous waste facility, the applicant shall publish notice at least once in a newspaper of general circulation in the county in which the facility is located and in each county and area that is adjacent or contiguous to each county in which the proposed facility is located.

(B) For Class I underground injection wells, the published notice must be at least 15 square inches (96.8 square centimeters) with a shortest dimension of at least three inches (7.6 centimeters) and the notice must appear in the section of the newspaper containing state or local news items.

(C) If the application concerns a hazardous waste facility, the hearing must include one session held in the county in which the facility is located. The applicant shall publish notice of the hearing once each week during the three weeks preceding the hearing under §39.405(f)(2) of this title. The published notice must be at least 15 square inches (96.8 square centimeters) with a shortest dimension of at least three inches (7.6 centimeters). The notice must appear in the section of the newspaper containing state or local news items. The text of the notice must include the statement that at least one session of the hearing will be held in the county in which the facility is located.

(3) Mailed notice.

(A) For all applications concerning underground injection wells, the chief clerk shall mail notice to persons listed in §39.413 of this title.

(B) For notice of hearings concerning Class I or Class III underground injection wells, the chief clerk shall also mail notice to:

(i) persons who own the property on which the existing or proposed injection well facility is or will be located, if different from the applicant;

(ii) landowners adjacent to the property on which the existing or proposed injection well facility is or will be located;

(iii) persons who own mineral rights underlying the existing or proposed injection well facility;

(iv) persons who own mineral rights underlying the tracts of land adjacent to the property on which the existing or proposed injection well facility is or will be located; and

(v) any groundwater conservation district established in the county in which the existing or proposed injection well facility is or will be located.

(C) If the applicant proposes a new solid waste management facility, the applicant shall mail notice to each residential or business address, not listed under subparagraph (A) of this paragraph, located within 1/2 mile of the facility and to each owner of real property located within 1/2 mile of the facility listed in the real property appraisal records of the appraisal district in which the facility is located. The notice must be mailed to the persons listed as owners in the real property appraisal records on the date the application is determined to be administratively complete. The notice must be mailed no more than 45 days and no less than 30 days before the contested case hearing. Within 30 days after the date of mailing, the applicant shall file with the chief clerk an affidavit certifying compliance with its obligations under this subsection. Filing an affidavit certifying facts that constitute compliance with notice requirements creates a rebuttable presumption of compliance with this subparagraph.

(4) Radio broadcast. If the application concerns a hazardous waste facility, the applicant shall broadcast notice under §39.503(d)(2) of this title.

(5) Deadline. Notice under paragraphs (2)(A), (3), and (4) of this subsection must be completed at least 30 days before the contested case hearing.

(g) Approval. All published notices required by this section must be in a form approved by the executive director prior to publication.

(h) Applications for individual Class V injection well permits for aquifer storage and recovery (ASR) projects. Notwithstanding the requirements of subsections (c) and (d) of this section, this subsection establishes the public notice requirements for an application for an individual Class V injection well permit for an ASR project. Issuance of the Notice of Receipt of Application and Intent to Obtain a Permit is not required for an application for an individual Class V injection well permit for an ASR project. The notice required by §39.419 of this title must be published by the applicant once in a newspaper of general cir-

culation in the county in which the injection well will be located after the chief clerk has mailed the preliminary decision and the Notice of Application and Preliminary Decision to the applicant. The chief clerk shall provide notice by first class mail to any groundwater conservation district in which the wells associated with the ASR project will be located. The chief clerk shall also mail notice to the persons listed in §39.413(7) - (9) of this title. This notice must contain the text as required by §39.411(c)(1) - (6) of this title.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

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Robert Martinez
Director, Environmental Law Division
Texas Commission on Environmental Quality
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For further information, please call: (512) 239-6812

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CHAPTER 293. WATER DISTRICTS
SUBCHAPTER C. SPECIAL REQUIREMENTS FOR GROUNDWATER CONSERVATION DISTRICTS

30 TAC §§293.17, 293.20, 293.22, 293.23

The Texas Commission on Environmental Quality (TCEQ, agency, or commission) adopts the amendments to §§293.17, 293.20, 293.22, and 293.23 *without change* to the proposed text as published in the November 20, 2015, issue of the *Texas Register* (40 TexReg 8172), and therefore, these amendments will not be republished.

Background and Summary of the Factual Basis for the Adopted Rules

In 2015, the 84th Texas Legislature passed House Bill (HB or bill) 2767, relating to the powers, duties, and administration of groundwater conservation districts (GCDs) and amending provisions that authorize fees. HB 2767 makes non-substantive, conforming, or clarification language changes throughout Texas Water Code (TWC), Chapter 36. Some of the changes made by HB 2767 do not affect the agency's rules. However, the commission has chosen to include all of the changes made by the bill in the Background and Summary of the Factual Basis for the Adopted Rules section of this preamble to provide context to the changes that HB 2767 does require.

Specifically, HB 2767 adds a definition to TWC, §36.001, for "operating permit" to mean any type of GCD permit for operation of or production from a water well including a permit to drill or complete a water well if a district does not require a separate permit for those actions. The bill adds a provision in TWC, §36.058, for GCD directors to be subject to Local Government Code, Chapter 176, relating to disclosure of conflicts. HB 2767 strikes language in TWC, §36.061, related to audit reporting standards and adds language in TWC, §36.153, consistent with TWC, Chapter 49, audit requirements and reporting standards. The bill amends TWC, §36.157(a), to add that a county or counties where the district is to be located may pay all costs and expenses incurred in the creation and organization of the district. HB 2767 also amends TWC, §36.251, by providing that only a GCD, an applicant, and parties to a contested case may participate in an appeal that was the subject of the contested case. The commission does not have rules governing the items listed in this paragraph; therefore, there are no changes for the commission to make to its rules to accommodate these amendments made by the bill.

Additionally, HB 2767 repeals TWC, §36.1082, Petition for Inquiry, and moves the repealed language to amended TWC, §36.3011, Commission Inquiry and Action Regarding District Duties. This move also included amendments to the newly placed language. The commission has rules governing these items; therefore, the commission amended the rule language in 30 TAC Chapter 293, Water Districts, to ensure the TWC citations included in the chapter are current and conform language to the TWC as amended.

HB 2767 closely follows bill language that was developed by the Texas Water Conservation Association over the interim. HB 2767 was authored by Representative Jim Keffer, sponsored by Senator Charles Perry, and became effective June 10, 2015.

Section by Section Discussion

§293.17, Purpose

The commission adopts the amendment to §293.17(3) by adding the word "and" to introduce the §293.17(4) provision. The commission adopts the amendment to §293.17(4) by inserting language to note that HB 2767 moved the petitions for inquiry to TWC, Chapter 36, Subchapter I. Additionally, the commission adopts the deletion of §293.17(5) because the rule language is not needed for commission inquiry or action regarding GCD duties. These changes are required by the amendments HB 2767 made to TWC, §36.3011.

§293.20, Records and Reporting

The commission adopts the amendment to §293.20(d) by changing the TWC citation from §36.1082 to §36.3011. HB 2767 repealed TWC, §36.1082, and moved the repealed language to amended TWC, §36.3011. This change brings the citations within the agency's rules into agreement with the TWC.

§293.22, Noncompliance Review and Commission Action

The commission adopts the amendment to §293.22(a)(5) and (e) by changing the TWC citation from §36.1082 to §36.3011. HB 2767 repealed TWC, §36.1082, and moved the repealed language to amended TWC, §36.3011. These changes bring the citations within the agency's rules into agreement with the TWC.

§293.23, Petition Requesting Commission Inquiry

The commission adopts the amendment to §293.23(a) by changing the definition of "affected person" to match the definition of "affected person" as defined in TWC, §36.3011, added by the bill. Additionally, the commission adopts removing the citation to TWC, §36.1082 that was repealed. These changes bring the agency's rules into agreement with the TWC.

The commission adopts the amendment to §293.23(b) by editing paragraphs (4) - (7) to include conforming changes made to TWC, §36.3011(b).

The commission adopts the amendment to §293.23(g)(4) by changing the TWC citation from §36.1082 to §36.3011. HB 2767 repealed TWC, §36.1082, and moved the repealed language to amended TWC, §36.3011. This change brings the citations within the agency's rules into agreement with the TWC.

Final Regulatory Impact Determination

The commission reviewed the adopted rulemaking in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and determined that the rulemaking is not subject to Texas Government Code, §2001.0225 because it does not meet the definition of a "major environmental rule" as defined in the Texas Administrative Procedure Act. A "major environmental rule" is a rule that is specifically intended to protect the environment or reduce risks to human health from environmental exposure and that may adversely affect in a material way the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state.

This rulemaking does not meet the statutory definition of a "major environmental rule" because the specific intent of the rule is not to protect the environment or reduce risks to human health from environmental exposure. The specific intent of the adopted rulemaking is to implement legislative changes enacted by HB 2767. HB 2767 repeals TWC, §36.1082, and moves the repealed language to amended TWC, §36.3011.

Further, the rulemaking does not meet the statutory definition of a "major environmental rule" because the adopted amendments do not adversely affect in a material way 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 cost of complying with the adopted rulemaking is not expected to be significant with respect to the economy as a whole or a sector of the economy; therefore, the adopted rulemaking does not adversely affect in a material way the economy, a sector of the economy, productivity, competition, or jobs.

Furthermore, the adopted rulemaking does not meet the statutory definition of a "major environmental rule" because it does not meet any of the four applicability requirements listed in Texas Government Code, §2001.0225(a). Texas Government Code, §2001.0225(a) only applies to a major environmental rule, the result of which is to: 1) exceed a standard set by federal law, unless the rule is specifically required by state law; 2) exceed an express requirement of state law, unless the rule is specifically required by federal law; 3) exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program; or 4) adopt a rule solely under the general powers of the agency instead of under a specific state law. The adopted rulemaking does not meet the four applicability requirements, because the adopted amendments: 1) do not exceed a standard set by federal law; 2) do not exceed an express requirement of state law; 3) do not exceed a requirement of federal delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program as no such federal delegation agreement exists with regard to the adopted rules; and 4) are not an adoption of a rule solely under the general powers of the commission as the adopted rules are required by HB 2767.

The commission invited public comment regarding the Draft Regulatory Impact Analysis Determination during the public comment period. The commission did not receive any comments regarding this section of the preamble.

Takings Impact Assessment

The commission evaluated this adopted rulemaking and performed an assessment of whether the adopted rulemaking constitutes a taking under Texas Government Code, Chapter 2007. The commission adopted this rulemaking for the specific purpose of implementing legislation enacted by the 84th Texas Legislature in 2015. The commission's analysis revealed that the rulemaking would achieve consistency with TWC, §36.3011, as amended by HB 2767. The adopted rulemaking amends the rule sections to ensure the TWC citations included in Chapter 293 are current and conform to the language as amended by HB 2767.

A "taking" under Texas Government Code, Chapter 2007, means a governmental action that affects private real property in a manner that requires compensation to the owner under the United States or Texas Constitution, or a governmental action that affects real private property in a manner that restricts or limits the owner's right to the property and reduces the market value of affected real property by at least 25%. Because no taking of private real property would occur by ensuring the TWC citations included within Chapter 293 are current and conform to the language as amended, the commission has determined that promulgation and enforcement of this adopted rulemaking is neither a statutory nor a constitutional taking of private real property. Specifically, there are no burdens imposed on private real property under the rules because the adopted rulemaking neither relates to, nor has any impact on, the use or enjoyment of private real property, and there would be no reduction in real property value as a result of the rulemaking. Therefore, the adopted rulemaking does not constitute a taking under Texas Government Code, Chapter 2007.

Consistency with the Coastal Management Program

The commission reviewed the adopted rulemaking and found the adopted rulemaking is identified in the Coastal Coordination Act Implementation Rules, 31 TAC §505.11(b)(4), relating to rules subject to the Texas Coastal Management Program (CMP), and, therefore, requires that goals and policies of the CMP be considered during the rulemaking process.

The commission reviewed this rulemaking for consistency with the CMP goals and policies in accordance with the regulations of the Coastal Coordination Advisory Committee and determined that the rulemaking is administrative in nature and does not have a substantive effect on commission actions subject to the CMP and is, therefore, consistent with CMP goals and policies.

The commission invited public comment regarding the consistency with the CMP during the public comment period. The commission did not receive any comments on the CMP section of the preamble.

Public Comment

The commission held a public hearing on December 15, 2015. The comment period closed on January 4, 2016. The commission received comments from the High Plains Underground Water Conservation District (High Plains UWCD). High Plains UWCD suggested changes to the proposed rule as discussed in the Response to Comments section of this preamble.

Response to Comments

Comment

High Plains UWCD commented that the acronym GCD was misspelled in §293.23(a)(2). High Plains UWCD also commented that using the term "GDC district" in §293.23(a)(2) is duplicative and unnecessary since the term district includes a groundwater conservation district under §293.17. High Plains UWCD recommends striking GCD from the proposed rules.

Response

The commission acknowledges this comment. The proposed version of the rule published on November 20, 2015, in the *Texas Register* (40 TexReg 8172) does not contain a misspelled acronym or include the duplicative term of "GCD district" in §293.23(a)(2). The proposed rule language published in the *Texas Register* states "a GCD or subsidence district in or adjacent to the management area." No changes were made in response to this comment.

Statutory Authority

These amendments are adopted under Texas Water Code (TWC), §5.102, General Powers, which establishes the commission's general authority necessary to carry out its jurisdiction; TWC, §5.103, Rules, which establishes the commission's general authority to adopt rules; TWC §5.105, General Policy, which establishes the commission's authority to set policy by rule; and TWC, §36.3011, Commission Inquiry and Action Regarding District Duties, which allows an affected person to file a petition for inquiry.

The adopted amendments implement House Bill 2767.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

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Robert Martinez
Director, Environmental Law Division
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CHAPTER 295. WATER RIGHTS, PROCEDURAL

The Texas Commission on Environmental Quality (TCEQ, agency, or commission) adopts the repeal of §295.21 and §295.22; new §295.21; and an amendment to §295.202.

New §295.21 is adopted *with change* to the proposed text as published in the December 25, 2015, issue of the *Texas Register* (40 TexReg 9496). The repeal of §295.21 and §295.22 and the amendment to §295.202 are adopted *without change* to the proposed text and, therefore, will not be republished.

Background and Summary of the Factual Basis for the Adopted Rules

This rulemaking implements House Bill (HB) 655, 84th Texas Legislature, 2015, addressing the commission's regulation of aquifer storage and recovery (ASR) projects in Texas. ASR involves the use of one or more injection wells for the purpose of placing a water supply into a subsurface geologic formation, or aquifer, for storage so that the water may be subsequently recovered and used by the project operator. The adopted revisions to Chapter 295 implement amendments to Texas Water Code (TWC), §11.153 and the repeal of TWC, §11.154 under HB 655. HB 655 eliminated the requirement that ASR projects using appropriated water must first develop a pilot project. The adopted revisions in this chapter implement HB 655 by removing the requirements that an ASR project using surface water under a water right develop the project in separate phases. HB 655 states that a water right holder or a person who has contracted for the use of water under a contract that does not prohibit the use of the water in an ASR project may undertake an ASR project without obtaining any additional authorization under the water rights program. An ASR project must comply with applicable requirements under TWC, Chapters 27 and 36.

In corresponding rulemaking published in this issue of the *Texas Register,* the commission also adopts amendments to 30 TAC Chapter 39, Public Notice; 30 TAC Chapter 297, Water Rights, Substantive; and 30 TAC Chapter 331, Underground Injection Control.

Section by Section Discussion

§295.21, Aquifer Storage and Retrieval Projects

The commission adopts the repeal of §295.21. Existing §295.21 includes the requirements for water rights permitting from TWC, §11.153(d) and (e). HB 655 amended TWC, §11.153, to remove subsections (d) and (e); therefore, the commission adopts the repeal of the corresponding requirements in §295.21.

§295.21, Aquifer Storage and Recovery Projects

HB 655 also amended TWC, §11.153(a) - (c), to allow a water right holder or a person who has contracted for the use of water under a contract that does not prohibit the use of the water in an ASR project to undertake an ASR project without obtaining any additional authorization under TWC, Chapter 11. However, TWC, §11.153, as amended by HB 655, requires the applicant to obtain any necessary authorizations for an ASR project under TWC, Chapter 27, Subchapter G, and TWC, Chapter 36, Subchapter N. The commission adopts new §295.21 to incorporate these changes to the TWC.

Adopted new §295.21 allows a water right holder or contractee to undertake an ASR project without obtaining any additional authorization under TWC, Chapter 11, for the project. In addition, adopted new §295.21 specifies that a person undertaking an ASR project must obtain any required authorizations under TWC, Chapter 27, Subchapter G, and TWC, Chapter 36, Subchapter N and comply with the terms of the applicable water right.

Current TCEQ rules in 30 TAC §297.42(d) allow the commission to consider water availability on a case-by-case basis for projects, including ASR projects, that are not based on continuous availability of historical streamflow. Water for these projects could be available on a variable or non-constant basis and the commission could consider lower water availability for a water right application that includes an ASR project if the proposed project is viable for the intended purpose and the water can be beneficially used without waste. Adopted new §295.21(b) is included to allow TCEQ to continue to consider the storage made available through an ASR project in its water availability determination under §297.42(d) even though the ASR project does not require a water rights permit.

§295.22, Additional Requirements for the Underground Storage of Surface Water for Subsequent Retrieval and Beneficial Use

The commission adopts the repeal of §295.22. This section contains additional requirements for the underground storage of surface water for subsequent retrieval and beneficial use associated with Phase I and II ASR projects. These requirements are from TWC, §11.154. HB 655 repealed TWC, §11.154; therefore, the commission adopts the repeal of this corresponding rule section.

§295.202, Reports

Section 295.202(e) contains requirements for operations reports for ASR projects. HB 655 amended TWC, §11.153(a) - (c), to allow a water right holder or contractee to undertake an ASR project without obtaining any additional authorization under TWC, Chapter 11, for the project. In addition, HB 655 repealed TWC, §11.153(d) and (e), and §11.154, which pertained to ASR projects; therefore, the commission adopts the deletion of subsection (e).

Final Regulatory Impact Analysis Determination

The commission reviewed the adopted rulemaking action in light of the regulatory analysis requirements of 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 the statute. "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. The adopted action implements legislative requirements in HB 655, which revises the requirements for the commission's regulation of injection wells associated with ASR projects and associated water rights. The adoption does not meet the definition of "major environmental rule" because the rulemaking does not affect in a material way 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 adopted rules implement the statutory repeal of the requirement to establish a pilot project for an ASR project under HB 655.

Furthermore, the adopted rules do not meet any of the four applicability requirements listed in Texas Government Code, §2001.0225(a). The adopted rules do not exceed a standard set by federal law, because there are no federal standards regarding Texas water rights. The adopted rules do not exceed an express requirement of state law because the rules are consistent with the express requirements of HB 655 and TWC, §11.153. The adopted rules do not exceed requirements of a federal delegation agreement or contract because there is no federal delegation or contract for the Texas Water Rights program. The rulemaking is not adopted under the general powers of the agency and is adopted under the express requirements of HB 655, Section 6.

The commission invited public comment regarding the Draft Regulatory Impact Analysis Determination during the public comment period. The commission did not receive comments on the regulatory impact analysis determination for the Chapter 295 rules.

Takings Impact Assessment

The commission evaluated this rulemaking action and performed a preliminary assessment of whether Texas Government Code, Chapter 2007 is applicable. The adopted action implements legislative requirements in HB 655, which revises the requirements for the commission's regulation of water rights associated with ASR projects.

The adopted rules would be neither a statutory nor a constitutional taking of private real property. The adopted rules eliminate a requirement that ASR projects first establish a pilot project and develop the project in phases consistent with the requirements of HB 655. The adopted rules do not affect a landowner's rights in private real property because this rulemaking action does not burden (constitutionally), nor restrict or limit, the owner's right to property and reduce its value by 25% or more beyond which would otherwise exist in the absence of the regulations.

Consistency with the Coastal Management Program

The commission reviewed the adopted rulemaking and found the adoption is a rulemaking identified in the Coastal Coordination Act Implementation Rules, 31 TAC §505.11(b)(4), relating to rules subject to the Texas Coastal Management Program (CMP), and will, therefore, require that goals and policies of the CMP be considered during the rulemaking process.

The commission reviewed this rulemaking for consistency with the CMP goals and policies in accordance with the regulations of the Coastal Coordination Advisory Committee and determined that the rulemaking is procedural in nature and will have no substantive effect on commission actions subject to the CMP and is, therefore, consistent with CMP goals and policies.

The commission invited public comment regarding the consistency with the CMP during the public comment period. The commission did not receive comments on the CMP.

Public Comment

The commission held a public hearing on January 22, 2016. The comment period closed on February 8, 2016. The commission received comments from the Benbrook Water Authority (Benbrook), Hemphill Underground Water Conservation District (Hemphill Underground WCD), High Plains Underground Water Conservation District (High Plains Underground WCD), Llano Estacado Underground Water Conservation District (Llano Estacado Underground WCD), Mesa Underground Water Conservation District (Mesa Underground WCD), Permian Basin Underground Water Conservation District (Permian Basin Underground WCD), Sandy Land Underground Water Conservation District (Sandy Land Underground WCD), Sledge Law and Public Strategies (Sledge Law), and South Plains Underground Water Conservation District (South Plains Underground WCD).

The Hemphill Underground WCD, High Plains Underground WCD, Llano Estacado Underground WCD, Mesa Underground WCD, Permian Basin Underground WCD, Sandy Land Underground WCD, and South Plains Underground WCD supported the rulemaking. Benbrook and Sledge Law suggested changes as discussed in the Response to Comments section of this preamble.

Response to Comments

Section by Section Discussion of §295.21, Aquifer Storage and Recovery Projects

Comment

Benbrook and Sledge Law requested that the commission include additional preamble language to explain what the commission means by the words: "...not based on continuous availability of historical streamflow" in the preamble discussion of new §295.21. Benbrook commented that they believe these words were meant as a clarification that an applicant for a water right could use ASR to help prove up a water right that qualifies a firm yield demonstration through storage (i.e. municipal use right).

Response

The commission responds that adopted §295.21(b) implements TWC, §11.053(c). Water for ASR projects could be available on a variable or non-constant basis. Under adopted new §295.21(b) the commission could consider lower water availability for a wa-

ter right application that includes an ASR project if the proposed project is viable for the intended purpose and the water can be beneficially used without waste. Adopted new §295.21(b) allows TCEQ to continue to consider the storage made available through an ASR project in its water availability determinations under §297.42(d), even though the ASR component of the project does not require a water rights permit. The commission clarified the Section by Section discussion of adopted §295.21 in response to this comment.

Subchapter A: Requirements of Water Rights Applications General Provisions

Division 2: Additional Requirements for the Storage of Appropriated Surface Water in Aquifers

Comment

The Hemphill Underground WCD, High Plains Underground WCD, Llano Estacado Underground WCD, Mesa Underground WCD, Permian Basin Underground WCD, Sandy Land Underground WCD, and South Plains Underground WCD commented that they support the repeal of existing §295.21 and §295.22 and the new rule language in §295.21.

Response

The commission acknowledges this comment. No changes were made in response to this comment.

Comment

Benbrook and Sledge Law commented that the commission should add the words, "as defined in §297.1 of this title (relating to Definitions)" after the words, "aquifer storage and recovery project" in §295.21(b). The commenters stated that the suggested language is in repealed §295.21 and that without the language there is no definition for an ASR project in Chapter 295.

Response

The commission agrees with the commenters. Section §295.21(b) was changed in response to this comment.

Subchapter F: Miscellaneous

Comment

The Hemphill Underground WCD, High Plains Underground WCD, Llano Estacado Underground WCD, Mesa Underground WCD, Permian Basin Underground WCD, Sandy Land Underground WCD, and South Plains Underground WCD commented that they support the amendment of §295.202.

Response

The commission acknowledges this comment. No changes were made in response to this comment.

SUBCHAPTER A. REQUIREMENTS OF WATER RIGHTS APPLICATIONS GENERAL PROVISIONS

DIVISION 2. ADDITIONAL REQUIREMENTS FOR THE STORAGE OF APPROPRIATED SURFACE WATER IN AQUIFERS

30 TAC §295.21, §295.22

Statutory Authority

The repeal is adopted under Texas Water Code (TWC), §5.103, which provides the commission the authority to adopt any rules necessary to carry out its powers and duties under TWC and other laws of this state; TWC, §5.105, which authorizes the commission to establish and approve all general policy of the commission by rule; TWC, §5.120, which authorizes the commission to administer the law so as to promote the judicious use and maximum conservation and protection of the environment and natural resources of the state; and House Bill (HB) 655, Section 6, 84th Texas Legislature, 2015.

The adopted repeal implements HB 655; TWC, §11.153; and the repeal of TWC, §11.154.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

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Robert Martinez
Director, Environmental Law Division
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30 TAC §295.21

Statutory Authority

The new section is adopted under Texas Water Code (TWC), §5.103, which provides the commission the authority to adopt any rules necessary to carry out its powers and duties under TWC and other laws of this state; TWC, §5.105, which authorizes the commission to establish and approve all general policy of the commission by rule; TWC, §5.120, which authorizes the commission to administer the law so as to promote the judicious use and maximum conservation and protection of the environment and natural resources of the state; and House Bill (HB) 655, Section 6, 84th Texas Legislature, 2015.

The adopted new section implements HB 655; TWC, §11.153; and the repeal of TWC, §11.154.

§295.21. Aquifer Storage and Recovery Projects.

(a) A water right holder or a person who has contracted for the use of water under a contract that does not prohibit the use of the water in an aquifer storage and recovery project may undertake an aquifer storage and recovery project without obtaining any additional authorization under Texas Water Code (TWC), Chapter 11, for the project. A person, as described in this section, undertaking an aquifer storage and recovery project must:

(1) obtain any required authorizations under TWC, Chapter 27, Subchapter G, and TWC, Chapter 36, Subchapter N; and

(2) comply with the terms of the applicable water right.

(b) This section does not preclude the commission from considering an aquifer storage and recovery project, as defined in §297.1 of this title (relating to Definitions), to be a component of a project permitted under TWC, Chapter 11, that is not required to be based on the continuous availability of historic, normal stream flow.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

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SUBCHAPTER F. MISCELLANEOUS

30 TAC §295.202

Statutory Authority

The amendment is adopted under Texas Water Code (TWC), §5.103, which provides the commission the authority to adopt any rules necessary to carry out its powers and duties under TWC and other laws of this state; TWC, §5.105, which authorizes the commission to establish and approve all general policy of the commission by rule; TWC, §5.120, which authorizes the commission to administer the law so as to promote the judicious use and maximum conservation and protection of the environment and natural resources of the state; and House Bill (HB) 655, Section 6, 84th Texas Legislature, 2015.

The adopted amendment implements HB 655; TWC, §11.153; and the repeal of TWC, §11.154.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

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CHAPTER 297. WATER RIGHTS, SUBSTANTIVE

The Texas Commission on Environmental Quality (TCEQ, agency, or commission) adopts the amendments to §§297.1, 297.13, and 297.19 *without changes* to the proposed text as published in the December 25, 2015, issue of the *Texas Register* (40 TexReg 9500) and, therefore, will not be republished.

Background and Summary of the Factual Basis for the Adopted Rules

This rulemaking implements House Bill (HB) 655, 84th Texas Legislature, 2015, addressing the commission's regulation of aquifer storage and recovery (ASR) projects in Texas. ASR involves the use of one or more injection wells for the purpose of placing a water supply into a subsurface geologic formation, or aquifer, for storage so that the water may be subsequently recovered and used by the project operator. The adopted amendments to Chapter 297 implement amendments to Texas Water Code (TWC), §11.153 and the repeal of TWC, §11.154 under HB 655 regarding the storage of appropriated water in ASR projects.

The 84th Texas Legislature also passed HB 2031. HB 2031 relates to the diversion, treatment, and use of marine seawater and the discharge of treated marine seawater and waste resulting from the desalination of marine seawater. HB 2031 created TWC, Chapter 18, to address marine seawater desalination projects. New TWC, §18.001, added a definition for "Marine seawater." The commission intends to implement statutory requirements for desalination in a separate rulemaking project (Rule Project Number 2015-029-295-OW). Because the commission is adopting changes to definitions in §297.1 to implement HB 655, the commission is also adopting changes to this section to include a definition from HB 2031 to avoid open section conflicts under *Texas Register* publication requirements when the rest of HB 2031 is implemented in the separate rulemaking project.

In corresponding rulemaking published in this issue of the *Texas Register,* the commission also adopts revisions to 30 TAC Chapter 39, Public Notice; 30 TAC Chapter 295, Water Rights, Procedural; and 30 TAC Chapter 331, Underground Injection Control.

Section by Section Discussion

In addition to adopting amendments to implement HB 655 and HB 2031, the commission adopts grammatical, stylistic, and various other non-substantive changes to update the rules in accordance with current *Texas Register* style and format requirements, improve readability, and establish consistency in the rules. These non-substantive changes are not intended to alter the existing rule requirements in any way and are not specifically discussed in this preamble.

§297.1, Definitions

The commission adopts the amendment to §297.1(5) and adds §297.1(30). The commission amends the definition of "Aquifer Storage and Retrieval Project" in §297.1(5). HB 655 created new TWC, Chapter 27, Subchapter G, which contains a definition of "Aquifer storage and recovery project." The commission amends the existing term and definition in §297.1(5) to bring it into agreement with "Aquifer storage and recovery project" as defined in the amendments to the TWC made by HB 655.

The commission also adds a definition for "Marine seawater" as §297.1(30). HB 2031 created TWC, Chapter 18, to address marine seawater desalination projects. New TWC, §18.001, added a definition for "Marine seawater." Because the commission has opened §297.1 to amend the definition of "Aquifer Storage and Retrieval Project," the commission also simultaneously adopts the addition of the definition of "Marine seawater" to avoid a potential open section conflict with another agency rulemaking.

Additionally, the commission adopts the renumbering of the existing definitions to accommodate the addition of §297.1(30).

§297.13, Temporary Permit under the Texas Water Code, §11.138

The adopted amendment to §297.13 revises the title to remove the TWC reference to TWC, §§11.153 - 11.155, because a temporary permit is no longer required for an ASR project under TWC, Chapter 11. HB 655 amended TWC, §11.153(a) - (c), to allow a water right holder or a person who has contracted

for the use of water under a contract that does not prohibit the use of the water in an ASR project to undertake an ASR project without obtaining any additional authorization under TWC, Chapter 11. However, TWC, §11.153, as amended by HB 655, requires the applicant to obtain any necessary authorizations for an ASR project under TWC, Chapter 27, Subchapter G, and TWC, Chapter 36, Subchapter N. In addition, HB 655 repealed TWC, §11.153(d) and (e), and §11.154, which included the repeal of Phase I ASR projects. The commission amends §297.13(a), which includes a description of the types of projects a temporary permit is designed for, by deleting, "evaluation of Phase I of an aquifer storage and retrieval project" since HB 655 repealed Phase I ASR projects.

§297.19, Term Permit under Texas Water Code, §11.1381

The adopted amendment to §297.19 revises the title to remove the TWC reference to TWC, §§11.153 - 11.155, and deletes §297.19(d) because the term permit is no longer required for an ASR project under TWC, Chapter 11, as amended by HB 655.

Final Regulatory Impact Analysis Determination

The commission reviewed the adopted rulemaking action in light of the regulatory analysis requirements of 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 the statute. "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. The adopted action implements legislative requirements in HB 655, which revises the requirements for the commission's regulation of injection wells associated with ASR projects and associated water rights; and implements HB 2031, by adding a definition of "Marine seawater." The adoption does not meet the definition of "major environmental rule" because the rulemaking does not affect in a material way 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 adopted rules implement the statutory repeal of the requirement to establish a pilot project for an ASR project under HB 655 by removing rule requirements for temporary and term permits for ASR projects and amends definitions consistent with HB 655 and HB 2031.

Furthermore, the adopted rules do not meet any of the four applicability requirements listed in Texas Government Code, §2001.0225(a). The adopted rules do not exceed a standard set by federal law, because there are no federal standards regarding Texas water rights. The adopted rules do not exceed an express requirement of state law because the rules are consistent with the express requirements of HB 655; TWC, §11.153; the repeal of TWC, §11.154; and TWC, §18.001, as established in HB 2031. The adopted rules do not exceed requirements of a federal delegation agreement or contract because there is no federal delegation or contract for the Texas Water Rights program. The rulemaking is not adopted under the general powers of the agency and is adopted under the express requirements of HB 655, Section 6.

The commission invited public comment regarding the Draft Regulatory Impact Analysis Determination during the public comment period. The commission did not receive comments on the regulatory impact analysis determination for the Chapter 297 rules.

Takings Impact Assessment

The commission evaluated this rulemaking action and performed a preliminary assessment of whether Texas Government Code, Chapter 2007 is applicable. The adopted action implements legislative requirements in HB 655, which revises the requirements for the commission's regulation of water rights associated with ASR projects; and implements HB 2031 by adding a definition of "Marine seawater."

The adopted rules would be neither a statutory nor a constitutional taking of private real property. The adopted rules eliminate requirements for temporary or term permits because ASR projects do not have to establish a pilot project or develop the project in phases under the requirements of HB 655. The adopted rules also amend definitions to implement HB 655 and HB 2031. The adopted rules do not affect a landowner's rights in private real property because this rulemaking action does not burden (constitutionally), nor restrict or limit, the owner's right to property and reduce its value by 25% or more beyond which would otherwise exist in the absence of the regulations.

Consistency with the Coastal Management Program

The commission reviewed the adopted rulemaking and found the adoption is a rulemaking identified in the Coastal Coordination Act Implementation Rules, 31 TAC §505.11(b)(4), relating to rules subject to the Texas Coastal Management Program (CMP), and will, therefore, require that goals and policies of the CMP be considered during the rulemaking process.

The commission reviewed this rulemaking for consistency with the CMP goals and policies in accordance with the regulations of the Coastal Coordination Advisory Committee and determined that the rulemaking is procedural in nature and will have no substantive effect on commission actions subject to the CMP and is, therefore, consistent with CMP goals and policies.

The commission invited public comment regarding the consistency with the CMP during the public comment period. The commission did not received comments regarding the consistency with the CMP.

Public Comment

The commission held a public hearing on January 22, 2016. The comment period closed on February 8, 2016. The commission received comments from the Hemphill Underground Water Conservation District (Hemphill Underground WCD), High Plains Underground Water Conservation District (High Plains Underground WCD), Llano Estacado Underground Water Conservation District (Llano Estacado Underground WCD), Mesa Underground Water Conservation District (Mesa Underground WCD), Permian Basin Underground Water Conservation District (Permian Basin Underground WCD), Sandy Land Underground Water Conservation District (Sandy Land Underground WCD), and South Plains Underground Water Conservation District (South Plains Underground WCD).

The Hemphill Underground WCD, High Plains Underground WCD, Llano Estacado Underground WCD, Mesa Underground WCD, Permian Basin Underground WCD, Sandy Land Underground WCD, and South Plains Underground WCD supported the rulemaking.

Response to Comments

Comment

The Hemphill Underground WCD, High Plains Underground WCD, Llano Estacado Underground WCD, Mesa Underground WCD, Permian Basin Underground WCD, Sandy Land Underground WCD, and South Plains Underground WCD commented that they support the amendment of §§297.1, 297.13, and 297.19.

Response

The commission acknowledges this comment. No changes were made in response to this comment.

SUBCHAPTER A. DEFINITIONS AND APPLICABILITY

30 TAC §297.1

Statutory Authority

The amendment is adopted under Texas Water Code (TWC), §5.103, which provides the commission the authority to adopt any rules necessary to carry out its powers and duties under TWC and other laws of this state; TWC, §5.105, which authorizes the commission to establish and approve all general policy of the commission by rule; TWC, §5.120, which authorizes the commission to administer the law so as to promote the judicious use and maximum conservation and protection of the environment and natural resources of the state; and House Bill (HB) 655, Section 6, 84th Texas Legislature, 2015.

The adopted amendment implements HB 655, TWC, §11.153, and the repeal of TWC, §11.154; and HB 2031, 84th Texas Legislature, 2015, and TWC, §18.001.

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 April 29, 2016.

TRD-201602031
Robert Martinez
Director, Environmental Law Division
Texas Commission on Environmental Quality
Effective date: May 19, 2016
Proposal publication date: December 25, 2015
For further information, please call: (512) 239-6812

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SUBCHAPTER B. CLASSES OF WATER RIGHTS

30 TAC §297.13, §297.19

Statutory Authority

The amendments are adopted under Texas Water Code (TWC), §5.103, which provides the commission the authority to adopt any rules necessary to carry out its powers and duties under TWC and other laws of this state; TWC, §5.105, which authorizes the commission to establish and approve all general policy of the commission by rule; TWC, §5.120, which authorizes the commission to administer the law so as to promote the judicious use and maximum conservation and protection of the environment and natural resources of the state; and House Bill (HB) 655, Section 6, 84th Texas Legislature, 2015.

The adopted amendments implement HB 655; TWC, §11.153; and the repeal of TWC, §11.154.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

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CHAPTER 331. UNDERGROUND INJECTION CONTROL

The Texas Commission on Environmental Quality (TCEQ, agency, or commission) adopts amendments to §§331.2, 331.7, 331.11, and 331.181 - 331.186.

The amendments to §331.7 and §§331.182 - 331.186 are adopted *with changes* to the proposed text as published in the December 25, 2015, issue of the *Texas Register* (40 TexReg 9552). The amendments to §§331.2, 331.11, and 331.181 are adopted *without changes* to the proposed text and, therefore, will not be republished.

Background and Summary of the Factual Basis for the Adopted Rules

This rulemaking implements House Bill (HB) 655, 84th Texas Legislature, 2015, addressing the commission's regulation of aquifer storage and recovery (ASR) projects in Texas. ASR involves the use of one or more injection wells for the purpose of placing a water supply into a subsurface geologic formation, or aquifer, for storage so that the water may be subsequently recovered and used by the project operator. ASR allows the operator to utilize an existing aquifer as a storage reservoir rather than using aboveground storage options. The stored water can be available for public or private drinking water supplies, agriculture, or industrial uses. The operator must assure that the aquifer formation receiving the injected water has appropriate geologic and hydrologic properties that are amenable to injection and will allow the control or containment of the injected water. The operator must assure that injection will not endanger any drinking water source that supplies or can reasonably be expected to supply any public water system. Such a drinking water source is endangered if injection may result in the presence of any contaminant that may result in the system not being compliant with any national primary drinking water regulation, or if injection may otherwise adversely affect the health of persons. TCEQ's Underground Injection Control (UIC) program regulates the authorization, construction, operation, and closure of the injection wells used for ASR projects. Because ASR injection wells inject fluids into a formation that is considered an underground source of drinking water, ASR injection wells are classified as Class V injection wells. Other TCEQ regulatory programs, such as the Water Rights program or the Public Drinking Water program, may also be involved with ASR projects, depending on the original source of the injected water or the final use of the recovered water. Projects situated

within a groundwater conservation district may be subject to the requirements of that district as provided in HB 655.

HB 655 amended Texas Water Code (TWC) to revise the requirements that apply to authorization for ASR projects. TWC, §11.153 was amended to allow the injection of appropriated water for an ASR project without obtaining any additional authorizations under TWC, Chapter 11, and to specify that commission approval of an ASR project is not contingent on the continuous availability of historic, normal stream flow. TWC, §11.155 was amended to remove the requirement for a pilot project prior to approval of an ASR project. TWC, Chapter 27 was amended to add TWC, Chapter 27, Subchapter G, Aquifer Storage and Recovery Projects, §§27.151 - 27.157. Under new TWC, §27.151, definitions were provided for the following terms: "Aquifer storage and recovery project," "ASR injection well," "ASR recovery well," "Native groundwater," and "Project operator." Under new TWC, §27.152, the commission is granted exclusive jurisdiction over the regulation and permitting of ASR injection wells. Under new TWC, §27.153, the commission may authorize the use of a Class V ASR injection well by rule, individual permit, or under a general permit. Under new TWC, §27.153(b), in adopting rules or when issuing a permit for an ASR injection well, the commission shall consider if the injection of water will comply with the standards of the federal Safe Drinking Water Act, the amount of injected water that can be recovered, the effect of the ASR project on existing water wells, and the effect of the injected water on the physical, chemical, or biological quality of the native groundwater that would render the water produced harmful or detrimental to people, vegetation, or property. All wells associated with a single ASR project must be located within a continuous perimeter boundary. The commission is required to provide for public notice and comment on a proposed general permit, and the applicant for an individual permit is required to provide first class mailed notice to any groundwater conservation district in which the ASR wells will be located, and is required to publish notice in a newspaper of general circulation in the county in which the well will be located. Under new TWC, §27.154, the commission is directed to adopt technical standards governing the approval of the use of a Class V injection well as an ASR injection well. For an ASR project located within the jurisdiction of a groundwater conservation district or other special purpose district with authority to regulate groundwater withdrawal, the volume of groundwater recovered at an ASR project is limited to the volume of water injected. If the commission determines that a loss of injected water or loss of native water will occur, the commission shall impose additional restrictions on the amount of water that may be recovered to account for the loss. The commission may not deny a permit based on a determination that such a loss will occur. The commission shall prescribe by rule construction and completion standards, metering, and reporting requirements for ASR injection and recovery wells. The commission may not adopt or enforce groundwater protection standards for the quality of water injected that are more stringent than federal standards. New TWC, §27.155 requires an ASR project operator to install a meter on each ASR injection and recovery well associated with the ASR project. The project operator also must provide monthly reports to the commission on the volume of water injected, and the volume of water recovered for beneficial use. New TWC, §27.156 requires an ASR operator to perform annual water quality testing on water to be injected and on recovered water, and to provide testing results to the commission. New TWC, §27.157 provides that new TWC, Chapter 27, Subchapter G does not affect the ability to regulate an ASR project under specific legislation applicable to the Edwards Aquifer Authority, the Harris-Galveston Subsidence District, the Fort Bend Subsidence District, the Barton Springs Edwards Aquifer Conservation District, or the Corpus Christi Aquifer Storage and Recovery Conservation District. New TWC, Chapter 27, Subchapter G, does not affect the commission's authority regarding recharge projects in certain portions of the Edwards underground reservoir under TWC, §11.023 or injection wells that transect or terminate in certain portions of the Edwards Aquifer under TWC, §27.0516.

In corresponding rulemaking published in this issue of the *Texas Register,* the commission also adopts revisions to 30 TAC Chapter 39, Public Notice; 30 TAC Chapter 295, Water Rights, Procedural; and 30 TAC Chapter 297, Water Rights, Substantive.

Section by Section Discussion

In addition to adopting amendments to implement HB 655, the commission adopts grammatical, stylistic, and various other non-substantive changes to update the rules in accordance with current *Texas Register* style and format requirements, improve readability, and establish consistency in the rules. These non-substantive changes are not intended to alter the existing rule requirements in any way and are not specifically discussed in this preamble.

§331.2, Definitions

The commission adopts an amendment to §331.2 to implement HB 655 new definitions established in TWC, §27.151. Section 331.2 is amended to add definitions for the following terms: "Aquifer storage and recovery injection well," "Aquifer storage and recovery production well," "Aquifer storage and recovery project," "Native groundwater," and "Project operator." The existing definition for the term "Aquifer storage well" is amended to "Aquifer storage and recovery," as the amended definitions for the terms "Aquifer storage and recovery injection well" and "Aquifer storage and recovery production well" now supersede the existing definition for "Aquifer storage well." Existing definitions in this section are renumbered accordingly.

§331.7, Permit Required

The commission adopts the amendment to §331.7 to add subsection (h), under which a Class V injection well associated with an ASR project may be authorized by permit, general permit, or authorization by rule. Adopted §331.7(h) implements TWC, §27.153(a). The commission expects that most ASR projects can be authorized by rule as provided in HB 655 and as allowed for Class V injection wells under the commission's UIC program approved by the United States Environmental Protection Agency (EPA) under the federal Safe Drinking Water Act. Under existing authority in §331.9(c), the executive director may require the owner or operator of an injection well otherwise authorized by rule to apply for and obtain an injection well permit. The executive director may use this authority, on a case-by-case basis, to require that an owner or operator of ASR project seek authorization under a permit rather than by rule. Because the commission expects that most ASR projects can be authorized by rule, the commission does not plan to develop a general permit for ASR at this time.

Based on comments received, the proposed rule is amended to refer to "individual permit" in the adopted rule, as the term "individual permit" is consistent with TWC, §27.153(a)(2). Additionally, based on comments received, adopted §331.7(h) includes the requirements that the executive director inform a groundwater conservation district of any ASR project proposed to be au-

thorized by rule for a project that is located within that district. Lastly, proposed §331.7(h) was amended at adoption to state that Class V injection well associated with an ASR project may be "authorized by individual permit, general permit, or by rule" rather than "authorized by permit, general permit, or by permit-by-rule." "Permit-by-rule" is not a term used to describe authorizations under Chapter 331. This change will make the adopted rule consistent with TWC, §27.153(a)(1).

§331.11, Classification of Injection Wells

The commission adopts the amendment to §331.11(a)(4)(L) to refer to wells used for the injection of water for storage and subsequent retrieval for beneficial use as part of an ASR project. Revision of the description of this type of Class V well addresses the adopted definition for the term "Aquifer storage and recovery injection well" at §331.2(9).

Subchapter K, Additional Requirements for Class V Injection Wells Associated with Aquifer Storage and Recovery Projects

The commission adopts amending the title of Subchapter K from "Additional Requirements for Class V Aquifer Storage Wells" to "Additional Requirements for Class V Injection Wells Associated with Aquifer Storage and Recovery Projects." This adopted amendment is necessary for consistency with the adopted definition for the term "Aquifer storage and recovery injection well."

§331.181, Applicability

The commission adopts the amendment to §331.181 to refer to "Class V aquifer storage and recovery injection wells" instead of "aquifer storage wells" to be consistent with the adopted definition for "Aquifer storage and recovery injection well" at §331.2(9) and with the adopted amendment to §331.11(a)(4)(L) regarding the classification of Class V wells used for ASR.

§331.182, Area of Review

The commission adopts the amendment of §331.182 to remove the area of review determination for a Phase I Class V aquifer storage well, as the requirement for a pilot project (Phase I) was repealed from TWC, §11.153(b) and (c) under HB 655. The area of review requirements that applied to the Phase II aquifer storage well is retained and will apply to an ASR project. The commission adopts §331.182(4) to require an applicant for an authorization to provide all of the information to the executive director that is required under adopted §331.186(a) to implement TWC, §27.153(b), as amended by HB 655.

Based on comments received, the commission revised the rule to specify that the area of review for an ASR project is the area determined by a radius of 1/2 mile from the proposed ASR injection well. For an ASR project that includes more than one proposed injection well, the area of review in the adopted rule is the area determined by a radius of 1/2 mile from the centroid of the injection well field. In a case where the extent of the underground stored water of the ASR project will exceed the area determined by the 1/2 mile radius, the adopted rule includes the requirement that the area of review is the area determined by the projected extent of the underground stored water as calculated by using site-specific hydrogeologic information. Additionally, based on comments received, the adopted rule refers to "water" rather than "state water."

§331.183, Construction and Closure Standards

The commission adopts the amendment to §331.183 to refer to "aquifer storage and recovery injection wells" rather than "aquifer storage wells" to be consistent with the adopted definition for "Aquifer storage and recovery injection wells" at §331.2(9) and with the adopted amendment to §331.11(a)(4)(L) regarding the classification of Class V injection wells used for ASR. The commission also adopts an amendment to this section to revise the term "operator" to "project operator" to be consistent with the latter term as it is defined in adopted §331.2(92). Lastly, the commission adopts §331.183(4) and (5). Under adopted §331.183(4), an ASR injection well may be used as an ASR production well, as specified in TWC, §27.154(c), as added by HB 655. To maintain consistency with existing 30 TAC §290.41, which applies to water wells that are used to supply water to a public water system, adopted paragraph (4) includes the requirement that an ASR injection well that also is used as an ASR production well must be constructed and operated in accordance with the requirements in §290.41 if the recovered water will serve a public water system.

Adopted §331.183(5) addresses TWC, §27.153(c), as added by HB 655, under which all wells associated with an ASR project must be within a continuous perimeter boundary of one parcel of land, or within two or more adjacent parcels of land under the common ownership, lease, joint operating agreement, or contract.

Based on comments received, proposed §331.183(4) was amended to apply to all ASR production wells, not just those that serve as both an ASR injection well and an ASR production well.

§331.184, Operating Requirements

The commission adopts the amendment of §331.184 to refer to "aquifer storage and recovery injection wells" rather than "aquifer storage wells" to be consistent with the adopted definition for "Aquifer storage and recovery injection wells" at §331.2(9) and with the adopted amendment to §331.11(a)(4)(L) regarding the classification of Class V wells used for ASR. The commission adopts the amendment of §331.184(e) to remove the requirement that water injected for storage and subsequent recovery for beneficial use must meet the water quality standards in 30 TAC Chapter 290, Public Drinking Water.

The commission adds §331.184(f), under which all ASR injection and production wells must be installed with a flow meter for measuring the volume of water injected and the volume of the water recovered or produced. Section 331.184(f) implements TWC, §27.155(a), as added by HB 655.

The commission adds §331.184(g) to address the requirements of TWC, §27.154(b), as added by HB 655. Under adopted §331.184(g), the requirements of TWC, Chapter 36, Subchapter N apply to an ASR project that is within the jurisdiction of a groundwater conservation district or other special-purpose district with the authority to regulate the withdrawal of groundwater. For ASR projects located within the jurisdiction of a district, the commission will not authorize the recovery of a volume of water that exceeds the volume of water injected as provided in TWC, §27.154(b). Under TWC, Chapter 36, Subchapter N, an ASR operator is subject to a district's requirements for registration and reporting of ASR production wells; reporting of injection and production volumes; reporting of volume of water produced that exceeds the volume injected; district permitting, spacing, and production requirements for volume of produced water that exceeds the volume of water injected; and the district's requirements regarding fees and surcharges, as they apply to

the volume of water produced that exceed the volume of water injected.

Based on comments received, several revisions were made to this section. Section 331.184(a) was revised to remove the reference to pollution. In adopted §331.184(a), all Class V ASR injection wells must be operated in a manner to assure that injection will not endanger drinking water sources if it may result in the presence in underground water which supplies or can reasonably be expected to supply any public water system of any contaminant, and if the presence of such contaminant may result in such system's not complying with any national primary drinking water regulation or may otherwise adversely affect the health of persons. This change makes §331.184(a) consistent with HB 655, as the revised language is consistent with the federal Safe Drinking Water Act, §1421(d)(2). Second, §331.184(e) was revised to remove the requirements regarding treatment of water prior to injection when such treatment was considered to be necessary to avoid pollution of native groundwater. Section 331.184(e) was revised in the adopted rule to reference the requirements of §331.186(a)(1). As discussed in the Response to Comments section of this preamble, this change was made to make the adopted rule consistent with HB 655. The requirement of subsection (e) that water that will be recovered from an ASR and provided to a public water system be subject to applicable requirements of Chapter 290 is retained in the adopted rule. Section 331.184(g)(1) was revised at adoption to specify that an authorization or permit issued under Chapter 331 may not authorize a volume of water to be recovered that exceeds the volume of water that is injected, or the volume of injected water that the commission determines can be recovered, whichever is less. Section 331.184(g)(2) was revised also to specify that the requirements of TWC, Chapter 36, Subchapter N apply to the volume of water recovered from an ASR project that exceeds the volume of water the commission determines can be recovered, and otherwise as applicable. Section 331.184(g)(3) was deleted.

§331.185, Monitoring and Reporting Requirements

The commission adopts the amendment of §331.185(a) to replace the requirement for quarterly reporting to the TCEQ with monthly reporting. The commission amends subsection (a) to include requirements for reporting of the volume of water injected for storage, and for the reporting of the volume of water produced for beneficial use, as required under TWC, §27.155, as added by HB 655. Reporting of monthly average injection pressures and reporting of other information, as required by the executive director, necessary for protection of underground sources of drinking water are retained. The commission adopts amendments to remove the existing requirement in §331.185(a)(4) for monthly reporting of water quality analyses of injected water. TWC, §27.156, added by HB 655, requires water quality testing on an annual basis, which is now required under the adopted amendment to §331.185(b), discussed in this Section by Section Discussion.

The commission adopts the amendment to §331.185(b) to remove reference to the report required for Phase I of an ASR project, as this requirement has been removed from TWC, §11.153(b) and (c). The commission also amends §331.185(b) to require annual water quality testing and reporting as required under TWC, §27.156, as added by HB 655.

Based on comments received, the proposed rule is amended to refer to "individual permit" in the adopted rule, as the term "individual permit" is consistent with TWC, §27.153(a)(2).

§331.186, Additional Requirements

Existing requirements for regulating an ASR project in two phases (initial and final) was removed from TWC, §11.153(b) and (c) under HB 655. TCEQ now can authorize by rule, or issue individual or general permit for an ASR project without requiring a pilot project (Phase I). For this reason, the commission amends the title of §331.186 and deletes the requirement in §331.186 for submission of the information obtained during the first phase of an ASR project. The commission also adopts the amendment of §331.186 to refer to "aquifer storage and recovery injection wells" rather than "aquifer storage wells" to be consistent with the adopted definition for "Aquifer storage and recovery injection wells" at §331.2(9) and with the adopted amendment to §331.11(a)(4)(L) regarding the classification of Class V injection wells used for ASR. The commission adopts amendments to reorganize the sequence of existing §331.186 so that the information that was previously required to be provided after Phase I is now provided to the executive director after the completion of the injection well in adopted §331.186(b).

The commission amends §331.186 by creating a subsection (a) to include factors the TCEQ (either the executive director when considering applications for individual, general permit, or authorizations by rule; or the commission when considering contested applications) shall consider when issuing a new permit for an ASR project. TCEQ must consider whether the injection of the water will comply with the standards set forth in the federal Safe Drinking Water Act; the extent to which the cumulative volume of water injected for storage can be recovered; the effect of the ASR project on existing water wells; and whether the introduction of water in the subsurface will alter the physical, chemical or biological quality of the native groundwater to a degree that would render produced water harmful or detrimental, or would require an unreasonable higher level of treatment to render the produced water suitable for beneficial use. Section 331.186(a) was revised to include the executive director's consideration of the factors specified in TWC, §27.153(a) and (b). Adopted §331.186(a) implements TWC, §27.153(a) and (b), as added by HB 655.

Based on comments received, the proposed rule is amended to refer to "individual permit" in the adopted rule, as the term "individual permit" is consistent with TWC, §27.153(a)(2).

Final Regulatory Impact Analysis Determination

The commission reviewed the adopted rulemaking action in light of the regulatory analysis requirements of 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 the statute. "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. The adopted action implements legislative requirements in HB 655, which revises the requirements for the commission's regulation of injection wells associated with ASR projects. The adoption does not meet the definition of "major environmental rule" because the rulemaking does not adversely affect in a material way 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. Prior to the enactment of HB 655, the commission had previously authorized only two ASR projects and does not expect a great number of new projects. The adopted

rules implement the legislative directives of HB 655 and do not impose additional regulatory burdens that would affect the economy or a sector of the economy in a material way.

Furthermore, the adopted rules do not meet any of the four applicability requirements listed in Texas Government Code, §2001.0225(a). The adopted rules do not exceed a standard set by federal law, because the adopted rules are consistent with applicable federal standards for Class V ASR injection wells. The adopted rules do not exceed an express requirement of state law because the adopted rules are consistent with the express requirements of HB 655 and TWC, Chapter 27, Subchapter G. The adopted rules do not exceed requirements set out in the commission's UIC program authorized for the state of Texas under the federal Safe Drinking Water Act. The rulemaking is not adopted under the general powers of the agency, but is adopted under the express requirements of HB 655 and TWC, §§27.019, 27.153, and 27.154.

The commission invited public comment regarding the Draft Regulatory Impact Analysis Determination during the public comment period. No comments were received on the Draft Regulatory Impact Analysis Determination for the Chapter 331 rules.

Takings Impact Assessment

The commission evaluated this rulemaking action and performed a preliminary assessment of whether Texas Government Code, Chapter 2007 is applicable. The adopted action implements legislative requirements of HB 655, which revises the requirements for the commission's regulation of injection wells associated with ASR projects.

The adopted rules would be neither a statutory nor a constitutional taking of private real property. The adopted rules would establish conditions and requirement for certain injection activities associated with ASR projects, consistent with the requirements of HB 655. The adopted rulemaking does not affect a landowner's rights in private real property because this rulemaking action does not burden (constitutionally), nor restrict or limit, the owner's right to property and reduce its value by 25% or more beyond which would otherwise exist in the absence of the regulations.

Consistency with the Coastal Management Program

The commission reviewed the adopted 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 adopted rules are not subject to the Texas Coastal Management Program (CMP).

The commission invited public comment regarding the consistency with the CMP during the public comment period. No comments were received regarding the consistency with the CMP during the public comment period.

Public Comment

The commission held a public hearing on January 22, 2016. The comment period closed on February 8, 2016. The commission received comments from Benbrook Water Authority (Benbrook); Brazos Valley Groundwater Conservation District (Brazos Valley GWCD); Clearwater Underground Water Conservation District (Clearwater Underground WCD); Hemphill Underground Water Conservation District (Hemphill Underground WCD); High Plains Underground Water Conservation District (High Plains Underground WCD); the Honorable Lyle Larson, Texas State Representative, District 122, who authored HB 655 (Representative Larson); Llano Estacado Underground Water Conservation District (Llano Estacado Underground WCD); Lone Star Groundwater Conservation District (Lone Star GWCD); Mesa Underground Water Conservation District (Mesa Underground WCD); Permian Basin Underground Water Conservation District (Permian Basin Underground WCD); Prairielands Groundwater Conservation District (Prairielands GWCD); Sandy Land Underground Water Conservation District (Sandy Land Underground WCD); Sledge Law and Public Strategies (Sledge Law); South Plains Underground Water Conservation District (South Plains Underground WCD); Texas Alliance of Groundwater Districts; Texas Farm Bureau; and the Upper Trinity Groundwater Conservation District (Upper Trinity GWCD).

All commenters generally were in support of the proposed rules, although there were numerous suggested changes, as detailed in the Response to Comments section of this preamble. A common comment was that certain rules were not consistent with HB 655.

Response to Comments

General

Comment

Representative Larson, Hemphill Underground WCD, High Plains Underground WCD, Llano Estacado Underground WCD, Mesa Underground WCD, Permian Basin Underground WCD, Sandy Land Underground WCD, South Plains Underground WCD, Upper Trinity GWCD, Texas Farm Bureau, Prairielands GWCD, Upper Trinity GWCD, Sledge Law, Benbrook, Texas Alliance of Groundwater Districts, and Lone Star GWCD commented that the proposed rules should be revised to ensure consistency with HB 655.

Response

The commission agrees that the adopted rules should be consistent with the provisions of HB 655. To ensure that these rules are consistent with HB 655, all comments were carefully reviewed, and, as detailed in the responses, changes to the proposed rules were made, as appropriate, to maintain consistency with HB 655.

Comment

Sledge Law commented that the preamble to this rulemaking did not include the Corpus Christi Aquifer Storage and Recovery Conservation District as an entity that new TWC, Chapter 27, Subchapter G does not affect regarding that districts ability to regulate groundwater.

Response

The commission agrees with this comment, as this entity was included in TWC, §27.157. The preamble to the adopted rules has been amended to include the Corpus Christi Aquifer Storage and Recovery Conservation District.

Subchapter A: General Provisions

§331.2, Definitions

Comment

The Hemphill Underground WCD, High Plains Underground WCD, Llano Estacado Underground WCD, Mesa Underground WCD, Permian Basin Underground WCD, Sandy Land Un-

derground WCD, South Plains Underground WCD, and Upper Trinity GWCD commented that the commission did not use the exact terms in TWC, §27.151(2) and (3), as amended by HB 655, for the new definitions at §331.2(9) and (10), respectively, for the terms "ASR recovery well" and "ASR production well." Commenters suggested that to be consistent with HB 655, the commission use the terms in TWC, §27.151(2) and (3) in the new definitions, and that the terms in TWC, §27.151(2) and (3) be used throughout the Chapter 331 adopted rules.

Response

The commission acknowledges that the terms defined at §331.2(9) and (10) are not the exact terms used at TWC, §27.151(2) and (3), respectively, although the rule definition for each term is identical to the respective definition in TWC, §27.151(2) and (3). The proposed rule defined the term "Aquifer storage and recovery injection well" instead of the term "ASR injection well," used in TWC, §27.151(2). Similarly, the proposed rule defined the term "Aquifer storage and recovery production well" instead of the term "ASR recovery well," used in TWC, §27.151(3). The commission made these modifications to avoid a possible reference to an "aquifer storage and recovery recovery well." The double "recovery" in this term could create confusion when the ASR acronym is stated in full. This modification does not deviate from the intent of the definitions at TWC, §27.151(2) and (3), as the actual definitions in the rules are identical to the respective definitions in TWC, §27.151(2) and (3). No changes were made in response to this comment.

§331.7, Permit Required

Comment

The Hemphill Underground WCD, High Plains Underground WCD, Llano Estacado Underground WCD, Mesa Underground WCD, Permian Basin Underground WCD, Sandy Land Underground WCD, and the South Plains Underground WCD commented that proposed §331.7(h) be revised to refer to "individual permit" rather than to "permit."

Response

The commission agrees with this comment, as the term "individual permit" is used in TWC, §27.153(a)(2). Adopted §331.7(h) is amended to refer to "individual permit" rather than to "permit." Additionally, as discussed in corresponding rulemaking for 30 TAC Chapter 39 published in this issue of the *Texas Register*, proposed §331.7(h) was amended at adoption to require that the executive director inform a groundwater conservation district of any ASR project proposed to be authorized by rule for a project that is located within that district. Lastly, proposed §331.7(h) was amended at adoption to state that the commission may authorize an ASR project by individual permit, general permit, or by rule, rather than by individual permit, general permit, or permit-by-rule. This change will make the adopted rule consistent with TWC, §27.153(a), under which the commission may authorize the use of a Class V injection well as an ASR injection well under an individual permit, under a general permit, or by rule.

Subchapter K: Additional Requirements for Class V Injection Wells Associated With Aquifer Storage and Recovery Projects

§331.182, Area of Review

Comment

The Prairielands GWCD, Upper Trinity GWCD, Benbrook, Lone Star GWCD, and Sledge Law commented that proposed §331.182 should refer simply to "water" rather than to "state water," as management of water at an ASR project is not restricted to state water.

Response

The commission agrees with this comment. At TWC, §27.151(1), the term "aquifer storage and recovery project" is defined as a project involving the injection of *water* (emphasis added) into a geologic formation for the purpose of subsequent recovery and beneficial use by the project operator. As discussed in the following response to comments, proposed §331.182 has been revised to address how the area of review is determined. Based on those comments, the reference to "state water" is amended to "water."

Comment

Benbrook commented that the proposed rule language at §331.182 regarding the area of review was unclear, and suggested the proposed rule be amended to adopt a default area of review, which they described as "a circle of a 1/2 mile radius." Benbrook commented that a typical ASR project has a radius of 200 feet. Benbrook further commented that if information submitted in the application indicated the extent of stored water was greater than the area described by a radius of 1/2 mile, the area of review could be extended. Benbrook stated that this recommendation is based on the difficulty and costs associated with determining the location of the "buffer zone" in order to establish a 1/4 mile area of review from the buffer zone.

Response

Prior to amendment of TWC by HB 655, the area of review was described in §331.182 as the area determined by a radius of 1/4 mile from the perimeter of a buffer zone as described under 30 TAC §295.22(e)(5). Under §295.22(e)(5), an application for an ASR project had to include "the location of a buffer zone surrounding the land surface area under which the underground storage of state water will occur and beyond which pumpage by other wells will not interfere or significantly affect the movement or storage of the state water." In a corresponding rulemaking for 30 TAC Chapter 295, published in this issue of the *Texas Register,* the commission repeals §295.22. Although §295.22 was repealed, HB 655 did not remove the requirements that are in §331.182 regarding information in §331.182(1) - (3), which pertain to the area of review. That is to say, HB 655 did not remove the requirement for an area of review under existing §331.182. Additionally, an area of review is required to address the requirement at TWC, §27.153(b)(3), under which the commission shall consider the effect of the ASR project on existing water wells. In their comments, Benbrook stated that at a typical ASR project, the extent of the stored water is within an area with a radius of about 200 feet. Benbrook also stated that determination of a buffer zone is difficult and expensive, and that the area of review should be a circle of 1/2 mile radius (presumably centered on an ASR well or wells). The commission agrees that the area of review should be based on a distance from an identifiable feature; in this case, an ASR injection well, or, in the case of an ASR project for which there will be more than one injection well, the centroid of the injection well field. Benbrook also stated that the radius of a typical ASR project is approximately 200 feet. In consideration of this fact, the adopted rule identifies an area of review, defined as the area described by a radius of 1/2 mile from either the ASR injection well or from the centroid of the injection well field, as applicable. This requirement will address the existing requirements in §331.182, as well as the requirements in TWC, §27.153(b)(3). Based on comments from Benbrook, the

adopted rule also is amended to specify that should the area of injected water exceed an area determined by a radius of 1/2 mile from the ASR injection well or the well field centroid, the area of review will be determined by the projected extent of the underground stored water as calculated by using site-specific hydrogeologic information.

§331.183, Construction and Closure Standards

Comment

The Texas Farm Bureau commented that although the proposed rules adequately address injection of water, they do not address issues associated with production of water, and asked what mechanism will be used for monitoring production of water at an ASR project to ensure that native groundwater is not withdrawn. Prairielands GWCD commented that the proposed rules did not address regulation of ASR production wells, and that the adopted rules should include requirements for such wells. Upper Trinity GWCD commented that under HB 655, the commission was granted authority to regulate both ASR injection wells and ASR production wells. Benbrook and Lone Star GWCD commented that although the proposed rules address regulation of a well that serves as both an injection and production ASR well, they do not address requirements for wells that are only for production. The Brazos Valley GWCD commented that the commission now has authority over both ASR injection and production wells, and that this authority should be addressed in the rules.

Response

Standards for water wells are found in existing §290.41, and include construction and operating requirements. Under proposed §331.183(4), an ASR injection well that also serves as an ASR production well must comply with the applicable requirements in §290.41. To address this comment, adopted §331.183(4) has been revised to apply the requirements in §290.41 to all ASR production wells.

Comment

The Hemphill Underground WCD, High Plains Underground WCD, Llano Estacado Underground WCD, Mesa Underground WCD, Permian Basin Underground WCD, Sandy Land Underground WCD, and the South Plains Underground WCD commented that the qualifier "within" in proposed §331.183(5)(A) and (B) be removed and placed at the beginning of §331.183(5).

Response

Section 331.183(5)(A) and (B) is adopted to address the requirement at TWC, §27.153(c) that "all wells associated with a single aquifer storage and recovery project must be located within a continuous perimeter boundary of one parcel of land, or two or more adjacent parcels of land under common ownership, lease, joint operating agreement, or contract." The commission responds that the placement of the qualifier "within" at §331.183(5) adequately conveys the intent of TWC, §27.153(c). No changes were made in response to this comment.

Comment

Brazos Valley GWCD commented that the proposed rules do not address a method to determine the amount of land required to be owned or controlled by an ASR operator. Brazos Valley GWCD commented that the proposed rules should include a definitive method to address this issue, including determination of a buffer zone. Otherwise, according to Brazos Valley GWCD, the commission may have a situation involving "underground trespass." Lastly, Brazos Valley GWCD commented that ASR project operators need assurance that their injected water is protected from extraction by adjacent landowners.

Response

In accordance with proposed §331.183(5)(A) and (B), all ASR injection wells and all ASR production wells must be located within a continuous boundary of one parcel of land, or two or more adjacent parcels of land under common ownership, lease, joint operating agreement, or contract. An applicant for an ASR project will have to provide proof that this requirement is satisfied. Such information will be required in an ASR project application form. It is the responsibility of the applicant to ensure he or she has control of an adequate amount of property such that the planned ASR project is contained within that parcel of land. Given the importance of the injected water to an ASR operator, it is in the interest of the ASR project manager to limit loss of any injected water and to acquire sufficient acreage for the ASR project to ensure, to the greatest extent possible, that his or her injected water does not migrate out of the ASR project, or that the injected water is not captured by an adjacent landowner. The commission notes that the purpose of the area of review requirements at amended §331.182 is to address issues related to operation of an ASR project. No change was made in response to this comment.

§331.184, Operating Requirements

Comment

Representative Larson commented that with respect to TWC, §27.153(b) and §27.154(d) regarding assessment of water quality impacts, the commission rules should allow for consideration of natural processes that occur in an aquifer, as such a consideration is consistent with EPA policy and reasonable interpretations of federal law. Representative Larson further commented that the rules should provide flexibility to evaluate drinking water standards at a logical distance from an ASR injection well. Representative Larson stated that an ASR project manager should be allowed to propose monitoring and testing to evaluate the effects injected water may have on groundwater. Such testing and monitoring would enable the operator to consider microbial, geochemical, and physical processes that occur in the aquifer when assessing whether or not injection will cause a violation of TWC, §27.153(b)(4). Prairielands GWCD commented that proposed §331.184(e) should be amended to be consistent with the statutory test regarding commission consideration of water quality impacts established in TWC, §27.153(b). Sledge Law, Benbrook, Clearwater Underground WCD, and the Upper Trinity GWCD commented that proposed §331.184(a) and (e) are inconsistent with the statutory test set forth in HB 655, and that the terms "pollution" and "pathogens and other organisms" are not used in HB 655. Upper Trinity GWCD, Texas Alliance of Groundwater Districts, and Clearwater Underground WCD commented that proposed §331.184(a) and (e) should be amended to be consistent with the statutory test established in TWC, §27.153(b)(4) and §27.154(d). Sledge Law commented that there have been recent public written interpretations by the EPA regarding standards for ASR projects, and that these comments were carefully considered by the Texas Water Conservation Association Committee and the Texas Legislature in development of HB 655. Sledge Law further commented that the demonstration an applicant for an ASR project must make is in TWC, §27.154(d). Benbrook commented that the rules should allow applicants for an ASR project the flexibility to propose monitoring and testing of water quality impacts, with consideration of natural processes,

including microbial, geochemical, and geophysical processes that occur underground that provide treatment of injected water. Benbrook commented that this approach is consistent with current EPA policy and also is a reasonable interpretation of federal laws that apply to UIC. Additionally, Benbrook commented that state rules regarding regulation of ASR projects should not be more stringent than federal requirements regarding water quality testing for ASR projects. Benbrook commented that the commission should allow, as does EPA, for situations to be addressed on a case-by-case basis to allow for ASR project operations that may cause a violation of primary drinking water regulations under 40 Code of Federal Regulations (CFR) Part 142 on the ASR site, but that are managed in such a manner as to prevent any off-site endangerment as described in the federal Safe Drinking Water Act at §1421(d)(2). Lone Star GWCD commented that proposed §331.184(e) be amended to be consistent with HB 655 regarding water quality impacts.

Response

The commission acknowledges that the term "pollution" is not used in HB 655. In response to this comment, the commission revised the language in §331.184(a) to mirror the language in the federal Safe Drinking Water Act §1421(d)(2). Section 331.184(e) has also been revised.

With regards to the comment that the commission should allow, as does the EPA, for situations to be addressed on a case-by-case basis to allow for ASR project operations that may cause a violation of primary drinking water regulations under 40 CFR Part 142 on the ASR site, but that are managed in such a manner as to prevent any off-site endangerment as described in the federal Safe Drinking Water Act at §1421(d)(2), the commission accepts the findings in the September 27, 2013, letter to Mr. Mark Thomasson, Director of the Division of Water Resource Management of the Florida Department of Environmental Protection from Dr. Peter Grevatt, Director of the EPA's Office of Ground Water and Drinking Water. This letter addresses the situation in Florida where injection of treated drinking water at ASR facilities has resulted in leaching of arsenic from the formation material of the aquifer in which the water was injected. In this letter, Dr. Grevatt states that this situation, which technically is a violation of a primary drinking water standard, is allowed under federal regulations provided the ASR operator institutes controls to restrict the occurrence and migration of the arsenic. As noted by Dr. Grevatt in this letter, this situation should be addressed by issuance of a Class V UIC permit for the Class V UIC wells associated with the ASR project.

The commission accepts the findings in Dr. Grevatt's letter, and notes in his conclusion he states that the purpose of the letter is to explain how Safe Drinking Water Act and UIC regulations allow states to address water shortages and at the same time protect the quality of future water supplies. Further, although this letter does not address the specific case presented by the commenter regarding reliance of natural attenuation and geochemical processes in the subsurface to control certain constituents in the injected water, the commission agrees that these processes may be considered in authorizing an ASR project. On a case-by-case basis, the commission may consider the effects of natural processes including microbial, geochemical, and geophysical process in the subsurface. To evaluate the effects of these processes, the commission may require controls such as monitoring and testing of the injected water. To provide maximum flexibility to operators regarding consideration of these processes, the commission will rely on adopted §331.186(a)(1). The commission, before issuing an individual permit, general permit, or authorization by rule for an ASR project, will consider whether the injection of water will comply with the standards set forth under the federal Safe Drinking Water Act (42 United States Code, §§300f, *et seq.).*This approach allows flexibility in the ASR authorization process to consider the factors presented by commenters, and to consider other factors that may be appropriate on a case-by-case basis. Finally, the adopted rule is consistent with TWC, §27.153(b) and §27.154(d), as amended by HB 655.

The commission is amending §331.184(e) in the adopted rule to remove reference to "pathogens," and to include the requirements in TWC, §27.153(b), in which the federal Safe Drinking Water Act (42 USC, §§300f *et seq);* is specifically referenced. By doing this, the commission may, on a case-by-case basis, consider proposed ASR projects with respect to determinations of how the requirements of §331.5 and 40 CFR §144.12(a) are met. In making such a determination, the commission may rely on EPA policy memoranda, EPA guidance, or case law.

Comment

The Texas Farm Bureau commented that for an ASR project located with the jurisdiction of a groundwater conservation district, that district should receive all water quality data required by the commission. Additionally, the Texas Farm Bureau commented that any adjacent district also should receive these data. Benbrook commented that local authority (presumably the groundwater conservation district) should receive monthly water quantity and water quality reports.

Response

In accordance with TWC, §36.453(b), for an ASR project within the jurisdiction of a groundwater conservation district, if an ASR project operator produces more water than was authorized by TCEQ, that operator must report to the district the volume of water produced that exceeds the volume authorized to be recovered. The ASR operator also must provide a monthly report that includes the information required under TWC, §27.155. These requirements are addressed in adopted §331.184(g), under which an ASR project is subject to TWC, Chapter 36, Subchapter N. With regards to reporting of water data to an adjacent groundwater conservation district, no such requirement is included in HB 655. No changes were made in response to this comment.

Comment

The Texas Farm Bureau and Upper Trinity GWCD commented that all ASR production wells within the jurisdiction of a groundwater conservation district, not just those that produce a volume of water in excess of the volume of water injected, must comply with the requirements of TWC, Chapter 36, Subchapter N.

Response

Enforcement of the specific requirements in TWC, Chapter 36, Subchapter N (or any provisions in TWC, Chapter 36, for that matter) is the responsibility of the individual groundwater conservation districts, not the commission. The commission does not have the authority to compel an ASR project operator to pay fees imposed by a district, for example. With regards to application of TWC, Chapter 36, Subchapter N, the commission cannot prohibit the production of native groundwater by an ASR project if the production complies with TWC, Chapter 36, Subchapter N. To address this consideration, the commission proposed §331.184(g). No changes were made in response to this comment.

Comment

The Hemphill Underground WCD, High Plains Underground WCD, Llano Estacado Underground WCD, Mesa Underground WCD, Permian Basin Underground WCD, Sandy Land Underground WCD, and the South Plains Underground WCD commented that proposed §331.184(g)(3) be amended to specify that a project manager of an ASR project "shall," rather than "may" be subject to registration, reporting, fee or other requirements of a groundwater conservation district or other special-purpose district with the authority to regulate the withdrawal of water. Lone Star GWCD commented that §331.184(g) should be clarified that an ASR project in the jurisdiction of a groundwater conservation district or other special-purpose district with authority to regulate withdrawal of groundwater is subject to the requirements of TWC, Chapter 36, Subchapter N.

Response

Section 331.184(g)(3) was proposed to address the requirement in TWC, §27.154(b), under which an ASR project located within the jurisdiction of a groundwater conservation district or other special-purpose district with authority to regulate the withdrawal of water is subject to the requirements of TWC, Chapter 36, Subchapter N. The proposed rule was intended to summarize certain TWC, Chapter 36, Subchapter N requirements. However, based on this comment, the commission has revisited this rule, and finds it does not adequately capture the intent of TWC, Chapter 36, Subchapter N. Therefore, in the adopted rule, §331.184(g)(3) is removed, and §331.184(g)(2) references TWC, Chapter 36, Subchapter N. Additionally, §331.184(g)(2) is revised to apply to the volume of water recovered that exceeds the volume of water the commission determines can be recovered. These revisions will remove any ambiguity regarding the requirements for an ASR project located within the jurisdiction of a groundwater conservation district or other special-purpose district with authority to regulate the withdrawal of water.

§331.185, Monitoring and Reporting Requirements

Comment

The Texas Farm Bureau commented by asking what is the mechanism for monitoring withdrawals from ASR projects to ensure that injected water and not native groundwater is being withdrawn. The Farm Bureau further commented that this is a critical question because withdrawal of native groundwater subject to the rules of a groundwater conservation district or other special-purpose district with authority to regulate withdrawal of groundwater. Lastly, the Texas Farm Bureau commented that monitor wells, operated by local groundwater districts, should be required within a buffer zone of an ASR project. Clearwater Underground WCD and Texas Alliance of Groundwater Districts commented that a mechanism or protocol by which a groundwater conservation district's groundwater monitoring network might be leveraged to detect injected water migration should be strongly considered by the commission

Response

The monitoring of the amount of water produced in association with an ASR project is addressed in proposed §331.185(a)(1) and (2). Under these rules, an ASR operator must report to the commission the volume of water injected for storage and the volume of water recovered for beneficial use. Also, under §331.184(g)(2), an operator of an ASR project that is within the jurisdiction of an groundwater conservation district is subject to TWC, Chapter 36, Subchapter N for the amount of water produced that exceeds the volume of water that the commission determines can be recovered. With regards to monitor wells completed on the periphery of an ASR project, with the purpose of detecting movement of injected water that may migrate offsite, the commission could require such monitor wells as part of an ASR project in cases where such monitoring may be needed. However, the requirement for an ASR operator to install and operate such wells would be determined on a case-by-case basis, depending on local geology and hydrogeology. Any monitor wells installed as part of an ASR project would be operated by the ASR operator, not a groundwater conservation district. No changes were made in response to this comment.

Comment

The Hemphill Underground WCD, High Plains Underground WCD, Llano Estacado Underground WCD, Mesa Underground WCD, Permian Basin Underground WCD, Sandy Land Underground WCD, and the South Plains Underground WCD commented that proposed §331.185(b) should refer to an "individual permit" rather than to a "permit," and also should refer to an "authorization by rule" rather than to an "authorization."

Response

The commission agrees with these suggested changes, and the adopted rule was revised to refer to an "individual permit" rather than to a "permit," and to an "authorization by rule" rather than to an "authorization."

§331.186, Additional Requirements

Comment

Upper Trinity GWCD, Sledge Law, and Brazos Valley GWCD commented that proposed §331.186 (regarding the factors the commission shall consider before authorizing an ASR project) applied to applications for individual permits and for authorization under a general permit, but not to an application for authorization of an ASR project by rule. These entities commented that the requirements of §331.186 should also apply to an application for authorization of an ASR project by rule.

Response

The commission agrees with this comment. The factors the commission or executive director must consider regarding authorization of an ASR project apply to permits (individual and general) and to an authorization by rule (TWC, §27.153(b)). Based on this comment, adopted §331.186(a) is amended to apply to an application for an individual permit, a general permit, or an authorization by rule and includes the executive director's consideration.

Comment

Prairielands GWCD, Lone Star GWCD, and Upper Trinity GWCD commented that the proposed rules in Chapter 331 should be revised to require the commission to make a determination of how much of the injected water can be recovered by an ASR project operator to account for any loss of injected water. Prairieland GWCD commented that this accounting by the commission is important to ensure that native groundwater is not produced without complying with local district restriction, and that such an accounting should be consistently reflected in the rules.

Response

As discussed subsequently in this Response to Comments, proposed §331.186(a) has been revised to require the commission, prior to authorizing an ASR project by individual permit, gen-

eral permit, or by rule, shall consider the extent to which the cumulative volume of water injected for storage in the receiving geologic formation can be successfully recovered from the geologic formation for beneficial use, taking into account that the injected water may be commingled to some degree with native groundwater. The commission responds that in considering these factors, it is in fact making the determination required in TWC, §27.154(b). The commission notes that this determination will be made on information provided by the applicant, and that no determination will be made until sufficient information is provided by the applicant. For projects within the jurisdiction of a groundwater conservation district, §331.184(g)(1) was revised to provide that an authorization or permit may not authorize a volume of water to be recovered that exceeds the volume of water that is injected or the volume of injected water that the commission determines can be recovered.

Comment

Upper Trinity GWCD commented that the proposed rules require that ASR production wells be included in an ASR project permit or authorization by rule.

Response

At TWC, §27.154(c), the commission is directed to adopt rules for the construction and completion standards and metering and reporting requirements for ASR injection wells and ASR recovery wells, including an ASR injection well that also serves as an ASR production well. Construction and completion of an ASR injection well are addressed in existing Chapter 331, Subchapter H (Standards for Class V Wells). Standards for construction and completion of an ASR production well are addressed in existing §290.41, and are referenced in adopted §331.183(4), as are ASR injection wells that also serve as an ASR production well. The commission notes that ASR injection wells will be authorized under a Class V UIC individual permit, general permit, or by rule. While TCEQ has exclusive jurisdiction over ASR injection wells under TWC, §27.152, other regulatory entities, such as the Texas Department of Licensing and Regulation, may be involved with the regulation of water wells. ASR production wells associated with a Class V ASR permit or authorization by rule will be identified in that permit or authorization. No changes were made in response to this comment.

Comment

Clearwater Underground WCD and Texas Alliance of Groundwater Districts commented that regular water quality monitoring that includes geochemical analysis and project evaluation should be required. Clearwater Underground WCD also commented that sufficient water quality testing should be considered for the receiving aquifer prior to ASR project authorization.

Response

In accordance with TWC, §27.156, an ASR project manager shall perform annual water quality testing on water to be injected and on produced water. This requirement is included in adopted §331.185(b). The commission agrees that the quality of the groundwater in the receiving aquifer should be adequately characterized prior to any injection. No changes were made in response to this comment.

Comment

Clearwater Underground WCD and Texas Alliance of Groundwater Districts commented that regular monitoring and modeling of water migration is necessary in order to define jurisdictional boundaries between ASR recovery and neighboring groundwater production.

Response

TCEQ has exclusive jurisdiction over the regulation and permitting of ASR injection wells. Well location requirements for an ASR project are established under adopted §331.183(5). A project operator will be required to demonstrate the extent to which the cumulative volume of water injected for storage in the receiving formation can be successfully recovered, taking into account that injected water may be commingled to some degree with native groundwater. If that ASR project is within the jurisdiction of a groundwater conservation district or other special-purpose district with authority to regulate withdrawal of water, then the applicable requirements of TWC, Chapter 36, Subchapter N apply. No changes were made in response to this comment.

SUBCHAPTER A. GENERAL PROVISIONS

30 TAC §§331.2, 331.7, 331.11

Statutory Authority

The amendments are adopted under Texas Water Code (TWC), §5.103, which provides the commission the authority to adopt any rules necessary to carry out its powers and duties under TWC and other laws of this state; TWC, §5.105, which authorizes the commission to establish and approve all general policy of the commission by rule; TWC, §5.120, which authorizes the commission to administer the law so as to promote the judicious use and maximum conservation and protection of the environment and natural resources of the state; TWC, §27.019, which requires the commission to adopt rules reasonably required for the regulation of injection wells; TWC, §27.153, which requires the commission to adopt rules for authorization of aquifer storage and recovery injection wells by rule or by permit; and TWC, §27.154, which requires the commission to adopt technical standards for aquifer storage and recovery injection wells.

The adopted amendments implement House Bill 655, 84th Texas Legislature, 2015, and TWC, Chapter 27, Subchapter G, which confers commission jurisdiction and establishes requirements for injection wells associated with aquifer storage and recovery projects.

§331.7. Permit Required.

(a) Except as provided in §331.9 of this title (relating to Injection Authorized by Rule) and by subsections (d) - (f) of this section, all injection wells and activities must be authorized by an individual permit.

(b) For Class III in situ uranium solution mining wells, Frasch sulfur wells, and other Class III operations under commission jurisdiction, an area permit authorizing more than one well may be issued for a defined permit area in which wells of similar design and operation are proposed. The wells must be operated by a single owner or operator. Before commencing operation of those wells, the permittee may be required to obtain a production area authorization for separate production or mining areas within the permit area.

(c) The owner or operator of a large capacity septic system, a septic system which accepts industrial waste, or a subsurface area drip dispersal system, as defined in §222.5 of this title (relating to Definitions) must obtain a wastewater discharge permit in accordance with Texas Water Code, Chapter 26 or Chapters 26 and 32, and Chapter 305 of this title (relating to Consolidated Permits), and must submit the inventory information required under §331.10 of this title (relating to Inventory of Wells Authorized by Rule).

(d) Pre-injection units for Class I nonhazardous, noncommercial injection wells and Class V injection wells permitted for the disposal of nonhazardous waste must be either authorized by a permit issued by the commission or registered in accordance with §331.17 of this title (relating to Pre-Injection Units Registration). The option of registration provided by this subsection shall not apply to pre-injection units for Class I injection wells used for the disposal of byproduct material, as that term is defined in Chapter 336 of this title (relating to Radioactive Substance Rules). Pre-injection units for Class I wells authorized to inject only nonhazardous desalination concentrate or nonhazardous drinking water treatment residuals are not subject to authorization by registration but are subject to authorization by an individual permit or under the general permit issued under Subchapter L of this chapter (relating to General Permit Authorizing Use of a Class I Injection Well to Inject Nonhazardous Desalination Concentrate or Nonhazardous Drinking Water Treatment Residuals).

(e) The commission may issue a general permit under Subchapter L of this chapter. The commission may determine that an injection well and the injection activities are more appropriately regulated under an individual permit than under a general permit based on findings that the general permit will not protect ground and surface fresh water from pollution due to site-specific conditions.

(f) Notwithstanding subsection (a) of this section, an injection well authorized by the Railroad Commission of Texas to use nonhazardous desalination concentrate or nonhazardous drinking water treatment residuals as an injection fluid for enhanced recovery purposes does not require a permit from the commission. The use or disposal of radioactive material under this subsection is subject to the applicable requirements of Chapter 336 of this title.

(g) Permits issued before September 1, 2007 for Class III wells for uranium mining will expire on September 1, 2012 unless the permit holder submits an application for permit renewal under §305.65 of this title (relating to Renewal) before September 1, 2012. Any holders of permits for Class III wells for uranium mining issued before September 1, 2007 who allow those permits to expire by not submitting a permit renewal application by September 1, 2012 are not relieved from the obligations under the expired permit or applicable rules, including obligations to restore groundwater and to plug and abandon wells in accordance with the requirements of the permit and applicable rules.

(h) Class V injection wells associated with an aquifer storage and recovery (ASR) project may be authorized by individual permit, general permit, or by rule. The executive director will notify a groundwater conservation district of an ASR project proposed to be authorized by rule that is located within the jurisdictional boundary of that groundwater conservation district.

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 April 29, 2016.

TRD-201602033
Robert Martinez
Director, Environmental Law Division
Texas Commission on Environmental Quality
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Proposal publication date: December 25, 2015
For further information, please call: (512) 239-6812

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SUBCHAPTER K. ADDITIONAL REQUIREMENTS FOR CLASS V INJECTION WELLS ASSOCIATED WITH AQUIFER STORAGE AND RECOVERY PROJECTS

30 TAC §§331.181 - 331.186

Statutory Authority

The amendments are adopted under Texas Water Code (TWC), §5.103, which provides the commission the authority to adopt any rules necessary to carry out its powers and duties under TWC and other laws of this state; TWC, §5.105, which authorizes the commission to establish and approve all general policy of the commission by rule; TWC, §5.120, which authorizes the commission to administer the law so as to promote the judicious use and maximum conservation and protection of the environment and natural resources of the state; TWC, §27.019, which requires the commission to adopt rules reasonably required for the regulation of injection wells; TWC, §27.153, which requires the commission to adopt rules for authorization of aquifer storage and recovery injection wells by rule or by permit; and TWC, §27.154, which requires the commission to adopt technical standards for aquifer storage and recovery injection wells.

The adopted amendments implement House Bill 655, 84th Texas Legislature, 2015, and TWC, Chapter 27, Subchapter G, which confers commission jurisdiction and establishes requirements for injection wells associated with aquifer storage and recovery projects.

§331.182. Area of Review.

The area of review for an aquifer storage and recovery (ASR) project is the area determined by a radius of 1/2 mile from the proposed ASR injection well. For an ASR project that includes more than one proposed injection well, the area of review is the area determined by a radius of 1/2 mile from the centroid of the injection well field. If the extent of the underground stored water of the ASR project will exceed the area determined by the 1/2 mile radius as described in this section, the area of review is the area determined by the projected extent of the underground stored water as calculated by using site-specific hydrogeologic information. In the application for authorization, the applicant shall provide information on the activities within the area of review including the following factors and their adverse impacts, if any, on the injection operation:

(1) location of all artificial penetrations that penetrate the interval to be used for aquifer storage and recovery, including but not limited to: water wells and abandoned water wells from commission well files or ground water district files; oil and gas wells and saltwater injection wells from the Railroad Commission of Texas files; and waste disposal wells/other injection wells from the commission disposal well files;

(2) completion and construction information, where available, for identified artificial penetrations;

(3) site specific, significant geologic features, such as faults and fractures; and

(4) all information required for the consideration of an aquifer storage and recovery injection well under §331.186(a) of this title (relating to Additional Requirements).

§331.183. Construction and Closure Standards.

All Class V aquifer storage and recovery (ASR) injection wells shall be designed, constructed, completed, and closed to prevent commingling, through the wellbore and casing, of injection waters with other fluids

outside of the authorized injection zone; mixing through the wellbore and casing of fluids from aquifers of substantively different water quality; and infiltration through the wellbore and casing of water from the surface into ground water zones.

(1) Plans and specifications. Except as specifically required in the terms of the Class V injection well authorization, the drilling and completion of a Class V ASR injection well shall be done in accordance with the requirements of §331.132 of this title (relating to Construction Standards) and the closure of a Class V ASR injection well shall be done in accordance with the requirements of §331.133 of this title (relating to Closure Standards for Injection Wells).

(A) If the project operator proposes to change the injection interval to one not reviewed during the authorization process, the project operator shall notify the executive director immediately. The project operator may not inject into any unauthorized zone.

(B) The executive director shall be notified immediately of any other changes, including but not limited to, changes in the completion of the well, changes in the setting of screens, and changes in the injection intervals within the authorized injection zone.

(2) Construction materials. Casing materials for Class V ASR injection wells shall be constructed of materials resistant to corrosion.

(3) Construction and workover supervision. All phases of any ASR injection well construction, workover or closure shall be supervised by qualified individuals who are knowledgeable and experienced in practical drilling engineering and who are familiar with the special conditions and requirements of injection well and water well construction.

(4) An ASR production well, or an ASR injection well that is also serving as an ASR production well, and is providing water to a public water system must comply with the applicable requirements for groundwater sources in §290.41 of this title (relating to Water Sources).

(5) All ASR injection wells and all ASR production wells associated with a single ASR project must be located:

(A) within a continuous perimeter boundary of one parcel of land; or

(B) within two or more adjacent parcels of land under the common ownership, lease, joint operating agreement, or contract.

§331.184. Operating Requirements.

(a) All Class V aquifer storage and recovery (ASR) injection wells shall be operated in such a manner that injection will not endanger drinking water sources. Underground injection endangers drinking water sources if such injection may result in the presence in underground water which supplies or can reasonably be expected to supply any public water system of any contaminant, and if the presence of such contaminant may result in such system's not complying with any national primary drinking water regulation or may otherwise adversely affect the health of persons.

(b) Injection pressure at the wellhead shall not exceed a maximum which shall be calculated so as to assure the pressure in the injection zone does not cause movement of fluid out of the injection zone.

(c) The owner or operator of an ASR injection well that has ceased operations for more than two years shall notify the executive director 30 days prior to resuming operation of the well.

(d) The owner or operator shall maintain the mechanical integrity of all wells operated under this section.

(e) The quality of the water injected at an ASR project must meet the requirements in §331.186(a)(1) of this title (relating to Additional Requirements). Water recovered from an ASR project that is provided to a public water system is subject to all applicable requirements, maximum contaminant levels, and treatment techniques under Chapter 290 of this title (relating to Public Drinking Water).

(f) All ASR injection and ASR production wells must be installed with a flow meter for measuring the volume of water injected and the volume of the water recovered.

(g) This subsection only applies to an ASR project that is located within the jurisdiction of a groundwater conservation district or other special-purpose district with the authority to regulate the withdrawal of groundwater.

(1) An authorization or permit issued under this chapter may not authorize a volume of water to be recovered that exceeds the volume of water that is injected or the volume of injected water that the commission determines can be recovered, whichever is less; and

(2) The requirements of Texas Water Code, Chapter 36, Subchapter N apply to the volume of water recovered from an ASR project that exceeds the volume of water the commission determines can be recovered, and otherwise as applicable.

§331.185. Monitoring and Reporting Requirements.

(a) An aquifer storage and recovery (ASR) project operator shall monitor each ASR injection well and each ASR production well associated with an ASR project. Each calendar month the project operator shall provide the executive director either a written or electronic report of the following information for the previous month:

(1) the volume of water injected for storage;

(2) the volume of water recovered for beneficial use;

(3) monthly average injection pressures; and

(4) other information as determined by the executive director as necessary for the protection of underground sources of drinking water.

(b) On an annual basis, an ASR project operator shall perform water quality testing on water to be injected at an ASR project and on water that is recovered from that project. The ASR project operator shall provide the executive director either a written or electronic report of the results of this testing. The report shall include the test results for all water quality parameters identified in the individual permit, general permit, or authorization by rule.

§331.186. Additional Requirements.

(a) The executive director or commission shall consider the following before issuing an individual permit, a general permit, or an authorization by rule for an aquifer storage and recovery (ASR) injection well:

(1) whether the injection of water will comply with the standards set forth under the federal Safe Drinking Water Act (42 United States Code, §§300f, *et seq);*

(2) the extent to which the cumulative volume of water injected for storage in the receiving geologic formation can be successfully recovered from the geologic formation for beneficial use, taking into account that the injected water may be comingled to some degree with native groundwater;

(3) the effect of the ASR project on existing water wells; and

(4) whether the introduction of water into the receiving geologic formation will alter the physical, chemical, or biological quality of the native groundwater to a degree that would:

(A) render the groundwater produced from the receiving formation harmful or detrimental to people, animals, vegetation, or property; or

(B) require an unreasonably higher level of treatment of the groundwater produced from the receiving geologic formation than is necessary for the native groundwater in order to render the groundwater suitable for beneficial use.

(b) Upon completion of an ASR injection well, the following information shall be submitted to the executive director within 30 days of receipt of the results of all analyses and test results:

(1) as-built drilling and completion data on the well;

(2) all logging and testing data on the well;

(3) formation fluid analyses;

(4) injection fluid analyses;

(5) injectivity and pumping tests determining well capacity and reservoir characteristics;

(6) hydrogeologic modeling, with supporting data, predicting mixing zone characteristics and injection fluid movement and quality; and

(7) other information as determined by the executive director as necessary for the protection of underground sources of drinking water.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

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Robert Martinez
Director, Environmental Law Division
Texas Commission on Environmental Quality
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For further information, please call: (512) 239-6812

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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 §3.320

The Comptroller of Public Accounts adopts amendments to §3.320, concerning Texas emissions reduction plan surcharge; off-road, heavy-duty diesel equipment, with changes to the proposed text as published in the November 6, 2015, issue of the *Texas Register* (40 TexReg 7796). This section is amended to implement House Bill 7 (HB 7), 84th Legislature, 2015. Effective September 1, 2015, Tax Code, §151.0515(b) (Texas Emissions Reduction Plan Surcharge) is amended to reduce the off-road, heavy-duty diesel Texas Emissions Reduction Plan Surcharge to 1.5%.

Subsection (a) contains definitions. Paragraph (3) is changed from the proposed rule to correct a typographical error by replacing the term "sale price" with the term "sales price."

Subsection (b) addresses the imposition of the surcharge. Subsection (b) is changed from the proposed rule. Proposed new paragraph (4) is deleted and existing paragraphs (4) and (5) are not renumbered. The proposed language is incorporated into existing paragraphs.

Paragraph (1) now provides both the new rate of 1.5% and the previous rate of 2.0% for applicable periods for sales.

Paragraph (2) now provides both the new rate of 1.5% and the previous rate of 2.0% for applicable periods for financing leases.

Paragraph (3) now provides both the new rate of 1.5% and the previous rate of 2.0% for applicable periods for operating leases.

Paragraph (4) now provides both the new rate of 1.5% and the previous rate of 2.0% for applicable periods on equipment purchased, leased, or rented out of state and brought into Texas for use.

Paragraph (5) is amended to make the paragraph easier to read.

Subsection (c) is amended to correct the name of §3.286 of this title (relating to Seller's and Purchaser's Responsibilities, including Nexus, Permits, Returns and Reporting Periods, and Collection and Exemption Rules).

Additional minor revisions are adopted in subsection (e) to make the subsection easier to read.

We received one comment from Ms. Pam Bushnell with Equipment Depot in Waco. The comment recommended amending the definition of "sales price" in subsection (a)(3) to exclude charges for transportation and other expenses connected to the sale, lease, or rental of new or used off-road, heavy-duty diesel equipment. In her comment, Ms. Bushnell also requested that Texas rental companies be allowed to collect the reduced surcharge rate on existing leases executed prior to September 1, 2015, similar to subsection (b)(4), which applies the reduced rate to off-road, heavy-duty diesel equipment brought into Texas on or after September 1, 2015, regardless of when the lease took effect.

After carefully considering Ms. Bushnell's comments, we determined the suggestions to amend the definition of "sales price" and to apply the reduced surcharge rate on leases executed prior to September 1, 2015, were beyond the scope of HB 7. However, based on Ms. Bushnell's comments, we amended subsection (b) to clarify the imposition of the surcharge on off-road, heavy-duty diesel equipment sold, leased, or rented in Texas. Paragraphs (1) - (3) notify sellers and purchasers the rate is imposed on Texas sales, leases, or rentals when the purchaser takes possession or title of the equipment. In contrast, the surcharge for off-road, heavy-duty diesel equipment purchased, leased, or rented outside the state and brought into Texas for use, is imposed at the time the equipment is brought into this state for use.

This amendment is adopted under Tax Code, §111.002 (Comptroller's Rules; Compliance; Forfeiture), which provides the comptroller with the authority to prescribe, adopt, and enforce

rules relating to the administration and enforcement of the provisions of Tax Code, Title 2.

The amendment implements Tax Code, Chapter 151, §151.0515 (Texas Emissions Reduction Plan Surcharge).

§3.320. Texas Emissions Reduction Plan Surcharge; Off-Road, Heavy-Duty Diesel Equipment.

(a) Definitions. The following words and terms, when used in this section, shall have the following meanings, unless the context clearly indicates otherwise.

(1) Off-road, heavy-duty diesel equipment--Diesel-powered equipment of 50 horsepower or greater, other than motor vehicles and equipment used directly in oil and gas exploration and production at an oil or gas well site. See §3.96 of this title (relating to Imposition and Collection of a Surcharge on Certain Diesel Powered Motor Vehicles) for information about the imposition of the surcharge on motor vehicles. Off-road, heavy-duty diesel equipment includes accessories and attachments sold with the equipment. Off-road, heavy-duty diesel equipment includes, but is not limited to, the following diesel-powered equipment:

(A) backhoes;

(B) bore equipment and drilling rigs, except drilling rigs used to drill oil and gas wells;

(C) bulldozers;

(D) compactors (plate compactors, etc.);

(E) cranes;

(F) crushing and processing equipment (rock and gravel crushers, etc.);

(G) dumpsters and tenders;

(H) excavators;

(I) forklifts (rough terrain forklifts, etc.);

(J) graders;

(K) light plants (generators) and signal boards;

(L) loaders;

(M) mining equipment;

(N) mixers (cement mixers, mortar mixers, etc.);

(O) off-highway vehicles and other moveable specialized equipment (equipment, such as a motorized crane, that does not meet the definition of a motor vehicle because it is designed to perform a specialized function rather than designed to transport property or persons other than the driver);

(P) paving equipment (asphalt pavers, concrete pavers, etc.);

(Q) rammers and tampers;

(R) rollers;

(S) saws (concrete saws, industrial saws, etc.);

(T) scrapers;

(U) surfacing equipment;

(V) tractors; and

(W) trenchers.

(2) Surcharge--A fee imposed on the sale, lease, or rental in Texas of new or used off-road, heavy-duty diesel equipment and on the storage, use, or other consumption of such equipment subject to use tax as provided for in §3.346 of this title (relating to Use Tax). This surcharge is in addition to state and local sales and use taxes that are due on the equipment and is for the benefit of the Texas Emissions Reduction Fund, which is administered by the Texas Commission on Environmental Quality.

(3) Sales price--The total amount a purchaser pays a seller for the purchase, lease, or rental of off-road, heavy-duty diesel equipment as set out in Tax Code, §151.007. The sales price includes charges for accessories, transportation, installation, services, and other expenses that are connected to the sale.

(b) Imposition of Surcharge.

(1) A surcharge is due on the sales price of off-road, heavy-duty diesel equipment sold in Texas. If the purchaser takes possession of or title to the equipment on or after September 1, 2015, the surcharge is 1.5% of the sales price. If the purchaser took possession of or title to the equipment on or after July 1, 2003, and before September 1, 2015, the surcharge is 2.0% of the sales price.

(2) A surcharge is due on the sales price, excluding separately stated interest charges, of off-road, heavy-duty diesel equipment leased under a financing lease, as defined in §3.294 of this title (relating to Rental and Lease of Tangible Personal Property). If the lessee takes possession of the equipment on or after September 1, 2015, the surcharge is 1.5% of the sales price. If the lessee took possession of the equipment on or after July 1, 2003, and before September 1, 2015, the surcharge is 2.0% of the sales price.

(3) A surcharge is due on the lease payments for off-road, heavy-duty diesel equipment that is leased under an operating lease, as defined in §3.294 of this title. If the lessee takes possession of the equipment on or after September 1, 2015, the surcharge is 1.5% of the lease payments. If the lessee took possession of the equipment on or after July 1, 2003, and before September 1, 2015, the surcharge is 2.0% of the lease payments.

(4) A surcharge is due on the sales price of off-road, heavy-duty diesel equipment purchased, leased, or rented out of state and brought into Texas for use. If the purchaser brings the equipment into Texas for use on or after September 1, 2015, the surcharge is 1.5% of the sales price. If the purchaser brought the equipment into Texas for use on or after July 1, 2003, and before September 1, 2015, the surcharge is 2.0% of the sales price. See §3.346 of this title.

(5) A 1.0% surcharge is due on off-road, heavy-duty diesel construction equipment sold, leased, or rented if the purchaser took possession of or title to the equipment on or after August 31, 2001 and before July 1, 2003. No surcharge is due on equipment sold, leased, or rented during this time period if the equipment is subject to use tax or is used in non-construction activities.

(c) Collection of surcharge. A seller must collect the surcharge from the purchaser on the sales price of each sale, lease, or rental in Texas of off-road, heavy-duty diesel equipment that is not exempt from sales tax. The surcharge is collected at the same time and in the same manner as sales or use tax. See §3.286 of this title (relating to Seller's and Purchaser's Responsibilities, including Nexus, Permits, Returns and Reporting Periods, and Collection and Exemption Rules) for information on the collection and remittance of sales or use tax. The surcharge is collected in addition to state and local sales or use taxes but is not collected on the amount of the sales or use tax.

(d) Exemptions. No surcharge is collected on the sale, lease, or rental of off-road, heavy-duty diesel equipment that is exempt from sales and use tax. A seller who accepts a valid and properly completed resale or exemption certificate, direct payment exemption certificate,

or other acceptable proof of exemption from sales and use tax is not required to collect the surcharge. For example, a seller may accept an exemption certificate in lieu of collecting sales tax and the surcharge from a farmer who purchases a bulldozer to be used exclusively in the construction or maintenance of roads and water facilities on a farm that produces agricultural products that are sold in the regular course of business.

(e) Reports and payments.

(1) A seller or purchaser with a surcharge account, including a direct payment holder, must report and pay the surcharge in the same manner as sales or use tax, but separate reports and payments for the surcharge are required.

(A) A seller's or purchaser's reporting period (i.e., monthly, quarterly, or yearly) and due date for the surcharge are determined by the amount of surcharge that the seller collects or purchaser owes. See §3.286 of this title.

(B) A purchaser who does not hold a surcharge account must report and pay the surcharge by the 20th day of the month following the month in which the purchaser acquired off-road, heavy-duty diesel powered equipment on which the seller did not collect the surcharge.

(2) A seller or purchaser must report and pay the surcharge to the comptroller on forms prescribed by the comptroller for the surcharge. A seller or purchaser is not relieved of the responsibility for filing a surcharge report and paying the surcharge by the due date because the seller or purchaser fails to receive the correct form from the comptroller.

(3) The penalties and interest imposed for failure to timely file and pay the surcharge are the same as those imposed for failure to timely file and pay sales or use tax. Likewise, the 0.5% discount for timely filing and payment is applicable to surcharge reports and payments. No prepayment discount will be paid a seller or purchaser for prepayment of the surcharges.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

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Lita Gonzalez
General Counsel
Comptroller of Public Accounts
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For further information, please call: (512) 475-0387

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PART 3. TEACHER RETIREMENT SYSTEM OF TEXAS

CHAPTER 31. EMPLOYMENT AFTER RETIREMENT

SUBCHAPTER A. GENERAL PROVISIONS

34 TAC §31.1

The Teacher Retirement System of Texas (TRS) adopts amendments to §31.1, which provides definitions to certain terms applicable to Chapter 31, including school year, substitute, and third-party entity for purposes of employment after retirement. The amended rule is adopted without changes to the proposed rule text as published in the March 4, 2016, issue of the *Texas Register* (41 TexReg 1662).

The amended rule modifies §31.1(b) regarding the definition of a substitute to include work in a vacant position, provided the retiree does not serve more than 20 days in a vacant position or positions. The 20-day cap on working in a vacant position will allow ample time for a retiree to discover that the position is vacant and/or for the employer to make other arrangements for the assignment without jeopardizing the retiree's annuity. Limiting the number of days the retiree may serve in a vacant position is also in keeping with the concept of a substitute being a person who serves on a "temporary basis." The amended rule also clarifies that a retiree will not be considered a substitute while serving in a vacant position that was last held by that retiree. The amendments also incorporate the requirement in §824.602(a)(1) that a retiree may work without limit as a substitute only if the pay is not more than the daily rate of substitute pay established by the employer.

No comments were received on the rule proposal.

Statutory Authority: The amended rule is adopted under §824.601 of the Government Code, which authorizes TRS to adopt rules necessary for administering Chapter 824, Subchapter G, of the Government Code concerning loss of benefits on resumption of service, and §825.102 of the Government Code, which authorizes the board to adopt rules for the administration of the funds of the retirement system.

Cross-Reference to Statute: The adopted amendments affect Government Code, §824.601, which provides for loss of annuity by any service or disability retiree who works for a TRS-covered employer unless such employment is exempted by law from forfeiture of annuity; Government Code; §824.602, which sets forth the exceptions to the loss of monthly annuities of retirees employed in Texas public educational institutions; §824.6022, which requires employers to file a monthly certified statement of employment of retirees and makes it an offense for an administrator who is responsible for filing such a statement to knowingly fail to do so; §825.4092, which provides for a pension surcharge for re-employed retirees; and Insurance Code, §1575.204, which provides for a retiree health benefit (TRS-Care) surcharge for re-employed retirees.

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 April 26, 2016.

TRD-201601982
Brian K. Guthrie
Executive Director
Teacher Retirement System of Texas
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Proposal publication date: March 4, 2016
For further information, please call: (512) 542-6438

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TITLE 40. SOCIAL SERVICES AND ASSISTANCE

PART 19. DEPARTMENT OF FAMILY AND PROTECTIVE SERVICES

CHAPTER 700. CHILD PROTECTIVE SERVICES

SUBCHAPTER P. SERVICES AND BENEFITS FOR TRANSITION PLANNING TO A SUCCESSFUL ADULTHOOD

DIVISION 3. TEXAS TUITION AND FEE WAIVER FOR YOUTH RETURNING TO A PARENT

40 TAC §700.1630

The Health and Human Services Commission adopts, on behalf of the Department of Family and Protective Services (DFPS), new §700.1630 without changes to the proposed text published in the March 4, 2016, issue of the *Texas Register* (41 TexReg 1664). Current law allows youth who exit foster care prior to their 18th birthday to a non-parent managing conservator to potentially qualify for the Texas Tuition and Fee waiver. However, youth who exit foster care to a parent's permanent managing conservatorship do not. Since the Texas Tuition and Fee Waiver is a valuable benefit there is a disincentive for youth to exit foster care to a parent's care prior to turning 18 because if the youth ages out of DFPS conservatorship he or she can potentially qualify for the waiver. Senate Bill (SB) 206, Section 3, 84th Legislature, Regular Session, was enacted to help alleviate this issue and promote permanency by allowing youth who return to a parent whether parental rights have been terminated or not to qualify for the Texas Tuition and Fee Waiver. The rules were drafted in consultation with the Texas Higher Education Coordinating Board as required by SB 206, Section 3.

New §700.1630 specifies the eligibility criteria for the Texas Tuition and Fee Waiver when the youth is returned to a parent, including the starting age for youth. DFPS proposes: (1) the starting age of 14 for those in permanent managing conservatorship of DFPS as this is a pivotal age for youth; and (2) the starting age of 16 or older for those in temporary managing conservatorship (TMC) as the potential length of a TMC case could be close to 24 months (when a monitored return occurs) until the case is either dismissed or the department is named permanent managing conservator. Also the title to Subchapter P is changed to "Services and Benefits for Transition Planning to a Successful Adulthood."

The section will function so that more former foster care youth will attend college which will assist youth in building an independent and successful life.

No comments were received regarding adoption of the section.

The new section is adopted under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The new section implements Senate Bill 206, Section 3, as codified at Texas Education Code §54.366(c).

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

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Trevor Woodruff
General Counsel
Department of Family and Protective Services
Effective date: June 1, 2016
Proposal publication date: March 4, 2016
For further information, please call: (512) 438-2611

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REVIEW OF AGENCY RULES

This section contains notices of state agency rules review as directed by the Texas Government Code, §2001.039. Included here are (1) notices of *plan to review;* (2) notices of *intention to review,* which invite public comment to specified rules; and (3) notices of *readoption,* which summarize public comment to specified rules. The complete text of an agency's *plan to review* is available after it is filed with the Secretary of State on the Secretary of State's web site (http://www.sos.state.tx.us/texreg). The complete text of an agency's rule being reviewed and considered for *readoption* is available in the *Texas Administrative* Code on the web site (http://www.sos.state.tx.us/tac).

For questions about the content and subject matter of rules, please contact the state agency that is reviewing the rules. Questions about the web site and printed copies of these notices may be directed to the *Texas Register* office.

Proposed Rule Reviews

Texas Department of Licensing and Regulation

Title 16, Part 4

The Texas Department of Licensing and Regulation (Department) files this notice of intent to review and consider for re-adoption, revision, or repeal Title 16, Texas Administrative Code, Chapter 91, Dog or Cat Breeders Program. This review and consideration is being conducted in accordance with the requirements of Texas Government Code, §2001.039.

An assessment will be made by the Department as to whether the reasons for adopting or readopting these rules continue to exist. Each rule will be reviewed to determine whether it is obsolete, whether the rule reflects current legal and policy considerations, and whether the rule reflects current procedures of the Department.

Any questions or written comments pertaining to this rule review may be submitted by mail to Pauline Easley, Legal Assistant, General Counsel's Office, Texas Department of Licensing and Regulation, P.O. Box 12157, Austin, Texas 78711, or by facsimile to (512) 475-3032, or electronically to *erule.comments@tdlr.texas.gov.* The deadline for comments is 30 days after publication in the *Texas Register.*

Any proposed changes to these rules as a result of the rule review will be published in the Proposed Rule Section of the *Texas Register.* The proposed rules will be open for public comment prior to final adoption or repeal by the Department, in accordance with the requirements of the Administrative Procedure Act, Texas Government Code, Chapter 2001.

§91.1. Authority.

§91.10. Definitions.

§91.20. Applicability.

§91.21. License Required--Presumptions.

§91.22. License Required--Dog or Cat Breeder.

§91.23. License Requirements--Dog or Cat Breeder.

§91.24. License Requirements--Dog or Cat Breeders License Renewal.

§91.25. License Approval and Issuance.

§91.27. License or Registration--Notice of Proposed Denial, Opportunity to Comply.

§91.28. Department Notifications to Licensee or Registrant.

§91.29. License or Registration--Term.

§91.30. Exemptions.

§91.50. Inspections--Prelicense.

§91.51. Inspections--Prelicense Exemption.

§91.52. Inspections--Periodic.

§91.53. Out-of-Cycle Inspections.

§91.54. Corrective Actions Following Periodic or Out-of-Cycle Inspections.

§91.55. Responsibilities of the Department--Directory.

§91.56. Responsibilities of the Department--Disciplinary Database.

§91.57. Responsibilities of the Department--Consumer Interest Information.

§91.58. Responsibilities of the Department--Donations, Disbursements and Reporting.

§91.59. Responsibilities of the Department--Reporting Violations; Eligibility of Applicant.

§91.60. Responsibilities of the Department--Payment of Rewards.

§91.65. Advisory Committee.

§91.66. Responsibilities of Inspectors--Inspections, Investigations, and Reports of Animal Cruelty.

§91.71. Responsibilities of Licensee--Advertising.

§91.72. Responsibilities of Licensee--Display of Breeders License.

§91.73. Responsibilities of Licensee--Onsite Availability of Law and Rules.

§91.74. Responsibilities of Licensee--Mandatory Contract Provisions.

§91.75. Responsibilities of Licensee--Change in License Information.

§91.76. Responsibilities of Licensee--Annual Inventory.

§91.77. Responsibilities of Licensee--Animal Records Content, Availability, and Retention Period.

§91.78. Responsibilities of Licensee--Inspections.

§91.80. Fees.

§91.90. Administrative Sanctions and Penalties.

§91.91. Enforcement Authority.

§91.92. License Revocation and Suspension.

§91.100. Standards of Care--Housing Generally.

§91.101. Standards of Care--Indoor Housing Facilities.

§91.102. Standards of Care--Sheltered Housing Facilities.

§91.103. Standards of Care--Outdoor Housing Facilities.

§91.104. Standards of Care--Primary Enclosure.

§91.105. Standards of Care--Compatible Grouping.

§91.106. Standards of Care--Exercise for Dogs.

§91.107. Standards of Care--Feeding.

§91.108. Standards of Care--Watering.

§91.109. Standards of Care--Cleaning, Sanitization, Housekeeping, and Pest Control.

§91.110. Standards of Care--Onsite Personnel.

§91.111. Standards of Care--Grooming.

§91.112. Standards of Care--Veterinary Care.

§91.113. Standards of Care--Sales and Transfers.

§91.200. Transportation Standards-Food and Water Requirements.

§91.201. Transportation Standards--Mobile or Traveling Facilities.

§91.202. Transportation Standards--Primary Enclosure Used to Transport Live Dogs and Cats.

TRD-201602134
William H. Kuntz, Jr.
Executive Director
Texas Department of Licensing and Regulation
Filed: May 4, 2016

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Public Utility Commission of Texas

Title 16, Part 2

The Public Utility Commission of Texas (commission) publishes this notice of intention to review Chapter 22, Procedural Rules, pursuant to Texas Government Code §2001.039, *Agency Review of Existing Rules.* The commission's Chapter 22, Procedural Rules, provides a system of procedures for practice before the commission intended to promote the just and efficient disposition of proceedings and public participation in the decision-making process. Chapter 22 governs the initiation, conduct, and determination of proceedings required or permitted by law, including proceedings referred to the State Office of Administrative Hearings, whether instituted by order of the commission or by the filing of an application, complaint, petition or any other pleading. The text of the rule sections will not be published. The text of the rules may be found in the Texas Administrative Code, Title 16, Economic Regulation, Part 2, or through the commission's website at www.puc.texas.gov. Project Number 45856, *Rule Review of Chapter 22, Procedural Rules, Pursuant to Texas Government Code §2001.039* is assigned to this rule review project.

Texas Government Code §2001.039 requires that each state agency review and readopt, readopt with amendments, or repeal the rules adopted by that agency pursuant to Texas Government Code, Chapter 2001, Subchapter B, Rulemaking. As required by §2001.039(e), this review is to assess whether the reason for adopting or readopting the rules continues to exist. The commission requests specific comments from interested persons on whether the reasons for adopting each section in Chapter 22 continue to exist. In addition, the commission welcomes comments on any modifications interested persons believe would improve the rules.

If it is determined during this review that any section of Chapter 22 needs to be repealed or amended, the repeal or amendment will be initiated under a separate proceeding; thus, this notice of intention to review Chapter 22 has no effect on the sections as they currently exist.

Comments on the review of Chapter 22 may be submitted to the Filing Clerk, Public Utility Commission of Texas, 1701 North Congress Avenue, P.O. Box 13326, Austin, Texas 78711-3326, within 30 days after publication. Sixteen copies of comments to the proposed rule review are required to be filed pursuant to §22.71(c)(13) of this title. When filing comments, interested persons are requested to comment on the sections in the same order they are found in the chapters and to clearly designate which section is being commented upon. All comments should refer to Project Number 45856.

The notice of intent to review Chapter 22, Procedural Rules, is proposed under the Public Utility Regulatory Act, Texas Utilities Code Annotated §14.002 (West 2007 and Supp. 2015) (PURA), which provides the Public Utility Commission with the authority to make and enforce rules reasonably required in the exercise of its powers and jurisdiction; PURA §14.052, which requires the commission to adopt and enforce rules governing practice and procedure before the commission and, as applicable, practice and procedure before the utility division of the State Office of Administrative Hearings; and Texas Government Code §2001.039 (West 2016 and Supp. 2015) which requires each state agency to review its rules every four years.

Cross Reference to Statutes: Public Utility Regulatory Act §14.002 and §14.052; Texas Government Code §2001.039.

TRD-201602143
Adriana Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: May 4, 2016

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Adopted Rule Reviews

Texas Department of Transportation

Title 43, Part 1

Notice of Readoption

The Texas Department of Transportation (department) files notice of the completion of review and the readoption of Title 43 TAC Part 1, Chapter 1, Management, Chapter 5, Finance, Chapter 11, Design, Chapter 15, Financing and Construction of Transportation Projects, Chapter 21, Right of Way, and Chapter 27, Toll Projects.

This review and readoption has been conducted in accordance with Government Code, §2001.039. The Texas Transportation Commission (commission) has reviewed these rules and determined that the reasons for adopting them continue to exist. The department received no comments on the proposed rule review, which was published in the February 12, 2016, issue of the *Texas Register* (41 TexReg 1132).

This concludes the review of Chapters 1, 5, 11, 15, 21, and 27.

TRD-201602012
Joanne Wright
Deputy General Counsel
Texas Department of Transportation
Filed: April 28, 2016

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TABLES & GRAPHICS

Graphic images included in rules are published separately in this tables and graphics section. Graphic images are arranged in this section in the following order: Title Number, Part Number, Chapter Number and Section Number.

Graphic images are indicated in the text of the emergency, proposed, and adopted rules by the following tag: the word "Figure" followed by the TAC citation, rule number, and the appropriate subsection, paragraph, subparagraph, and so on.

Figure: 19 TAC §33.5(n)(2)(J)

TEA
TEXAS EDUCATION AGENCY

Texas Permanent School Fund

19 TAC §33.5 (n)(2)(J)

Annual Expenditures Report

Report of Expenditures of Persons Providing Services to the State Board of Education Relating to the Management and Investment of the Permanent School Fund

Report for the Period
January 1 - December 31, 20____ -
Due Date: January 31, 20____ -

A PSF Service Provider shall file a report **annually on January 31** of each year on the expenditure report provided in this subparagraph entitled "Report of Expenditures of Persons Providing Services to the State Board of Education Relating to the Management and Investment of the Permanent School Fund." The report shall be for the time period beginning on January 1 and ending on December 31 of the previous year. The expenditure report must describe in detail any expenditure of more than $50 made by the Person on behalf of:
(i) an SBOE Member;
(ii) the commissioner of education; or
(iii) an employee of the TEA or of a nonprofit corporation created under the Texas Education Code, §43.006.

Name of Individual Making Report:

Title:

Employer:

Services Rendered to TEA:

Did Expenditures over $50 Occur (If Yes, complete transaction details below)

	Date	Amount	Name (SBOE Member, Commissioner, Employee	Detailed Description of Expenditure
Add Row Delete Row		$		

By typing my name in the box below, I certify that the content of this report is true and accurate.

Signature

Date

Print Form Submit by Email

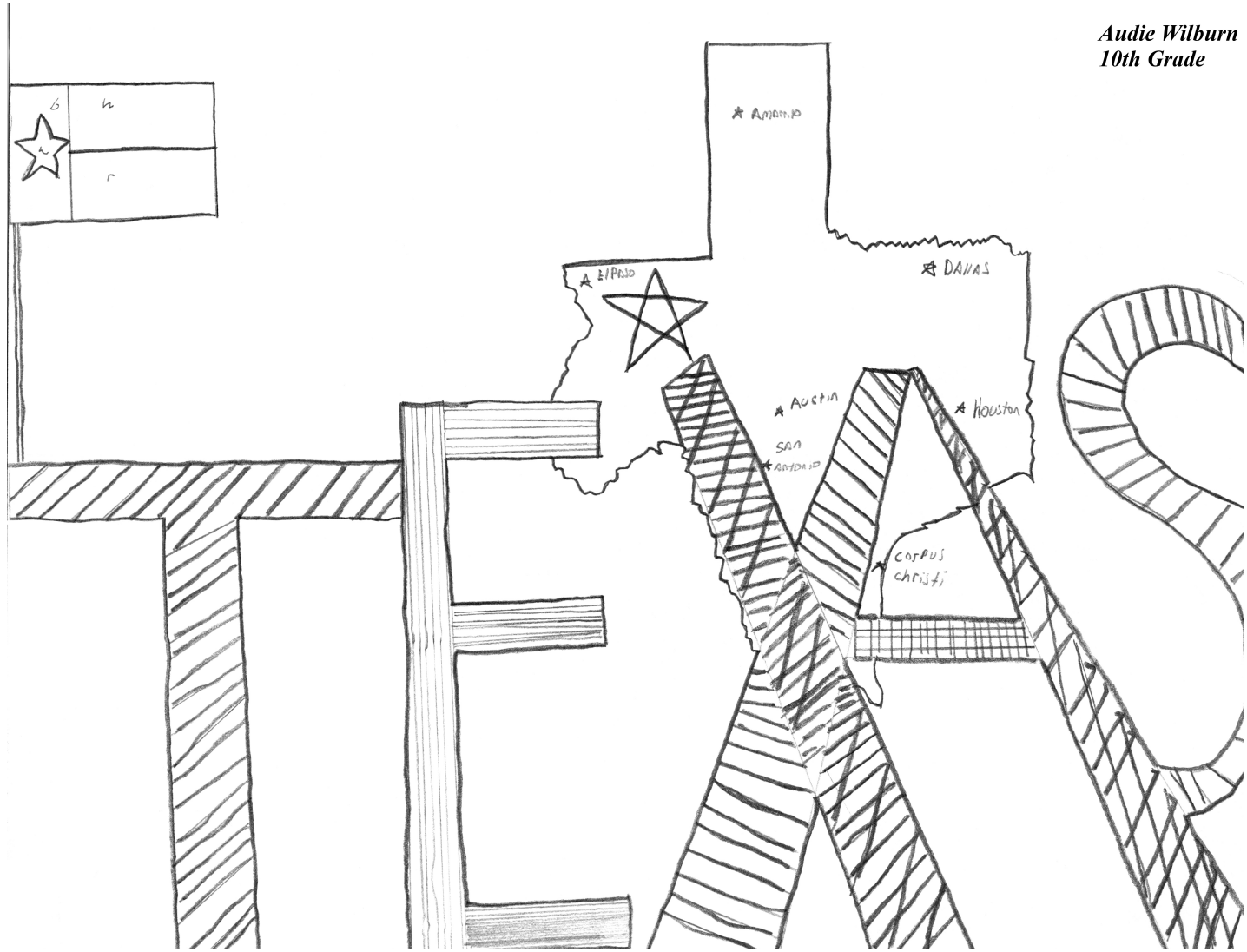
Figure: 28 TAC §21.2106(b)(7)

NOTICE OF CERTAIN MANDATORY BENEFITS

This notice is to advise you of certain coverage or [and/or] benefits provided by your contract with ([]]name of carrier)[]].

Coverage of Tests for Detection of Human Papillomavirus, Ovarian Cancer, and Cervical Cancer Coverage is provided[,] for each woman enrolled in the plan who is 18 years of age or older[,] for expenses incurred for an annual, medically recognized diagnostic examination for the early detection of ovarian and cervical cancer. Coverage required under this section includes a CA 125 blood test and, at a minimum, a conventional Pap smear screening or a screening using liquid-based cytology methods, as approved by the FDA [United States Food and Drug Administration], alone or in combination with a test approved by the FDA [United States Food and Drug Administration] for the detection of the human papillomavirus.

Audie Wilburn
10th Grade



IN ADDITION

The *Texas Register* is required by statute to publish certain documents, including applications to purchase control of state banks, notices of rate ceilings issued by the Office of Consumer Credit Commissioner, and consultant proposal requests and awards. State agencies also may publish other notices of general interest as space permits.

Department of Aging and Disability Services

State Supported Living Centers Long Range Report

The Texas Department of Aging and Disability Services (DADS) will hold a public meeting on June 9, 2016, to accept public testimony regarding long range planning for state supported living centers (SSLC).

The meeting will be held in the Public Hearing Room of the John H. Winters Building, 701 West 51st St., Austin, Texas. The meeting will begin 30 minutes following adjournment of the DADS Council meeting which convenes at 8:30 a.m.

DADS is required in the Texas Health and Safety Code, Title 7, Subtitle A, Chapter 533A, Subchapter B, §533A.032(c) to prepare a report about the provision of services at SSLCs.

If you wish to submit written comments in lieu of public testimony, please email comments by June 10, 2016 by 5:00 p.m. to SslcReport@dads.state.tx.us or via U.S. Postal Service to DADS State Supported Living Centers, State Office (W-511), 701 W. 51st St., Austin, Texas 78751. Comments submitted via U.S. Postal Service must be postmarked by June 10, 2016.

Persons with disabilities attending the public meeting who require special adaptive services are requested to contact Bill Macdonald at (512) 438-4157 or send via email to *bill.macdonald@dads.state.tx.us* by June 2, 2016 to make arrangements.

TRD-201602096
Lawrence T. Hornsby
General Counsel
Department of Aging and Disability Services
Filed: May 3, 2016

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Alamo Area Metropolitan Planning Organization

Request for Proposals

The Alamo Area Metropolitan Planning Organization (MPO) is seeking proposals from qualified firms to conduct a Regional Thoroughfare Plan Study.

A copy of the Request for Proposals (RFP) may be requested by downloading the RFP and attachments from the MPO's website at *www.alamoareampo.org* or calling Jeanne Geiger, Deputy Director, at (210) 227-8651. Anyone wishing to submit a proposal must do so by 12:00 p.m. (CT), Friday, June 17, 2016 at the MPO office to:

Jeanne Geiger

Deputy Director

Alamo Area MPO

825 S. St. Mary's Street

San Antonio, Texas 78205

Reimbursable funding for this study, in the amount of $300,000, is contingent upon the availability of Federal transportation planning funds.

TRD-201602091
Jeanne Geiger
Deputy Director
Alamo Area Metropolitan Planning Organization
Filed: May 3, 2016

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Office of the Attorney General

Texas Water Code and Texas Health and Safety Code Settlement Notice

Notice is hereby given by the State of Texas of the following proposed resolution of an environmental enforcement lawsuit under the Texas Water Code and the Texas Health & Safety Code. Before the State may settle a judicial enforcement action under the Texas Water Code, the State shall permit the public to comment in writing on the proposed judgment. The Attorney General will consider any written comments and may withdraw or withhold consent to the proposed judgment if the comments disclose facts or considerations that include that the consent is inappropriate, improper, inadequate, or inconsistent with the requirements of the Texas Water Code and the Texas Health & Safety Code.

Case Title and Court: *Ector County, Texas and the State of Texas, v. A&G Construction, Jesus Antonio Gomez, SIW Pipe & Supply, Inc., and James Gordon Albright,* Cause No. D-1-GV-13-000085, in the 250th Judicial District Court, Travis County, Texas.

Nature of the Defendants' Operations: The case involves A&G Construction, owned by Jesus Antonio Gomez and SIW Pipe & Supply, Inc., owned by James Gordon Albright, and the use of property owned by SIW in Odessa, Texas as an illegal landfill. The Defendants, Jesus Antonio Gomez and James Gordon Albright dumped trash, tires, and construction debris at this site for years without authorization. Since the filing of the lawsuit the Defendants have removed and properly disposed of the waste dumped into the illegal landfill.

Proposed Agreed Judgment: The Agreed Final Judgment orders Defendants to pay civil penalties of $10,000 to be divided equally between Ector County and the State of Texas. The Defendants will pay attorney's fees to Ector County in the amount of $3,000 and to the State of Texas in the amount of $2,000.

For a complete description of the proposed settlement, the complete proposed Agreed Final Judgment and Permanent Injunction should be reviewed. Requests for copies of the judgment, and written comments on the proposed settlement, should be directed to Sireesha Chirala, Assistant Attorney General, Office of the Attorney General, P.O. Box 12548, Austin, Texas 78711-2548, (512) 463-2012, facsimile (512) 320-0911. Written comments must be received within 30 days of publication of this notice to be considered.

TRD-201602010
Amanda Crawford
General Counsel
Office of the Attorney General
Filed: April 28, 2016

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Office of Consumer Credit Commissioner

Notice of Rate Ceilings

The Consumer Credit Commissioner of Texas has ascertained the following rate ceilings by use of the formulas and methods described in §§303.003, 303.005 and 303.009, Texas Finance Code.

The weekly ceiling as prescribed by §303.003 and §303.009 for the period of 05/09/16 - 05/15/16 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 05/09/16 - 05/15/16 is 18% for Commercial over $250,000.

The monthly ceiling as prescribed by §303.005[3] for the period of 05/01/16 - 05/31/16 is 18% for Consumer/Agricultural/Commercial/credit through $250,000.

The monthly ceiling as prescribed by §303.005 for the period of 05/01/16 - 05/31/16 is 18% for Commercial over $250,000.

[1] Credit for personal, family or household use.

[2] Credit for business, commercial, investment or other similar purpose.

[3] For variable rate commercial transactions only.

TRD-201602097
Leslie L. Pettijohn
Commissioner
Office of Consumer Credit Commissioner
Filed: May 3, 2016

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Texas Education Agency

Request for Applications Concerning the 2016-2017 Support for Texas Students of US Military Personnel Grant

Filing Date. May 3, 2016

Filing Authority. The availability of grant funds under Request for Applications (RFA) #701-16-104 is authorized by the General Appropriations Act, Article III, Rider 38, 84th Texas Legislature, 2015.

Eligible Applicants. The Texas Education Agency (TEA) is requesting applications under Request for Applications (RFA) #701-16-104 from all nonprofit organizations, institutions of higher education, individuals, and private companies. To be eligible for the 2016-2017 Support for Texas Students of US Military Personnel grant, the eligible entity must have a strong background in working on military-related educational issues and demonstrate its capacity to remove barriers to educational success imposed on children of military families due to the frequent moves and deployment of their parents. This project specifically recognizes the unique needs of students who are the children of active-duty United States military personnel.

Description. The 2016-2017 Support for Texas Students of US Military Personnel grant will provide resources and technical assistance to school districts and charter schools to assist Texas students who are the children of active-duty members of the United States military in their educational pursuits. The grant recipient will need to address key educational transition issues encountered by students of military families, including enrollment, placement, attendance, eligibility, testing, and graduation. This will require the completion of a comprehensive educational needs assessment of Texas students who are the children of active-duty United States military personnel, including, but not limited to, needs associated with moving to different schools when the active-duty parent receives new orders. The applicant must develop an action plan, including timeline and metrics, to efficiently use the project funds to meet needs determined in the needs assessment. The action plan must include appropriate stakeholder training for school personnel (counselors, teachers, and principals) and military parents and strategies to reduce barriers and facilitate achievement among military children by tackling issues such as placement, transfer of records, access to special programs, and on-time graduation. Additionally, the applicant must identify the most effective uses of Internet-based technologies to create a single resource to help students and their families obtain information that will assist with transition to a Texas public or charter school and create welcoming environments in schools for this population.

Dates of Project. The 2016-2017 Support for Texas Students of US Military Personnel grant will be implemented beginning in the 2016-2017 school year. Applicants should plan for a starting date of no earlier than July 25, 2016, and an ending date of no later than August 31, 2017.

Project Amount. Approximately $500,000 is available in state funds for the 2016-2017 Support for Texas Students of US Military Personnel grant. This project is funded 100 percent from state funds.

Selection Criteria. Applications will be selected based on the ability of each applicant to carry out all requirements contained in the RFA. Reviewers will evaluate applications based on the overall quality and validity of the proposed grant programs and the extent to which the applications address the primary objectives and intent of the project. Applications must address each requirement as specified in the RFA to be considered for funding. TEA reserves the right to select from the highest-ranking applications those that address all requirements in the RFA.

Further Information. For clarifying information, contact Jessica Snyder, Division of Curriculum, Texas Education Agency, (512) 463-9581. In order to assure that no prospective applicant may obtain a competitive advantage because of acquisition of information unknown to other prospective applicants, any and all questions must be submitted in writing to the TEA contact persons identified in the Program Guidelines of the RFA. All questions and the written answers thereto will be posted on the TEA website in the format of Frequently Asked Questions (FAQs) at http://burleson.tea.state.tx.us/GrantOpportunities/forms. In the "Select Search Options" box, select the name of the RFA from the drop-down list. Scroll down to the "Application and Support Information" section to view all documents that pertain to this RFA.

Deadline for Receipt of Applications. Applications must be received in the TEA Document Control Center by 5:00 p.m. (Central Time), June 3, 2016, to be eligible to be considered for funding.

TRD-201602127
Cristina De La Fuente-Valadez
Director, Rulemaking
Texas Education Agency
Filed: May 3, 2016

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Texas Commission on Environmental Quality

Agreed Orders

The Texas Commission on Environmental Quality (TCEQ, agency, 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 June 13, 2016. 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 June 13, 2016. Written comments may also be sent by facsimile machine to the enforcement coordinator at (512) 239-2550. The commission 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: City of Lampasas; DOCKET NUMBER: 2016-0008-PWS-E; IDENTIFIER: RN101409100; LOCATION: Lampasas, Lampasas County; TYPE OF FACILITY: public water supply; RULES VIOLATED: 30 TAC §290.46(d)(2)(B) and §290.110(b)(4) and Texas Health and Safety Code (THSC), §341.0315(c), by failing to maintain a disinfectant residual of at least 0.5 milligrams per liter of total chlorine throughout the distribution system at all times; 30 TAC §290.42(l), by failing to maintain a thorough and up-to-date plant operations manual for operator review and reference; and 30 TAC §290.39(j)(1)(A) and THSC, §341.0351, by failing to notify the executive director prior to making any significant change or addition where the change in the existing distribution system results in an increase or decrease in production, treatment, storage and/or pressure maintenance capacity; PENALTY: $370; ENFORCEMENT COORDINATOR: Katy Montgomery, (210) 403-4016; REGIONAL OFFICE: 6801 Sanger Avenue, Suite 2500, Waco, Texas 76710-7826, (254) 751-0335.

(2) COMPANY: City of Overton; DOCKET NUMBER: 2015-1384-PWS-E; IDENTIFIER: RN103934733; LOCATION: Overton, Rusk County; TYPE OF FACILITY: public water supply; RULES VIOLATED: 30 TAC §290.121(a) and (b), by failing to develop and maintain an up-to-date chemical and microbiological monitoring plan that identifies all sampling locations, describes the sampling frequency, and specifies the analytical procedures and laboratories that the public water system will use to comply with the monitoring requirements; and 30 TAC §290.46(e)(4)(C), by failing to operate the facility under the direct supervision of at least two operators who hold a Class C or higher groundwater license and who work at least 16 hours per month; PENALTY: $354; ENFORCEMENT COORDINATOR: Epifanio Villarreal, (361) 825-3425; REGIONAL OFFICE: 2916 Teague Drive, Tyler, Texas 75701-3734, (903) 535-5100.

(3) COMPANY: EnLink Midstream Services, LLC; DOCKET NUMBER: 2016-0083-AIR-E; IDENTIFIER: RN100223619; LOCATION: Bridgeport, Wise County; TYPE OF FACILITY: natural gas processing plant; RULES VIOLATED: 30 TAC §§101.20(3), 116.115(b)(2)(F) and (c), and 122.143(4), New Source Review Permit Numbers 16926 and PSDTX686M1, Special Conditions Number 1, Federal Operating Permit Number O910, Special Terms and Conditions Number 7, and Texas Health and Safety Code, §382.085(b), by failing to prevent unauthorized emissions; PENALTY: $25,000; ENFORCEMENT COORDINATOR: Carol McGrath, (210) 403-4063; REGIONAL OFFICE: 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(4) COMPANY: G and S CONCRETE, INCORPORATED; DOCKET NUMBER: 2015-1756-WQ-E; IDENTIFIER: RN104457908; LOCATION: Katy, Harris County; TYPE OF FACILITY: concrete batch facility; RULES VIOLATED: 30 TAC §205.7, 40 Code of Federal Regulations §122.28(b)(2) Texas Pollutant Discharge Elimination System General Permit Number TXG111209, Part III and Part IV 7(f), by failing to timely submit monitoring results at the intervals specified in the permit; PENALTY: $1,350; ENFORCEMENT COORDINATOR: Ronica Rodriguez, (512) 239-2601; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(5) COMPANY: Galo Equipment and Construction, LLC; DOCKET NUMBER: 2015-1841-MLM-E; IDENTIFIER: RN108297128; LOCATION: Garden Ridge, Comal County; TYPE OF FACILITY: aggregate extraction and processing facility; RULES VIOLATED: 30 TAC §281.25(a)(4) and 40 Code of Federal Regulations §122.26(c), by failing to obtain authorization to discharge storm water associated with industrial activities under Texas Pollutant Discharge Elimination System Multi-Sector General Permit TXR050000; and 30 TAC §101.4 and §101.5 and Texas Health and Safety Code, §382.085(a) and (b), by failing to prevent nuisance dust conditions and failing to prevent a traffic hazard or interference with normal road use; PENALTY: $5,937; ENFORCEMENT COORDINATOR: Rajesh Acharya, (512) 239-0577; REGIONAL OFFICE: 14250 Judson Road, San Antonio, Texas 78233-4480, (210) 490-3096.

(6) COMPANY: Green Ground LLC and Chris Panagopoulos; DOCKET NUMBER: 2015-1587-MLM-E; IDENTIFIER: RN106529118; LOCATION: Fort Worth, Tarrant County; TYPE OF FACILITY: composting facility; RULES VIOLATED: 30 TAC §324.15 and 40 Code of Federal Regulations (CFR) §279.22(d), by failing to perform cleanup actions upon detection of a release of used oil; 30 TAC §324.6 and 40 CFR §279.22(c)(1), by failing to mark or clearly label used oil storage containers with the words "Used Oil"; 30 TAC §332.8(c)(2), (4), and (5), by failing to water, treat with dust-suppressant chemicals, or pave all in-plant roads and vehicle works areas at the site, failing to equip the outdoor grinder at the site with fog nozzles or have portable watering equipment during grinding operations at the site, and failing to equip the conveyors utilized to off-load materials from the outdoor grinder at the site with a water or mechanical dust suppression system; 30 TAC §37.921 and §328.5(d), by failing to establish and maintain financial assurance for closure of the site; 30 TAC §328.5(c)(1), by failing to provide a written cost estimate for closure of the site; 30 TAC §328.4(d), by failing to obtain a permit or registration prior to processing loads of recyclable material that contained more than incidental amounts of non-recyclable waste; 30 TAC §328.5(b) and §332.23(5), by failing to provide notification within 90 days prior to any change in site operations; and 30 TAC §328.5(f)(1) - (2) and (g), by failing to maintain recycling records and make them available for inspection upon request by agency personnel; PENALTY: $14,507; ENFORCEMENT COORDINATOR: Abigail Lindsey, (512) 239-2576; REGIONAL OFFICE: 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(7) COMPANY: Harris County Municipal Utility District Number 71; DOCKET NUMBER: 2016-0166-MWD-E; IDENTIFIER: RN102177656; LOCATION: Katy, Harris County; TYPE OF FACILITY: wastewater treatment facility; RULES VIOLATED: 30 TAC §305.125(1), TWC, §26.121(a)(1), and Texas Pollutant Discharge Elimination System Permit Number WQ0011917001, Interim Effluent Limitations and Monitoring Requirements Number 1, by failing to comply with permitted effluent limitations; PENALTY: $35,937; EN-

FORCEMENT COORDINATOR: Melissa Castro, (512) 239-0855; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(8) COMPANY: HOLLY SPRINGS WATER SUPPLY CORPORATION; DOCKET NUMBER: 2016-0233-PWS-E; IDENTIFIER: RN101221505; LOCATION: Hughes Springs, Cass County; TYPE OF FACILITY: public water supply; RULES VIOLATED: 30 TAC §290.46(d)(2)(B) and §290.110(b)(4) and Texas Health and Safety Code, §341.0315(c), by failing to maintain a disinfectant residual of at least 0.5 milligrams per liter of chloramine throughout the distribution system at all times; 30 TAC §290.121(a) and (b), by failing to maintain an up-to-date chemical and microbiological monitoring plan that identifies all sampling locations, describes the sampling frequency, and specifies the analytical procedures and laboratories that the public water system will use to comply with the monitoring requirements; and 30 TAC §290.46(z), by failing to create a nitrification action plan for a system distributing chloraminated water; PENALTY: $200; ENFORCEMENT COORDINATOR: Ryan Byer, (512) 239-2571; REGIONAL OFFICE: 2916 Teague Drive, Tyler, Texas 75701-3734, (903) 535-5100.

(9) COMPANY: Horsemans Ranch Morgan Mill Homeowners Association Incorporated; DOCKET NUMBER: 2016-0223-PWS-E; IDENTIFIER: RN104497441; LOCATION: Stephenville, Erath County; TYPE OF FACILITY: public water supply; RULES VIOLATED: 30 TAC §290.110(e)(4)(A) and (f)(3), by failing to submit a Disinfectant Level Quarterly Operating Report (DLQOR) to the executive director each quarter by the tenth day of the month following the end of the quarter; 30 TAC §290.109(c)(4)(B), by failing to collect a raw groundwater source *Escherichia coli* sample from the facility's two active sources within 24 hours of being notified of a distribution total coliform positive result; 30 TAC §290.117(i)(6) and (j), by failing to mail consumer notification of lead tap water monitoring results to persons served at the locations that were sampled, and failing to submit to the TCEQ a copy of the consumer notification and certification that the consumer notification has been distributed to the persons served at the locations in a manner consistent with TCEQ requirements; and 30 TAC §290.272 and §290.274(a), by failing to meet the adequacy, availability, and/or content requirements for the Consumer Confidence Report; PENALTY: $550; ENFORCEMENT COORDINATOR: Jason Fraley, (512) 239-2552; REGIONAL OFFICE: 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(10) COMPANY: KELLY BURT DOZER, INCORPORATED; DOCKET NUMBER: 2016-0443-WQ-E; IDENTIFIER: RN109125856; LOCATION: Bryan, Brazos County; TYPE OF FACILITY: aggregate production operation (APO); RULE VIOLATED: 30 TAC §342.25(b), by failing to register the APO no later than 10 business days before the beginning date of regulated activities; PENALTY: $5,000; ENFORCEMENT COORDINATOR: Steven Van Landingham, (512) 239-5717; REGIONAL OFFICE: 6801 Sanger Avenue, Suite 2500, Waco, Texas 76710-7826, (254) 751-0335.

(11) COMPANY: Mauser USA, LLC; DOCKET NUMBER: 2016-0169-AIR-E; IDENTIFIER: RN100211002; LOCATION: Houston, Harris County; TYPE OF FACILITY: steel drum manufacturing plant; RULES VIOLATED: 30 TAC §122.143(4) and §122.146(2), Texas Health and Safety Code, §382.085(b), and Federal Operating Permit Number O3319, General Terms and Conditions, by failing to submit a Permit Compliance Certification within 30 days after the end of the certification period; PENALTY: $2,438; ENFORCEMENT COORDINATOR: Kingsley Coppinger, (512) 239-6581; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(12) COMPANY: Megatel Homes, Incorporated; DOCKET NUMBER: 2016-0450-WQ-E; IDENTIFIER: RN109016469; LOCATION: Forney, Kaufman County; TYPE OF FACILITY: construction site; RULES VIOLATED: 30 TAC §281.25(a)(4) and 40 Code of Federal Regulations §122.26(c), by failing to obtain authorization to discharge stormwater associated with construction activities; PENALTY: $938; ENFORCEMENT COORDINATOR: Larry Butler, (512) 239-2543; REGIONAL OFFICE: 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(13) COMPANY: MMPK INCORPORATED dba Angleton Chevron; DOCKET NUMBER: 2016-0207-PST-E; IDENTIFIER: RN102021227; LOCATION: Angleton, Brazoria County; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULES VIOLATED: 30 TAC §334.50(b)(1)(A) and TWC, §26.3475(c)(1), by failing to monitor the underground storage tanks for releases at a frequency of at least once every month; PENALTY: $3,375; ENFORCEMENT COORDINATOR: John Fennell, (512) 239-2616; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(14) COMPANY: MURPHY OIL USA, INCORPORATED dba Murphy USA 5661; DOCKET NUMBER: 2016-0269-PST-E; IDENTIFIER: RN102257920; LOCATION: Marble Falls, Burnet County; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULES VIOLATED: 30 TAC §334.8(c)(5)(A)(i) and TWC, §26.3467(a), by failing to make available to a common carrier a valid current TCEQ delivery certificate before accepting delivery of a regulated substance into the underground storage tanks (USTs); and 30 TAC §334.8(c)(4)(A)(vii) and (5)(B)(ii), by failing to renew a previously issued UST delivery certificate by submitting a properly completed UST registration and self-certification form at least 30 days before the expiration date; PENALTY: $5,500; ENFORCEMENT COORDINATOR: John Fennell, (512) 239-2616; REGIONAL OFFICE: 12100 Park 35 Circle, Building A, Austin, Texas 78711-3087, (512) 339-2929.

(15) COMPANY: Olmos Contracting I, LLC; DOCKET NUMBER: 2016-0340-WQ-E; IDENTIFIER: RN105564777; LOCATION: San Antonio, Bexar County; TYPE OF FACILITY: aggregate production operation (APO); RULE VIOLATED: 30 TAC §342.25(d), by failing to renew the APO registration annually as regulated activities continued; PENALTY: $5,000; ENFORCEMENT COORDINATOR: Melissa Castro, (512) 239-0855; REGIONAL OFFICE: 14250 Judson Road, San Antonio, Texas 78233-4480, (210) 490-3096.

(16) COMPANY: Peter Wilfridus DeRidder dba DeRidder Dairy; DOCKET NUMBER: 2016-0102-AGR-E; IDENTIFIER: RN101522233; LOCATION: Iredell, Erath County; TYPE OF FACILITY: concentrated animal feeding operation; RULES VIOLATED: TWC, §26.121(a)(1), 30 TAC §§305.125(1), 321.31(a), and 321.42(d), and Texas Pollutant Discharge Elimination System (TPDES) Permit Number WQ0003290000, Part VII, (A)(2)(a) and (5)(a)(1), by failing to prevent the unauthorized discharge of manure, litter, or wastewater into or adjacent to any water in the state from an animal feeding operation; and 30 TAC §305.125(1) and TPDES Permit Number WQ0003290000, Special Provisions (A)(1), by failing to remove sludge from Retention Control Structure Number 2 to meet the total required capacity within 180 days from the issuance of TPDES Permit Number WQ0003290000; PENALTY: $3,875; ENFORCEMENT COORDINATOR: Steven Van Landingham, (512) 239-5717; REGIONAL OFFICE: 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(17) COMPANY: SAMK CORPORATION dba Valero Corner Store 1239; DOCKET NUMBER: 2016-0204-PST-E; IDENTIFIER: RN102372117; LOCATION: Bedford, Tarrant County; TYPE OF

FACILITY: convenience store with retail sales of gasoline; RULES VIOLATED: 30 TAC §334.50(b)(1)(A) and TWC, §26.3475(c)(1), by failing to monitor the underground storage tanks for releases at a frequency of at least once every month; PENALTY: $3,375; ENFORCEMENT COORDINATOR: Epifanio Villarreal, (361) 825-3425; REGIONAL OFFICE: 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(18) COMPANY: SOUTHERN METHODIST UNIVERSITY; DOCKET NUMBER: 2016-0211-WQ-E; IDENTIFIER: RN100542745; LOCATION: Dallas, Dallas County; TYPE OF FACILITY: university; RULE VIOLATED: TWC, §26.121(a)(2), by failing to prevent the unauthorized discharge of chlorinated potable water into or adjacent to any water in the state; PENALTY: $5,625; Supplemental Environmental Project offset amount of $5,625; ENFORCEMENT COORDINATOR: Sandra Douglas, (512) 239-2549; REGIONAL OFFICE: 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(19) COMPANY: Targa Downstream LLC; DOCKET NUMBER: 2016-0130-AIR-E; IDENTIFIER: RN100222900; LOCATION: Mont Belvieu, Chambers County; TYPE OF FACILITY: natural gas fractionating plant; RULES VIOLATED: 30 TAC §116.115(c), New Source Review Permit Number 22088, Special Conditions Number 1, and Texas Health and Safety Code, §382.085(b), by failing to prevent unauthorized emissions; PENALTY: $10,125; Supplemental Environmental Project offset amount of $4,050; ENFORCEMENT COORDINATOR: Carol McGrath, (210) 403-4063; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(20) COMPANY: Toll Dallas TX LLC; DOCKET NUMBER: 2016-0186-WQ-E; IDENTIFIER: RN105739247; LOCATION: Colleyville, Tarrant County; TYPE OF FACILITY: construction site; RULES VIOLATED: 30 TAC §281.25(a)(4) and Texas Pollutant Discharge Elimination System (TPDES) General Permit Number TXR15PY55, Part III, Section F(2)(a)(ii), by failing to maintain best management practices designed to minimize pollutants in stormwater associated with construction activity; and 30 TAC §281.25(a)(4) and TPDES General Permit Number TXR15PY55, Part III, Section G(2), by failing to install best management practices designed to minimize pollutants in stormwater associated with construction activity; PENALTY: $1,950; ENFORCEMENT COORDINATOR: Austin Henck, (512) 239-6155; REGIONAL OFFICE: 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

TRD-201602124
Kathleen C. Decker
Director, Litigation Division
Texas Commission on Environmental Quality
Filed: May 3, 2016

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Notice of Hearing

West Travis County Public Utility Agency

SOAH Docket No. 582-16-3784

TCEQ Docket No. 2016-0022-MWD

Permit No. WQ0013594001

APPLICATION.

West Travis County Public Utility Agency, 12117 Bee Cave Road, Building 3, Suite 120, Bee Cave, Texas 78738, has applied to the Texas Commission on Environmental Quality (TCEQ) for a renewal of TCEQ Permit No. WQ0013594001, which authorizes the disposal of treated domestic wastewater at a daily average flow not to exceed 1,000,000 gallons per day via surface irrigation of 350 acres of public access land. This permit will not authorize a discharge of pollutants into water in the state. TCEQ received this application on June 3, 2014.

The wastewater treatment facility and disposal site are located at 3100 Napa Drive, Austin, in Travis County, Texas 78738 (Site A). The Effluent Pond No. 1 is located approximately 8,000 feet northwest of the intersection of Farm-to-Market Road 620 and State Highway 71 in Travis County, Texas 78738. The irrigation site (Spillman Ranch) is also located approximately 8,000 feet northwest of the intersection of Farm-to-Market Road 620 and State Highway 71 in Travis County, Texas 78738. The irrigation site (CCNG) is located approximately 2,500 feet south of the intersection of Farm-to-Market Road 620 and State Highway 71 in Travis County, Texas 78738. The Effluent Pond No. 2 and a treatment facility are located approximately 3,000 feet northwest of the intersection of Farm-to-Market Road 2244 and State Highway 71 in Travis County, Texas 78738 (Site B). The wastewater treatment facilities and the storage pond at Site B are located in the drainage basin of Lake Austin in Segment No. 1403 of the Colorado River Basin. The effluent disposal sites and the storage pond at Site A are located in the drainage basin of Barton Creek in Segment No. 1430 of the Colorado River Basin.

The TCEQ Executive Director has prepared a draft permit which, if approved, would establish the conditions under which the facility must operate. The Executive Director has made a preliminary decision that this permit, if issued, meets all statutory and regulatory requirements. The permit application, Executive Director's preliminary decision, and draft permit are available for viewing and copying at the Bee Cave Public Library, 4000 Galleria Parkway, Bee Cave, Texas. As a public courtesy, we have provided the following Web page to an online map of the site or the facility's general location. The online map is not part of the application or the notice: http://www.tceq.texas.gov/assets/public/hb610/index.html?lat=30.310833&lng=-97.925833&zoom=13&type=r. For the exact location, refer to the application.

CONTESTED CASE HEARING.

The State Office of Administrative Hearings (SOAH) will conduct a formal contested case hearing at:

10:00 a.m. - June 21, 2016

William P. Clements Building

300 West 15th Street, 4th Floor

Austin, Texas 78701

The contested case hearing will be a legal proceeding similar to a civil trial in state district court. The hearing will address the disputed issues of fact identified in the TCEQ order concerning this application issued on April 21, 2016. 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.

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 http://www.tceq.texas.gov/.

Further information may also be obtained from West Travis County Public Utility Agency at the address stated above or by calling Mr. Dennis Lozano, P.E., Murfee Engineering Company, Inc. at (512) 327-9204.

Persons with disabilities who need special accommodations at the hearing should call the SOAH Docketing Department at (512) 475-3445, at least one week prior to the hearing.

Issued: April 28, 2016

TRD-201602135
Bridget C. Bohac
Chief Clerk
Texas Commission on Environmental Quality
Filed: May 4, 2016

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Notice of Public Hearing on Proposed Revisions to the State Implementation Plan

The Texas Commission on Environmental Quality (commission) will conduct a public hearing to receive testimony regarding proposed revisions to the state implementation plan (SIP) under the requirements of Texas Health and Safety Code, §382.017; Texas Government Code, Chapter 2001, Subchapter B; and 40 Code of Federal Regulations §51.102 of the United States Environmental Protection Agency (EPA) concerning SIPs.

The proposed SIP revision would request that the EPA redesignate the Collin County nonattainment area for the 2008 lead National Ambient Air Quality Standard and include a plan that satisfies the redesignation requirements in Section 175A of the Federal Clean Air Act, including a maintenance plan that ensures the area will remain in attainment of the NAAQS through 2028.

The commission will hold a public hearing on this proposal in Frisco, Texas on June 2, 2016, at 2:00 p.m. at the George A. Purefoy Municipal Center located at 6101 Frisco Square Boulevard, City Council Chambers. 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.

Persons who have special communication or other accommodation needs who are planning to attend the hearing should contact Joyce Spencer-Nelson, Air Quality Division at (512) 239-5017 or 1-800-RELAY-TX (TDD). Requests should be made as far in advance as possible.

Written comments may be submitted to Brian Foster, MC 206, Air Quality Division, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087 or faxed to (512) 239-6188. Electronic comments may be submitted at: *http://www1.tceq.texas.gov/rules/ecomments/*. File size restrictions may apply to comments being submitted via the *eComments* system. All comments should reference Project Number 2016-003-SIP-NR. The comment period closes June 3, 2016. Copies of the proposed SIP revision can be obtained from the commission's website at *http://www.tceq.texas.gov/airquality/sip/dfw/dfw-latest-lead.* For further information, please contact Brian Foster, Air Quality Division, (512) 239-1930.

TRD-201602125
Robert Martinez
Director, Environmental Law Division
Texas Commission on Environmental Quality
Filed: May 3, 2016

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Notice of Public Meeting for TPDES Permit for Municipal Wastewater New Permit Number WQ0011404002

APPLICATION.

Dowdell Public Utility District, c/o Smith Murdaugh, Little & Bonham, L.L.P., 2727 Allen Parkway, Suite 1100, Houston, Texas 77019, has applied to the Texas Commission on Environmental Quality (TCEQ) for new Texas Pollutant Discharge Elimination System (TPDES) Permit No. WQ0011404002, to authorize the discharge of treated domestic wastewater at a daily average flow not to exceed 900,000 gallons per day.

The facility will be located west of Lozar Drive, approximately 750 feet northwest of the intersection of Lozar Drive and Avalon Aqua Way, in Harris County, Texas 77379. The treated effluent will be discharged to a detention pond system; thence to a 48-inch storm sewer pipe; thence to Harris County Flood Control District (HCFCD) ditch M114-00-00; thence to Willow Creek; 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 detention pond system, limited aquatic life use for HCFCD ditch M114-00-00, and high aquatic life use for Willow Creek. The designated uses for Segment No. 1008 are high aquatic life use, public water supply, and primary contact recreation. 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 Willow 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 at http://www.tceq.texas.gov/assets/public/hb610/index.html?lat=30.0796&lng=-95.5377&zoom=13&type=r.

The TCEQ Executive Director has completed the technical review of the application and prepared a draft permit. The draft permit, if approved, would establish the conditions under which the facility must operate. The Executive Director has made a preliminary decision that this permit, if issued, meets all statutory and regulatory requirements.

PUBLIC COMMENT/PUBLIC MEETING.

A public meeting will be held and will consist of two parts, an Informal Discussion Period and a Formal Comment Period. A public meeting is not a contested case hearing under the Administrative Procedure Act. During the Informal Discussion Period, the public will be encouraged to ask questions of the applicant and TCEQ staff concerning the permit application. The comments and questions submitted orally during the Informal Discussion Period will not be considered before a decision is reached on the permit application and no formal response will be made.

Responses will be provided orally during the Informal Discussion Period. During the Formal Comment Period on the permit application, members of the public may state their formal comments orally into the official record. A written response to all timely, relevant and material, or significant comments will be prepared by the Executive Director. All formal comments will be considered before a decision is reached on the permit application. A copy of the written response will be sent to each person who submits a formal comment or who requested to be on the mailing list for this permit application and provides a mailing address. Only relevant and material issues raised during the Formal Comment Period can be considered if a contested case hearing is granted on this permit application.

The Public Meeting is to be held:

Tuesday, June 14, 2016, at 7:00 p.m.

Klein Multipurpose Center

7500 FM 2920

Klein, Texas 77379

INFORMATION.

Citizens 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/about/comments.html. If you need more information about the permit application or the permitting process, please call the TCEQ Public Education Program, Toll Free, at 1-800-687-4040. *Si desea información en español, puede llamar 1-800-687-4040.* General information about the TCEQ can be found at our web site at www.tceq.texas.gov.

The permit application, Executive Director's preliminary decision, and draft permit are available for viewing and copying at the Harris County Public Library, Barbara Bush Branch Library at Cypress Creek Branch, 6817 Cypresswood Drive, Spring, Texas. Further information may also be obtained from Dowdell Public Utility District at the address stated above or by calling Mr. Jeffrey W. Vogler, P.E., Van De Wiele & Vogler, Inc., at (713) 782-0042.

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 one week prior to the meeting.

Issued: May 3, 2016

TRD-201602136
Bridget C. Bohac
Chief Clerk
Texas Commission on Environmental Quality
Filed: May 4, 2016

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Notice of Public Meeting for TPDES Permit for Municipal Wastewater Renewal Permit Number WQ0013633001

APPLICATION. City of Alamo, 420 North Tower Road, Alamo, Texas 78516, has applied to the Texas Commission on Environmental Quality (TCEQ) for a renewal of Texas Pollutant Discharge Elimination System (TPDES) Permit No. WQ0013633001, which authorizes the discharge of treated domestic wastewater at an annual average flow not to exceed 2,000,000 gallons per day.

The facility is located approximately 14,000 feet south along South Tower Road from the intersection of Tower Road and U.S. 83 Business Highway or approximately 17,000 feet south from the intersection of South Tower Road with U.S. 83 Expressway in Hidalgo County, Texas 78516. The treated effluent is discharged to Hidalgo County Drainage Ditch #2; thence to the Arroyo Colorado Above Tidal in Segment No. 2202 of the Nueces-Rio Grande Basin. The unclassified receiving water use is minimal aquatic life use for Hidalgo County Drainage #2. The designated uses for Segment No. 2202 are intermediate aquatic life use and primary contact recreation. 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. http://www.tceq.texas.gov/assets/public/hb610/index.html?lat=26.147222&lng=-98.116388&zoom=13&type=r

The TCEQ Executive Director has completed the technical review of the application and prepared a draft permit. The draft permit, if approved, would establish the conditions under which the facility must operate. The Executive Director has made a preliminary decision that this permit, if issued, meets all statutory and regulatory requirements.

PUBLIC COMMENT/PUBLIC MEETING. A public meeting will be held and will consist of two parts, an Informal Discussion Period and a Formal Comment Period. A public meeting is not a contested case hearing under the Administrative Procedure Act. During the Informal Discussion Period, the public will be encouraged to ask questions of the applicant and TCEQ staff concerning the permit application. The comments and questions submitted orally during the Informal Discussion Period will not be considered before a decision is reached on the permit application and no formal response will be made. Responses will be provided orally during the Informal Discussion Period. During the Formal Comment Period on the permit application, members of the public may state their formal comments orally into the official record. A written response to all timely, relevant and material, or significant comments will be prepared by the Executive Director. All formal comments will be considered before a decision is reached on the permit application. A copy of the written response will be sent to each person who submits a formal comment or who requested to be on the mailing list for this permit application and provides a mailing address. Only relevant and material issues raised during the Formal Comment Period can be considered if a contested case hearing is granted on this permit application.

The Public Meeting is to be held:

Thursday, June 16, 2016 at 7:00 PM

City of Alamo City Hall

420 North Tower Road

Alamo, Texas 78516

INFORMATION. Citizens 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/about/comments.html. If you need more information about the permit application or the permitting process, please call the TCEQ Public Education Program, Toll Free, at 1-800-687-4040. *Si desea información en español, puede llamar 1-800-687-4040.* General information about the TCEQ can be found at our web site at www.tceq.texas.gov.

The permit application, Executive Director's preliminary decision, and draft permit are available for viewing and copying at the City of Alamo City Hall, City Hall Building, 420 North Tower Road, Alamo, Texas. Further information may also be obtained from City of Alamo at the address stated above or by calling Mr. Luciano Ozuna, Jr., City Manager, City of Alamo, at (956) 787-0006.

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 one week prior to the meeting.

Issued: May 3, 2016

TRD-201602138
Bridget C. Bohac
Chief Clerk
Texas Commission on Environmental Quality
Filed: May 4, 2016

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Notice of Water Rights Applications

Notices issued April 8, 2016 through April 12, 2016.

APPLICATION NO. 14-1776A; Carolyn Dawson, 4704 Timber Ridge Drive, San Angelo, Texas 76904-6362, Applicant, seeks to amend a portion of Certificate of Adjudication No. 14-1776 to add a diversion point on the San Saba River, Colorado River Basin, in Menard County. Mailed notice is being given pursuant to Title 30 TAC §295.158(c)(2)(E) to the one interjacent water right holder being the co-owner of the Certificate. A portion of Certificate of Adjudication No. 14-1776 authorizes Carolyn Dawson to divert and use not to exceed four acre-feet of water per year from a point on the San Saba River, tributary of the Colorado River, Colorado River Basin, at a maximum combined diversion rate of 0.89 cfs (400 gpm) for agricultural purposes to irrigate 8.5 acres of land out of a 143.761-acre tract in Menard County. The time priority of this right is 1915. The application was received on January 2, 2014. Additional information and fees were received on June 30 and July 9, 2014. The application was declared administratively complete and accepted for filing on July 31, 2014. The TCEQ Executive Director has completed the technical review of the application and prepared a draft amendment. The draft amendment, if granted, would contain special conditions including, but not limited to, installing screens on the new diversion structure and a measuring device on the diversion point. The application and Executive Director's draft amendment are available for viewing and copying at the Office of the Chief Clerk, 12100 Park 35 Circle, Building F, Austin, Texas 78753. Written public comments and requests for a public meeting should be submitted to the Office of the Chief Clerk, at the address provided in the information section below by April 29, 2016.

APPLICATION NO. 02-5129B; Michael L. Mitchell, 4953 FM 367W, Iowa Park, Texas 76367, Applicant, seeks to amend Certificate of Adjudication No. 02-5129, pursuant to a Water Lease Contract Terms, to change a place of use and to add two diversion points on the Red River, Red River Basin in Grayson County. The application and fees were received on April 28, 2015. Additional information was received on September 17, September 19, September 23, 2015; February 15, February 22, March 5, March 11, and March 15, 2016. The application was declared administratively complete and filed with the Office of the Chief Clerk on April 1, 2016. The TCEQ Executive Director has completed the technical review of the application and prepared a draft amendment. The draft amendment, if granted, would contain special conditions including, but not limited to, maintenance of the water lease agreement. The application and Executive Director's draft amendment are available for viewing and copying at the Office of the Chief Clerk, 12100 Park 35 Circle, Building F, Austin, Texas 78753. Written public comments and requests for a public meeting should be submitted to the Office of the Chief Clerk, at the address provided in the information section below by April 26, 2016.

APPLICATION NO. 02-5140A; William L. Brown and Mary C. Brown, P.O. Box 281, Petrolia, Texas 76377, Applicants/Owners, seek to amend Certificate of Adjudication No. 02-5140, pursuant to a Water Lease Contract Terms, to add three diversion points on the Red River, Red River Basin for agricultural purposes to irrigate land in Grayson County. The application and fees were received on April 17, 2015. Additional information was received on September 17, September 19, September 23, 2015; February 15, February 17, March 5, March 11, and March 15, 2016. The application was declared administratively complete and filed with the Office of the Chief Clerk on April 1, 2016. The TCEQ Executive Director has completed the technical review of the application and prepared a draft amendment. The draft amendment, if granted, would contain special conditions including, but not limited to, maintenance of the water lease agreement. The application and Executive Director's draft amendment are available for viewing and copying at the Office of the Chief Clerk, 12100 Park 35 Circle, Building F, Austin, Texas 78753. Written public comments and requests for a public meeting should be submitted to the Office of the Chief Clerk, at the address provided in the information section below by April 26, 2016.

APPLICATION NO. 12879; Frontier Mining and Materials, L.L.C., 8409 Pickwick Lane #317, Dallas, Texas 75225, Applicant, seeks a temporary water use permit to divert and use not to exceed 60 acre-feet of water within a period of one year from a point on Trinity River, Trinity River Basin for industrial purposes in Navarro County. The application and partial fees were received on June 19, 2012. Additional information and fees were received on August 23, and October 30, 2012 and February 22, 2013. The application was declared administratively complete and accepted for filing with the Office of the Chief Clerk on February 26, 2013. The Executive Director completed the technical review of the application and prepared a draft permit. The draft permit, if granted, would include special conditions including, but not limited to streamflow restrictions. The application, technical memoranda, and Executive Director's draft permit are available for viewing and copying at the Office of the Chief Clerk, 12100 Park 35 Circle, Bldg. F, Austin, Texas 78753. Written public comments and requests for a public meeting should be submitted to the Office of Chief Clerk, at the address provided in the information section below, by May 6, 2016.

APPLICATION NO. 14-1529A; CSta Ranch, L.P. (CSta), P.O. Box 12199, San Antonio, Texas 78212, and Paint Creek Ranch Partners, Ltd. (PCRP), 10707 Mt. Tipton, San Antonio, Texas 78218, Applicants, seek to amend Certificate of Adjudication No. 14-1529 to add a place of use and to add two diversion points on the South Llano River, Colorado River Basin in Kimble County. The application and fees were received on June 6, 2011. Additional information and fees were received on September 8 and 9, 2011, and February 1, June 20, 2012, and November 26, 2013. The application was declared administratively complete and filed with the Office of the Chief Clerk on December 12, 2013. The TCEQ Executive Director has completed the technical review of the application and prepared a draft permit. The draft permit, if granted, would contain special conditions including, but not limited to, recommendation to install screens on diversion structures. The application and Executive Director's draft permit are available for viewing and copying at the Office of the Chief Clerk, 12100 Park 35 Circle, Building F, Austin, Texas 78753. Written public comments and requests for a public meeting should be submitted to the Office of the Chief Clerk, at the address provided in the information section below by April 29, 2016.

INFORMATION SECTION

To view the complete issued notice, view the notice on our web site at www.tceq.texas.gov/comm_exec/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.

A public meeting is intended for the taking of public comment, and is not a contested case hearing.

The Executive Director can consider approval of an application unless a written request for a contested case hearing is filed. To request a contested case hearing, you must submit the following: (1) your name (or for a group or association, an official representative), mailing address, daytime phone number, and fax number, if any: (2) applicant's name and permit number; (3) the statement (I/we) request a contested case hearing; and (4) a brief and specific description of how you would be affected by the application in a way not common to the general public. You may also submit any proposed conditions to the requested application which would satisfy your concerns. Requests for a contested case hearing must be submitted in writing to the TCEQ Office of the Chief Clerk at the address provided in the information section below.

If a hearing request is filed, the Executive Director will not issue the requested permit and may forward the application and hearing request to the TCEQ Commissioners for their consideration at a scheduled Commission meeting.

Written hearing requests, public comments or requests for a public meeting should be submitted to the Office of the Chief Clerk, MC 105, TCEQ, P.O. Box 13087, Austin, Texas 78711-3087. For information concerning the hearing process, please contact the Public Interest Counsel, MC 103, at the same address. For additional information, individual members of the general public may contact the Public Education Program at (800) 687-4040. General information regarding the TCEQ can be found at our web site at www.tceq.texas.gov. Si desea información en español, puede llamar al (800) 687-4040.

Issued in Austin, Texas on May 3, 2016

TRD-201602139
Bridget C. Bohac
Chief Clerk
Texas Commission on Environmental Quality
Filed: May 4, 2016

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Update to the Water Quality Management Plan (WQMP)

The Texas Commission on Environmental Quality (TCEQ or commission) requests comments from the public on the draft April 2016 Update to the WQMP for the State of Texas.

Download the draft April 2016 WQMP Update at *http://www.tceq.texas.gov/permitting/wqmp/WQmanagement_comment.html* or view a printed copy at the TCEQ Library, Building A, 12100 Park 35 Circle, Austin, Texas.

The WQMP is developed and promulgated in accordance with the requirements of Federal Clean Water Act, §208. The draft update includes projected effluent limits of specific domestic dischargers, which may be useful for planning in future permit actions. The draft update may also contain service area populations for listed wastewater treatment facilities, designated management agency information, and total maximum daily load (TMDL) revisions.

Once the commission certifies a WQMP update, it is submitted to the United States Environmental Protection Agency (EPA) for approval. For some Texas Pollutant Discharge Elimination System (TPDES) permits, the EPA's approval of a corresponding WQMP update is a necessary precondition to TPDES permit issuance by the commission.

Deadline

All comments must be received at the TCEQ no later than **5:00 p.m. on June 13, 2016.**

How to Submit Comments

Comments must be submitted in writing to:

Nancy Vignali

Texas Commission on Environmental Quality

Water Quality Division, MC 150

P.O. Box 13087

Austin, Texas 78711-3087

Comments may also be faxed to (512) 239-4420, but must be followed up with written comments by mail within three working days of the fax date or by the comment deadline, whichever is sooner.

For further information or questions, please contact Ms. Vignali at (512) 239-1303 or by email at *Nancy.Vignali@tceq.texas.gov.*

TRD-201602126
Robert Martinez
Director, Environmental Law Division
Texas Commission on Environmental Quality
Filed: May 3, 2016

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Texas Facilities Commission

Request for Proposals #303-7-20540-A

The Texas Facilities Commission (TFC), on behalf of the Department of Public Safety (DPS), announces the issuance of Request for Proposals (RFP) #303-7-20540-A. TFC seeks a five (5) or ten (10) year lease of approximately 21,008 square feet of usable space that consists of 20,813 square feet of office space and 195 square feet of outdoor employee lounge area space in SE Houston, Texas.

The deadline for questions is May 16, 2016, and the deadline for proposals is May 26, 2016, at 3:00 p.m. The award date is June 15, 2016. TFC reserves the right to accept or reject any or all proposals submitted. TFC is under no legal or other obligation to execute a lease on the basis of this notice or the distribution of an RFP. Neither this notice nor the RFP commits TFC to pay for any costs incurred prior to the award of a grant.

Parties interested in submitting a proposal may obtain information by contacting the Program Specialist, Evelyn Esquivel, at (512) 463-6494. A copy of the RFP may be downloaded from the Electronic State Business Daily at *http://esbd.cpa.state.tx.us/bid_show.cfm?bidid=124201.*

TRD-201602090
Kay Molina
General Counsel
Texas Facilities Commission
Filed: May 2, 2016

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Request for Proposals #303-7-20561

The Texas Facilities Commission (TFC), on behalf of the Comptroller of Public Accounts (CPA), Office of the Attorney General (OAG), announces the issuance of Request for Proposals (RFP) #303-7-20561. TFC seeks a five (5) or ten (10) year lease of approximately 10,480 square feet of office space in Brownsville, Texas.

The deadline for questions is May 25, 2016 and the deadline for proposals is June 3, 2016 at 3:00 p.m. The award date is July 20, 2016. TFC reserves the right to accept or reject any or all proposals submitted. TFC is under no legal or other obligation to execute a lease on the

basis of this notice or the distribution of an RFP. Neither this notice nor the RFP commits TFC to pay for any costs incurred prior to the award of a grant.

Parties interested in submitting a proposal may obtain information by contacting the Program Specialist, Evelyn Esquivel, at (512) 463-6494. A copy of the RFP may be downloaded from the Electronic State Business Daily at http://esbd.cpa.state.tx.us/bid_show.cfm?bidid=124228.

TRD-201602094
Kay Molina
General Counsel
Texas Facilities Commission
Filed: May 3, 2016

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Request for Proposals #303-7-20562

The Texas Facilities Commission (TFC), on behalf of the State Securities Board (SSB) and the Office of the Attorney General (OAG), announces the issuance of Request for Proposals (RFP) #303-7-20562. TFC seeks a five (5) or ten (10) year lease of approximately 5,496 square feet of office space in San Antonio, Texas.

The deadline for questions is May 24, 2016 and the deadline for proposals is June 1, 2016 at 3:00 p.m. The award date is July 20, 2016. TFC reserves the right to accept or reject any or all proposals submitted. TFC is under no legal or other obligation to execute a lease on the basis of this notice or the distribution of an RFP. Neither this notice nor the RFP commits TFC to pay for any costs incurred prior to the award of a grant.

Parties interested in submitting a proposal may obtain information by contacting the Program Specialist, Evelyn Esquivel, at (512) 463-6494. A copy of the RFP may be downloaded from the Electronic State Business Daily at *http://esbd.cpa.state.tx.us/bid_show.cfm?bidid=124198.*

TRD-201602083
Kay Molina
General Counsel
Texas Facilities Commission
Filed: May 2, 2016

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Texas Health and Human Services Commission

Public Notice: More Liberal Methods of Treating Income under §1902(r)(2) of the Act

The Texas Health and Human Services Commission announces its intent to submit transmittal number 16-0003 to the Texas State Plan for Medical Assistance, under Title XIX of the Social Security Act.

The purpose of this amendment is to exclude certain amounts held in school-based savings accounts and interest earned on the accounts when determining eligibility for Medicaid Eligibility for the Elderly and People with Disabilities (MEPD) and Medically Needy with Spend Down (MNSD) programs. The proposed amendment is effective August 1, 2016.

The proposed amendment is estimated to have no fiscal impact. The addition of excluding amounts held in school-based savings accounts and the interest earned on such accounts in determining eligibility is not expected to increase Medicaid utilization or cost because it is an optional program for school districts to implement.

To obtain copies of the proposed amendment, interested parties may contact J.R. Top, State Plan Coordinator, by mail at the Health and Human Services Commission, P.O. Box 13247, Mail Code H-600, Austin, Texas 78711; by telephone at (512) 462-6397; by facsimile at (512) 730-7472; or by e-mail at *jr.top@hhsc.state.tx.us*. Copies of the proposal will also be made available for public review at the local offices of the Texas Department of Aging and Disability Services.

TRD-201602019
Karen Ray
Chief Counsel
Texas Health and Human Services Commission
Filed: April 28, 2016

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University of Houston System

Notice of Request for Proposal - Dining Services

The University of Houston System announces a Request for Proposal (RFP) for consultant services pursuant to Government Code, Chapter 2254, Subchapter B.

RFP730-16113, Business and Service Review of Campus Dining Services Program

Purpose:

The University invites you to submit a proposal for services to include providing: (a) an independent, comprehensive evaluation of campus contracted dining services, including a review of current meal plan structure, and recommendations for improvement based on best, national industry practices; (b) guidance and assistance in any potential service and technology enhancements related to campus dining services; (c) guidance to the university regarding the business operations of dining services; (d) development of a comprehensive five year business plan and pro forma for the business operation of dining services; (e) development of performance indicators that can be used annually to monitor dining performance from a university perspective; and (f) recommendations to the university for contract, financial, operational, and management policies, procedures, and systems.

Eligible Applicants:

Consulting firms with related knowledge and experience in:

- Providing business reviews of partnership agreements for dining and food services partnerships on university campuses, including meal plan review.

- Providing guidance to clients regarding the negotiation or re-negotiation of business terms, the development of a multi-year business plan and pro forma, and recommendations for policies, procedures, or systems to better manage the contracted food services agreement.

Services to be performed:

Narrative business review and recommendations for service improvements (with justification for revision). Verbal and narrative guidance to assist the university with potential program improvements. Development of narrative business terms, plan, quality indicators for departmental and program improvement, and pro forma for five operating years. Narrative operational policy and procedure recommendation, including a contract management checklist.

Finding by Chief Executive Officer, Renu Khator:

The purpose of this third-party review is to ensure that we have: a) robust performance metrics in place for the evaluation of our contracted partnership; b) meal plan pricing that supports the needs of our students; c) technological enhancements in place that meet the needs of the management of this agreement; and d) a five-year pro forma in place that helps in the management and oversight of this agreement.

Review and Award Criteria:

All proposals will be evaluated by appointed representatives of the University in accordance with the following procedures:

1. Purchasing will receive and review each RFP proposal to ensure it meets the requirements of the RFP. Qualified proposals will be given to the selection committee.

2. Each member of the selection committee will independently evaluate the qualified proposals according to the criteria in section IX of the RFP, except for price, and send their evaluations to Purchasing. Price will be evaluated by Purchasing.

3. Purchasing will combine the committee's scores to determine which proposal received the highest combined score.

4. Purchasing will notify the respondent with the highest score that the University intends to contract with them.

Deadlines: UH must receive proposals according to instructions in the RFP package on or before June 15, 2016 at 10:00 a.m. (CDT).

Obtaining a copy of the RFP: Copies will be available on the Electronic State Business Daily (ESBD) at *http://esbd.cpa.state.tx.us/.*

The sole point of contact for inquiries concerning RFP is:

Jack Tenner (Director of Purchasing)

UH Purchasing

5000 Gulf Freeway, ERP 1, Rm.204

Houston, Texas 77204-5015

Phone: (713) 743-5671

Email: jdtenner@central.uh.edu

TRD-201602155
Dr. Renu Khator
President
University of Houston System
Filed: May 4, 2016

♦ ♦ ♦

Notice of Request for Proposal - Parking and Transportation Services

The University of Houston System announces a Request for Proposal (RFP) for consultant services pursuant to Government Code, Chapter 2254, Subchapter B.

RFP730-16112, Business and Service Review of Parking & Transportation Services

Purpose:

The University invites you to submit a proposal for services to include providing: (a) an independent, comprehensive evaluation of campus, self-operated Parking & Transportation Services; (b) guidance and assistance in any potential service and technology enhancements related to Parking and Transportation Services; (c) guidance to the university regarding the business operations of Parking & Transportation Services; (d) vehicular traffic analysis and management, including review of large event parking and mobility; (e) development of annual departmental performance benchmarks to evaluate annual performance; (f) development of a comprehensive five year business plan and pro forma for the business operation; and (g) recommendations to the university for contract, financial, operational, and management policies, procedures, or systems, including but not limited to the privatization in whole or part of any of its Parking and Transportation Services.

Eligible Applicants:

Consulting firms with related knowledge and experience in:

- Providing general assessments and recommendations for parking and transportation services, including: technology enhancements; current business and operational practices; potential privatization, in whole or part of any of its services; parking and vehicular mobility for large events for clients of similar size and type as the University of Houston.

- Assisting clients in the improvement of its parking and transportation operations.

Services to be performed:

Development of overall schedule to complete activities associated with this proposal.

Review current Parking and Transportation Services operations and provide narrative recommendations for improvement.

Provide the university with a recommendation about potential out-sourcing of any of its parking and transportation services, in whole or part.

Develop a five-year business plan and pro forma for the operation.

Review of current parking and transportation policies and procedures and provide recommendations for improvement.

Review of current staffing levels and incumbents and narrative recommendations for improvement.

Review traffic and vehicular mobility, in particular for large events, and make recommendations.

Development of departmental performance benchmarks that will be used to assess annual performance of Parking and Transportation Services.

Recommendations of improvements in technology and/or contracts that will enhance the overall performance of Parking and Transportation Services.

Finding by Chief Executive Officer, Renu Khator:

As the campus has grown substantially over the past eight years and with the addition of a large residential population, it has been determined that a comprehensive review of Parking and Transportation Services on our campus is necessary. This evaluation will help the university implement best practices from across the country in ensuring that this department is operating efficiently and effectively.

Additionally, this review will provide insight as to whether there are further opportunities to privatize any or all of its services. I have found the expertise to engage in this comprehensive review does not exist at the University; therefore, it is necessary to engage a consultant to complete this review.

Review and Award Criteria:

All proposals will be evaluated by appointed representatives of the University in accordance with the following procedures:

1. Purchasing will receive and review each RFP proposal to ensure it meets the requirements of the RFP. Qualified proposals will be given to the selection committee.

2. Each member of the selection committee will independently evaluate the qualified proposals according to the criteria in section IX of the RFP, except for price, and send their evaluations to Purchasing. Price will be evaluated by Purchasing.

3. Purchasing will combine the committee's scores to determine which proposal received the highest combined score.

4. Purchasing will notify the respondent with the highest score that the University intends to contract with them.

Deadlines: UH must receive proposals according to instructions in the RFP package on or before June 15, 2016 at 11:00 a.m. (CDT).

Obtaining a copy of the RFP: Copies will be available on the Electronic State Business Daily (ESBD) at *http://esbd.cpa.state.tx.us/*.

The sole point of contact for inquiries concerning RFP is:

Jack Tenner (Director of Purchasing)

UH Purchasing

5000 Gulf Freeway, ERP 1, Rm.204

Houston, Texas 77204-5015

Phone: (713) 743-5671

Email: jdtenner@central.uh.edu

TRD-201602157
Dr. Renu Khator
President
University of Houston System
Filed: May 4, 2016

♦ ♦ ♦

Texas Department of Insurance

Company Licensing

Application for incorporation in the State of Texas by WALDEN DENTAL PLANS INC., a domestic Health Maintenance Organization. The home office is in Houston, 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 Jeff Hunt, 333 Guadalupe Street, MC 305-2C, Austin, Texas 78701.

TRD-201602142
Norma Garcia
General Counsel
Texas Department of Insurance
Filed: May 4, 2016

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Correction of Error

The Texas Department of Insurance proposed amendments to 28 TAC §7.209, concerning Form A, in the April 29, 2016, issue of the *Texas Register* (41 TexReg 3080). Due to an editing error, the filing date on page 3086, first column, is shown to be "May 12, 2016". The correct date of filing is April 12, 2016. The corrected statement reads as follows:

"Filed with the Office of the Secretary of State on April 12, 2016."

TRD-201602141

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Texas Lottery Commission

Scratch Ticket Game Number 1762 "Spicy 9's"

1.0 Name and Style of Scratch Ticket Game.

A. The name of Scratch Ticket Game No. 1762 is "SPICY 9'S". The play style is "match 3 of X".

1.1 Price of Scratch Ticket Game.

A. The price for Scratch Ticket Game No. 1762 shall be $1.00 per Ticket.

1.2 Definitions in Scratch Ticket Game No. 1762.

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: $1.00, $2.00, $3.00, $5.00, $10.00, $20.00, $50.00, $100, $500, $1,000 and 9.

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. 1762 - 1.2D

PLAY SYMBOL	CAPTION
$1.00	ONE$
$2.00	TWO$
$3.00	THR$
$5.00	FIV$
$10.00	TEN$
$20.00	TWY$
$50.00	FFTY$
$100	ONHN
$500	FVHN
$1,000	ONTH
9	WIN$

E. Serial Number - A unique 13 (thirteen) 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. Low-Tier Prize - A prize of $1.00, $2.00, $3.00, $5.00, $10.00 or $20.00.

G. Mid-Tier Prize - A prize of $50.00, $100 or $500.

H. High-Tier Prize - A prize of $1,000.

I. Bar Code - A 24 (twenty-four) 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 Scratch Ticket number and the ten (10) digit Validation Number. The Bar Code appears on the back of the Scratch Ticket.

J. Pack-Scratch Ticket Number - A 14 (fourteen) digit number consisting of the four (4) digit game number (1762), a seven (7) digit Pack number, and a three (3) digit Scratch Ticket number. Scratch Ticket numbers start with 001 and end with 150 within each Pack. The format will be: 1762-0000001-001.

K. Pack - A Pack of the "SPICY 9'S" Scratch Ticket Game contains 150 Tickets. Ticket 001 to 005 will be on the top page; Tickets 006 to 0010 on the next page etc.; and Tickets 146 to 150 will be on the last page. All Packs will be tightly shrink-wrapped. There will be no breaks between the Tickets in a Pack.

L. 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.

M. Scratch Ticket Game, Scratch Ticket or Ticket - Texas Lottery "SPICY 9'S" Scratch Ticket Game No. 1762.

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, Instant Game Rules, these Game Procedures, and the requirements set out on the back of each Scratch Ticket. A prize winner in the "SPICY 9'S" Scratch Ticket Game is determined once the latex on the Scratch Ticket is scratched off to expose 6 (six) Play Symbols. 1. If a player reveals 3 matching prize amounts, the player wins that amount. 2. If the player reveals a "9" symbol in the play area, the player wins the corresponding prize in the PRIZE LEGEND. (Only highest prize paid.) No portion of the Display Printing nor any extraneous matter whatsoever shall be usable or playable as a part of the Scratch Ticket.

2.1 Scratch Ticket Validation Requirements.

A. To be a valid Scratch Ticket, all of the following requirements must be met:

1. Exactly 6 (six) 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, Retailer Validation Code and Pack-Scratch 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, Retailer Validation Code and Pack-Scratch 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 6 (six) Play Symbols under the Latex Overprint on the front portion of the Scratch Ticket, exactly one Serial Number, exactly one Retailer Validation Code, and exactly one Pack-Scratch 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 6 (six) Play Symbols must be exactly one of those described in Section 1.2.C of these Game Procedures;

17. Each of the 6 (six) 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 Pack-Scratch Ticket Number must be printed in the Pack-Scratch Ticket Number font and must correspond precisely to the artwork on file at the Texas Lottery;

18. The Display Printing on the Scratch Ticket must be regular in every respect and correspond precisely to the artwork on file at the Texas Lottery; and

19. The Scratch Ticket must have been received by the Texas Lottery by applicable deadlines.

B. The Scratch Ticket must pass all additional validation tests provided for in these Game Procedures, the Texas Lottery's Rules governing the award of prizes of the amount to be validated, and any confidential validation and security tests of the Texas Lottery.

C. Any Scratch Ticket not passing all of the validation requirements is void and ineligible for any prize and shall not be paid. However, the Executive Director may, solely at the Executive Director's discretion, refund the retail sales price of the Scratch Ticket. In the event a defective Scratch Ticket is purchased, the only responsibility or liability of the Texas Lottery shall be to replace the defective Scratch Ticket with another unplayed Scratch Ticket in that Scratch Ticket Game (or a Scratch Ticket of equivalent sales price from any other current Texas Lottery Scratch Ticket Game) or refund the retail sales price of the Scratch Ticket, solely at the Executive Director's discretion.

2.2 Programmed Game Parameters.

A. Consecutive Non-Winning Tickets within a Pack will not have matching patterns of either Play Symbols or Prize Symbols.

B. A Ticket will win as indicated by the prize structure.

C. A Ticket can win up to one (1) time.

D. No Ticket will contain two (2) sets of three (3) matching Prize Symbols.

E. No Ticket will contain four (4) or more matching Prize Symbols.

F. No Ticket will contain more than five (5) "9" Play Symbols.

G. No Ticket will contain one (1) or more "9" Play Symbols and three (3) matching Prize Symbols.

H. The "9" Play Symbol will only appear on intended winning Tickets as dictated by the prize structure.

2.3 Procedure for Claiming Prizes.

A. To claim a "SPICY 9'S" Scratch Ticket Game prize of $1.00, $2.00, $3.00, $5.00, $10.00, $20.00, $50.00, $100 or $500, a claimant shall sign the back of the Scratch Ticket in the space designated on the Scratch Ticket and present the winning Scratch Ticket to any Texas Lottery Retailer. The Texas Lottery Retailer shall verify the claim and, if valid, and upon presentation of proper identification, if appropriate, make payment of the amount due the claimant and physically void the Scratch Ticket; provided that the Texas Lottery Retailer may, but is not required, to pay a $50.00, $100 or $500 Scratch Ticket Game. In the event the Texas Lottery Retailer cannot verify the claim, the Texas Lottery Retailer shall provide the claimant with a claim form and instruct the claimant on how to file a claim with the Texas Lottery. If the claim is validated by the Texas Lottery, a check shall be forwarded to the claimant in the amount due. In the event the claim is not validated, the claim shall be denied and the claimant shall be notified promptly. A claimant may also claim any of the above prizes under the procedure described in Section 2.3.B and Section 2.3.C of these Game Procedures.

B. To claim a "SPICY 9'S" Instant Game prize of $1,000, the claimant must sign the winning Ticket and present it at one of the Texas Lottery's Claim Centers. If the claim is validated by the Texas Lottery, payment will be made to the bearer of the validated winning 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 "SPICY 9'S" Scratch Ticket Game prize, the claimant must sign the winning Scratch Ticket, thoroughly complete a claim form, and mail both to: Texas Lottery Commission, P.O. Box 16600, Austin, Texas 78761-6600. The Texas Lottery is not responsible for Scratch Tickets lost in the mail. In the event that the claim is not validated by the Texas Lottery, the claim shall be denied and the claimant shall be notified promptly.

D. Prior to payment by the Texas Lottery of any prize, the Texas Lottery shall deduct:

1. A sufficient amount from the winnings of a prize winner who has been finally determined to be:

a. 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;

b. in default on a loan made under Chapter 52, Education Code; or

c. in default on a loan guaranteed under Chapter 57, Education Code; and

2. delinquent child support payments from the winnings of a prize winner in the amount of the delinquency as 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 "SPICY 9'S" 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 "SPICY 9'S" 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 Ticket Prizes. There will be approximately 11,160,000 Scratch Tickets in Scratch Ticket Game No. 1762. The approximate number and value of prizes in the game are as follows:

Figure 2: GAME NO. 1762 - 4.0

Prize Amount	Approximate Number of Winners*	Approximate Odds are 1 in **
$1	1,202,800	9.28
$2	595,200	18.75
$3	260,400	42.86
$5	136,400	81.82
$10	136,400	81.82
$20	49,600	225.00
$50	1,860	6,000.00
$100	1,550	7,200.00
$500	248	45,000.00
$1,000	112	99,642.86

* The number of prizes in a game is approximate based on the number of tickets ordered. The number of actual prizes available in a game may vary based on number of tickets manufactured, testing, distribution, sales and number of prizes claimed.

**The overall odds of winning a prize are 1 in 4.68. 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. 1762 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 Instant 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. 1762, 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-201602128
Bob Biard
General Counsel
Texas Lottery Commission
Filed: May 3, 2016

♦ ♦ ♦

Scratch Ticket Game Number 1799 "$100,000 Super Cashword"

1.0 Name and Style of Scratch Ticket Game.

A. The name of Scratch Ticket Game No. 1799 is "$100,000 SUPER CASHWORD". The play style is "crossword".

1.1 Price of Scratch Ticket Game.

A. The price for Scratch Ticket Game No. 1799 shall be $5.00 per Scratch Ticket.

1.2 Definitions in Scratch Ticket Game No. 1799.

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: A, B, C, D, E, F, G, H, I, J, K, L, M, N, O, P, Q, R, S, T, U, V, W, X, Y, Z, $5.00, $10.00, $15.00, $20.00, $25.00, $50.00 and BLACKENED SQUARE SYMBOL. The possible red Play Symbols are: A, B, C, D, E, F, G, H, I, J, K, L, M, N, O, P, Q, R, S, T, U, V, W, X, Y and Z.

D. Play Symbol Caption - The small printed material appearing below each Play Symbol which explains the Play Symbol. One and only one of these Play Symbol Captions appears under each Play Symbol and each is printed in caption font in black ink in positive. Crossword and Bingo style games do not typically have Play Symbol Captions. The Play Symbol Caption which corresponds with and verifies each Play Symbol is as follows:

Figure 1: GAME NO. 1799 - 1.2D

PLAY SYMBOL	CAPTION
A (BLACK)	
B (BLACK)	
C (BLACK)	
D (BLACK)	
E (BLACK)	
F (BLACK)	
G (BLACK)	
H (BLACK)	
I (BLACK)	
J (BLACK)	
K (BLACK)	
L (BLACK)	
M (BLACK)	
N (BLACK)	
O (BLACK)	
P (BLACK)	
Q (BLACK)	
R (BLACK)	
S (BLACK)	
T (BLACK)	
U (BLACK)	
V (BLACK)	
W (BLACK)	
X (BLACK)	
Y (BLACK)	
Z (BLACK)	
A (RED)	
B (RED)	
C (RED)	
D (RED)	
E (RED)	
F (RED)	
G (RED)	
H (RED)	
I (RED)	
J (RED)	
K (RED)	
L (RED)	

M (RED)	
N (RED)	
O (RED)	
P (RED)	
Q (RED)	
R (RED)	
S (RED)	
T (RED)	
U (RED)	
V (RED)	
W (RED)	
X (RED)	
Y (RED)	
Z (RED)	
$5.00 (BLACK)	FIV$
$10.00 (BLACK)	TEN$
$15.00 (BLACK)	FFN$
$20.00 (BLACK)	TWY$
$25.00 (BLACK)	TWFV$
$50.00 (BLACK)	FFTY$
▒ SYMBOL (BLACK)	

E. Serial Number - A unique 13 (thirteen) 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. Low-Tier Prize - A prize of $5.00, $10.00, $15.00 or $20.00.

G. Mid-Tier Prize - A prize of $25.00, $50.00, $100, $200 or $500.

H. High-Tier Prize - A prize of $1,000 or $100,000.

I. Bar Code - A 24 (twenty-four) 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 Scratch Ticket number and the ten (10) digit Validation Number. The Bar Code appears on the back of the Scratch Ticket.

J. Pack-Scratch Ticket Number - A 14 (fourteen) digit number consisting of the four (4) digit game number (1799), a seven (7) digit Pack number, and a three (3) digit Scratch Ticket number. Scratch Ticket numbers start with 001 and end with 075 within each Pack. The format will be: 1799-0000001-001.

K. Pack - A Pack of "$100,000 SUPER CASHWORD" Scratch Ticket Game contains 075 Scratch 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 the back of 075 while the other fold will show the back of Ticket 001 and front of 075.

L. Non-Winning Scratch Ticket - A 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.

M. Scratch Ticket Game, Scratch Ticket or Ticket - A Texas Lottery "$100,000 SUPER CASHWORD" Scratch Ticket Game No. 1799 Ticket.

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, Instant Game Rules, these Game Procedures, and the requirements set out on the back of each Scratch Ticket. A prize winner in the "$100,000 SUPER CASHWORD" Scratch Ticket Game is determined once the latex on the Scratch Ticket is scratched off to expose 195 (one hundred ninety-five) Play Symbols. The player must scratch all of the YOUR 19 LETTERS. Then the player must scratch all the letters found in GAME 1 and GAME 2 that exactly match the YOUR 19 LETTERS. If a player has scratched at least 3 complete WORDS within a GAME, the player wins the prize found in the corresponding PRIZE LEGEND. If the player wins a prize in either GAME and one of the completed words in that GAME is RED, the player wins DOUBLE the prize found in the corresponding PRIZE LEGEND. Each GAME is played separately. WORDS revealed in one GAME cannot be combined with WORDS revealed in the other GAME. Only one prize paid per GAME. Only

letters within the same GAME that are matched with the YOUR 19 LETTERS can be used to form a complete WORD. In each GAME, every lettered square within an unbroken horizontal (left to right) or vertical (top to bottom) sequence must be matched with the YOUR 19 LETTERS to be considered a complete WORD. WORDS revealed in diagonal sequence are not considered valid WORDS. WORDS within WORDS are not eligible for a prize. A complete WORD must contain at least three letters. GAME 1 can win by revealing 3 to 11 complete WORDS. GAME 2 can win by revealing 3 to 5 complete WORDS. BONUS WORD: The player must scratch all the letters in the BONUS WORD that exactly match the YOUR 19 LETTERS. If the player matches all five letters to complete the BONUS WORD, the player wins the BONUS WORD PRIZE. 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 195 (one hundred ninety-five) 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; Crossword and Bingo style games do not typically have Play Symbol Captions;

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, Retailer Validation Code and Pack-Scratch 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, Retailer Validation Code and Pack-Scratch 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 195 (one hundred ninety-five) Play Symbols under the Latex Overprint on the front portion of the Scratch Ticket, exactly one Serial Number, exactly one Retailer Validation Code, and exactly one Pack-Scratch 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 195 (one hundred ninety-five) Play Symbols must be exactly one of those described in Section 1.2.C of these Game Procedures;

17. Each of the 195 (one hundred ninety-five) 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 Pack-Scratch Ticket Number must be printed in the Pack-Scratch Ticket Number font and must correspond precisely to the artwork on file at the Texas Lottery;

18. The Display Printing on the Scratch Ticket must be regular in every respect and correspond precisely to the artwork on file at the Texas Lottery; and

19. The Scratch Ticket must have been received by the Texas Lottery by applicable deadlines.

B. The Scratch Ticket must pass all additional validation tests provided for in these Game Procedures, the Texas Lottery's Rules governing the award of prizes of the amount to be validated, and any confidential validation and security tests of the Texas Lottery.

C. Any Scratch Ticket not passing all of the validation requirements is void and ineligible for any prize and shall not be paid. However, the Executive Director may, solely at the Executive Director's discretion, refund the retail sales price of the Scratch Ticket. In the event a defective Scratch Ticket is purchased, the only responsibility or liability of the Texas Lottery shall be to replace the defective Scratch Ticket with another unplayed Scratch Ticket in that Scratch Ticket Game (or a Scratch Ticket of equivalent sales price from any other current Texas Lottery Scratch Ticket Game) or refund the retail sales price of the Scratch Ticket, solely at the Executive Director's discretion.

2.2 Programmed Game Parameters.

A. Consecutive Non-Winning Tickets in a Pack will not have matching play data, spot for spot.

B. There is no correlation between any exposed data on a Ticket and its status as a winner or non-winner.

C. All words used will be from the TEXAS APPROVED CASHWORD/CROSSWORD LIST v. 1.1.

D. No matching words on a Ticket.

E. All words will contain a minimum of 3 letters.

F. All words will contain a maximum of 9 letters.

G. No consonant will appear more than nine (9) times, and no vowel will appear more than fourteen (14) times in GAME 1 (11X11).

H. No consonant will appear more than seven (7) times, and no vowel will appear more than ten (10) times in GAME 2 (7X7).

I. GAME 1 (11X11) will not have more than 11 words completed.

J. GAME 2 (7X7) will not have more than 5 words completed.

K. No matching Play Symbols in the YOUR 19 LETTERS play area.

L. There will be a minimum of three (3) vowels in the YOUR 19 LETTERS play area. Vowels are considered to be A, E, I, O, U.

M. At least fifteen (15) letters in the YOUR 19 LETTERS play area will open at least one letter across all grids, including GAME 1 (11X11), GAME 2 (7X7) and the BONUS WORD.

N. The presence or absence of any letter or combination of letters in the YOUR 19 LETTERS play area will not be indicative of a winning or Non-Winning Ticket.

O. Words from the TEXAS REJECTED WORD LIST v.2.2 will not appear horizontally, left to right and right to left, in the YOUR 19 LETTERS play area.

P. GAME 1 (11X11) will have four (4) RED words.

Q. GAME 2 (7X7) will have two (2) RED words.

R. Only one (1) RED word will be completed in GAME 1 (11X11) as indicated by the prize structure.

S. Only one (1) RED word will be completed in GAME 2 (7X7) as indicated by the prize structure.

T. A completed RED word will never appear in a non-winning grid.

U. On Non-Winning Tickets, GAME 1 and GAME 2 will have 2 completed words.

V. BONUS WORD: The BONUS WORD will be completed as indicated by the prize structure.

W. BONUS WORD: Non-winning BONUS WORD Prize Symbols will appear randomly.

X. BONUS WORD: On winning Tickets when only the BONUS WORD is completed, only one completed word will be revealed in each of the non-winning GAMES.

2.3 Procedure for Claiming Prizes.

A. To claim a "$100,000 SUPER CASHWORD" Scratch Ticket Game prize of $5.00, $10.00, $15.00, $20.00, $25.00, $50.00, $100, $200 or $500, a claimant shall sign the back of the Scratch Ticket in the space designated on the Scratch Ticket and present the winning Scratch Ticket to any Texas Lottery Retailer. The Texas Lottery Retailer shall verify the claim and, if valid, and upon presentation of proper identification, if appropriate, make payment of the amount due the claimant and physically void the Scratch Ticket; provided that the Texas Lottery Retailer may, but is not required to pay a $25.00, $50.00, $100, $200 or $500 Scratch Ticket. 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 2.3.C of these Game Procedures.

B. To claim a "$100,000 SUPER CASHWORD" Scratch Ticket Game prize of $1,000 or $100,000, the claimant must sign the winning Scratch Ticket and present it at one of the Texas Lottery's Claim Centers. If the claim is validated by the Texas Lottery, payment will be made to the bearer of the validated winning Scratch Ticket for that prize upon presentation of proper identification. When paying a prize of $600 or more, the Texas Lottery shall file the appropriate income reporting form with the Internal Revenue Service (IRS) and shall withhold federal income tax at a rate set by the IRS if required. In the event that the claim is not validated by the Texas Lottery, the claim shall be denied and the claimant shall be notified promptly.

C. As an alternative method of claiming a "$100,000 SUPER CASHWORD" Scratch Ticket Game prize, the claimant must sign the winning Scratch Ticket, thoroughly complete a claim form, and mail both to: Texas Lottery Commission, Post Office 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:

1. a sufficient amount from the winnings of a prize winner who has been finally determined to be:

a. 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;

b. in default on a loan made under Chapter 52, Education Code; or

c. in default on a loan guaranteed under Chapter 57, Education Code; and

2. delinquent child support payments from the winnings of a prize winner in the amount of the delinquency as 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 of less than $600 from the "$100,000 SUPER CASHWORD" 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 "$100,000 SUPER CASHWORD" 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 Ticket Prizes. There will be approximately 20,040,000 Scratch Tickets in the Scratch Ticket Game No. 1799. The approximate number and value of prizes in the game are as follows:

Figure 2: GAME NO. 1799 - 4.0

Prize Amount	Approximate Number of Winners*	Approximate Odds are 1 in **
$5	2,271,200	8.82
$10	1,269,200	15.79
$15	801,600	25.00
$20	534,400	37.50
$25	129,425	154.84
$50	192,551	104.08
$100	28,390	705.88
$200	10,020	2,000.00
$500	3,340	6,000.00
$1,000	501	40,000.00
$100,000	10	2,004,000.00

*The number of prizes in a game is approximate based on the number of tickets ordered. The number of actual prizes available in a game may vary based on number of tickets manufactured, testing, distribution, sales and number of prizes claimed.
**The overall odds of winning a prize are 1 in 3.82. 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.

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. 1799 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 Instant 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. 1799, 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-201602130

Bob Biard
General Counsel
Texas Lottery Commission
Filed: May 3, 2016

♦ ♦ ♦

Public Utility Commission of Texas

Announcement of Application for Amendment to a State-Issued Certificate of Franchise Authority

The Public Utility Commission of Texas (commission) received an application on April 27, 2016, to amend a state-issued certificate of franchise authority, pursuant to §§66.001 - 66.016 of the Public Utility Regulatory Act (PURA).

Project Title and Number: Application of Time Warner Cable Texas LLC for Amendment to its State-Issued Certificate of Franchise Authority, Project Number 45890.

The requested amendment is to expand the service area footprint to include the newly incorporated areas excluding any federal properties in the municipal boundaries of Lavon and Wilmer, Texas.

Information on the application may be obtained by contacting the Public Utility Commission of Texas by mail at P.O. Box 13326, Austin, Texas 78711-3326 or by phone at (512) 936-7120 or toll-free at (888) 782-8477. Hearing and speech-impaired individuals with text telephones (TTY) may contact the commission through Relay Texas by dialing 7-1-1. All inquiries should reference Project Number 45890.

TRD-201602025
Adriana Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: April 29, 2016

♦ ♦ ♦

Announcement of Application for State-Issued Certificate of Franchise Authority

The Public Utility Commission of Texas (commission) received an application on May 2, 2016, for a state-issued certificate of franchise authority (SICFA), pursuant to Public Utility Regulatory Act (PURA) §§66.001 - 66.016.

Project Title and Number: Application of Comcast of Louisiana/Mississippi/Texas, LLC for a State-Issued Certificate of Franchise Authority, Project Number 45920.

The requested SICFA service area consists of the municipality of Waskom, Texas, including any future annexations, and all unincorporated areas, excluding federal properties of Harrison and Panola Counties, Texas.

Information on the application may be obtained by contacting the commission by mail at P.O. Box 13326, Austin, Texas 78711-3326 or by phone at (512) 936-7120 or toll-free at (888) 782-8477. Hearing and speech-impaired individuals with text telephones (TTY) may contact the commission through Relay Texas by dialing 7-1-1. All inquiries should reference Project Number 45920.

TRD-201602152
Adriana Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: May 4, 2016

♦ ♦ ♦

Notice of Application for Approval of Special Amortization

Notice is given to the public of the filing with the Public Utility Commission of Texas of an application on April 27, 2016, for approval of a special amortization pursuant to §52.252 and §53.056 of the Public Utility Regulatory Act, Texas Utility Code Annotated §§11.001 - 66.016 (West 2007 & Supp. 2015).

Docket Title and Number: Application of Nortex Communications for Approval of Special Amortization, Docket Number 45893.

The Application: Nortex Communications filed an application for approval of a special amortization for Account 2212.200 - Soft Switch-MetaSwitch in order to retire the soft switch earlier than anticipated over a two-year period with an annual amortized rate that results in a depreciation expense that is more than two percent of Nortex's annual revenue. Nortex proposed an effective date of January 1, 2016.

Persons wishing to intervene or comment on the action sought should contact the Public Utility Commission of Texas by mail at P.O. Box 13326, Austin, Texas 78711-3326 or by phone at (512) 936-7120 or toll-free at (888) 782-8477. A deadline for intervention in this proceeding will be established. Hearing and speech-impaired individuals with text telephones (TTY) may contact the Commission through Relay Texas by dialing 7-1-1. All comments should reference Docket Number 45893.

TRD-201602023
Adriana Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: April 29, 2016

♦ ♦ ♦

Notice of Application for Retail Electric Provider Certification

Notice is given to the public of the filing with the Public Utility Commission of Texas (commission) of an application on April 26, 2016, for retail electric provider certification, pursuant to Public Utility Regulatory Act §39.352.

Docket Title and Number: Application of Citigroup Energy Inc. for a Retail Electric Provider Certificate, Docket Number 45884.

Persons wishing to comment upon the action sought should contact the commission by mail at P.O. Box 13326, Austin, Texas 78711-3326 or by phone at (512) 936-7120 or toll-free at (888) 782-8477 no later than June 10, 2016. Hearing and speech-impaired individuals with text telephones (TTY) may contact the commission at (512) 936-7136 or toll-free at (800) 735-2989. All comments should reference Docket Number 45884.

TRD-201602103
Adriana Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: May 3, 2016

♦ ♦ ♦

Notice of Application for Service Area Exception

Notice is given to the public of the filing with the Public Utility Commission of Texas (commission) of an application on April 28, 2016, to amend a certificated service area for a service area exception within Kerr County, Texas.

Docket Style and Number: Application of Kerrville Public Utility Board for an Amendment to a Certificate of Convenience and Necessity for a Service Area Exception in Kerr County. Docket Number 45901.

The Application: Kerrville Public Utility Board (Kerrville) filed an application for a service area boundary exception to allow Kerrville to provide service to a specific customer located within the certificated service area of Central Texas Electric Cooperative, Inc. (CTEC). CTEC has provided an affidavit of relinquishment for the proposed change.

Persons wishing to comment on the action sought or intervene should contact the commission no later than May 20, 2016 by mail at P.O. Box 13326, Austin, Texas 78711-3326 or by phone at (512) 936-7120 or toll-free at (888) 782-8477. Hearing and speech-impaired individuals with text telephones (TTY) may contact the commission through Relay Texas by dialing 7-1-1. All comments should reference Docket Number 45901.

TRD-201602102

Adriana Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: May 3, 2016

♦ ♦ ♦

Notice of Application for Waiver

Notice is given to the public of an application filed with the Public Utility Commission of Texas (commission) on April 26, 2016 for waiver of 16 Texas Administrative Code §22.243(b).

Docket Style and Number: Application of Southwestern Electric Power Company for Waiver of Rate Filing Package Schedule S, Docket Number 45886.

The Application: Southwestern Electric Power Company (SWEPCO) filed an application requesting that the Public Utility Commission of Texas (commission) waive the requirement of 16 TAC §22.243(b) to file all of the schedules required by the commission's current rate filing package. SWEPCO stated it is planning on filing a base rate change application in the latter part of 2016. SWEPCO requests waiver of the requirement to file Schedule S - Independent Audit of Application and of the related audit required by Schedule S.

Persons wishing to intervene or comment on the action sought should contact the Public Utility Commission of Texas by mail at P.O. Box 13326, Austin, Texas 78711-3326 or by phone at (512) 936-7120 or toll-free at (888) 782-8477. A deadline for intervention in this proceeding will be established. Hearing and speech-impaired individuals with text telephones (TTY) may contact the commission through Relay Texas by dialing 7-1-1. All comments should reference Docket Number 45886.

TRD-201602024
Adriana Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: April 29, 2016

♦ ♦ ♦

Notice of Application to Amend a Certificate of Convenience and Necessity for a Proposed Transmission Line

Notice is given to the public of an application filed with the Public Utility Commission of Texas (commission) on April 28, 2016, to amend a certificate of convenience and necessity for a proposed transmission line in Williamson County, Texas.

Docket Style and Number: Application of LCRA Transmission Services Corporation to Amend its Certificate of Convenience and Necessity for the Round Rock - Leander 138-kV Transmission Line in Williamson County, Docket Number 45866.

Application: The proposed project is designated as the Leander to Round Rock 138-kV Transmission Line Project. The facilities include construction of two new substations and a new 138-kV transmission line connecting the new substations to the electric grid at existing Leander and Round Rock substations. Substation 1 will be in the general area near the intersection of Parmer Lane/Ronald Reagan Boulevard and Farm to Market (FM) Road 1431. Substation 2 will be in the general area near the intersection of Ronald Reagan Boulevard and Crystal Falls Parkway. The project will be constructed on double-circuit capable steel and/or concrete pole structures with one circuit to be installed initially and the second circuit to be installed at a later date. LCRA TSC is seeking certification for both 138-kV circuits in this application. The total estimated cost for the project ranges from approximately $67.8 million to $99.6 million depending on the route chosen

The proposed project is presented with thirteen alternate routes and is estimated to be approximately 12 to 21 miles in length. Any of the routes or route segments presented in the application could, however, be approved by the commission.

Persons wishing to intervene or comment on the action sought should contact the Public Utility Commission of Texas by mail at P.O. Box 13326, Austin, Texas 78711-3326 or by phone at (512) 936-7120 or toll-free at (888) 782-8477. The deadline for intervention in this proceeding is June 13, 2016. Hearing and speech-impaired individuals with text telephones (TTY) may contact the commission through Relay Texas by dialing 7-1-1. All comments should reference Docket Number 45866.

TRD-201602037
Adriana Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: April 29, 2016

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Notice of Application to Amend a Service Provider Certificate of Operating Authority

On April 29, 2016, Mobilitie, LLC and TX Relay Transmission Networks, LLC filed an application with the Public Utility Commission of Texas (commission) to amend service provider certificate of operating authority number 60779.

Docket Style and Number: Application of Mobilitie, LLC and TX Relay Transmission Networks, LLC for Amendment to a Service Provider Certificate of Operating Authority, Docket Number 45913.

Persons wishing to comment on the action sought should contact the commission by mail at P.O. Box 13326, Austin, Texas 78711-3326 or by phone at (512) 936-7120 or toll-free at (888) 782-8477 no later than May 20, 2016. Hearing and speech-impaired individuals with text telephones (TTY) may contact the commission through Relay Texas by dialing 7-1-1. All comments should reference Docket Number 45913.

TRD-201602149
Adriana Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: May 4, 2016

♦ ♦ ♦

Notice of Application to Amend Certificated Service Area Boundaries

Notice is given to the public of the filing with the Public Utility Commission of Texas (commission) of an application filed on April 27, 2016, for an amendment to certificated service area boundaries within Cameron County, Texas.

Docket Style and Number: Application of the Public Utilities Board of the City of Brownsville (BPUB) to Amend a Certificate of Convenience and Necessity for Service Area Boundaries within Cameron County. Docket Number 45897.

The Application: The application encompasses an area of land which is singly-certificated to American Electric Power Company (AEP), formerly known as Central Power & Light, and is within the corporate limits of the City of Brownsville. BPUB received a letter request from Rafael Chacon requesting BPUB to provide electric utility service to

a proposed office building on a 0.87-acre tract of land. The estimated cost to BPUB to provide service to this proposed area is $14,637. The area is presently undeveloped. AEP and BPUB have existing overhead distribution lines across the highway from the property. BPUB proposes to extend overhead primary to the property and an underground service within the property. If the application is granted, the area would be dually certificated for electric service.

Persons wishing to comment on the action sought should contact the commission no later than May 20, 2016, by mail at P.O. Box 13326, Austin, Texas 78711-3326 or by phone at (512) 936-7120 or toll-free at (888) 782-8477. Hearing and speech-impaired individuals with text telephones (TTY) may contact the commission through Relay Texas by dialing 7-1-1. All comments should reference Docket Number 45897.

TRD-201602101
Adriana Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: May 3, 2016

♦ ♦ ♦

Notice of Application to Amend Water Certificates of Convenience and Necessity

Notice is given to the public of the filing with the Public Utility Commission of Texas (commission) of an application to amend water certificates of convenience and necessity (CCN) in Denton County, Texas.

Docket Style and Number: Joint Application of the City of Sanger and Bolivar Water Supply Corporation to Amend Certificates of Convenience and Necessity and for Approval of a Water Service Agreement in Denton County, Docket Number 45879.

The Application: The City of Sanger (the City) and Bolivar Water Supply Corporation (Bolivar) filed an application, pursuant to Texas Water Code §13.248 (TWC), for approval of an agreement that would amend their water certificates of convenience and necessity (CCN) in Denton County so that the City may provide retail water service to two tracts of land that Sanger Holdings, LLC plans to develop. There are currently no water or sewer customers or facilities within the property. The City holds water CCN no. 10196 and sewer CCN no. 20073. Bolivar holds water CCN no. 11257. The affected property is located within the City's certificated sewer service area. The City and Bolivar have agreed to amend their respective water CCNs to transfer certain certificated service areas from Bolivar to the City so that the affected property would be located within the water CCN of the City.

Persons wishing to intervene or comment on the action sought should contact the Public Utility Commission of Texas by mail at P.O. Box 13326, Austin, Texas 78711-3326 or by phone at (512) 936-7120 or toll-free at (888) 782-8477. A deadline for intervention in this proceeding will be established. Hearing and speech-impaired individuals with text telephones (TTY) may contact the commission through Relay Texas by dialing 7-1-1. All comments should reference Docket Number 45879.

TRD-201602009
Adriana Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: April 27, 2016

♦ ♦ ♦

Notice of Intent to Implement a Minor Rate Change Pursuant to 16 TAC §26.171

Notice is given to the public of an application filed with the Public Utility Commission of Texas (commission) on May 2, 2016, to implement a minor rate change pursuant to 16 TAC §26.171.

Tariff Control Title and Number: Notice of Ganado Telephone Company, Inc. for Approval of a Minor Rate Change Pursuant to 16 Tex. Admin. Code §26.171 and PURA Section 53, Subchapter G, Tariff Control Number 45917.

The Application: Ganado Telephone Company, Inc. (Ganado) filed an application with the commission for revisions to its General Exchange Tariff to increase its Residential Local Exchange Access Line Service rates for the Ganado Exchange by $2.00 and the Louise Exchange by $0.60. Ganado is also correcting the Area Code designation for the Louise and Markham Exchanges as a result of an area code split. Ganado proposed an effective date of June 1, 2016. The estimated revenue increase to be recognized by the applicant is $23,750 in gross annual intrastate revenues. The applicant has 2,146 access lines (residence and business) in service in the state of Texas.

If the commission receives a complaint(s) relating to this application signed by 5% of the affected local service customers to which this application applies by May 18, 2016, the application will be docketed. The 5% limitation will be calculated based upon the total number of customers of record as of the calendar month preceding the commission's receipt of the complaint(s).

Persons wishing to comment on this application should contact the Public Utility Commission of Texas by May 18, 2016. Requests to intervene should be filed with the commission's Filing Clerk at P.O. Box 13326, Austin, Texas 78711-3326 or you may call the commission at (512) 936-7120 or toll-free 1-800-735-2989. Hearing and speech-impaired individuals with text telephones (TTY) may contact the commission through Relay Texas by dialing 7-1-1. All correspondence should refer to Tariff Control Number 45917.

TRD-201602146
Adriana Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: May 4, 2016

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Notice of Intent to Implement a Minor Rate Change Pursuant to 16 TAC §26.171

Notice is given to the public of an application filed with the Public Utility Commission of Texas (commission) on May 2, 2016, to implement a minor rate change pursuant to 16 TAC §26.171.

Tariff Control Title and Number: Notice of Lake Livingston Telephone Company for Approval of a Minor Rate Change Pursuant to 16 Tex. Admin. Code §26.171 and PURA Section 53, Subchapter G, Tariff Control Number 45918.

The Application: Lake Livingston Telephone Company (Lake Livingston) filed an application with the commission for revisions to its General Exchange Tariff to increase its Residential and Business Local Exchange Access Line Service rates by $2.00 and $3.00, respectively. Lake Livingston also proposed to add a Directory Assistance Service. Lake Livingston proposed an effective date of June 1, 2016. The estimated revenue increase to be recognized by the applicant is $11,508 in gross annual intrastate revenues. The applicant has 464 access lines (residence and business) in service in the state of Texas.

If the commission receives a complaint(s) relating to this application signed by 5% of the affected local service customers to which this application applies by May 23, 2016, the application will be docketed.

The 5% limitation will be calculated based upon the total number of customers of record as of the calendar month preceding the commission's receipt of the complaint(s).

Persons wishing to comment on this application should contact the Public Utility Commission of Texas by May 23, 2016. Requests to intervene should be filed with the commission's Filing Clerk at P.O. Box 13326, Austin, Texas 78711-3326 or you may call the commission at (512) 936-7120 or toll-free 1-800-735-2989. Hearing and speech-impaired individuals with text telephones (TTY) may contact the commission through Relay Texas by dialing 7-1-1. All correspondence should refer to Tariff Control Number 45918.

TRD-201602147
Adriana Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: May 4, 2016

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Notice of Intent to Implement a Minor Rate Change Pursuant to 16 TAC §26.171

Notice is given to the public of an application filed with the Public Utility Commission of Texas (Commission) on May 2, 2016, to implement a minor rate change pursuant to 16 TAC §26.171.

Tariff Control Title and Number: Notice of Cameron Telephone Company for Approval of a Minor Rate Change Pursuant to 16 Tex. Admin. Code §26.171 and PURA Section 53, Subchapter G, Tariff Control Number 45921.

The Application: Cameron Telephone Company (CTC) filed an application with the commission for revisions to its General Exchange Tariff to increase Single-Line Residential Access Line rates by $2.00. CTC proposed an effective date of June 1, 2016. The estimated revenue increase to be recognized by the applicant is $9,120 in gross annual intrastate revenues. The applicant has 381 access lines (residence and business) in service in the state of Texas.

If the commission receives a complaint(s) relating to this application signed by 5% of the affected local service customers to which this application applies by May 31, 2016, the application will be docketed. The 5% limitation will be calculated based upon the total number of customers of record as of the calendar month preceding the commission's receipt of the complaint(s).

Persons wishing to comment on this application should contact the Public Utility Commission of Texas by May 31, 2016. Requests to intervene should be filed with the commission's Filing Clerk at P.O. Box 13326, Austin, Texas 78711-3326 or you may call the commission at (512) 936-7120 or toll-free 1-800-735-2989. Hearing and speech-impaired individuals with text telephones (TTY) may contact the commission through Relay Texas by dialing 7-1-1. All correspondence should refer to Tariff Control Number 45921.

TRD-201602148
Adriana Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: May 4, 2016

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Notice of Petition for Amendment to Certificate of Convenience and Necessity by Expedited Release

Notice is given to the public of the filing with the Public Utility Commission of Texas (commission) on April 28, 2016, a petition to amend a certificate of convenience and necessity (CCN) by expedited release in Travis County.

Docket Style and Number: Petition of Carma Easton LLC to Amend Creedmoor-Maha Water Supply Corporation's Certificate of Convenience and Necessity in Travis County by Expedited Release, Docket Number 45902.

The Application: Carma Easton LLC filed an application for expedited release of approximately 2.903 acres from Creedmoor-Maha Water Supply Corporation's water CCN No. 11029 in Travis County pursuant to Texas Water Code §13.254(a-5) and 16 Texas Administrative Code §24.113(r).

Persons wishing to comment on the action sought should contact the commission no later than May 31, 2016, by mail at P.O. Box 13326, Austin, Texas 78711-3326 or by phone at (512) 936-7120 or toll-free at (888) 782-8477. Hearing and speech-impaired individuals with text telephones (TTY) may contact the commission through Relay Texas by dialing 7-1-1. All comments should reference Docket Number 45902.

TRD-201602100
Adriana Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: May 3, 2016

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Texas Department of Transportation

Aviation Division - Request for Qualifications for Professional Engineering Services

The City of Littlefield, through its agent, the Texas Department of Transportation (TxDOT), intends to engage a Professional Engineering Firm for services pursuant to Chapter 2254, Subchapter A, of the Government Code. TxDOT Aviation Division will solicit and receive qualifications for the current aviation project as described below.

Current Project: City of Littlefield; TxDOT CSJ No.: 1505LTFLD; Scope: Provide engineering and design services, including construction administration, to:

1. Rehabilitate & mark Runway 1-19;
2. Rehabilitate & mark Runway 13-31;
3. Rehabilitate Taxiways A & B;
4. Overlay Stub Taxiway to Runway 1;
5. Reconstruct Southern portion of apron; and
6. Rehabilitate apron.

The Agent, in accordance with the provisions of Title VI of the Civil Rights Act of 1964 (78 Stat. 252, 42 U.S.C. §§2000d to 2000d-4) and the Regulations, hereby notifies all respondents that it will affirmatively ensure that any contract entered into pursuant to this advertisement, that disadvantaged business enterprises will be afforded full and fair opportunity to submit in response to this solicitation and will not be discriminated against on the grounds of race, color, or national origin in consideration for an award.

The proposed contract is subject to 49 CFR Part 26 concerning the participation of Disadvantaged Business Enterprises.

The DBE goal for the design phase of the current project is 3%. The goal will be re-set for the construction phase. TxDOT Project Manager is Ed Mayle.

Utilizing multiple engineering/design and construction grants over the course of the next five years, future scope of work items at the Littlefield Taylor Brown Municipal Airport may include the following:

1. Reconstruct RW 13-31;
2. Extend RW 1-19 to 5,000';
3. Widen RW 1-19 to 75';
4. Replace MIRL RW 1-19;
5. Extend parallel TXWY Alpha to RW 19;
6. Install PAPI-2 RW 1-19;
7. Reconstruct Terminal Apron; and
8. Rehabilitate apron, TXWY and RW.

The City of Littlefield reserves the right to determine which of the above services may or may not be awarded to the successful firm and to initiate additional procurement action for any of the services above.

To assist in your qualification statement preparation, the criteria, 5010 drawing, project diagram, and most recent Airport Layout Plan are available online at *http://www.txdot.gov/inside-txdot/division/aviation/projects.html* by selecting "Littlefield Taylor Brown Municipal Airport." The qualification statement should address a technical approach for the current scope only. Firms shall use page 4, Recent Airport Experience, to list relevant past projects for both current and future scope.

Interested firms shall utilize the latest version of Form AVN-550, titled "Qualifications for Aviation Architectural/Engineering Services." The form may be requested from TxDOT, Aviation Division, 125 E. 11th Street, Austin, Texas 78701-2483, phone number, (800) 68-PILOT (74568). The form may be emailed by request or downloaded from the TxDOT website at *http://www.txdot.gov/inside-txdot/division/aviation/projects.html.* The form may not be altered in any way. All printing must be in black on white paper, except for the optional illustration page. Firms must carefully follow the instructions provided on each page of the form. Qualifications shall not exceed the number of pages in the AVN-550 template. The AVN-550 consists of eight 8 1/2" x 11" pages of data plus one optional illustration page. The optional illustration page shall be no larger than 11" x 17" and may be folded to an 8 1/2" x 11" size. A prime provider may only submit one AVN-550. If a prime provider submits more than one AVN-550, that provider will be disqualified. AVN-550s shall be stapled but not bound or folded in any other fashion. AVN-550s WILL NOT BE ACCEPTED IN ANY OTHER FORMAT.

ATTENTION: To ensure utilization of the latest version of Form AVN-550, firms are encouraged to download Form AVN-550 from the TxDOT website as addressed above. Utilization of Form AVN-550 from a previous download may not be the exact same format. Form AVN-550 is a PDF Template.

Please note:

SEVEN completed copies of Form AVN-550 **must be received** by TxDOT, Aviation Division no later than June 7, 2016, 4:00 p.m. (CDST). Electronic facsimiles or forms sent by email will not be accepted. Please mark the envelope of the forms to the attention of Kelle Chancey using one of the delivery methods below:

Overnight Delivery

TxDOT - Aviation

200 East Riverside Drive

Austin, Texas 78704

Hand Delivery or Courier

TxDOT - Aviation

150 East Riverside Drive

5th Floor, South Tower

Austin, Texas 78704

The consultant selection committee will be composed of local government representatives. The final selection by the committee will generally be made following the completion of review of AVN-550s. The committee will review all AVN-550s and rate and rank each. The Evaluation Criteria for Engineering Qualifications can be found at *http://www.txdot.gov/inside-txdot/division/aviation/projects.html* under Information for Consultants. All firms will be notified and the top rated firm will be contacted to begin fee negotiations for the design and bidding phases. The selection committee does, however, reserve the right to conduct interviews for the top rated firms if the committee deems it necessary. If interviews are conducted, selection will be made following interviews.

Please contact TxDOT Aviation for any technical or procedural questions at (800) 68-PILOT (74568). For procedural questions, please contact Kelle Chancey, Grant Manager. For technical questions, please contact Ed Mayle, Project Manager.

TRD-201602133
Leonard Reese
Associate General Counsel
Texas Department of Transportation
Filed: May 3, 2016

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Request for Qualifications

Pursuant to the authority granted under Transportation Code, Chapter 223, Subchapter F (enabling legislation), the Texas Department of Transportation (department), may enter into, in each fiscal year, up to three design-build contracts for the design, construction, expansion, extension, maintenance, rehabilitation, alteration, or repair of a highway project with a construction cost estimate of $150 million or more. The enabling legislation authorizes private involvement in design-build projects and provides a process for the department to solicit proposals for such projects. Transportation Code §223.245 prescribes requirements for issuance of a request for qualifications and requires the department to publish a notice of such issuance in the *Texas Register*. The Texas Transportation Commission (commission) adopted Texas Administrative Code, Title 43, Chapter 9, Subchapter I relating to design-build contracts (the "rules"). The enabling legislation, as well as the rules, govern the submission and processing of qualifications submittals, and provide for the issuance of a request for qualifications that sets forth the basic criteria for qualifications, experience, technical competence, and ability to develop a proposed project and such other information the department considers relevant or necessary.

The commission has authorized the issuance of a request for qualifications (RFQ) to design, develop, construct, and potentially maintain the Southern Gateway Project (Project) consisting of improvements to I-35 E from south of the I-35 E/US 67 interchange to Colorado Boulevard, with transition work extending north to Reunion Boulevard, and improvements to US 67 from the I-35 E/US 67 interchange to I-20 pursuant to a Design-Build Contract. The Southern Gateway Project to be constructed under the agreement will provide increased capacity through the addition of general purpose lanes along with non-tolled managed express lanes, and has an estimated design build cost of approximately $625 million.

Through this notice, the department is seeking qualifications submittals (QS) from teams interested in entering into a design-build contract. The department intends to evaluate any QS received in response to the RFQ and may request submission of detailed proposals, potentially leading to the negotiation, award, and execution of a design-build contract. The department will accept for consideration any QS received in accordance with the enabling legislation, the rules, and the RFQ, on or before the deadline in this notice. The department anticipates issuing the RFQ, receiving and analyzing the QS, developing a shortlist of proposing entities or consortia, and issuing a request for proposals (RFP) to the shortlisted entities. After review and a best value evaluation of the responses to the RFP, the department may negotiate and enter into a design-build contract for the project.

RFQ Evaluation Criteria. QSs will be evaluated by the department for shortlisting purposes using the following general criteria: qualifications and experience, statement of technical approach, and safety qualifications. The specific criteria under the foregoing categories will be identified in the RFQ, as will the relative weighting of the criteria.

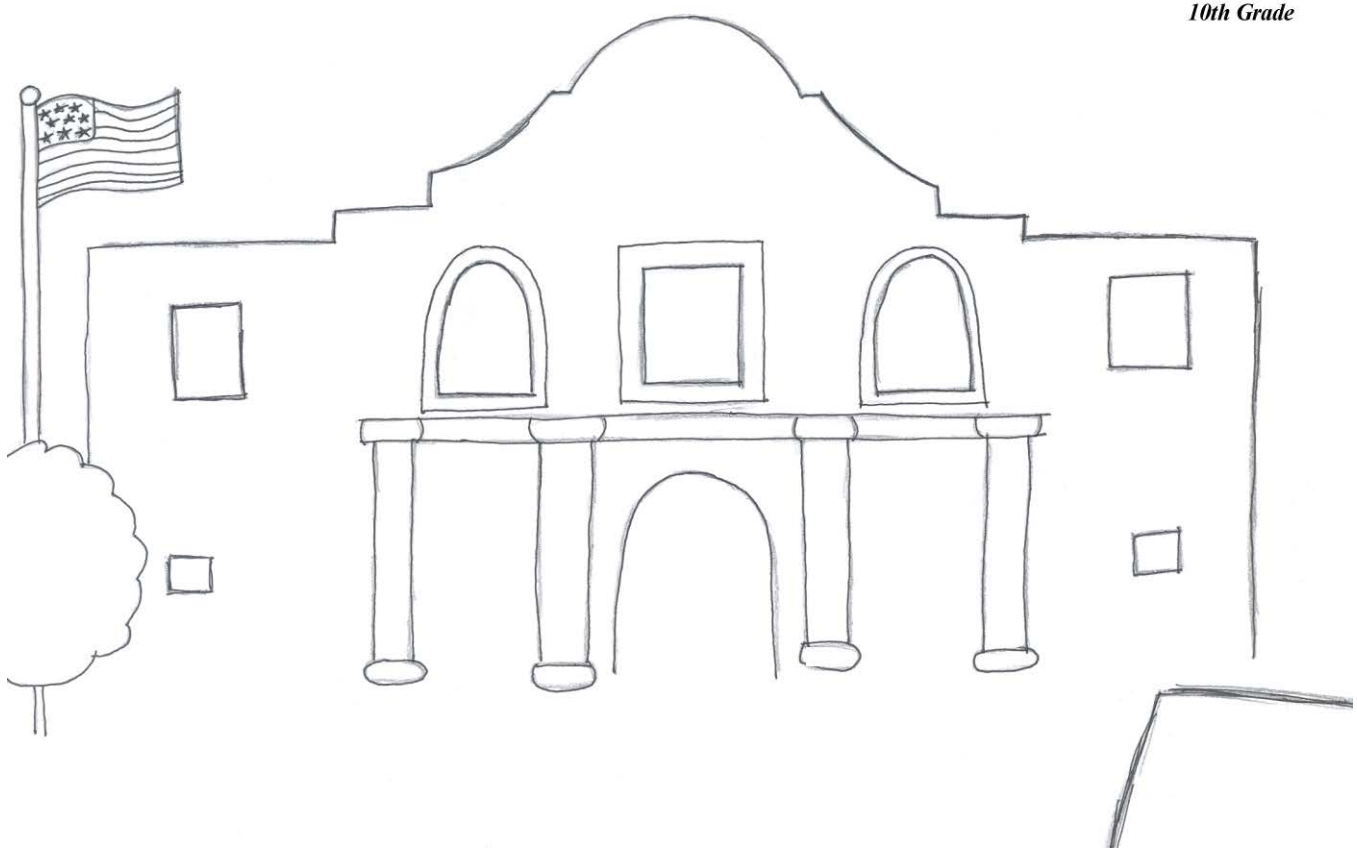
Release of RFQ and Due Date. The department currently anticipates that the RFQ will be available on May 13, 2016. Copies of the RFQ will be available at the Texas Department of Transportation, 4777 East Highway 80, Mesquite, Texas 75150-6643, or at the following website:

http://www.txdot.gov/inside-txdot/division/strategic-projects/partnerships/southern-gateway/rfq.html

QSs will be due by 12:00 p.m. CDT on June 30, 2016 at the address specified in the RFQ.

TRD-201602160
Jack Ingram
Associate General Counsel
Texas Department of Transportation
Filed: May 4, 2016

Amber Uballe
10th Grade



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 40 (2015) is cited as follows: 40 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 "40 TexReg 2 issue date," while on the opposite page, page 3, in the lower right-hand corner, would be written "issue date 40 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
28. Insurance
30. Environmental Quality
31. Natural Resources and Conservation
34. Public Finance
37. Public Safety and Corrections
40. Social Services and Assistance
43. Transportation

How to Cite: Under the *TAC* scheme, each section is designated by a *TAC* number. For example in the citation 1 TAC §27.15: 1 indicates the title under which the agency appears in the *Texas Administrative Code*; *TAC* stands for the *Texas Administrative Code*; §27.15 is the section number of the rule (27 indicates that the section is under Chapter 27 of Title 1; 15 represents the individual section within the chapter).

How to update: To find out if a rule has changed since the publication of the current supplement to the *Texas Administrative Code*, please look at the *Index of Rules*.

The *Index of Rules* is published cumulatively in the blue-cover quarterly indexes to the *Texas Register*.

If a rule has changed during the time period covered by the table, the rule's *TAC* number will be printed with the *Texas Register* page number and a notation indicating the type of filing (emergency, proposed, withdrawn, or adopted) as shown in the following example.

TITLE 1. ADMINISTRATION
Part 4. Office of the Secretary of State
Chapter 91. Texas Register
1 TAC §91.1…….....950 *(P)*

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