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

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

TITLE 4. AGRICULTURE

PART 1. TEXAS DEPARTMENT OF AGRICULTURE

CHAPTER 30. COMMUNITY DEVELOPMENT

SUBCHAPTER A. TEXAS COMMUNITY DEVELOPMENT BLOCK GRANT PROGRAM

DIVISION 3. ADMINISTRATION OF PROGRAM FUNDS

4 TAC §30.50, §30.67

The Texas Department of Agriculture (Department) proposes amendments to Title 4, Part 1, Chapter 30, Subchapter A, Division 3, §30.50, relating to the Community Development (CD) Fund, and new §30.67, relating to the Utility U Job Training Program.

The Department proposes revisions to §30.50 to update scoring elements for the Community Development Block Grant (CDBG) Program and to clarify language relating to Regional Review Committees. The Department proposes new §30.67 to create and implement rules relating to the Utility U Job Training Program, a new program fund category within the Texas Capital Fund, an existing state CDBG Program which the Department will implement in Program Year 2018.

Suzanne Barnard, Director for CDBG Programs, has determined that for the first five years the rules are in effect, there will be no fiscal implications for state or local governments as a result of the proposal.

Ms. Barnard has also determined that for each year of the first five years the rules are in effect, the public benefit anticipated as a result of the proposal will be the availability of grant funds specifically for job training purposes which will further the development of rural Texas; the proposal will also result in more effective administration of the state CDBG program. There will be no adverse economic effect on micro-businesses, small businesses or individuals who are required to comply with the proposal. There will be no adverse impact on rural communities.

Ms. Barnard has provided the following information related to the government growth impact statement, as required pursuant to Texas Government Code, §2001.021. As a result of implementing the proposal, for the first five years the proposed rules are in effect:

(1) the Utility U Job Training Program is a new government program being created using Community Development Block Grant funds, subject to the availability of federal funding allocations which are already made to the Department for the Texas Capital Fund-no new allocations will be made specifically for this program;

(2) no employee positions will be created, nor will any existing Department staff positions be eliminated; and

(3) there will not be an increase or decrease in future legislative appropriations to the Department of state funds, nor will there be an increase or decrease in federal appropriations.

Additionally, Ms. Barnard has determined that for the first five years the proposed rules are in effect:

(1) there will be no increase or decrease in fees paid to the Department, as this is a federally funded community development block grant program;

(2) there will be no new regulations created by §30.50 of the proposal; §30.67 of the proposal creates no regulations as it only delineates eligibility requirements for program application and funding;

(3) there will be no expansion of existing regulations relating to §30.50;

(4) there will be no increase or decrease to the number of individuals subject to the proposal, as all rural communities are currently subject to the provisions in Chapter 30, related to the Texas Community Development Block Grant Program; and

(5) the proposal will positively affect the Texas economy by providing rural communities with the opportunity to access job training grants for utility operators.

Comments on the proposal may be submitted to Suzanne Barnard, Director for CDBG Programs, Texas Department of Agriculture, P.O. Box 12847, Austin, Texas 78711, or by email to *Suzanne.Barnard@TexasAgriculture.gov.* Comments must be received no later than 30 days from the date of tne proposal's publication in the *Texas Register.*

The proposal is made under Texas Government Code §487.051, which provides the Department authority to administer the state's community development block grant non-entitlement program, and §487.052, which provides authority for the Department to adopt rules as necessary to implement Chapter 487.

The code affected by the proposal is Texas Government Code Chapter 487.

§30.50. Community Development (CD) Fund.

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

(c) Regional allocations.

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

(3) RRC priority set-aside. Each RRC is highly encouraged to allocate a percentage or amount of its CD Fund allocation

to housing projects and, for RRCs in eligible areas, non-border colonia projects proposed in and for that region. Under a set-aside, the highest ranked applications for a housing or non-border colonia activity, regardless of the position in the overall ranking, would be selected to the extent permitted by the housing or non-border colonia set-aside level. If the region allocates a percentage of its funds to housing and/or non-border colonia activities and applications conforming to the maximum and minimum amounts are not received to use the entire set-asides, the remaining funds may be used for other eligible activities. Only one application will be accepted for the CD Fund, including any RRC set-asides. [~~(Under a priority set-aside process, a community would not be able to receive an award for both a housing or non-border colonia activity and an award for another CD Fund activity during the biennial cycle.)~~]

(d) Selection procedures.

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

(3) Determination of final rankings. Regional scores and RRC ranking of applications are not considered final until they have been reviewed and approved by the department. The department will review all scores for accuracy and determine the final ranking of applications once RRC and department scores are summed. Each RRC is responsible for providing final scores to communities and the public, even if the department has also made scores available.

(4) (No change.)

(e) Scoring criteria.

(1) Department scoring criteria. The following factors are considered by the department when scoring CD Fund applications (detailed application and scoring information are available in the application guidelines):

(A) past performance--the department will consider a community's performance on all previously awarded TxCDBG contracts within the past 4 years preceding the application deadline. [~~(Adjustments may be made for contracts that are engaged in appropriately pursuing due diligence such as bonding remedies or litigation to ensure adequate performance under the TxCDBG contract.)~~] Evaluation of a community's past performance will include the following:

(i) (No change.)

(ii) submission of environmental review requirements within prescribed deadlines; [~~and~~]

(iii) submission of the required close-out documents within the period prescribed for such submission; and[~~.~~]

(iv) maximum utilization of grant funds awarded.

(B) (No change.)

(2) RRC scoring criteria. Each RRC is responsible for determining local project priorities and objective scoring factors for its region in accordance with the requirements of this section and the current TxCDBG Action Plan. Each RRC must establish the numerical value of the points assigned to each scoring factor as described in the current Regional Review Committee Guidelines.

(A) Procedures for selecting scoring criteria. The public must be given an opportunity to comment on the priorities and the scoring criteria considered. RRCs are responsible for convening public hearings to discuss and select the objective scoring criteria that will be used to score and rank applications at the regional level.

(i) - (ii) (No change.)

(iii) Final selection of scoring criteria. The final selection of the scoring criteria is the responsibility of the RRC and must be consistent with the requirements of the current TxCDBG Action Plan. RRCs are encouraged to establish a priority scoring factor that considers the nature and type of project. A RRC may not adopt scoring factors that directly negate or offset the department's scoring factors. [~~Each RRC must obtain written approval from the department before implementing its RRC scoring methodology.~~] The department will review the scoring factors selected to ensure that all scoring factors are objective and publish the approved scoring methodology.

(B) Regions without RRC scoring methodology. In the event a RRC for a region fails to approve an objective scoring methodology to the satisfaction of the department consistent with the requirements in the current TxCDBG Action Plan by the established deadline, [~~or fails to adopt or implement the approved methodology,~~] the department will establish scoring factors for that region by using the scoring factors identified in the current Regional Review Committee Guidelines. [~~most recently approved final RRC scoring criteria and modifying scoring factors as applicable in accordance with the current TxCDBG Action Plan.~~]

(f) RRC Guidebook.

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

(3) The RRC Guidebook must be submitted in a format acceptable to the department and include information on: [~~the selection of the entity responsible for calculating the RRC scores and the roe of each entity selected. The RRC also must include information relating to any housing and/or non-border colonia set-asides in its RRC Guidebook.~~]

(A) the selection of the entity responsible for calculating the RRC scores and the role of each entity selected;

(B) any housing and/or non-border colonia set-asides;

(C) the maximum amount of grant funds to be requested by applicants; and

(D) scoring criteria, including calculations, source documentation to be provided by applicants, and number of points to be awarded.

(4) - (5) (No change.)

(g) (No change.)

§30.67. Utility U Job Training Program

(a) Program overview. Utility U Job Training Program grants are awarded to eligible communities that form a contractual relationship with an entity that qualifies as a nonprofit development organization under Section 105(a)(15) of the Housing and Community Development Act of 1974 (HCD Act), as amended (42 USC §5301 et seq.). The community awards the grant funds to the nonprofit which must use those funds to provide job training for utility operators and similar occupations.

(b) Eligibility. In addition to qualifying as a nonprofit development organization under Section 105(a)(15) of the HCD Act, the organization must meet the following requirements:

(1) The organization must be exempt from taxation under 26 USC §501(c), and in full compliance with all laws and regulations applicable to the organization;

(2) The organization must be organized under state or local law to serve or carry out community/economic development activities which address the development needs of communities;

(3) The organization must be independent of local or state government; and

(4) The organization will be responsible for providing job training services supported by the Utility U award.

(c) The community receiving a Utility U award is responsible for compliance with all CDBG requirements including monitoring the nonprofit organization and ensuring job training is provided to eligible recipients.

(d) Application cycle. Applications for Utility U grants are accepted on an as-needed basis throughout the program year. Applications will only be accepted upon the recommendation of two or more state or federal agencies, which provide funding, technical assistance, or regulatory oversight for utilities in non-entitlement communities.

(e) Selection procedures. Applications will be evaluated by the department for eligibility. Awards will be made on a first-come, first-served basis.

(f) Eligible activities. Utility U funds must be used for job training activities that support utility operators and similar occupations for primarily low- to moderate-income persons. Activities may include classroom education, on-site training experiences, peer support services, and other similar public 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 April 5, 2018.

TRD-201801418
Jessica Escobar
Assistant General Counsel
Texas Department of Agriculture
Earliest possible date of adoption: May 20, 2018
For further information, please call: (512) 463-4075

♦ ♦ ♦

TITLE 16. ECONOMIC REGULATION

PART 4. TEXAS DEPARTMENT OF LICENSING AND REGULATION

CHAPTER 78. MOLD ASSESSORS AND REMEDIATORS

16 TAC §§78.58, 78.60, 78.62, 78.64, 78.70, 78.74, 78.80, 78.120, 78.130, 78.150

The Texas Department of Licensing and Regulation (Department) proposes amendments to existing rules at 16 Texas Administrative Code (TAC), Chapter 78, §§78.58, 78.60, 78.62, 78.64, 78.70, 78.74, 78.80, 78.120, 78.130 and 78.150, regarding the Mold Assessors and Remediators program.

JUSTIFICATION AND EXPLANATION OF THE RULES

House Bill 4007 (HB 4007), 85th Legislature, Regular Session (2017), modified Texas Occupations Code, Chapter 1958, which provides statutory authority for the Mold Assessors and Remediators program. Primarily, HB 4007 allows the remediation contractor to provide the required photos of the remediation area to the property owner within ten days (formerly seven) after remediation. Additional changes are also made to the records retention policy and to continue to require a mycologist or microbiologist to oversee a mold analysis laboratory. The proposed rules are necessary to implement HB 4007 and to clarify and simply existing rules.

SECTION- BY- SECTION SUMMARY

The proposed amendment to §78.58 corrects a cross reference.

The proposed amendments to §78.60 remove the requirement for records to be kept at a Texas office. The amendments also correct a cross reference.

The proposed amendments to §78.62 correct the rule to restore the longstanding requirement for oversight of mold analysis activity in all licensed laboratories.

The proposed amendments to §78.64 require applicants for training provider accreditation to identify their designated responsible persons consistent with longstanding practice interpreting §78.10(38) and with the same requirement imposed on licensed entities. The amendments also make editorial corrections.

The proposed amendment to §78.70 removes the requirement for records to be kept at a Texas office and work site locations.

The proposed amendments to §78.74 clarify and simplify the records retention requirements regarding the Mold Assessors and Remediators program. On-site record requirements are removed unmodified and placed in §78.120.

The proposed amendments to §78.80 remove unnecessary redundant language.

The proposed amendments to §78.120 insert unmodified on-site record requirements formerly located in §78.74, and make editorial corrections.

The proposed amendment to §78.130 corrects a cross reference.

The proposed amendment to §78.150 implements HB 4007 by increasing the time period during which a licensed mold remediation contractor or company must provide the property owner with required photographs.

FISCAL IMPACT ON STATE AND LOCAL GOVERNMENT

Brian E. Francis, Executive Director, has determined that for each year of the first five years the proposed rules are in effect, there are no foreseeable implications relating to costs or revenues to state or local government as a result of enforcing or administering the proposed amendments.

LOCAL EMPLOYMENT IMPACT STATEMENT

Mr. Francis has determined that the proposed rules will not affect local economies, so the agency is not required to prepare a local employment impact statement under Government Code §2001.022.

PUBLIC BENEFITS

Mr. Francis has also determined that for each year of the first five-years that the proposed rules are in effect, the public will benefit by simplifying and clarifying the record retention requirements as well as removing outdated requirements to retain paper records at a central location at the licensee's Texas office. These changes contribute to an effective and efficient regulatory program for mold assessment and remediation which protects the health, safety, and welfare of the citizens of Texas.

PROBABLE ECONOMIC COSTS TO PERSONS REQUIRED TO COMPLY WITH PROPOSAL

Mr. Francis has determined that for each year of the first five-year period the proposed rules are in effect, there are no anticipated economic costs to persons who are required to comply with the proposed rules.

FISCAL IMPACT ON SMALL BUSINESSES, MICRO-BUSINESSES, AND RURAL COMMUNITIES

There is no anticipated adverse effect on small businesses, micro-businesses, or rural communities as a result of the proposed rules.

Because the agency has determined that the proposed rule will have no adverse economic effect on small businesses, micro-businesses, or rural communities, preparation of an Economic Impact Statement and a Regulatory Flexibility Analysis, as detailed under Texas Government Code §2006.002, are not required.

ONE-FOR-ONE REQUIREMENT FOR RULES WITH A FISCAL IMPACT

Under Government Code §2001.0045, a state agency may not adopt a proposed rule if the fiscal note states that the rule imposes a cost on regulated persons, including another state agency, a special district, or a local government, unless the state agency: (a) repeals a rule that imposes a total cost on regulated persons that is equal to or greater than the total cost imposed on regulated persons by the proposed rule; or (b) amends a rule to decrease the total cost imposed on regulated persons by an amount that is equal to or greater than the cost imposed on the persons by the rule. There are exceptions for certain types of rules under §2001.0045(c).

The proposed rules do not have a fiscal note that imposes a cost on regulated persons, including another state agency, a special district, or a local government. Therefore, the agency is not required to take any further action under Government Code §2001.0045.

GOVERNMENT GROWTH IMPACT STATEMENT

Pursuant to Government Code §2001.0221, the agency provides the following Government Growth Impact Statement for the proposed rules. For each year of the first five years the proposed amendments will be in effect, the agency has determined the following:

(1) The proposed rules do not create or eliminate a government program.

(2) Implementation of the proposed rules does not require the creation of new employee positions or the elimination of existing employee positions.

(3) Implementation of the proposed rules does not require an increase or decrease in future legislative appropriations to the agency.

(4) The proposed rules do not require an increase or decrease in fees paid to the agency.

(5) The proposed rules do not create a new regulation.

(6) The proposed rules repeal the requirement to keep records at a central location at a Texas office, and repeal the requirement to make records available to a law enforcement agency upon request. (7) The proposed rules do not increase or decrease the number of individuals subject to the rule's applicability.

(8) The proposed rules do not positively or adversely affect this state's economy.

PUBLIC COMMENTS

Comments on the proposal may be submitted by mail to Pauline Easley, Legal Assistant, 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.*

STATUTORY AUTHORITY

The amended rules are proposed under Texas Occupations Code, Chapters 51 and 1958, which authorize the Commission, the Department's governing body, to adopt rules as necessary to implement these chapters and any other law establishing a program regulated by the Department.

The statutory provisions affected by the proposal are those set forth in Texas Occupations Code, Chapters 51 and 1958. No other statutes, articles, or codes are affected by the proposal.

§78.58. Mold Remediation Contractor License.

(a) - (e) (No change.)

(f) Responsibilities. In addition to the requirements of §78.70 and all other applicable responsibilities in this chapter, a licensed mold remediation contractor shall:

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

(6) maintain copies of the required training documents in accordance with §78.74(b)(2) [~~78.74(e),~~] if providing mold remediation worker training as authorized in §78.68(d);

(7) - (14) (No change.)

§78.60. Mold Remediation Company License.

(a) - (d) (No change.)

(e) Responsibilities. In addition to the requirements of §78.70 and all other applicable responsibilities in this chapter, a licensed mold remediation company shall:

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

(5) maintain copies of the required training documents [~~at a central location at its Texas office~~] in accordance with §78.74(b)(2) [~~78.74(e)~~] if providing mold remediation worker training as authorized in §78.68(d);

(6) - (8) (No change.)

§78.62. Mold Analysis Laboratory License.

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

(c) Qualifications. A person must submit documentation showing that:

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

(4) all individuals who will analyze mold samples: [~~the laboratory meets the following requirements:~~]

[~~(A) all individuals who will analyze mold samples:~~]

(A) [~~(i)~~] have at least a bachelor's degree in microbiology or biology;

(B) [~~(ii)~~] have successfully completed training in mold analysis offered by the McCrone Research Institute or by a program deemed equivalent by the department, including receiving a training certificate; and

(C) [~~(iii)~~] have a least three years of experience as a mold microscopist[~~; and~~]

(5) [~~(B)~~] mold analysis activity at the laboratory is overseen by a full-time mycologist or microbiologist with:

(A) [~~(i)~~] an advanced academic degree; or

(B) [~~(ii)~~] at least two years of experience in mold analysis.

(d) - (f) (No change.)

§78.64. Mold Training Provider Accreditation.

(a) (No change.)

(b) Authorizations and Conditions. The following shall apply to issuance of accreditations under this section.

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

(6) A training provider must require instructors and guest speakers to present in person during at least 50% of the classroom instruction and all of the hands-on instruction. The training provider may allow an instructor or guest speaker to use training films and videos [~~videotapes~~], but audiovisual materials shall not be used as substitutes for the required in-person presentations or the hands-on instruction.

(7) - (12) (No change.)

(c) Qualifications. To qualify for an accreditation, a training provider must:

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

(3) designate one or more individuals as responsible persons;

(4) [~~(3)~~] employ a mold training manager who meets at least one of the following requirements in (A), (B), or (C):

(A) at least two years of experience, education, or training in teaching adults;

(B) a bachelor's or graduate degree in building construction technology, engineering, industrial hygiene, safety, public health, education, or business administration or program management;

(C) at least two years of experience in managing an occupational health and safety training program specializing in environmental hazards; and

(D) has demonstrated experience, education, or training in mold assessment or remediation, lead or asbestos abatement, occupational safety and health, or industrial hygiene;

(5) [~~(4)~~] provide for each course a qualified principal instructor who is:

(A) approved by the training provider; and

(B) meets the requirements under §78.66; and

(6) [~~(5)~~] develop and implement a plan to maintain and improve the quality of the training program. This plan shall contain at least the following elements:

(A) procedures for periodic revision of training materials and the course test to reflect innovations in the field; and

(B) procedures for the training manager's annual review of instructor competency.

(d) (No change.)

(e) Applications. Unless otherwise indicated, an applicant must submit all required information and documentation on department-approved forms or in a manner specified by the department. In addition to fulfilling the requirements in §78.21, an applicant must submit the following required documentation:

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

(3) a description of the training provider's organization, including:

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

(C) the name of each individual designated by the applicant as a responsible person;

(D) [~~(C)~~] a statement of any affiliation with other mold-related companies doing business in Texas;

(E) [~~(D)~~] a listing of the courses to be offered; and

(F) [~~(E)~~] the identity of the qualified staff member designated as the mold training manager.

(f) Responsibilities. In addition to the requirements of §78.70 and all other applicable responsibilities in this chapter, an accredited mold training provider shall:

(1) - (9) (No change.)

(10) for each training course for a mold license, maintain [~~maintaining~~] in the file:

(A) - (D) (No change.)

(11) (No change.)

(g) (No change.)

§78.70. Responsibilities of Credentialed Persons.

(a) Persons who are licensed, registered, or accredited under this chapter shall, as applicable:

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

(6) comply with the recordkeeping responsibilities under §78.74 [~~at both the Texas office and work site locations as applicable~~];

(7) - (8) (No change.)

(b) - (h) (No change.)

§78.74. Records.

(a) Record retention. Records and documents [~~required by this section~~] shall be retained for the time periods specified in this section [~~subsection (b)(2) for mold remediation companies and contractors, subsection (c)(2) for mold assessment companies and consultants, subsection (d) for mold analysis laboratories, and subsection (e)(1) for training providers~~].

(1) Records and documents shall be made available for inspection by the department or the department's representative or designee [~~or any law enforcement agency~~] immediately upon request.

(2) Licensees and accredited training providers who cease to do business shall notify the department in a manner specified by the department at least 30 calendar days before such event to advise how they will maintain all records during the minimum three- or five-year retention period. The department, upon receipt of such notification and at its option, may provide instructions for how the records shall be maintained during the required retention period. A licensee or accredited person shall notify the department that it has complied with the department's instructions within 30 calendar days after their receipt or make other arrangements approved by the department. [~~Failure to comply may result in disciplinary action.~~]

(3) Licensees and accredited training providers may maintain the records required under this section in an electronic format unless otherwise indicated.

(4) Licensees and accredited training providers who maintain the required records in an electronic format shall provide paper copies of records or the original paper documents to the department or the department's representative or designee on request.

(b) Mold remediation companies and contractors. [~~A licensed mold remediation company shall maintain the records listed in paragraphs (1) and (2) for each mold remediation project performed by the company and the records listed in paragraph (4) for each remediation worker training session provided by the company. A licensed mold remediation contractor not employed by a company shall personally maintain the records listed in paragraphs (1) and (2) for each mold remediation project performed by the contractor and the records listed in paragraph (4) for each remediation worker training session provided by the mold remediation contractor.~~]

(1) A licensed mold remediation company or a licensed mold remediation contractor not employed by a company shall maintain the following records and documents for three years following the stop date of each project that the company or contractor performs [~~contractor shall maintain the following records and documents on-site at the location of the mold-related activities at a project for its duration~~]:

[~~(A) a current copy of the mold remediation work plan and all mold remediation protocols used in the preparation of the work plan; and~~]

[~~(B) a listing of the names and license or registration numbers of all individuals working on the remediation project.~~]

[~~(2)~~] [~~A licensed mold remediation company shall maintain the following records and documents at a central location at its Texas office for three years following the stop date of each project that the company performs. A licensed mold remediation contractor not employed by a company shall maintain the following records and documents at a central location at his or her Texas office for three years following the stop date of each project that the contractor performs:~~]

(A) [~~a copy of~~] the mold remediation work plan [~~specified under paragraph (1)(A)~~];

(B) photographs of the scene of the mold remediation taken before and after the remediation;

(C) the written contract between the mold remediation company or remediation contractor and the client, and any written contracts related to the mold remediation project between the company or contractor and any other party;

(D) all invoices issued regarding the mold remediation; and

(E) copies of all certificates of mold remediation issued by the company or contractor.

(2) A licensed mold remediation contractor or a licensed mold remediation company providing mold remediation worker training shall maintain the records required to be created, compiled, or maintained by §78.58(f)(5) and §78.60(e)(4) for five years following the provision of a training course or the issuance of a training certificate.

[~~(3) A remediation contractor or company may maintain the records required under paragraphs (1) and (2) in an electronic format. A remediation contractor or company who maintains the required records in an electronic format must provide paper copies of records to a department inspector during an inspection if requested to do so by the inspector.~~]

[~~(4) A licensed mold remediation contractor or licensed mold remediation company that provides mold remediation worker training to meet the requirements under §78.68(d) shall maintain copies of the required training documents at a central location at its Texas office.~~]

(c) Mold assessment companies and consultants.

(1) A licensed mold assessment company or a licensed mold assessment consultant not employed by a company shall maintain the following records and documents [~~at a central location at its Texas office~~] for the time period required under paragraph (2) for each mold assessment project that the company or consultant performs[~~. A licensed mold assessment consultant not employed by a company shall maintain the following records and documents at a central location at his or her Texas office for the time period required under paragraph (2) for each project that the contractor performs~~]:

(A) - (G) (No change.)

(2) (No change.)

(d) (No change.)

(e) Training providers. Accredited training providers shall retain all records required to be created, compiled, or maintained by §§78.64, 78.66, and 78.68 for a period of five years following the most recent applicable event related to the records, including: [~~comply with the following record-keeping requirements. The training provider shall maintain the records in a manner that allows verification of the required information by the department or the department's representative or designee.~~]

(1) the accreditation of the training provider;

[~~(1) The training provider shall maintain records for at least five years from the date of each training course.~~]

(2) the approval of a course or instructor;

[~~(2) A training provider may maintain the records required under paragraph (1) in an electronic format. A training provider who maintains the required records in an electronic format must provide paper copies of records to a department inspector during an inspection if requested to do so by the inspector.~~]

(3) the employment of a mold training manager;

(4) the termination of an instructor or mold training manager;

(5) the termination of the training provider accreditation;

(6) the provision of a training course;

(7) the issuance of a training certificate;

(8) the creation, amendment, or termination of a plan or policy.

§78.80. Fees.

(a) All fees paid to the department are nonrefundable.

[~~(a) Unless otherwise specified, the fees established in this section must be paid to the department before a license, registration, or accreditation will be issued or renewed.~~]

(b) - (e) (No change.)

[~~(f) All fees paid to the department are nonrefundable.~~]

§78.120. Minimum Work Practices and Procedures for Mold Remediation.

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

(c) On-site records. A licensed mold remediation company and a licensed mold remediation contractor who is not employed by a company shall maintain the following records and documents on-site at the location of the mold-related activities at a project for its duration:

(1) a current copy of the mold remediation work plan and all mold remediation protocols used in the preparation of the work plan; and

(2) a listing of the names and license or registration numbers of all individuals working on the remediation project.

(d) [~~(c)~~] Personal protective equipment (PPE) requirements. If an assessment consultant specifies in the mold remediation protocol that PPE is required for the project, the remediation contractor or company shall provide the specified PPE to all individuals who engage in remediation activities and who will, or are anticipated to, disturb or remove mold contamination, when the mold affects a total surface area for the project of 25 contiguous square feet or more. The recommended minimum PPE is an N-95 respirator.

(1) Each individual who is provided PPE must receive training on the appropriate use and care of the provided PPE.

(2) The remediation contractor or company must document successful completion of the training before the individual performs regulated activities.

(e) [~~(d)~~] Containment requirements. The containment specified in the remediation protocol must be used on a mold remediation project when the mold affects a total surface area of 25 contiguous square feet or more for the project.

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

(f) [~~(e)~~] Notice signs. Signs advising that a mold remediation project is in progress shall be displayed at all accessible entrances to remediation areas.

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

(g) [~~(f)~~] Removal of containment. No person shall remove or dismantle any walk-in containment structures or materials from a project site before receipt by the licensed mold remediation contractor or remediation company overseeing the project of a written notice from a licensed mold assessment consultant that the project has achieved clearance as described under §78.140.

(h) [~~(g)~~] Disinfectants, biocides, and antimicrobial coatings.

(1) A disinfectant, biocide, or [~~and~~] antimicrobial coating may be used only if:

(A) its use is specified in a mold remediation protocol;

(B) it is registered by the United States Environmental Protection Agency (EPA) for the intended use; and

(C) the use is consistent with the manufacturer's labeling instructions.

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

§78.130. Mold Remediation of Heating, Ventilation and Air Conditioning (HVAC) Systems.

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

(c) Disinfectants, biocides and antimicrobial coatings. A licensee or registered worker under this chapter may apply a disinfectant, biocide or antimicrobial coating in an HVAC system only in accordance with §78.120(h)[~~(g)~~]. The licensee or registered worker shall apply the product only after the building owner or manager has been provided a material safety data sheet for the product, has agreed to the application, and has notified building occupants in potentially affected areas before the application. The licensee or registered worker shall follow all applicable manufacturer's label directions when using the product.

(d) (No change.)

§78.150. Photographs; Certificate of Mold Damage Remediation; Duty of Property Owner.

(a) Not later than ten [~~seven~~] calendar days after the project stop-date, the licensed mold remediation contractor or company shall provide the property owner with copies of required photographs of the scene of the mold remediation taken before and after the remediation.

(b) - (e) (No change.)

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

Filed with the Office of the Secretary of State on April 5, 2018.

TRD-201801425
Brian E. Francis
Executive Director
Texas Department of Licensing and Regulation
Earliest possible date of adoption: May 20, 2018
For further information, please call: (512) 463-8179

♦ ♦ ♦

TITLE 19. EDUCATION

PART 2. TEXAS EDUCATION AGENCY

CHAPTER 61. SCHOOL DISTRICTS
SUBCHAPTER CC. COMMISSIONER'S RULES CONCERNING SCHOOL FACILITIES

19 TAC §61.1032

The Texas Education Agency (TEA) proposes an amendment to §61.1032, concerning instructional facilities allotment. The proposed amendment would update the rule to align with current practice for administering the Instructional Facilities Allotment (IFA) program.

The proposed amendment to 19 TAC §61.1032 exercises the commissioner's authority to adopt rules to implement the IFA program under TEC, Chapter 46, Subchapter A, which provides assistance to school districts in making debt service payments on qualifying bond or lease-purchase agreements. Bond or lease-purchase proceeds must be used for the construction or renovation of an instructional facility. The proposed amendment would reflect changes in how the TEA administers this program. Specifically, the following changes would be made.

The proposed amendment would simplify the requirements for school districts by removing obsolete requirements to send to the TEA paper copies of documents that are already on file with the state information repository, the Municipal Advisory Council of Texas (MAC), in subsections (b)(4) and (t)(2)(D) and (E) and to send debt service schedules for interest rate management agreements that are updated with the state information repository (MAC) in subsection (d)(13). In addition, the proposed

amendment would remove the requirement in current subsection (d)(9)(C)(iv) for financial advisors to certify net present value savings for refinancing to school districts separate from the IFA program amendment process prior to school districts submitting to the TEA. Instead, school districts would be required to submit those certifications directly to the TEA through the IFA program amendment process.

Rule text that re-states statutory requirements would be removed from current subsection (d)(9)(A)-(C) and (11)(A) and (B) and subsection (e).

Current subsection (d)(11)(C) and (D), (14), and (15) would be rearranged and rule text would be added or removed to clarify the TEA's practice for calculating the amount of excess collections, if any, to be applied to satisfy the IFA local share requirement.

Rule text that has expired would be removed from subsections (d)(9)(F) and (m)(2)(D).

Rule text would be modified in subsection (d)(2) to clarify requirements for timely submission of an application for funding of bonded debt service in accordance with the TEC, §46.003(h). New definitions would be added as subsection (a)(6) for the state information repository (MAC) referenced throughout §61.1032 and as subsection (a)(7) to define sale date referenced in subsection (d)(2).

The proposed amendment would reduce reporting requirements for school districts by removing obsolete requirements to send documentation to the TEA that are already on file with the state information repository (MAC).

The proposed amendment would reduce locally maintained records as reporting obligations to the TEA are decreased.

FISCAL NOTE. Leo Lopez, associate commissioner for school finance / chief school finance officer, has determined that for the first five-year period the amendment is in effect, there will be no fiscal implications for state and local government as a result of enforcing or administering the 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. The proposed amendment does not impose a cost on regulated persons and, therefore, is not subject to Texas Government Code, §2001.0045.

GOVERNMENT GROWTH IMPACT. The TEA has determined that the proposed amendment to §61.1032 would have a government growth impact. The proposed amendment would repeal certain requirements for school districts to send paper copies of documents that are already on file with the state information repository (MAC) to the TEA.

PUBLIC BENEFIT/COST NOTE. Mr. Lopez 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 proposed amendment would be simplification of the administration of the IFA program for the TEA and school districts. State assistance for this program will be more timely and will generate less administrative burden for school districts. 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, MICROBUSINESSES, AND RURAL COMMUNITIES. There is no direct adverse economic impact for small businesses, microbusinesses, and rural communities; therefore, no regulatory flexibility analysis, specified in Texas Government Code, §2006.002, is required.

REQUEST FOR PUBLIC COMMENT. The public comment period on the proposal begins April 20, 2018, and ends May 21, 2018. 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 proposal submitted under the Administrative Procedure Act must be received by the commissioner of education not more than 14 calendar days after notice of the proposal has been published in the *Texas Register* on April 20, 2018.

STATUTORY AUTHORITY. The amendment is proposed under Texas Education Code (TEC), §46.002, which permits the commissioner of education to adopt rules for the implementation of the TEC, Chapter 46, Subchapter A; TEC, §46.003, which provides for an allotment of state funds to certain school districts to pay the principal and interest on eligible bonds issued to construct, acquire, renovate, or improve an instructional facility; TEC, §46.004, which permits a district to receive assistance in connection with a lease-purchase agreement concerning an instructional facility; TEC, §46.005, which provides for certain limits on the amount of state and local funds that a district may be awarded under TEC, §46.003; TEC, §46.006, which defines the process for allocating funding for new projects if the amount appropriated is less than the amount of money to which school districts applying for state assistance are entitled for that year; TEC, §46.007, which outlines the requirements for refunding bonds to be eligible for state assistance; TEC, §46.009, which provides for the amounts and timing of payments of state assistance to school districts; TEC, §46.013, which clarifies that school districts are not eligible for state assistance under TEC, Chapter 46, Subchapter A, for any taxes for which a district receives assistance under TEC, Chapter 42, Subchapter F; and TEC, §46.061, which permits the commissioner of education to adopt rules governing state assistance for refinancing school district debt. The commissioner may allocate state assistance for a refinancing to TEC, Chapter 46, Subchapter A.

CROSS REFERENCE TO STATUTE. The amendment implements Texas Education Code, §§46.002-46.007, 46.009, 46.013, and 46.061

§61.1032. Instructional Facilities Allotment.

(a) Definitions. The following definitions apply to the instructional facilities allotment (IFA) governed by this section:

(1) Instructional facility--real property, an improvement to real property, or a necessary fixture of an improvement to real property that is used predominantly for teaching the curriculum required by Texas Education Code (TEC), §28.002.

(2) Noninstructional facility--a facility that may occasionally be used for instruction, but the predominant use is for purposes other than teaching the curriculum required by TEC, §28.002.

(3) Necessary fixture--equipment necessary to the use of a facility for its intended purposes, but which is permanently attached to the facility, such as lighting and plumbing.

(4) Debt service--as used in this section, debt service shall include regularly scheduled payments of principal and interest that are made between September 1 and August 31 each year on general obligation bonded debt or the underlying bonded debt applicable to an eligi-

ble lease-purchase agreement as reported in the final official statement (FOS) or in the bond order, if the bonds are privately placed, to the state information depository. Debt service payments that are not reported to the state information depository are not eligible to receive IFA state assistance.

(5) Allotment--the amount of eligible debt service that can be considered for state aid. The total allotment is made up of a combination of state aid and local funds. The state share and local share are adjusted annually based on changes in average daily attendance (ADA), property values, and debt service.

(6) State information repository--the Municipal Advisory Council of Texas (MAC).

[(6) Interest rate management agreement--an agreement that provides for an interest rate transaction, including a swap, basis, forward, option, cap, collar, floor, lock, debt derivative transaction, or hedge transaction, for a transaction similar to those types of transactions, or for a combination of any of those types of transactions, as described in the Texas Government Code, §1231.001.]

(7) Sale date--the date of the award (i.e., the official acceptance by the issuer of a bid or an offer to purchase a new issue of municipal securities by an underwriter).

(b) Application process. A school district must complete a separate application requesting funding under the IFA for each debt issue or lease-purchase agreement proposed for funding. The commissioner of education may require supplemental information to be submitted at an appropriate time after the application is filed to reflect changes in amounts and conditions related to the debt. The application shall contain at a minimum the following:

(1) a description of the needs and projects to be funded with the debt issue or other financing, with an estimate of cost of each project and a categorization of projects according to instructional and noninstructional facilities or other uses of funds;

(2) a description of the debt issuance or other financing proposed for funding, including a projected schedule of payments covering the life of the debt;

(3) an estimate of the weighted average maturity of bonded debt; and

(4) drafts of official statements or contracts that fully describe the debt and that are filed with the state information repository, as soon as available.

(c) District eligibility. All school districts legally authorized to enter into eligible debt arrangements as defined in subsection (d) of this section are eligible to apply for an IFA.

(d) Debt eligibility. In order to be eligible for state funding under this section, a debt service requirement must meet all of the criteria of this subsection.

(1) The debt service must be an obligation of a school district that is entered into pursuant to the issuance of bonded debt under TEC, Chapter 45, Subchapter A; an obligation for refunding bonds as defined in TEC, §46.007; or an obligation under a lease-purchase agreement authorized by Local Government Code, §271.004.

(2) Application for funding of bonded debt service must be received at the Texas Education Agency (TEA) before the sale date of an issue [on which a district or its representatives price the bonds].

(3) Application for funding of lease-purchase payments must be received at the TEA before the passage of an order by the school district board of trustees authorizing the lease-purchase agreement.

(4) Eligible bonded debt must have a weighted average maturity of at least eight years. The term of a lease-purchase agreement must be for at least eight years. For purposes of this section, a weighted average maturity shall be calculated by dividing bond years by the issue price, where "bond years" is defined as the product of the dollar amount of bonds divided by 1,000 and the number of years from the dated date to the stated maturity, and "issue price" is defined as the par value of the issue plus accrued interest, less original issue discount or plus premium.

(5) Funds raised by the district through the issuance of bonded debt must be used for an instructional facility purpose as defined by TEC, §46.001. The facility acquired by entering into a lease-purchase agreement must be an instructional facility as defined by TEC, §46.001.

(6) If the bonded debt is for a refinancing or a combination of refinancing and new debt, the refinanced portion must meet the same eligibility criteria with respect to dates of first debt service as a new issue as defined by TEC, §46.003(d)(1). The method used for the allocation of debt service between qualified and nonqualified projects and between eligible and ineligible debt will be applied to the debt service schedule resulting from a refinancing of IFA-supported debt.

(7) An amended application packet is required for any IFA-supported bonds or IFA-supported lease-purchase agreement that has undergone changes, including, but not limited to, refinancing, restatement, or any other transaction that materially affects the terms of the bonds or the terms of the lease-purchase agreement, including transactions that materially affect the terms of the underlying bonds. Amended application packets must be submitted to the TEA no later than 180 days following the date on which the transaction was approved by the attorney general, if the transaction required approval by the attorney general. If approval by the attorney general was not required, the amended application packet is due within 180 days of the date that the school board approved the transaction.

(8) Failure to submit the amended application packet to the TEA division responsible for state funding within the 180-day period defined in paragraph (7) of this subsection will result in the suspension of IFA state aid payments for the applicable IFA allotment award. This suspension has the following effects.

(A) Debt service payments associated with the applicable IFA allotment will be disqualified for IFA state aid upon expiration of the 180-day period defined in paragraph (7) of this subsection. Debt service payments made after the 180-day period expires will not earn IFA state aid.

(B) IFA state aid associated with the applicable allotment will resume on the date the amended application packet, including any required supporting documentation, is received. The IFA state aid will be based on eligible debt service payments scheduled on or after the date the amended application packet is received.

(C) Current and future IFA state aid payments may be adjusted to reflect the disqualified debt service payments. If no IFA state aid is due in a fiscal year that is affected by such an adjustment, a district will be notified about the disqualified amount and the provisions in TEC, §46.009(e), will apply [will be required to remit that amount to the TEA no later than 30 days after notification].

(D) Unless otherwise requested, payments of IFA state aid based on the updated eligible debt service reported in the completed amended application packet shall be made with the payments due for the following fiscal year in accordance with TEC, §46.009(d).

(9) In addition to the provisions in TEC, §46.007, refunding [~~Refunding~~] bonds must also meet the following criteria[~~, the first three of which are defined by TEC, §46.007~~].

[~~(A) Refunding bonds may not be called for redemption earlier than the earliest call date of the bonds being refunded.~~]

[~~(B) Refunding bonds must not have a final maturity date later than the last day of the last fiscal year applicable to the final maturity date of the bonds being refunded.~~]

(A) [~~(C)~~] The refinancing of bonds must result in a present value savings as defined by TEC, §46.007[~~, which is determined by computing the net present value of the difference between each scheduled payment on the original bonds, or on the most recently approved debt service schedule, if the bonds have been previously modified, and each scheduled payment on the newly revised debt applicable to the modified bonds~~].

(i) Present value savings for fixed rate bonds shall be computed at the true interest cost of the refinanced bonds.

(ii) In a refinancing of variable rate bonds with fixed rate bonds, present value savings will be calculated based on:

(I) an assumed interest rate for the variable rate bonds equal to the Municipal Market Data index (or other comparable index) of "AAA" general obligation tax-exempt bonds for the month in which the bonds were originally issued; and

(II) the rate, if any, used to determine the amount deposited into a mandatory and irrevocable fund for the sole purpose of defeasing the bonds in a variable rate mode.

(iii) In a refinancing of fixed rate bonds with variable rate bonds, present value savings will be calculated based on an assumed interest rate for the variable rate bonds equal to the ten-year average of the Municipal Market Data index (or other comparable index) of "AAA" general obligation tax-exempt bonds bearing interest in a variable rate mode comparable to the variable rate mode in which the refinanced bonds will be issued.

(iv) The [~~financial advisor to a~~] district must certify the projected net present value savings for refinancing described in clauses (i)-(iii) [~~clause (ii) and (iii)~~] of this subparagraph based on the parameters prescribed therein. [~~The district's financial advisor to the refinancing transaction must sign and date the certification. The district must submit the certification to the TEA division responsible for state funding no later than 180 days after the date the refunding bonds were approved for sale by the attorney general if refunding bonds are issued. If refunding bonds are not issued, the district must submit the certification no later than 180 days after the refinancing transaction is approved by the school district board of trustees.~~] The district must submit the certification in a format prescribed by the commissioner.

(B) [~~(D)~~] A conversion of the period, mode, or index used to determine the interest rate for eligible debt in accordance with the order authorizing the issuance or delivery of such eligible debt shall not be considered a refunding of eligible debt, and a district shall be eligible for state funding assistance based on the new debt service schedule contingent upon receipt of the required amended application packet as defined in paragraph (7) of this subsection.

(C) [~~(E)~~] A [~~Effective January 1, 2008, a~~] district may refinance IFA-supported debt up to two times after the issuance of the original IFA-supported debt. Upon the third or subsequent refinancing transaction, the TEA may [~~will~~] evaluate the IFA-supported debt for conversion to the Existing Debt Allotment (EDA) program. Determination of eligibility for conversion will be based on the district's remaining capacity in the EDA program and the district's other IFA-supported debt. The TEA will notify the district of the conversion [~~results of this evaluation~~] within 180 days of receiving notification of the third or subsequent refinancing transaction involving an IFA-supported debt.

[~~(F) Debt that has been refinanced three or more times before January 1, 2008, will be evaluated for possible conversion and districts will be notified of the results of that evaluation no later than January 1, 2009. This subparagraph expires January 1, 2009.~~]

(10) Certain other refinanced debt may be eligible for the funding under this subsection.

(A) When a district issues a general obligation bond to acquire a facility that is the subject of an existing lease-purchase agreement of the district or refinances an existing lease-purchase agreement with another lease-purchase agreement, the transaction is considered a refinancing of the lease-purchase agreement for purposes of continued participation in the IFA program. Any transactions affecting the lease-purchase agreement, including those that affect the underlying bonds, are subject to the amendment requirements and eligibility criteria specified in paragraphs (7) - (9) of this subsection, including the restrictions related to early redemption and extension of maturity dates, and the requirement for the refinancing transactions to produce present value savings.

(B) A lease-purchase agreement in the IFA program that is refinanced with a general obligation bond or another lease-purchase agreement at a present value savings and without extension of the original term of the lease-purchase agreement shall remain part of the IFA program. Any transaction that reduces the term of the lease-purchase agreement to less than eight years will result in the disqualification of IFA state aid on debt service that is associated with the lease-purchase agreement, beginning with the date that the transaction is approved by the school district board of trustees.

(C) Any portion of a bond issue that refinances a portion of a lease-purchase agreement that was originally ineligible for IFA funding shall remain ineligible. Ineligible debt includes refunded bonds that fail to meet the criteria under TEC, §46.007, and/or bonds used for purposes not meeting the definition of qualified projects as described in TEC, §46.001 and §46.002.

(D) Any portion of a bond issue that refinances a portion of an original lease-purchase agreement that was eligible for IFA consideration but exceeded the IFA limit shall not be eligible for consideration in future funding cycles.

(E) General obligation bonded debt that is used to refinance a lease-purchase agreement that is not in the IFA program shall gain eligibility for the IFA by the terms of that program. Any interest and sinking (I&S) fund tax effort associated with the bonded debt payments may be counted for purposes of computing the IFA. For the refinancing to be considered for IFA funding, a district must submit an application to the program that identifies the refinancing as a new debt before the refinancing of the lease-purchase agreement.

(F) If any portion of a maturity of an IFA debt is refinanced at a present value cost or with an extension of the term beyond the fiscal year in which the final maturity occurs in the original debt service schedule, the entire amount of annual debt service associated with that maturity shall be removed from eligibility for further IFA state aid.

(G) Debt that is refinanced in a manner that disqualifies it for eligibility for funding within the IFA program shall be treated as new bonded debt at the time of issuance for the purpose of EDA funding consideration.

(11) In addition to I&S fund taxes collected in the current school year, other district funds budgeted for the payment of bonds may

be eligible for the IFA program for the purpose of meeting local share requirements pursuant to TEC [~~Texas Education Code~~], Chapter 46.

[~~(A) Funds budgeted by a district for payment of eligible bonds may include I&S fund taxes collected in the 1999-2000 school year or a later school year in excess of the amount necessary to pay the district's local share of debt service on bonds in that year, provided that the taxes were not used to generate other state aid.~~]

[~~(B) Funds budgeted by a district for payment of eligible bonds may include maintenance and operations (M&O) taxes collected in the 1999-2000 school year or a later school year that are in excess of amounts used to generate other state aid.~~]

(A) [~~(C)~~] District revenues that qualify for meeting a district's local share requirement for the IFA are specified in the TEC, §46.003(b)-(d). The commissioner will provide each district with information on which [~~about what~~] tax collections were not equalized by state assistance in the preceding school year and worksheets to enable districts to calculate tax collections that will not receive state assistance in a current school year. The commissioner will determine the amount of excess collections, if any, to be applied to the IFA local share requirement.

(B) I&S fund taxes collected during a school year will be attributed first to satisfy the local share requirement of debts eligible for EDA state aid for that school year and, secondly, to satisfy the local share requirements of any IFA debts for that school year.

[~~(D) The commissioner of education will determine the amount of excess collections, if any, to be applied to the IFA local share requirement.~~]

(12) If a district issues debt that requires the deposit of payments into a mandatory I&S fund or debt service reserve fund, the deposits will be considered debt payments for the purpose of the IFA if the district's bond covenant calls for the deposit of payments into a mandatory and irrevocable fund for the sole purpose of defeasing the bonds or if the final statement stipulates the requirements of the I&S fund and the bond covenant.

[~~(13) If a district enters into an interest rate management agreement related to debt that is supported by IFA funds, the district shall provide a schedule or schedules demonstrating the anticipated effect of the interest rate management agreement on the debt service for the related bonds within 180 days of entering the interest rate management agreement, subject to the provisions of paragraph (8) of this subsection.~~]

[~~(14) I&S fund taxes collected during a school year will be attributed first to satisfy the local share requirement of debts eligible for EDA state aid for that school year, second to satisfy the local share requirements of any debts eligible for IFA state aid for that school year, and third to excess taxes that may raise the limit for the EDA program in a subsequent biennium if collected in the second year of a state fiscal biennium.~~]

[~~(15) When the TEA considers an application for IFA funding, the TEA shall remove from consideration under the IFA program any debt that meets the eligibility requirements of the EDA program unless a district's existing debt tax rate exceeds the limit for that program described in TEC, §46.034, during the year in which the IFA application is evaluated.~~]

(e) Biennial limitation on access to allotment. The guaranteed amount of state and local funds that a district may be awarded under TEC, §46.003, is prescribed by TEC, §46.005. [~~The cumulative amount of new debt service for which a district may receive approvals for funding within a biennium shall be the greater of $100,000 per year or $250 per student in average daily attendance per year.~~] A district may submit multiple applications for approval during the same biennium. Timely application before executing the bond order for bonds or authorizing the order for a lease-purchase agreement must be made to ensure eligibility of the debt for program participation. [~~The calculation of the limitation on assistance shall be based on the highest annual amount of debt service that occurs within the state fiscal biennium in which payment of state assistance begins.~~]

(f) Additional applications. For previously awarded debt, increases in a district's debt allotment to pay for increases in debt service payment requirements in subsequent biennia must receive approval through one or more additional application(s). The portion of any increase in eligible, qualified debt service that may be funded in subsequent biennia is the amount that exceeds any previously awarded and approved allotments, within the biennial limitation on funding as calculated at the time of approval of the additional applications. If additional IFA state aid is approved, the allotment limit will be amended to reflect the increased IFA support for the applicable debt issuance.

(g) Finality of award. Awards of assistance under TEC, Chapter 46, will be made based on the information available to TEA at the deadline for receipt of applications for that application cycle. Changes in the terms of the issuance of debt, either in the length of the payment schedule or the applicable interest rate, that occur after the time of the award of assistance will not result in an increase in the debt service considered for award.

(1) Any reduction in debt service requirements resulting from changes in the terms of issuance of debt shall result in a reduction in the amount of the award of assistance. Such a reduction in debt service requirements may result in an adjustment to the allotment awarded for the last application on the prioritization list to receive funding during an application cycle, if that application was not fully funded because of a lack of sufficient appropriations. In no case will changes to debt service amounts result in the awarding of additional IFA allotments for other eligible applications that were not funded during that application cycle because of a lack of sufficient appropriations.

(2) Refinancing of the bonds or lease-purchase agreements that receive IFA state aid may result in amendments to the allotment for the original IFA-supported debt issuance and may result in the designation of allotment amounts to be associated with the new debt issuances that include refundings of the original IFA-supported debt issuance.

(h) Data sources.

(1) For purposes of determining the limitation on assistance and prioritization, the projected ADA as adopted by the legislature for appropriations purposes shall be used.

(2) For purposes of prioritization, the final property values certified by the comptroller of public accounts for the tax year preceding the year in which assistance is to begin shall be used. If final property values are unavailable, the most recent projection of property values shall be used.

(3) For purposes of both the calculation of the limitation on assistance and prioritization, the commissioner may consider, before the deadline for receipt of applications for that application cycle, adjustments to data values determined to be erroneous.

(4) For purposes of prioritization, enrollment increases over the previous five years shall be determined using Texas Student Data System Public Education Information Management System (TSDS PEIMS) [~~(PEIMS)~~] submission data available at the time of application.

(5) For purposes of prioritization, outstanding debt is defined as voter-approved bonded debt or lease-purchase debt outstanding at the time of the application deadline.

(6) All final calculations of assistance earned shall be based on property values as certified by the comptroller for the preceding school year, and the final ADA for the current school year. A district must request any adjustment to state assistance based on changes in the final ADA, property values, or debt service or based on any other reason no later than three years following August 31 of the state fiscal year for which the adjustment is sought.

(7) For the TEA to determine eligible debt service applicable to eligible bonded debt or the underlying bonds of an eligible lease-purchase agreement, the debt service schedule a district submits on the application must reflect the debt service schedule the district reported in the FOS or, if no FOS is prepared, in the final bond order or other official document describing the relevant financing activity, including a final debt service schedule. Failure to submit the required amended application packet to the TEA following any refinancing transaction as required by subsection (d)(7) of this section will result in the disqualification of debt service as prescribed in subsection (d)(8) of this section. IFA state aid for debt service payments that are later determined to be disqualified may be recovered through the reduction of future IFA state aid payments for the affected debt issuance.

(i) Allocation of debt service between qualified and nonqualified projects. Debt service shall be allocated between qualified and nonqualified purposes and between eligible and ineligible categories of debt. The method used for allocation between qualified and nonqualified purposes shall be on the basis of pro rata value of the instructional facility versus the noninstructional purposes over the life of the debt service. The method of allocation of debt service between eligible and ineligible categories shall be on the basis of the pro rata value of the refinanced portion of the bond issue versus the new money portion of the bond issue. The method used for the allocation of debt service between qualified and nonqualified projects and between eligible and ineligible debt will be applied to the debt service schedule for the original bond issuance and for the revised debt service schedule that results from the refinancing of IFA-eligible bonds. This allocation method will also be applied to determine the eligible and qualified portions of the debt service on the bonds that are issued to refinance IFA-supported debt. Total IFA-eligible debt service for refinanced bonds is determined by the following method.

(1) The amount of remaining debt service on the original IFA-funded debt service must be reflected in the revised debt service schedule reported in the FOS, or (if no FOS is prepared) in a schedule submitted to the TEA, for that bond issue. The amount of IFA-related debt service for this bond series will be determined using the same pro rata allocation that was used to allocate the debt service for the original IFA allotment award as described in this subsection.

(2) The portion of the IFA-eligible debt service on the bond issue that refunds the IFA-supported debt is determined by:

(A) multiplying the debt service on the refunding bonds by the ratio that results from dividing the principal of refunding bonds by the total issue amount to determine the amount of IFA-related debt service associated with the refunding bonds; and

(B) then allocating the IFA-related debt service associated with the refunding bonds using the same pro rata allocation that was used to allocate the debt service for the original IFA allotment award as described in this subsection.

(3) The total amount of qualified, eligible IFA-related debt service is determined by the sum of IFA-related debt service as determined in paragraphs (1) and (2) of this subsection.

(j) Payments and deposits.

(1) Payment of state assistance shall be made as soon as practicable after September 1 of each year. No payments shall be made until the execution of the bond order or the authorization of the lease-purchase agreement, whichever is applicable, has occurred. Requests for payments and/or adjustments submitted to the TEA after December 15 may [~~shall~~] be processed with the payments due for the following fiscal year in accordance with TEC, §46.009(d). Debt service for IFA-supported debt that is subject to the provisions of subsection (d)(7) of this section because of a refinancing or other transaction as described in subsection (d) of this section is not eligible for IFA state aid until a complete amended application packet has been submitted to the TEA, subject to the provisions of subsection (d)(8) of this section.

(2) Funds received from the state for bonded debt must be deposited to the I&S fund of the school district and must be considered in setting the tax rate necessary to service the debt.

(3) Funds received from the state for lease-purchase agreements must be deposited to the general fund of the district and used for lease-purchase payments.

(4) A final determination of state assistance for a school year will be made using final attendance data and property value information as may be affected by TEC, §42.257. Additional amounts owed to districts shall be paid along with assistance in the subsequent school year, and any reductions in payments shall be subtracted from payments in the subsequent school year.

(5) As an alternative method of adjustment of payments, the commissioner may increase or decrease allocations of state aid under TEC, Chapter 42, to reflect appropriate increases or decreases in assistance under TEC, Chapter 46.

(6) Adjustments to state assistance based on changes in the final counts of ADA, changes to a district's property value, changes in the debt service schedule, or changes for any other reason must be requested no later than three years following the close of the school year for which the adjustment is sought. Changes to the debt service schedule will be subject to the provisions of subsection (d)(8) of this section, including the disqualification of debt service associated with a refinancing transaction as described in subsection (d)(7) of this section, if deadlines for reporting the refinancing transaction have not been met.

(k) Approval of attorney general required. All bond issues and all lease-purchase agreements must receive approval from the attorney general before a deposit of state funds will be made in the accounts of the school district.

(l) Deadlines.

(1) The commissioner of education shall conduct an annual application cycle with a deadline of June 15 or the next working day after June 15 every year based on the availability of appropriations for the purpose of awarding new allotments. If no funding is available, the commissioner shall cancel the June 15 deadline.

(2) The commissioner shall establish the relevant limit on the date of first debt service payment from property taxes for eligible bonded debt that will be considered for funding in the announced application cycle.

(3) An application received after the deadline shall be considered a valid application for the subsequent period unless withdrawn by the submitting district before the end of the subsequent period.

(4) If the bond order or the lease-purchase agreement has not been approved by the attorney general within 180 days of the deadline for the current application cycle, the TEA shall consider the application withdrawn.

(5) The school district may not submit an application for bonded debt before the successful passage of an authorizing proposition. The election to authorize the debt must be held before the close of the application cycle. An application for a lease-purchase agreement may not be submitted before the end of the 60-day waiting period in which voters may petition for a referendum, or until the results of the referendum, if called, approve the agreement.

(m) Prioritization and notice of award. Upon close of the application cycle, all eligible applications shall be ranked in order of property wealth per student in ADA. State assistance will be awarded beginning with the district with the lowest property wealth and continue until all available funds have been used. Each district shall be notified of the amount of assistance awarded and its position in the rank order for the application cycle. A district's wealth per student may be reduced if any or all of the following criteria are met.

(1) A district's wealth per student is first reduced by 10% if the district does not have any outstanding debt at the time the district applies for assistance.

(2) A district's wealth per student is next reduced if a district has had substantial student enrollment growth in the preceding five-year period. For this purpose, the district's wealth per student is reduced:

(A) by 5.0%, if the district has an enrollment growth rate in that period that is 10% or more but less than 15%;

(B) by 10%, if the district has an enrollment growth rate in that period that is 15% or more but less than 30%; or

(C) by 15%, if the district has an enrollment growth rate in that period that is 30% or more.[; or]

[(D) by 25%, if the district demonstrates, in a manner prescribed by the commissioner, that the district must construct, acquire, renovate, or improve one or more instructional facilities to serve the children of military personnel transferred to a military installation in or near the district under the Defense Base Closure and Realignment Act of 1990 (10 USC §2687). To qualify for this reduction, the district must include in its application for IFA funding one or more project descriptions for facilities that will serve the children of military personnel who are transferred to the military installation in or near the district. This subparagraph expires September 1, 2012.]

(3) If a district has submitted an application with eligible debt and has not previously received any assistance due to a lack of appropriated funds, its property wealth for prioritization shall be reduced by 10% for each biennium in which assistance was not provided. The reduction is calculated after reductions for outstanding debt and enrollment are completed, if applicable. This reduction in property wealth for prioritization purposes is only effective if the district actually entered the proposed debt without state assistance before the deadline for a subsequent cycle for which funds are available.

(n) Bond taxes. A school district that receives state assistance must levy and collect sufficient eligible taxes to meet its local share of the debt service requirement for which state assistance is granted. Failure to levy and collect sufficient eligible taxes shall result in pro rata reduction of state assistance. The requirement to levy and collect eligible taxes specified in this subsection may be waived at the discretion of the commissioner for a school district that must maintain local maintenance tax effort in order to continue receiving federal impact aid.

(o) Exclusion from taxes. The taxes collected for bonded debt service for which funding under TEC, Chapter 46, is granted shall be excluded from the tax collections used to determine the amount of state aid under TEC, Chapter 42. For a district operating with a waiver as described in subsection (n) of this section, the amount of the local share of the allotment shall be subtracted from the total tax collections used to determine state aid under TEC, Chapter 42.

(p) Calculation of bond tax rate (BTR) for lease-purchase agreements. The value of BTR in the formula for state assistance for a lease-purchase agreement shall be calculated based on the lease-purchase payment requirement, not to exceed the relevant limitations described in this section. The lease-purchase payment shall be divided by the guaranteed level (FYL), then by ADA, and then by 100. The value of BTR shall be subtracted from the value of district tax rate (DTR) as computed in TEC, §42.302, before limitation imposed by TEC, §42.303.

(q) Continued treatment of taxes and lease-purchase payments. Taxes associated with bonded debt may not be considered for state aid under TEC, Chapter 42. Bonded debt service or lease-purchase payments that were excluded from consideration for state assistance due to prioritization or due to the limitation on assistance may be considered for state assistance in subsequent biennia through additional applications. A modified application may be provided for previously rejected debt service or lease-purchase payments.

(r) Variable rate bonds. Variable rate bonds are eligible for state assistance under the IFA. For purposes of calculating the biennial limitation on access to the allotment, the payment requirement for a variable rate bond shall be valued at the minimum amount a district must budget for payment of interest cost and the scheduled minimum mandatory redemption amount, if applicable. For purposes of calculating state assistance under TEC, Chapter 46, the lesser of the actual payment or the limitation on the allotment shall be used. A district may exercise its ability to make payments in amounts in excess of the minimum, but the excess amount shall not be used in determining the value of BTR or in the calculation of state assistance under TEC, Chapter 46, in that year.

(s) Fixed-rate bonds. Computation for fixed-rate bonds shall be based on published debt service schedules as contained in the FOS or, for a private placement, in a supplemental filing with the TEA. Prepayment of a bond, either through an early call provision or some other mechanism, shall not increase the state's obligation or the computed state aid pursuant to the IFA. To the extent that prepayments reduce future debt service requirements, the computation of state aid shall also be appropriately adjusted.

(t) Reports required. The commissioner shall require such information and reports as are necessary to assure compliance with applicable laws.

(1) The commissioner shall require immediate notification by a district of relevant financing activities as described in subsection (d)(7) of this section. Failure by a district to make such notification will result in the disqualification of debt service from IFA state aid as described in subsection (d)(8) of this section. A district is also required to report changes in use of bond proceeds or other actions taken by the district that might affect state funding requirements by submitting a complete amended application packet. Failure to submit the amended application packet will result in the suspension of IFA state aid payments for the applicable IFA allotment award, as described in subsection (d)(8) of this section.

(2) A complete amended application packet, as prescribed by the commissioner, includes:

(A) the appropriate schedules needed to identify the original IFA allotment award or the most recently approved revised allotment award, including the assigned document control number and changes to the title of the debt issuance, the authorization to issue the debt, and other relevant terms;

(B) the appropriate schedules needed to describe changes in the use of the bond proceeds, if applicable;

(C) the appropriate schedules needed to describe changes in debt service schedules to demonstrate present value savings;

(D) an electronic [a] copy of the FOS that is filed with the state information repository, or, if an FOS is not available, an electronic copy of the final bond order or other official document describing the relevant financing activity that is filed with the state information repository, including a final debt service schedule; and

(E) an electronic [a] copy of the letter from the attorney general approving the transaction that is filed with the state information repository, if the transaction required approval by the attorney general.

(3) Receipt of the complete amended application packet is required before debt service payments on the relevant debt issuances will be qualified for IFA state aid.

(4) Upon evaluation of the complete amended application packet, the TEA may request additional supporting documentation.

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 9, 2018.

TRD-201801521
Cristina De La Fuente-Valadez
Director, Rulemaking
Texas Education Agency
Earliest possible date of adoption: May 20, 2018
For further information, please call: (512) 475-1497

♦ ♦ ♦

CHAPTER 89. ADAPTATIONS FOR SPECIAL POPULATIONS

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

The Texas Education Agency (TEA) proposes amendments to §§89.1201, 89.1203, 89.1205, 89.1207, 89.1210, 89.1215, 89.1220, 89.1225, 89.1227, 89.1228, 89.1230, 89.1233, 89.1235, 89.1240, 89.1245, 89.1250, and 89.1265; new 89.1226 and 89.1229; and the repeal of 89.1267 and 89.1269, concerning the state plan for educating English learners. The proposed amendments, new sections, and repeals would amend and clarify provisions relating to identifying, placing, serving, and reclassifying English learners to align the rules with current agency practice and make modifications to align with the proposed Every Student Succeeds Act (ESSA) State Plan, Title III, Part A.

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

During the recent statutorily required review of rules in 19 TAC Chapter 89, staff identified the need to update rules in Subchapter BB to align with current agency practice. In addition, the issuance of the proposed ESSA State Plan, Title III, Part A, necessitated conforming changes to §89.1225 and the addition of new §89.1226.

The proposed revisions to 19 TAC Chapter 89, Subchapter BB, would update the term "English language learner" to "English learner" and the term "home language" to "primary language" throughout the rules. In addition, the following changes would be made.

Section 89.1201, Policy, would be amended to update terminology and align language with the required curriculum standards for bilingual education and ESL programs.

Section 89.1203, Definitions, would be amended to define terms used in Chapter 89, Subchapter BB, and align them with statute. Definitions would be added for bilingual education allotment, certified English as a second language teacher, dual-language instruction, English as a second language program, English language proficiency standards, exit, and reclassification.

Section 89.1205, Required Bilingual Education and English as a Second Language Programs, would be amended to update terminology and clarify that school districts seeking to implement bilingual education program models that are not required under statute have the authority to do so.

Section 89.1207, Exceptions and Waivers, would be amended to update terminology and codify filing and reporting procedures to align with current agency practices. The elements of a comprehensive professional development plan would be added to provide guidance that would ensure consistent and comprehensive training statewide. In addition, a requirement would be added that schools maintain records to support the submission of an exception or waiver. This would ensure schools have the appropriate documentation to present information to the school board as required by §89.1265. The section title would also be amended to add clarity.

Section 89.1210, Program Content and Design, would be amended to update terminology and add clarity to the descriptions of the various bilingual education and ESL program models.

Section 89.1215, Home Language Survey, would be amended to update terminology and provide guidance on responsibilities regarding the survey. A requirement would be added to provide the survey in Vietnamese to reflect that it is the state's second most represented primary language. In addition, language would be amended to clarify that the home language survey should be given only to students enrolling in a Texas public school for the

first time and to require the receiving district to make multiple attempts to obtain the survey from the sending district for a student who has been enrolled previously in a Texas public school. These changes would ensure continuity of program services for students and avoid services potentially being interrupted or altered.

Section 89.1220, Language Proficiency Assessment Committee, would be amended to update terminology and clarify the member composition of the LPAC as well as student monitoring requirements to align with requirements in statute. Additional changes would clarify parent notification and parent approval procedures and adjust timeline language to align with ESSA and state statutory requirements.

Section 89.1225, Testing and Classification of Students, would be amended to update terminology and align with new ESSA requirements for the 2018-2019 school year, including a student assessment and identification timeline of four weeks, use of a standardized rubric for providing subjective teacher evaluation for student exit purposes, and additional clarification of testing requirements for program entry and exit. Additionally, clarification would be provided with regard to the role of the LPAC and the admission, review, and dismissal (ARD) committee and procedures to be followed in the decision-making process for English learners with identified special needs. Language would be amended to align with new annual language proficiency testing procedures made allowable through ESSA for English learners with significant cognitive disabilities. This section would be superseded by §89.1226 beginning with the 2019-2020 school year.

Proposed new §89.1226, Testing and Classification of Students, Beginning with School Year 2019-2020, would be added to align with new ESSA requirements to be implemented beginning with the 2019-2020 school year. New standardized procedures would be introduced, including the state's use of a single English language proficiency test for student identification and entrance and a single English language proficiency test for student exit. Additionally, proposed amendments to §89.1225 would be included in this section where appropriate.

Section 89.1227, Minimum Requirements for Dual Language Immersion Program Model, would be amended to include language regarding provision of equitable resources to ensure that program model participants are consistently given equitable access to the state curriculum.

Section 89.1228, Dual Language Immersion Program Model Implementation, would be amended to update terminology and clarify parent permission requirements. The section title would be amended to clarify the specific program model addressed in this section.

Proposed new §89.1229, General Standards for Recognition of Dual Language Immersion Program Models, would be added. The new section would contain language from §89.1265, General Standards for Recognition of Dual Language Immersion Program Models, proposed for repeal, and would be moved to more logically organize the rules. Differences from the repealed rule would include clearly delineated criteria for recognizing dual language immersion program implementation and new language about recognition of student performance as required in TEC, §28.0051.

Section 89.1230, Eligible Students with Disabilities, would be amended to update terminology and clarify the role and responsibilities of the LPAC in decision-making for English learners with disabilities.

Section 89.1233, Participation of English Proficient Students, would be amended to update terminology and clarify participation enrollment limitations in accordance with statute.

Section 89.1235, Facilities, would be amended to update terminology and provide flexibility for how school districts continue services for students who have attended a newcomer center for the allowed two years. Information regarding percentage of enrolled English learners per facility would be amended and moved to §89.1233 to align with statute.

Section 89.1240, Parental Authority and Responsibility, would be amended to update terminology and clarify requirements to be included in the bilingual education allotment.

Section 89.1245, Staffing and Staff Development, would be amended to update terminology and remove outdated language regarding emergency teaching permits. To streamline and eliminate redundancy, language describing requirements for school districts filing for a bilingual exception or ESL waiver would be deleted and language describing materials provision would be combined.

Section 89.1250, Required Summer School Programs, would be amended to update terminology and clarify allowable funding sources. The state's bilingual education allotment provides funds for this state-mandated program.

Section 89.1265, Evaluation, would be amended to update terminology and clarify annual evaluation requirements aligned with statute and incorporate requirements currently described in §89.1267. Additional evaluation reporting requirements would be provided for school districts filing for a bilingual exception and/or an ESL waiver to align with proposed amendments to §89.1207.

Section 89.1267, Standards for Evaluation of Dual Language Immersion Program Models, would be repealed to eliminate redundancy, as these requirements are already fulfilled in §89.1265.

Section 89.1269, General Standards for Recognition of Dual Language Immersion Program Models, would be repealed and proposed as new §89.1229 to more logically organize the rules.

In addition, the subchapter title would be changed to "Commissioner's Rules Concerning State Plan for Educating English Learners."

The proposed revisions would have no new reporting implications. However, the revisions would include new procedural requirements to codify current agency practice. Section 89.1215(d) would require receiving districts to make and document multiple attempts to obtain the student's home language survey from the sending district. Section 89.1265 would require the evaluation report to be presented to the school board.

The proposed revisions would include new locally maintained paperwork requirements to codify current agency practice. Section 89.1207(a)(2) and (b)(2) would require school districts submitting a bilingual education exception or ESL exception to maintain written records of all documents supporting the submission, including a list of specific documents. Section 89.1215(d) would require receiving districts to make and document multiple attempts to obtain the student's home language survey from the sending district. Section 89.1220(m)(2) would allow districts to obtain parental approval through a phone conversation or email if the phone conversation or email is documented and retained.

FISCAL NOTE. Penny Schwinn, chief deputy commissioner for academics, has determined that for the first five-year period the revisions are in effect, there will be no fiscal implications for state or local government as a result of enforcing or administering the revisions.

There is no effect on local economy for the first five years that the proposed revisions are in effect; therefore, no local employment impact statement is required under Texas Government Code, §2001.022. The proposed revisions do not impose a cost on regulated persons and, therefore, are not subject to Texas Government Code, §2001.0045.

GOVERNMENT GROWTH IMPACT. The TEA has determined that the proposed revisions would not have a government growth impact pursuant to Texas Government Code, §2001.0221.

PUBLIC BENEFIT/COST NOTE. Ms. Schwinn has determined that for each year of the first five years the proposed revisions are in effect, the public benefit anticipated as a result of enforcing the proposed revisions would be clarification of the rules for serving English learners. There is no anticipated economic cost to persons who are required to comply with the proposed revisions.

ECONOMIC IMPACT STATEMENT AND REGULATORY FLEXIBILITY ANALYSIS FOR SMALL BUSINESSES, MICROBUSINESSES, AND RURAL COMMUNITIES. There is no direct adverse economic impact for small businesses, microbusinesses, and rural communities; therefore, no regulatory flexibility analysis, specified in Texas Government Code, §2006.002, is required.

REQUEST FOR PUBLIC COMMENT. The public comment period on the proposal begins April 20, 2018, and ends May 21, 2018. A public hearing to solicit testimony and input on the proposed revisions will be held from 9:00 a.m. until the conclusion of testimony or not later than 11:00 a.m. on May 2, 2018, in Room 1-104, William B. Travis Building, 1701 North Congress Avenue, Austin, Texas 78701. Individuals who wish to testify at the hearing should sign in at the hearing site; no prior registration is necessary.

19 TAC §§89.1201, 89.1203, 89.1205, 89.1207, 89.1210, 89.1215, 89.1220, 89.1225 - 89.1230, 89.1233, 89.1235, 89.1240, 89.1245, 89.1250, 89.1265

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

CROSS REFERENCE TO STATUTE. The amendments and new sections implement Texas Education Code, §§29.051, 29.053 - 29.056, 29.0561, 29.057 - 29.063, and 29.066.

§89.1201. Policy.

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

(1) identify English [~~language~~] learners based on criteria established by the state;

(2) provide bilingual education and ESL programs, as integral parts of the general [~~regular~~] program as described in the TEC, §4.002;

(3) seek certified teaching personnel to ensure that English [~~language~~] learners are afforded full opportunity to master the essential knowledge and skills required by the state; and

(4) assess achievement for essential knowledge and skills in accordance with the TEC, Chapter 29 [~~39~~], to ensure accountability for English [~~language~~] learners and the schools that serve them.

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

parts of the academic goals for all students to enable English [~~language~~] learners to participate equitably in school.

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

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

§89.1203. Definitions.

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

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

(2) Certified English as a second language teacher--The term "certified English as a second language teacher" as used in this subchapter is synonymous with the term "professional transitional language educator" used in TEC, §29.063.

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

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

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

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

(7) [~~(1)~~] English [~~language~~] learner--A student [~~person~~] who is in the process of acquiring English and has another language as the primary [~~first native~~] language. The terms English language learner, English learner, and limited English proficient (LEP) student are used interchangeably.

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

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

[~~(2) Dual language immersion--An educational approach in which students learn two languages in an instructional setting that integrates subject content presented in English and another language. Models vary depending on the amount of each language used for instruction at each grade level. The program must be based on instruction that adds to the student's first language. The implementation of a dual language immersion program model is optional.~~]

(10) [~~(3)~~] School district--For the purposes of this subchapter, the definition of a school district includes an open-enrollment charter school.

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

(a) Each school district that has an enrollment of 20 or more English [~~language~~] learners in any language classification in the same grade level district-wide shall offer a bilingual education program as described in subsection (b) of this section for the English [~~language~~] learners in prekindergarten through the elementary grades who speak that language. "Elementary grades" shall include at least prekindergarten through Grade 5; sixth grade shall be included when clustered with elementary grades.

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

[~~(c) School districts are authorized to establish a bilingual education program at grade levels in which the bilingual education program is not required under subsection (a) of this section.~~]

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

(d) [~~(e)~~] A school district shall provide ESL [~~English as a second language~~] instruction by offering an ESL [~~English as a second language~~] program using one of the two models described in §89.1210 of this title.

(e) [~~(f)~~] School districts may join with other school districts to provide bilingual education or ESL [~~English as a second language~~] programs.

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

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

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

(a) Bilingual education program.

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

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

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

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

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

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

(ii) includes the non-certified teachers that are assigned to implement the proposed alternative program; and

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

(E) an assurance that at least 10% of the bilingual education allotment shall be used to fund the comprehensive professional development plan required under subparagraph (D) of this paragraph;

[~~(D) a description of the training program the school district will provide to improve the skills of the certified teachers that are assigned to implement the proposed alternative program and an assurance that at least 10% of the bilingual education allotment shall be used to fund this training program; and~~]

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

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

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

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

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

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

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

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

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

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

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

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

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

(6) [~~(5)~~] Special accreditation investigation. The commissioner may authorize a special accreditation investigation under the Texas Education Code (TEC), §39.057, if a school district [~~:~~]

[~~(A)~~] is denied a bilingual education program exception for more than three consecutive years.[~~; or~~]

[~~(B) is granted an exception based on meeting or exceeding the state average for English language learner performance on the required state assessments but has excessive numbers of allowable exemptions from the required state assessments.~~]

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

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

(1) Waivers. A school district that is unable to provide an ESL [~~English as a second language~~] program as required by §89.1205(c) [~~§89.1205(d)~~] of this title because of an insufficient number of certified teachers shall request from the commissioner a waiver of the certification requirements for each teacher who will provide instruction in ESL [~~English as a second language~~] for English [~~language~~] learners. The approval of a waiver of certification requirements shall be valid only during the school year for which it was granted. A request for an ESL [~~English as a second language~~] program waiver must be submitted by November 1 and shall include:

(A) a statement of the reasons the school district is unable to provide a sufficient number of certified teachers to offer the ESL [~~English as a second language~~] program;

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

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

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

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

(ii) includes the non-certified teachers that are assigned to implement the proposed alternative program; and

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

(E) an assurance that at least 10% of the bilingual education allotment shall be used to fund the comprehensive professional development plan required under subparagraph (D) of this paragraph;

[~~(D) the name of each teacher not on permit who is assigned to implement the English as a second language program and for each teacher under a waiver, the estimated date for the completion of the English as a second language supplemental certification, which must be completed by the end of the school year for which the waiver was requested;~~]

[~~(E) a description of the training program that the school district will provide to improve the skills of the certified teachers that are assigned to implement the proposed English as a second language program and an assurance that at least 10% of the bilingual education allotment shall be used to fund this training; and~~]

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

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

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

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

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

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

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

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

(3) [~~(2)~~] Approval of waivers. ESL [~~English as a second language~~] waivers will be granted by the commissioner if the requesting school district:

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

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

(4) [~~(3)~~] Denial of waivers. A school district denied an ESL [~~English as a second language~~] program waiver must submit to the commissioner a detailed action plan for complying with required regulations for the following school year.

(5) [~~(4)~~] Appeals. A school district denied an ESL [~~English as a second language~~] waiver may appeal to the commissioner or the commissioner's designee. The decision of the commissioner or commissioner's designee is final and may not be appealed further.

(6) [~~(5)~~] Special accreditation investigation. The commissioner may authorize a special accreditation investigation under the TEC, §39.057, if a school district[~~:~~]

[~~(A)~~] is denied an ESL [~~English as a second language~~] waiver for more than three consecutive years.[~~; or~~]

[~~(B) is granted a waiver based on meeting or exceeding the state average for English language learner performance on the required state assessments but has excessive numbers of allowable exemptions from the required state assessments.~~]

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

§89.1210. Program Content and Design.

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

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

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

[(b) The bilingual education program shall be a full-time program of instruction in which both the students' home language and English shall be used for instruction. The amount of instruction in each language within the bilingual education program shall be commensurate with the students' level of proficiency in each language and their level of academic achievement. The students' level of language proficiency and academic achievement shall be designated by the language proficiency assessment committee. The Texas Education Agency (TEA) shall develop program guidelines to ensure that the programs are developmentally appropriate, that the instruction in each language is appropriate, and that the students are challenged to perform at a level commensurate with their linguistic proficiency and academic potential.]

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

(1) Affective.

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

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

(2) Linguistic.

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

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

(3) Cognitive.

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

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

(c) [(d)] The bilingual education program shall be implemented [with consideration for each English language learner's unique readiness level] through at least one of the following program models.

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

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

(3) Dual language immersion/one-way is a bilingual/biliteracy program model in which students identified as English learners are served in both English and another language and are prepared to meet reclassification criteria in order to be successful in English-only instruction not earlier than six or later than seven years after the student

enrolls in school. Instruction in this program is delivered by a teacher appropriately certified in bilingual education under TEC, §29.061(b-1) and (b-2), for the assigned grade level and content area. The goal of one-way dual language immersion is for program participants to attain full proficiency in another language as well as English. This model provides ongoing instruction in literacy and academic content in the students' primary language as well as English, with at least half of the instruction delivered in the students' primary language for the duration of the program.

(4) Dual language immersion/two-way is a bilingual/biliteracy program model in which students identified as English learners are integrated with students proficient in English and are served in both English and another language and are prepared to meet reclassification criteria in order to be successful in English-only instruction not earlier than six or later than seven years after the student enrolls in school. Instruction in this program is delivered by a teacher appropriately certified in bilingual education under TEC, §29.061(b-1) and (b-2), for the assigned grade level and content area. The goal of two-way dual language immersion is for program participants to attain full proficiency in another language as well as English. This model provides ongoing instruction in literacy and academic content in English and another language with at least half of the instruction delivered in the non-English program language for the duration of the program.

~~[(1) Transitional bilingual/early exit is a bilingual program model that serves a student identified as limited English proficient in both English and Spanish, or another language, and transfers the student to English-only instruction. This model provides instruction in literacy and academic content areas through the medium of the student's first language, along with instruction in English oral and academic language development. Non-academic subjects such as art, music, and physical education may also be taught in English. Exiting of a student to an all-English program of instruction will occur no earlier than the end of Grade 1 or, if the student enrolls in school during or after Grade 1, no earlier than two years or later than five years after the student enrolls in school. A student who has met exit criteria in accordance with §89.1225(h), (j), and (k) of this title (relating to Testing and Classification of Students) may continue receiving services, but the school district will not receive the bilingual education allotment for that student.]~~

~~[(2) Transitional bilingual/late exit is a bilingual program model that serves a student identified as limited English proficient in both English and Spanish, or another language, and transfers the student to English-only instruction. Academic growth is accelerated through cognitively challenging academic work in the student's first language along with meaningful academic content taught through the student's second language, English. The goal is to promote high levels of academic achievement and full academic language proficiency in the student's first language and English. A student enrolled in a transitional bilingual/late exit program is eligible to exit the program no earlier than six years or later than seven years after the student enrolls in school. A student who has met exit criteria in accordance with §89.1225(h), (j), and (k) of this title may continue receiving services, but the school district will not receive the bilingual education allotment for that student.]~~

~~[(3) Dual language immersion/two-way is a biliteracy program model that integrates students proficient in English and students identified as limited English proficient. This model provides instruction in both English and Spanish, or another language, and transfers a student identified as limited English proficient to English-only instruction. Instruction is provided to both native English speakers and native speakers of another language in an instructional setting where language learning is integrated with content instruction. Academic subjects are taught to all students through both English and the other language. Program exit will occur no earlier than six years or later than seven years after the student enrolls in school. A student who has met exit criteria in accordance with §89.1225(h), (j), and (k) of this title may continue receiving services, but the school district will not receive the bilingual education allotment for that student. The primary goals of a dual language immersion program model are:]~~

~~[(A) the development of fluency and literacy in English and another language for all students, with special attention given to English language learners participating in the program;]~~

~~[(B) the integration of English speakers and English language learners for academic instruction, in accordance with the program design and model selected by the school district board of trustees. Whenever possible, 50% of the students in a program should be dominant English speakers and 50% of the students should be native speakers of the other language at the beginning of the program; and]~~

~~[(C) the promotion of bilingualism, biliteracy, cross-cultural awareness, and high academic achievement.]~~

~~[(4) Dual language immersion/one-way is a biliteracy program model that serves only students identified as limited English proficient. This model provides instruction in both English and Spanish, or another language, and transfers a student to English-only instruction. Instruction is provided to English language learners in an instructional setting where language learning is integrated with content instruction. Academic subjects are taught to all students through both English and the other language. Program exit will occur no earlier than six years or later than seven years after the student enrolls in school. A student who has met exit criteria in accordance with §89.1225(h), (j), and (k) of this title may continue receiving services, but the school district will not receive the bilingual education allotment for that student. The primary goals of a dual language immersion program model are:]~~

~~[(A) the development of fluency and literacy in English and another language for all students, with special attention given to English language learners participating in the program;]~~

~~[(B) the integration of English speakers and English language learners for academic instruction, in accordance with the program design and model selected by the school district board of trustees; and]~~

~~[(C) the promotion of bilingualism, biliteracy, cross-cultural awareness, and high academic achievement.]~~

~~[(e) English as a second language programs shall be intensive programs of instruction designed to develop proficiency in listening, speaking, reading, and writing in the English language. Instruction in English as a second language shall be commensurate with the student's level of English proficiency and his or her level of academic achievement. In prekindergarten through Grade 8, instruction in English as a second language may vary from the amount of time accorded to instruction in English language arts in the general education program for English proficient students to a full-time instructional setting using second language methods. In high school, the English as a second language program shall be consistent with graduation requirements under Chapter 74 of this title. The language proficiency assessment committee may recommend appropriate services that may include content courses provided through sheltered instructional approaches by trained teachers, enrollment in English as a second language courses, additional state elective English courses, and special assistance provided through locally determined programs.]~~

~~[(f) The English as a second language program shall be an integral part of the regular educational program required under Chapter 74~~

of this title. School districts shall use state-adopted English as a second language instructional materials and supplementary materials as curriculum tools. In addition, school districts may use other curriculum adaptations that have been developed. The school district shall provide for ongoing coordination between the English as a second language program and the regular educational program. The English as a second language program shall address the affective, linguistic, and cognitive needs of English language learners as follows.]

[(1) Affective. English language learners shall be provided instruction using second language methods in English to introduce basic concepts of the school environment, which instills confidence, self-assurance, and a positive identity with their cultural heritages. The program shall address the history and cultural heritage associated with both the students' home language and the United States.]

[(2) Linguistic. English language learners shall be provided intensive instruction to develop proficiency in listening, speaking, reading, and writing in the English language. The instruction in academic content areas shall be structured to ensure that the students master the required essential knowledge and skills and higher-order thinking skills.]

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

(d) [(g)] The ESL [English as a second language] program shall be implemented [with consideration for each English language learner's unique readiness level] through one of the following program models.

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

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

[(1) An English as a second language/content-based program model is an English program that serves only students identified as English language learners by providing a full-time teacher certified under the Texas Education Code (TEC), §29.061(c), to provide supplementary instruction for all content area instruction. The program integrates English as a second language instruction with subject matter instruction that focuses not only on learning a second language, but using that language as a medium to learn mathematics, science, social studies, or other academic subjects. Exiting of a student to an all-English program of instruction without English as a second language support will occur no earlier than the end of Grade 1 or, if the student enrolls in school during or after Grade 1, no earlier than two years or later than five years after the student enrolls in school. At the high school level, the English language learner receives sheltered instruction in all content areas. A student who has met exit criteria in accordance with §89.1225(h), (j), and (k) of this title may continue receiving services, but the school district will not receive the bilingual education allotment for that student.]

[(2) An English as a second language/pull-out program model is an English program that serves only students identified as English language learners by providing a part-time teacher certified under the TEC, §29.061(c), to provide English language arts instruction exclusively, while the student remains in a mainstream instructional arrangement in the remaining content areas. Instruction may be provided by the English as a second language teacher in a pull-out or inclusionary delivery model. Exiting of a student to an all-English program of instruction without English as a second language support will occur no earlier than the end of Grade 1 or, if the student enrolls in school during or after Grade 1, no earlier than two years or later than five years after the student enrolls in school. At the high school level, the English language learner receives sheltered instruction in all content areas. A student who has met exit criteria in accordance with §89.1225(h), (j), and (k) of this title may continue receiving services, but the school district will not receive the bilingual education allotment for that student.]

(e) [(h)] Except in the courses specified in subsection (f) [(i)] of this section, [English as a] second language acquisition methods [strategies], which may involve the use of the students' primary [home] language, may be provided in any of the courses or electives required for promotion or graduation to assist the English [language] learners to master the essential knowledge and skills for the required subject(s). The use of [English as a] second language acquisition methods [strategies] shall not impede the awarding of credit toward meeting promotion or graduation requirements.

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

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

§89.1215. Home Language Survey.

(a) School districts shall administer [conduct] only one home language survey to [of] each new student enrolling for the first time in a Texas public school in any grade from prekindergarten through Grade 12. [The home language survey shall be administered to each student new to the school district and to students previously enrolled who were not surveyed in the past.] School districts shall require that the survey be signed by the student's parent or guardian for each student in prekindergarten through Grade 8[,] or by the student in Grades 9-12 as permitted under the Texas Education Code, §29.056(a)(1). The original copy of the survey shall be kept in the student's permanent record.

(b) The home language survey shall be administered in English, [and] Spanish, and Vietnamese; for students of other language

groups, the home language survey shall be translated into the primary [home] language whenever possible. The home language survey shall contain the following questions.

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

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

[(c) Additional information may be collected by the school district and recorded on the home language survey.]

(c) [(d)] [The home language survey shall be used to establish the student's language classification for determining whether the school district is required to provide a bilingual education or English as a second language program.] If the response on the home language survey indicates that a language other than English is used, the student shall be tested in accordance with §89.1225 of this title (relating to Testing and Classification of Students) or §89.1226 of this title (relating to Testing and Classification of Students, Beginning with School Year 2019-2020).

(d) For students previously enrolled in a Texas public school, the receiving district shall secure the student records, including the home language survey. All attempts to contact the sending district to request records shall be documented. Multiple attempts to obtain the student's home language survey shall be made. If attempts to obtain the student's home language survey from the sending district are unsuccessful, the identification process shall begin while attempts to contact the sending district for records continue throughout the four-week testing and identification period.

§89.1220. Language Proficiency Assessment Committee.

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

(b) The [In school districts required to provide a bilingual education program, the] language proficiency assessment committee shall include a certified bilingual educator (for students served through a bilingual education program), a certified English as a second language (ESL) educator (for students served through an ESL program), a parent of an English learner participating in a bilingual or ESL program, and a campus administrator in accordance with [be composed of the membership described in the] Texas Education Code (TEC), §29.063. [If the school district does not have an individual in one or more of the school job classifications required, the school district shall designate another professional staff member to serve on the language proficiency assessment committee. The school district may add other members to the committee in any of the required categories.]

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

[(c) In school districts and grade levels not required to provide a bilingual education program, the language proficiency assessment committee shall be composed of one or more professional personnel, a campus administrator, and a parent of an English language learner participating in the program designated by the school district.]

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

(e) A school district shall establish and operate a sufficient number of language proficiency assessment committees to enable them to discharge their duties within four weeks [20 school days] of the enrollment of English [language] learners.

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

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

(1) designate the language proficiency level of each English [language] learner in accordance with the guidelines issued pursuant to §89.1225(b)-(f) or §89.1226(b)-(f) [§89.1210(b) and (c)] of this title [(relating to Program Content and Design)];

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

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

(4) facilitate the participation of English [language] learners in other special programs for which they are eligible while ensuring full access to the language program services required under the TEC, §29.053 [provided by the school district with either state or federal funds] ; and

(5) reclassify [classify] students, at the end of the school year only, as English proficient in accordance with the criteria described in §89.1225(i) or §89.1226(i) [§89.1225(h)] of this title[, and recommend their exit from the bilingual education or English as a second language program].

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

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

[(i) The language proficiency assessment committee shall give written notice to the student's parent advising that the student has been classified as an English language learner and requesting approval to place the student in the required bilingual education or English as a second language program. The notice shall include information about the benefits of the bilingual education or English as a second language program for which the student has been recommended and that it is an integral part of the school program.]

(j) Pending parent approval of an English [language] learner's entry into the bilingual education or ESL program [English as a second

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

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

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

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

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

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

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

[~~(k) The language proficiency assessment committee shall monitor the academic progress of each student who has exited from a bilingual or English as a second language program during the first two years after exiting in accordance with the TEC, §29.0561.~~]

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

(1) Documentation shall include:

(A) the identification of the student as an English [~~language~~] learner;

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

(C) the recommendation of program placement;

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

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

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

(G) additional instructional interventions provided to address the specific language needs of the student [~~students to ensure adequate yearly progress~~];

(H) the date of exit from the program and parental approval; [~~and~~]

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

(J) the home language survey.

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

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

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

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

[~~(2) reasonable attempts to inform and obtain permission from a parent or guardian have been made and documented;~~]

[~~(3) approval is obtained from:~~]

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

[~~(B) the student, if no parent, guardian, or other responsible adult is available; or~~]

[~~(4) a parent or guardian has not objected in writing to the proposed entry, exit, or placement.~~]

§89.1225. Testing and Classification of Students.

(a) Beginning with school year 2019-2020, the provisions of this section shall expire and be superseded by the provisions in §89.1226 of this title (relating to Testing and Classification of Students, Beginning with School Year 2019-2020).

(b) Within four weeks of initial enrollment in a Texas public school, a student with a language other than English indicated on the home language survey shall be administered the required oral language proficiency test in prekindergarten through Grade 12 and norm-referenced standardized achievement instrument in Grades 2-12 as described in subsection (c) of this section and shall be identified as an English learner and placed in the required bilingual education or English as a second language (ESL) program in accordance with the criteria listed in subsection (f) of this section.

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

(1) in prekindergarten through Grade 1, an oral language proficiency test approved by the Texas Education Agency (TEA); and

(2) in Grades 2-12, a TEA-approved oral language proficiency test and the English reading and English language arts sections from a TEA-approved norm-referenced assessment[~~, or another test approved by the TEA, unless the norm-referenced standardized achievement instrument is not valid in accordance with subsection (f)(2)(C) of this section~~].

(d) [~~(b)~~] School districts that provide a bilingual education program at the elementary grades shall administer an oral language proficiency test in the primary [~~home~~] language of the student who is eligible to be served in the bilingual education program. If the primary [~~home~~] language of the student is Spanish, the school district shall administer a [~~the~~] Spanish [~~version of the~~] TEA-approved oral language proficiency test [~~that was administered in English~~]. If a TEA-approved language proficiency test is not available in the primary [~~the home~~] language of the student [~~is other than Spanish~~], the school district

shall determine the student's level of proficiency using informal oral language assessment measures.

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

[~~(d) The grade levels and the scores on each test that shall identify a student as an English language learner shall be established by the TEA. The commissioner of education shall review the approved list of tests, grade levels, and scores annually and update the list.~~]

[~~(e) Students with a language other than English shall be administered the required oral language proficiency test in prekindergarten through Grade 12 and norm-referenced standardized achievement instrument in Grades 2-12 within 20 school days of their enrollment.~~]

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

(1) In prekindergarten through Grade 1, the student's score on the English oral language proficiency test is below the level designated for indicating [~~limited~~] English proficiency [~~under subsection (d) of this section~~].

(2) In Grades 2-12:

(A) the student's score on the English oral language proficiency test is below the level designated for indicating [~~limited~~] English proficiency [~~under subsection (d) of this section~~]; and

(B) the student's score on the English reading and/or English language arts sections of the TEA-approved norm-referenced standardized achievement instrument at his or her grade level is below the 40th percentile.[~~; or~~]

[~~(C) the student's ability in English is so limited that the administration, at his or her grade level, of the reading and language arts sections of a TEA-approved norm-referenced standardized achievement instrument or other test approved by the TEA is not valid.~~]

[~~(3) In the absence of data required in paragraph (2)(B) of this subsection, evidence that the student is not academically successful as defined in subsection (j) of this section is required.~~]

[~~(4) The admission review and dismissal (ARD) committee in conjunction with the language proficiency assessment committee shall determine an appropriate assessment instrument and designated level of performance for indicating limited English proficiency as required under subsection (d) of this section for students for whom those tests would be inappropriate as part of the individualized education program (IEP). The decision for entry into a bilingual education or English as a second language program shall be determined by the ARD committee in conjunction with the language proficiency assessment committee in accordance with §89.1220(g) of this title (relating to Language Proficiency Assessment Committee).~~]

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

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

[~~(g) Within 20 school days of their initial enrollment in the school district, students shall be identified as English language learners and enrolled into the required bilingual education or English as a second language program. Prekindergarten and kindergarten students preregistered in the spring shall be identified as English language learners and enrolled in the required bilingual education or English as a second language program within 20 school days of the start of the school year in the fall.~~]

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

(1) English proficiency on the state's approved test [~~TEA-approved tests~~] that measures [~~measure~~] the extent to which the student has developed oral and written language proficiency and specific language skills in English;

(2) passing standard met [~~satisfactory performance~~] on the reading assessment instrument under the Texas Education Code (TEC), §39.023(a), or, for students at grade levels not assessed by the aforementioned reading assessment instrument, [~~a TEA-approved English language arts assessment instrument administered in English, or~~] a score at or above the 40th percentile on both the English reading and the English language arts sections of the state's approved [~~a TEA-approved~~] norm-referenced standardized achievement instrument [~~for a student who is enrolled in Grade 1 or 2~~]; and

(3) English proficiency on a TEA-approved criterion-referenced written test [~~tests when available, or other TEA-approved tests when criterion-referenced tests are not available,~~] and the results of a subjective teacher evaluation using the state's standardized rubric.

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

(k) A student may not be exited from the bilingual education or ESL program if the language proficiency assessment committee has recommended designated supports or accommodations on the state reading or writing assessment instrument.

[~~(j) For determining whether a student who has been exited from a bilingual education or English as a second language program is academically successful, the following criteria shall be used at the end of the school year:~~]

[~~(1) the student meets state performance standards in English on the criterion-referenced assessment instrument required in the TEC, §39.023, for the grade level as applicable; and~~]

[~~(2) the student has passing grades in all subjects and courses taken.~~]

[~~(k) The ARD committee in conjunction with the language proficiency assessment committee shall determine an appropriate assessment instrument and performance standard requirement for exit under subsection (h) of this section for students for whom those tests would be inappropriate as part of the IEP. The decision to exit a student who receives both special education and special language services~~

~~from the bilingual education or English as a second language program is determined by the ARD committee in conjunction with the language proficiency assessment committee in accordance with applicable provisions of subsection (h) of this section.]~~

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

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

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

(o) The grade levels and the scores on each test that shall identify a student as an English learner or exit a student from a bilingual or ESL program shall be established by the TEA. The commissioner of education may review the approved list of tests, grade levels, and scores annually and update the list.

§89.1226. Testing and Classification of Students, Beginning with School Year 2019-2020.

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

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

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

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

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

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

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

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

(1) In prekindergarten through Grade 1, the student's score from the listening and speaking components on the state-approved English language proficiency test for identification is below the level designated for indicating English proficiency.

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

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

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

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

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

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

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

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

(k) A student may not be exited from the bilingual education or ESL program if the language proficiency assessment committee has recommended designated supports or accommodations on the state reading assessment instrument.

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

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

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

§89.1227. Minimum Requirements for Dual Language Immersion Program Model.

(a) A dual language immersion program model shall [~~must~~] address all curriculum requirements specified in Chapter 74, Subchapter A, of this title (relating to Required Curriculum) to include foundation and enrichment areas, English language proficiency standards, and college and career readiness standards.

(b) A dual language immersion program model shall be a full-time program of academic instruction in English and another language.

(c) A dual language immersion program model shall provide equitable resources in English and the additional program language whenever possible.

(d) [~~(c)~~] A minimum of 50% of instructional time shall [~~must~~] be provided in the language other than English for the duration of the program.

(e) [~~(d)~~] Implementation shall [~~should~~]:

(1) begin at prekindergarten or[~~,~~] kindergarten, [~~or Grade 1,~~] as applicable;

(2) continue without interruption incrementally through the elementary grades [~~whenever possible~~]; and

(3) consider expansion to middle school and high school whenever possible.

(f) [~~(e)~~] A dual language immersion program model shall be developmentally appropriate and based on current best practices identified in research.

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

(a) Student enrollment in a two-way dual language immersion program model is optional for English proficient students.

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

[~~(c) A school district must obtain written parental approval for student participation in the program sequence and model established by the school district.~~]

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

(1) eligibility criteria;

(2) program purpose;

(3) the district's commitment to providing equitable access to services for English learners;

(4) [~~(3)~~] grade levels in which the program will be implemented;

(5) [~~(4)~~] support of program goals as stated in §89.1210 of this title (relating to Program Content and Design); and

(6) [~~(5)~~] expectations for students and parents.

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

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

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

§89.1229. General Standards for Recognition of Dual Language Immersion Program Models.

(a) School recognition. A school district may recognize one or more of its schools that implement an exceptional dual language immersion program model if the school meets all of the following criteria.

(1) The school must meet the minimum requirements stated in §89.1227 of this title (relating to Minimum Requirements for Dual Language Immersion Program Model).

(2) The school must receive an acceptable performance rating in the state accountability system.

(3) The school must not be identified for any stage of intervention for the district's bilingual and/or English as a second language program under the performance-based monitoring system.

(b) Student recognition. A student participating in a dual language immersion program model may be recognized by the program and its local school district board of trustees by earning a performance acknowledgement in accordance with §74.14 of this title (relating to Performance Acknowledgments).

§89.1230. Eligible Students with Disabilities.

(a) School districts shall implement assessment procedures that differentiate between language proficiency and disabling [~~handicapping~~] conditions in accordance with Subchapter AA of this chapter (relating to Commissioner's Rules Concerning Special Education Services) and shall establish placement procedures that ensure that placement in a bilingual education or English as a second

language program is not refused solely because the student has a disability.

(b) Language proficiency assessment [~~Admission, review, and dismissal~~] committee members shall meet in conjunction with admission, review, and dismissal [~~language proficiency assessment~~] committee members to review and provide recommendations with regard to the educational needs of each English [~~language~~] learner who qualifies for services in the special education program.

§89.1233. Participation of English Proficient Students.

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

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

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

§89.1235. Facilities.

Bilingual education and English as a second language (ESL) programs shall be located in the [~~regular~~] public schools of the school district with equitable access to all educational resources rather than in separate facilities. In order to provide the required bilingual education or ESL [~~English as a second language~~] programs, school districts may concentrate the programs at a limited number of facilities within the school district [~~provided that the enrollment in those facilities shall not exceed 60% English language learners~~]. Recent immigrant English [~~language~~] learners shall be enrolled in newcomer centers for no more than two years [~~shall return to home campuses no later than two years after initial enrollment in a newcomer program~~].

§89.1240. Parental Authority and Responsibility.

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

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

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

§89.1245. Staffing and Staff Development.

(a) School districts shall take all reasonable affirmative steps to assign appropriately certified teachers to the required bilingual education and English as a second language (ESL) programs in accordance with the Texas Education Code (TEC), §29.061, concerning bilingual education and special language program teachers. [~~School districts that are unable to secure a sufficient number of certified bilingual education and English as a second language teachers to provide the required programs, shall request emergency teaching permits or special assignment permits, as appropriate, in accordance with Chapter 230 of this title (relating to Professional Educator Preparation and Certification).~~]

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

(c) Teachers assigned to the bilingual education program and/or ESL [~~English as a second language~~] program may receive salary supplements as authorized by the TEC, §42.153.

(d) School districts may compensate teachers and aides assigned to bilingual education and ESL [~~English as a second language~~] programs for participation in professional development [~~continuing education programs~~] designed to increase their skills or lead to bilingual education or ESL [~~English as a second language~~] certification.

[~~(e) School districts that are unable to staff their bilingual education and English as a second language programs with fully certified teachers shall use at least 10% of their bilingual education allotment for preservice and inservice training to improve the skills of the teachers who provide instruction in the alternative bilingual education program, instruction in English as a second language, and/or content area instruction in special classes for English language learners.~~]

(e) [~~(f)~~] The commissioner of education shall encourage school districts to cooperate with colleges and universities to provide training for teachers assigned to the bilingual education and/or ESL [~~English as a second language~~] programs.

(f) [~~(g)~~] The Texas Education Agency [~~(TEA)~~] shall develop, in collaboration with education service centers [~~(ESCs)~~], resources [~~bilingual education training guides~~] for implementing bilingual education and ESL [~~English as a second language~~] training programs. The materials shall provide a framework for:

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

(2) affectively, linguistically, and cognitively appropriate instruction in bilingual education and ESL [~~English as a second language~~] programs in accordance with §89.1210(b)(1)-(3)

[§89.1210(c)(1) and (f)(1)] of this title (relating to Program Content and Design); and

[(3) linguistically appropriate bilingual education and English as a second language programs in accordance with §89.1210(c)(2) and (f)(2) of this title;]

[(4) cognitively appropriate programs for English language learners in accordance with §89.1210(c)(3) and (f)(3) of this title; and]

(3) [(5)] developmentally appropriate programs for English [language] learners identified as gifted and talented and English [language] learners with disabilities.

§89.1250. Required Summer School Programs.

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

(1) Purpose of summer school programs.

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

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

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

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

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

(B) To be eligible for enrollment:

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

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

[(C) Limited English proficiency shall be determined by evaluating students using an oral language proficiency test approved by the Texas Education Agency.]

(3) Operation of the program.

(A) Enrollment is optional.

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

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

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

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

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

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

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

(4) Funding and records for programs.

(A) A school district shall use state and local funds for program purposes. [School districts may use federal funds, consistent with requirements for the expenditure of federal funds, for the program.]

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

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

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

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

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

§89.1265. Evaluation.

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

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

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

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

(3) the number of students who have been exited from the bilingual education and ESL [~~English as a second language~~] programs;[~~,~~] and

(4) the number of teachers and aides trained and the frequency, scope, and results of the training. [~~These reports shall be retained at the district level.~~]

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

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

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

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

(d) [~~(c)~~] School districts shall report to parents the progress of their child in acquiring English as a result of participation in the program offered to English [~~language~~] learners [~~in English and the home language at least annually~~].

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

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

Filed with the Office of the Secretary of State on April 9, 2018.

TRD-201801519
Cristina De La Fuente-Valadez
Director, Rulemaking
Texas Education Agency
Earliest possible date of adoption: May 20, 2018
For further information, please call: (512) 475-1497

♦ ♦ ♦

19 TAC §89.1267, §89.1269

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

CROSS REFERENCE TO STATUTE. The repeals implement Texas Education Code, §§29.051, 29.053-29.056, 29.0561, 29.057-29.063, and 29.066.

§89.1267. Standards for Evaluation of Dual Language Immersion Program Models.

§89.1269. General Standards for Recognition of Dual Language Immersion Program Models.

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 9, 2018.

TRD-201801520
Cristina De La Fuente-Valadez
Director, Rulemaking
Texas Education Agency
Earliest possible date of adoption: May 20, 2018
For further information, please call: (512) 475-1497

♦ ♦ ♦

TITLE 25. HEALTH SERVICES

PART 1. DEPARTMENT OF STATE HEALTH SERVICES

CHAPTER 133. HOSPITAL LICENSING

The Texas Health and Human Services Commission (HHSC) proposes amendments to §133.2, concerning Hospital Licensing and §133.41, concerning Hospital Functions and Services.

BACKGROUND AND PURPOSE

The purpose of the amendments is to implement Senate Bill (SB) 11, 85th Legislature, Special Session, 2017, which added Subchapter E to Texas Health and Safety Code, Chapter 166. This subchapter defines Do Not Resuscitate (DNR) orders and sets out procedures and requirements for issuing DNR orders. SB 11 applies to DNR orders issued in a health care facility or hospital. It does not apply to an out-of-hospital DNR order. The bill describes the requirements for a physician to issue a DNR order at the direction of a patient, an advance directive, the patient's legal guardian or known agent under a medical power of attorney, or a person authorized to make treatment decisions under Texas Health and Safety Code, §166.039. The bill also requires the health care facility or hospital to notify the patient or person authorized to make treatment decisions of the facility's policies and procedures for DNR orders, to notify the patient or person authorized to make treatment decisions of the issuance of the DNR order, and to take certain actions when the physician or facility and the patient are in disagreement about the execution of, or compliance with, a DNR order.

SECTION-BY-SECTION SUMMARY

The proposed amendments to §133.2 add a definition for "Do Not Resuscitate (DNR) order" and update the paragraph numbers to account for the additional definition. The amendments also update the agency names for the "Texas Board of Nursing" and the "Texas Physician Assistant Board" and replace references to the commissioner of state health services with references to the executive commissioner of health and human services.

The proposed amendment to §133.41(f) requires the governing body to adopt, implement, and enforce policies and procedures regarding DNR orders and disagreements.

The proposed amendment to §133.41(j) requires that if a DNR order is established or revoked, it should be entered into the patient's medical record.

The proposed amendment to §133.41(k) requires the facility to include in its medical staff bylaws procedures regarding a DNR order, the rights of the patient and the person authorized to make treatment decisions based on the patient's DNR order, and actions the physician and facility must take when the physician or facility and the patient are in disagreement about the execution of, or compliance with, a DNR order.

The proposed amendment to §133.41(o) requires that the nursing plan of care for each patient indicate whether a physician has issued a DNR order for the patient and to inform the patient or the person authorized to make treatment decisions.

The proposed amendment to §133.41(y) updates references to the Texas Commission for Environmental Quality rules concerning medical waste management.

FISCAL NOTE:

Greta Rymal, HHSC Deputy Executive Commissioner for Financial Services, has determined that for each year of the first five years that the sections will be in effect, there will be no implications to costs or revenues of state or local governments as a result of enforcing and administering the sections as proposed.

GOVERNMENT GROWTH IMPACT STATEMENT

HHSC has determined that during the first five years that the sections will be in effect, implementation of the proposed amended rules:

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

(2) will not affect the number of employee positions.

(3) will not require an increase or decrease in future legislative appropriations;

(4) will not affect fees paid to the agency;

(5) will not create new rules;

(6) will expand existing rules;

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

(8) are unlikely to have a significant impact on the state's economy.

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

Greta Rymal, HHSC Deputy Executive Commissioner for Financial Services, has also determined that there will be no adverse economic effect on small businesses, micro-businesses, or rural communities.

These rules will not affect DNR orders themselves. The proposal instead adds a requirement that DNR orders be documented, either electronically, or on paper in the patient's medical record, included in the nursing plan of care, and communicated to the patient or the patient's legal guardian, the person holding the patient's medical power of attorney, or the patient's spouse, adult child (if available), or parent (patient's representative).

HHSC assumes that the doctor and the nursing staff will create required documentation during existing medical charting processes and communicate with the patient or the patient's representative during regular doctor visits.

ECONOMIC COSTS TO PERSONS AND IMPACT ON LOCAL EMPLOYMENT

There are no anticipated economic costs to persons who are required to comply with the sections as proposed.

There is no anticipated negative impact on local economies.

COSTS TO REGULATED PERSONS

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

PUBLIC BENEFIT

David Kostroun, HHSC Deputy Executive Commissioner for Regulatory Services, has determined that for each year of the first five years the amendments will be in effect, the expected public benefits from the proposed amendments are that hospitals will have rules defining DNR orders and setting out procedures and requirements for issuing DNR orders to comply with the statutory changes implemented by SB 11.

TAKINGS IMPACT ASSESSMENT

HHSC has determined that the proposal does not restrict or limit an owner's right to his or her property that would otherwise exist

in the absence of government action and, therefore, does not constitute a taking under Government Code, §2007.043.

PUBLIC COMMENT

Written comments on the proposal may be submitted to the Health and Human Services Commission, Mail Code 1065, P.O. Box 13247, Austin, Texas 78711, or by email to SB11DNR-rulecomments@hhsc.state.tx.us. Please specify "Comments on DNR Proposed Rules" in the subject line.

Comments are accepted for 30 days following publication of the proposal in the *Texas Register.* If the last day to submit comments falls on a weekend or a holiday, comments must be postmarked, shipped, or emailed before midnight on the following business day to be accepted.

SUBCHAPTER A. GENERAL PROVISIONS

25 TAC §133.2

STATUTORY AUTHORITY

The proposed amendment is required by SB 11, 85th Legislature, Special Session, 2017, which defines a Do Not Resuscitate (DNR) order and sets out general procedures and requirements for health care facilities and hospitals regarding DNR orders in the Texas Health and Safety Code, Chapter 166. Texas Government Code, §531.0055, and Texas Health and Safety Code, §1001.075 authorize the Executive Commissioner to adopt rules and policies necessary for the operation and provision of health and human services.

The amendment affects Texas Health and Safety Code, Chapters 166, 241, and 1001, and Texas Government Code, §531.0055.

§133.2. Definitions.

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

(1) - (16) (No change.)

(17) Do Not Resuscitate (DNR) order--An order instructing a health care professional not to attempt cardiopulmonary resuscitation on a patient whose circulatory or respiratory function ceases.

(18) [~~(17)~~] Emergency medical condition--A medical condition manifesting itself by acute symptoms of sufficient severity (including severe pain, psychiatric disturbances or symptoms of substance abuse) such that the absence of immediate medical attention could reasonably be expected to result in one or all of the following:

(A) placing the health of the individual (or with respect to a pregnant woman, the health of the woman or her unborn child) in serious jeopardy;

(B) serious impairment to bodily functions;

(C) serious dysfunction of any bodily organ or part; or

(D) with respect to a pregnant woman who is having contractions:

(i) that there is inadequate time to effect a safe transfer to another hospital before delivery; or

(ii) that transfer may pose a threat to the health or safety of the woman or the unborn child.

(19) [~~(18)~~] Freestanding emergency medical care facility--A facility that is structurally separate and distinct from a hospital and receives individuals for the provision of emergency care. The facility is owned and operated by the hospital, and is exempt from the licensing requirements of Texas Health and Safety Code, Chapter 254, under §254.052(7) or (8).

(20) [~~(19)~~] General hospital--An establishment that:

(A) offers services, facilities, and beds for use for more than 24 hours for two or more unrelated individuals requiring diagnosis, treatment, or care for illness, injury, deformity, abnormality, or pregnancy; and

(B) regularly maintains, at a minimum, clinical laboratory services, diagnostic X-ray services, treatment facilities including surgery or obstetrical care or both, and other definitive medical or surgical treatment of similar extent.

(21) [~~(20)~~] Governing body--The governing authority of a hospital which is responsible for a hospital's organization, management, control, and operation, including appointment of the medical staff; includes the owner or partners for hospitals owned or operated by an individual or partners.

(22) [~~(21)~~] Governmental unit--A political subdivision of the state, including a hospital district, county, or municipality, and any department, division, board, or other agency of a political subdivision.

(23) [~~(22)~~] Hospital--A general hospital or a special hospital.

(24) [~~(23)~~] Hospital administration--Administrative body of a hospital headed by an individual who has the authority to represent the hospital and who is responsible for the operation of the hospital according to the policies and procedures of the hospital's governing body.

(25) [~~(24)~~] Inpatient--An individual admitted for an intended length of stay of 24 hours or greater.

(26) [~~(25)~~] Inpatient services--Services provided to an individual admitted to a hospital for an intended length of stay of 24 hours or greater.

(27) [~~(26)~~] Intellectual Disability--Significantly sub-average general intellectual functioning that is concurrent with deficits in adaptive behavior and originates during the developmental period.

(28) [~~(27)~~] Licensed vocational nurse (LVN)--A person who is currently licensed under the Nursing Practice Act by the Texas Board of Nursing [~~Board of Nurse Examiners~~] for the State of Texas as a licensed vocational nurse or who holds a valid vocational nursing license with multi-state licensure privilege from another compact state.

(29) [~~(28)~~] Licensee--The person or governmental unit named in the application for issuance of a hospital license.

(30) [~~(29)~~] Medical staff--A physician or group of physicians and a podiatrist or group of podiatrists who by action of the governing body of a hospital are privileged to work in and use the facilities of a hospital for or in connection with the observation, care, diagnosis, or treatment of an individual who is, or may be, suffering from a mental or physical disease or disorder or a physical deformity or injury.

(31) [~~(30)~~] Mental health services--All services concerned with research, prevention, and detection of mental disorders and disabilities and all services necessary to treat, care for, supervise, and rehabilitate persons who have a mental disorder or disability, including persons whose mental disorders or disabilities result from alcoholism or drug addiction.

(32) [~~(31)~~] Niche hospital--A hospital that:

(A) classifies at least two-thirds of the hospital's Medicare patients or, if data is available, all patients:

(i) in not more than two major diagnosis-related groups; or

(ii) in surgical diagnosis-related groups.

(B) specializes in one or more of the following areas:

(i) cardiac;

(ii) orthopedics;

(iii) surgery; or

(iv) women's health; and

(C) is not:

(i) a public hospital;

(ii) a hospital for which the majority of inpatient claims are for major diagnosis-related groups relating to rehabilitation, psychiatry, alcohol and drug treatment, or children or newborns; or

(iii) a hospital with fewer than 10 claims per bed per year.

(33) [~~(32)~~] Nurse--A registered, vocational, or advanced practice registered nurse licensed by the Texas Board of Nursing or entitled to practice in this state under Occupations Code, Chapters 301, 304, or 305.

(34) [~~(33)~~] Outpatient--An individual who presents for diagnostic or treatment services for an intended length of stay of less than 24 hours; provided, however, that an individual who requires continued observation may be considered as an outpatient for a period of time not to exceed a total of 48 hours.

(35) [~~(34)~~] Outpatient services--Services provided to patients whose medical needs can be met in less than 24 hours and are provided within the hospital; provided, however, that services that require continued observation may be considered as outpatient services for a period of time not to exceed a total of 48 hours.

(36) [~~(35)~~] Owner--One of the following persons or governmental unit which will hold or does hold a license issued under the statute in the person's name or the person's assumed name:

(A) a corporation;

(B) a governmental unit;

(C) a limited liability company;

(D) an individual;

(E) a partnership if a partnership name is stated in a written partnership agreement or an assumed name certificate;

(F) all partners in a partnership if a partnership name is not stated in a written partnership agreement or an assumed name certificate; or

(G) all co-owners under any other business arrangement.

(37) [~~(36)~~] Patient--An individual who presents for diagnosis or treatment.

(38) [~~(37)~~] Pediatric and adolescent hospital--A general hospital that specializes in providing services to children and adolescents, including surgery and related ancillary services.

(39) [~~(38)~~] Person--An individual, firm, partnership, corporation, association, or joint stock company, and includes a receiver, trustee, assignee, or other similar representative of those entities.

(40) [~~(39)~~] Physician--A physician licensed by the Texas Medical Board.

(41) [~~(40)~~] Physician assistant--A person licensed as a physician assistant by the Texas Physician Assistant Board [~~Texas State Board of Physician Assistant Examiners~~].

(42) [~~(41)~~] Podiatrist--A podiatrist licensed by the Texas State Board of Podiatric Medical Examiners.

(43) [~~(42)~~] Practitioner--A health care professional licensed in the State of Texas, other than a physician, podiatrist, or dentist. A practitioner shall practice in a manner consistent with their underlying practice act.

(44) [~~(43)~~] Premises--A premises may be any of the following:

(A) a single building where inpatients receive hospital services; or

(B) multiple buildings where inpatients receive hospital services provided that the following criteria are met:

(i) all buildings in which inpatients receive hospital services are subject to the control and direction of the same governing body;

(ii) all buildings in which inpatients receive hospital services are within a 30-mile radius of the primary hospital location;

(iii) there is integration of the organized medical staff of each of the hospital locations to be included under the single license;

(iv) there is a single chief executive officer for all of the hospital locations included under the license who reports directly to the governing body and through whom all administrative authority flows and who exercises control and surveillance over all administrative activities of the hospital;

(v) there is a single chief medical officer for all of the hospital locations under the license who reports directly to the governing body and who is responsible for all medical staff activities of the hospital;

(vi) each hospital location to be included under the license that is geographically separate from the other hospital locations contains at least one nursing unit for inpatients which is staffed and maintains an active inpatient census, unless providing only diagnostic or laboratory services, or a combination of diagnostic or laboratory services, in the building for hospital inpatients; and

(vii) each hospital that is to be included in the license complies with the emergency services standards:

(I) for a general hospital, if the hospital provides surgery or obstetrical care or both; or

(II) for a special hospital, if the hospital does not provide surgery or obstetrical care.

(45) [~~(44)~~] Presurvey conference--A conference held with department staff and the applicant or the applicant's representative to review licensure rules and survey documents and provide consultation prior to the on-site licensure inspection.

(46) [~~(45)~~] Psychiatric disorder--A clinically significant behavioral or psychological syndrome or pattern that occurs in an individual and that is typically associated with either a painful syndrome (distress) or impairment in one or more important areas of behavioral, psychological, or biological function and is more than a disturbance in the relationship between the individual and society.

(47) [~~(46)~~] Quality improvement--A method of evaluating and improving processes of patient care which emphasizes a multidisciplinary approach to problem solving, and focuses not on individuals, but systems of patient care which might be the cause of variations.

(48) [~~(47)~~] Registered nurse (RN)--A person who is currently licensed by the Texas Board of Nursing for the State of Texas as a registered nurse or who holds a valid registered nursing license with multi-state licensure privilege from another compact state.

(49) [~~(48)~~] Special hospital--An establishment that:

(A) offers services, facilities, and beds for use for more than 24 hours for two or more unrelated individuals who are regularly admitted, treated, and discharged and who require services more intensive than room, board, personal services, and general nursing care;

(B) has clinical laboratory facilities, diagnostic X-ray facilities, treatment facilities, or other definitive medical treatment;

(C) has a medical staff in regular attendance; and

(D) maintains records of the clinical work performed for each patient.

(50) [~~(49)~~] Stabilize--With respect to an emergency medical condition, to provide such medical treatment of the condition necessary to assure, within reasonable medical probability, that no material deterioration of the condition is likely to result from or occur during the transfer of the individual from a facility, or that the woman has delivered the child and the placenta.

(51) [~~(50)~~] Surgical technologist--A person who practices surgical technology as defined in Health and Safety Code, Chapter 259.

(52) [~~(51)~~] Transfer--The movement (including the discharge) of an individual outside a hospital's facilities at the direction of any person employed by (or affiliated or associated, directly or indirectly, with) the hospital, but does not include such a movement of an individual who has been declared dead, or leaves the facility without the permission of any such person.

(53) [~~(52)~~] Universal precautions--Procedures for disinfection and sterilization of reusable medical devices and the appropriate use of infection control, including hand washing, the use of protective barriers, and the use and disposal of needles and other sharp instruments as those procedures are defined by the Centers for Disease Control and Prevention (CDC) of the Department of Health and Human Services. This term includes standard precautions as defined by CDC which are designed to reduce the risk of transmission of blood borne and other pathogens in hospitals.

(54) [~~(53)~~] Violation--Failure to comply with the licensing statute, a rule or standard, special license provision, or an order issued by the executive commissioner of [~~state~~] health and human services (executive commissioner) or the executive commissioner's designee, adopted or enforced under the licensing statute. Each day a violation continues or occurs is a separate violation for purposes of imposing a penalty.

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

Filed with the Office of the Secretary of State on April 6, 2018.

TRD-201801483

Karen Ray
Chief Counsel
Department of State Health Services
Earliest possible date of adoption: May 20, 2018
For further information, please call: (512) 834-6651

♦ ♦ ♦

SUBCHAPTER C. OPERATIONAL REQUIREMENTS

25 TAC §133.41

The proposed amendment is required by SB 11, 85th Legislature, Special Session, 2017, which defines a Do Not Resuscitate (DNR) order and sets out general procedures and requirements for health care facilities and hospitals regarding DNR orders in the Texas Health and Safety Code, Chapter 166. Texas Government Code, §531.0055, and Texas Health and Safety Code, §1001.075 authorize the Executive Commissioner to adopt rules and policies necessary for the operation and provision of health and human services.

The amendment affects Texas Health and Safety Code, Chapters 166, 241, and 1001, and Texas Government Code, §531.0055.

§133.41. Hospital Functions and Services.

(a) - (e) (No change.)

(f) Governing body.

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

(6) Patient care. In accordance with hospital policy adopted, implemented and enforced, the governing body shall ensure that:

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

(F) the governing body shall adopt, implement, and enforce a policy and procedure regarding the removal of personal wrist bands and bracelets as well as a patient's right to refuse to wear condition alert wrist bands; and[~~.~~]

(G) the governing body shall adopt, implement, and enforce policies and procedures regarding DNR orders issued in the facility, the rights of the patient and person authorized to make treatment decisions regarding the patient's DNR status, and actions the physician and facility must take when the physician or facility and the patient are in disagreement about the execution of, or compliance with, a DNR order.

(7) - (9) (No change.)

(g) - (i) (No change.)

(j) Medical record services. The hospital shall have a medical record service that has administrative responsibility for medical records. A medical record shall be maintained for every individual who presents to the hospital for evaluation or treatment.

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

(5) If a physician establishes a DNR order for a patient, that order must be entered into the patient medical record as soon as practicable. In the event a physician revokes a DNR order, that revocation order shall also be entered in the patient medical record as soon as practicable.

(6) [~~(5)~~] Medical record entries must be legible, complete, dated, timed, and authenticated in written or electronic form by the

person responsible for providing or evaluating the service provided, consistent with hospital policies and procedures.

(7) [~~(6)~~] All orders (except verbal orders) must be dated, timed, and authenticated the next time the prescriber or another practitioner who is responsible for the care of the patient and has been credentialed by the medical staff and granted privileges which are consistent with the written orders provides care to the patient, assesses the patient, or documents information in the patient's medical record.

(8) [~~(7)~~] All verbal orders must be dated, timed, and authenticated within 96 hours by the prescriber or another practitioner who is responsible for the care of the patient and has been credentialed by the medical staff and granted privileges which are consistent with the written orders.

(A) Use of signature stamps by physicians and other licensed practitioners credentialed by the medical staff may be allowed in hospitals when the signature stamp is authorized by the individual whose signature the stamp represents. The administrative offices of the hospital shall have on file a signed statement to the effect that he or she is the only one who has the stamp and uses it. The use of a signature stamp by any other person is prohibited.

(B) A list of computer codes and written signatures shall be readily available and shall be maintained under adequate safeguards.

(C) Signatures by facsimile shall be acceptable. If received on a thermal machine, the facsimile document shall be copied onto regular paper.

(9) [~~(8)~~] Medical records (reports and printouts) shall be retained by the hospital in their original or legally reproduced form for a period of at least ten years. A legally reproduced form is a medical record retained in hard copy, microform (microfilm or microfiche), or other electronic medium. Films, scans, and other image records shall be retained for a period of at least five years. For retention purposes, medical records that shall be preserved for ten years include:

(A) identification data;

(B) the medical history of the patient;

(C) evidence of a physical examination, including a health history, performed no more than 30 days prior to admission or within 24 hours after admission. The medical history and physical examination shall be placed in the patient's medical record within 24 hours after admission;

(D) an updated medical record entry documenting an examination for any changes in the patient's condition when the medical history and physical examination are completed within 30 days before admission. This updated examination shall be completed and documented in the patient's medical record within 24 hours after admission;

(E) admitting diagnosis;

(F) diagnostic and therapeutic orders;

(G) properly executed informed consent forms for procedures and treatments specified by the medical staff, or by federal or state laws if applicable, to require written patient consent;

(H) clinical observations, including the results of therapy and treatment, all orders, nursing notes, medication records, vital signs, and other information necessary to monitor the patient's condition;

(I) reports of procedures, tests, and their results, including laboratory, pathology, and radiology reports;

(J) results of all consultative evaluations of the patient and appropriate findings by clinical and other staff involved in the care of the patient;

(K) discharge summary with outcome of hospitalization, disposition of care, and provisions for follow-up care; and

(L) final diagnosis with completion of medical records within 30 calendar days following discharge.

(10) [~~(9)~~] If a patient was less than 18 years of age at the time he was last treated, the hospital may authorize the disposal of those medical records relating to the patient on or after the date of his 20th birthday or on or after the 10th anniversary of the date on which he was last treated, whichever date is later.

(11) [~~(10)~~] The hospital shall not destroy medical records that relate to any matter that is involved in litigation if the hospital knows the litigation has not been finally resolved.

(12) [~~(11)~~] The hospital shall provide written notice to a patient, or a patient's legally authorized representative, that the hospital may authorize the disposal of medical records relating to the patient on or after the periods specified in this section. The notice shall be provided to the patient or the patient's legally authorized representative not later than the date on which the patient who is or will be the subject of a medical record is treated, except in an emergency treatment situation. In an emergency treatment situation, the notice shall be provided to the patient or the patient's legally authorized representative as soon as is reasonably practicable following the emergency treatment situation.

(13) [~~(12)~~] If a licensed hospital should close, the hospital shall notify the department at the time of closure the disposition of the medical records, including the location of where the medical records will be stored and the identity and telephone number of the custodian of the records.

(k) Medical staff.

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

(3) The medical staff shall adopt, implement, and enforce bylaws, rules, and regulations to carry out its responsibilities. The bylaws shall:

(A) - (D) (No change.)

(E) include criteria for determining the privileges to be granted and a procedure for applying the criteria to individuals requesting privileges; [~~and~~]

(F) include a requirement that a physical examination and medical history be done no more than 30 days before or 24 hours after an admission for each patient by a physician or other qualified practitioner who has been granted these privileges by the medical staff. The medical history and physical examination shall be placed in the patient's medical record within 24 hours after admission. When the medical history and physical examination are completed within the 30 days before admission, an updated examination for any changes in the patient's condition must be completed and documented in the patient's medical record within 24 hours after admission; and[.]

(G) include procedures regarding DNR orders, the rights of the patient and person authorized to make treatment decisions regarding the patient's DNR status, and procedures to ensure that the physician establishing a DNR order informs the patient of the order's issuance and documents the notification in the patient's medical record. The procedures shall ensure that if the patient is incompetent the physician shall inform the patient's known agent under a medical power of attorney or legal guardian or, if a patient does not have a medical power of attorney or legal guardian, a person described by

Health and Safety Code, §166.039(b)(1), (2), or (3), of the DNR order's issuance. The procedures shall include the actions the physician and facility must take when the physician or facility and the patient are in disagreement about the execution of, or compliance with, a DNR order.

(l) - (n) (No change.)

(o) Nursing services. The hospital shall have an organized nursing service that provides 24-hour nursing services as needed.

(1) (No change.)

(2) Staffing and delivery of care.

(A) - (D) (No change.)

(E) The nursing staff shall develop and keep current a nursing plan of care for each patient which addresses the patient's needs. The plan shall indicate whether the patient's attending physician has issued a DNR order for the patient. The nursing staff shall inform the patient of the DNR order; or if the patient is incompetent, the nursing staff shall inform the patient's known agent under a medical power of attorney or legal guardian or, if a patient does not have a medical power of attorney or legal guardian, a person described by Health and Safety Code, §166.039(b)(1), (2), or (3) of the DNR order.

(F) - (I) (No change.)

(3) - (8) (No change.)

(p) - (x) (No change.)

(y) Waste and waste disposal.

(1) Special waste and liquid/sewage waste management.

(A) The hospital shall comply with the requirements set forth by the department in §§1.131 - 1.137 of this title (relating to Definition, Treatment, and Disposition of Special Waste from Health Care-Related Facilities) and the TCEQ requirements in 30 TAC Chapter 326, Medical Waste Management, §326.17, §326.19, §326.21, and §326.23 (relating to Packaging, Labeling and Shipping Requirements) and §326.31 (relating to Exempt Medical Waste Operations) [§~~330.1207 (relating to Generators of Medical Waste)~~].

(B) (No change.)

(2) (No change.)

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

Filed with the Office of the Secretary of State on April 6, 2018.

TRD-201801484
Karen Ray
Chief Counsel
Department of State Health Services
Earliest possible date of adoption: May 20, 2018
For further information, please call: (512) 834-6651

♦ ♦ ♦

TITLE 28. INSURANCE

PART 2. TEXAS DEPARTMENT OF INSURANCE, DIVISION OF WORKERS' COMPENSATION

CHAPTER 129. INCOME BENEFITS--TEMPORARY INCOME BENEFITS

28 TAC §129.5

The Texas Department of Insurance, Division of Workers' Compensation (division) proposes the amendment of 28 Texas Administrative Code (TAC) §129.5, Work Status Reports. The proposed amendments to §129.5 are necessary to conform the division's rules to the Legislative changes adopted by House Bill 2546, 85th Legislature, Regular Session (HB 2546) that was effective on June 9, 2017. HB 2546 amended Labor Code §408.025 by adding a new subsection to allow a treating doctor to delegate to a physician assistant the authority to complete and sign a Work Status Report regarding an injured employee's ability to return to work. The delegating treating doctor is responsible for the acts of the physician assistant under §408.025.

Section 129.5 addresses Work Status Reports. The division proposes an amendment to §129.5(a)(1) to replace "§133.4 of this title (relating to Consulting and Referral Doctors)" with "§180.22(c) and (e) of this title (relating to Health Care Provider Roles and Responsibilities." This proposed amendment is necessary to update the citation to the definition of a treating or referral doctor. Section 133.4 no longer contains these definitions.

New §129.5(b) re-letters existing subsections (b) through (j) to (c) through (k). This non-substantive amendment is necessary to account for added text.

Amended §129.5(a)(4) deletes "(employee)." This non-substantive change is necessary to conform to agency style.

Amended §129.5(a)(2), (a)(4)(A), (a)(4)(B), (a)(4)(C), (d)(2), (d)(4), (e)(1), (e)(2), (e)(3), (f), (g), (g)(1), (g)(2), (h), (i)(3), and (k) add the word "injured" before the word "employee." This non-substantive change is necessary to conform to agency style.

Amended §129.5(a)(2), (a)(3), (d)(1), (d)(4), (e)(1), and (i)(3) add the word "injured" before the word "employee's." This change is necessary to conform to agency style.

New §129.5(b) adds, "A treating doctor may delegate authority to complete, sign, and file a Work Status Report to a licensed health care practitioner authorized to accept the delegation under Labor Code §408.025. The delegating treating doctor is responsible for the acts of the health care practitioner under this subsection." This change is necessary to conform the division's rules to HB 2546. Currently, physician assistants are the only licensed health care practitioners to whom the authority to complete, sign, and file a Work Status Report may be delegated under Labor Code §408.025.

Amended §129.5(c), (d), (e), (g), (i), (i)(2), (i)(3), (j), (j)(1), (j)(2), and (j)(3) add "or delegated health care practitioner" after the word "doctor" to the subsections. This change is necessary to conform the division's rules to the legislative change and to communicate or establish that regardless of whether a doctor or delegated health care practitioner completes, signs, and files a Work Status Report, all substantive or procedural requirements specified by the rule are the same.

Amended §129.5(c) and (d) update "Commission" to "division." This non-substantive change is necessary to reflect the change in the agency's name.

The division notes that amended §129.5(e) defines the situations in which treating doctor or delegated health care practi-

tioner shall complete and file a Work Status Report. Work Status Reports should be completed and filed by treating doctors or delegated health care practitioners only when one of these situations outlined in amended §129.5(e) has occurred.

Amended §129.5(e)(3) adds "or delegated health care practitioner's" after the word "doctor's" to the subsection. This change is necessary to conform the division's rules to the legislative change and to communicate that regardless whether a doctor or delegated health care practitioner has completed, signed, and filed a Work Status Report, all current substantive and procedural requirements specified by the rule are the same.

Amended §129.5(e)(3) deletes "(carrier)". This non-substantive change is necessary to conform to agency style.

Amended §129.5(e)(3), (f), (g), (i)(1), (j), (j)(2), and (j)(3) add the word "insurance" before the word "carrier". This change is necessary to conform to agency style.

Amended §129.5(e)(3) deletes "to" after the word "not." This non-substantive change corrects a typographical error.

Amended §129.5(f) adds "by hand delivery or electronic transmission if the injured employee agrees to receive the report by electronic transmission." This change is necessary to allow an injured employee the opportunity to receive the form by electronic transmission with the injured employee's agreement. This change increases efficiency within the workers' compensation system by allowing for Work Status Reports to be provided to the injured employee electronically via telemedicine services, if the use of telemedicine services are proper according to licensing board standards and other division rules. By allowing electronic transmission to an injured employee, the injured employee will have access to prompt, high-quality medical care which is a division goal under Labor Code §402.021(b)(9). In implementing the division's goals, the Legislature requires the workers' compensation system to take maximum advantage of technological advances to provide the highest levels of service possible to system participants. The division notes that this amendment does not change the requirements relating to when the Work Status Report must be provided to an injured employee.

Amended §129.5(f) adds the letter "(e)" after the word "subsection" and deletes the letter "(d)" to correct the citation.

Amended §129.5(g) adds the letter "(e)" after the word "subsection" and deletes the letter "(d)" to correct the citation.

Amended §129.5(i)(1) and (i)(2) delete "facsimile or" from the paragraphs. The change is necessary because facsimile is already included in the definition of electronic transmission in 28 TAC §102.4(m) of this title.

Amended §129.5(i)(3) adds "or delivered by electronic transmission if the injured employee agrees to receive the report by electronic transmission" This change increases efficiency within the workers' compensation system by allowing for Work Status Reports to be provided to the injured employee electronically via telemedicine services if the use of telemedicine services are proper according to licensing board standards and other division rules. By allowing electronic transmission to an injured employee, the injured employee will have access to prompt, high-quality medical care which is a division goal under Labor Code §402.021(b)(9). In implementing the division's goals, the Legislature requires the workers' compensation system to take maximum advantage of technological advances to provide the highest levels of service possible to system participants.

Amended §129.5(j) removes the word "a" and adds the "an." This non-substantive change is necessary to be grammatically accurate.

Amended §129.5(j) removes a comma after the word "carrier." This non-substantive change is necessary to be grammatically accurate.

Amended §129.5(j)(1) adds "(e)(1), (e)(2), and (g)" and deletes "(d)(1), (d)(2), and (f)" to correct the citations.

Amended §129.5(j)(2) adds "(e)(3)" and deletes "(d)(3)" to correct the citation.

Amended §129.5(k) adds "(g)" after §126.6 in two instances and deletes "(f)" in two instances to correct the citation.

Amended §129.5(k) removes a comma after the word "restrictions." This non-substantive change is necessary to be grammatically accurate.

Lastly, in amended §129.5(k), the division is removing "(on anyone's behalf)." This change is necessary to clarify that a required medical examination doctor is not able to conduct an examination on anyone's behalf.

Matt Zurek, Deputy Commissioner of Health Care Management, has determined that for each year of the first five years the amended sections are in effect, there will be no fiscal impact to state or local governments as a result of enforcing or administering the proposal. There will be no measurable effect on local employment or the local economy as a result of the proposed amendments. Any economic costs to those state and local governments that provide workers' compensation coverage are discussed below.

Mr. Zurek has also determined that, for each of the first five years amended §129.5 is in effect, the public benefits anticipated as a result of the proposed amendments include aligning §129.5 with the current statute and increasing efficiency within the workers' compensation system. Although physician assistants are allowed to treat injured employees in the workers' compensation system by delegated authority, previously they were not allowed to complete and file Work Status Reports. Allowing a licensed physician assistant who has been delegated authority by the treating doctor to complete, sign, and file Work Status Reports will increase efficiency in the workers' compensation system. Efficiency will also be increased by allowing for electronic transmission of the Work Status Report to the injured employee if the injured employee agrees to receive the report via electronic transmission. The ability for the injured employee to receive a Work Status Report electronically, upon agreement, will enable the use of telemedicine services if the use of telemedicine services are proper according to licensing board standards and other division rules, and will help ensure the injured employee receives prompt and high quality medical care.

Mr. Zurek anticipates that, for each of the first five years the amendments of §129.5 are in effect, there will be no costs to persons required to comply with the proposal. The proposed amendments do not change the circumstances under which Work Status Reports addressing an injured employee's ability to return to work may be completed and do not change the reimbursement amount for these reports. Instead, the amendments result in a cost savings to system participants by allowing for electronic transmission of required forms to injured employees if the injured employee agrees to receive the form via electronic transmission. If the injured employee agrees and electronic transmission is used, cost will be reduced by a printing cost of

$0.10 per page for each of the first five years. An additional cost savings may also apply for system participants who previously mailed a Work Status Report to the injured employee, which would equal $0.49 for each Work Status Report mailed.

Government Code §2001.0045 requires a state agency to offset any costs associated with a proposed rule by: (1) repealing a rule imposing a total cost that is equal to or greater than that of the proposed rule; or (2) amending a rule to decrease the total cost imposed by an amount that is equal to or greater than the cost of the proposed rule. As described above, the division has determined that the proposed amendments will not impose a cost on system participants.

Government Code §2006.002(c) provides that if a proposed rule may have an adverse economic effect on small businesses, micro-businesses, or rural communities, state agencies must prepare as part of the rulemaking process an economic impact statement that assesses the potential impact of the proposed rule and a regulatory flexibility analysis that considers alternative methods of achieving the purpose of the rule. Government Code §2006.001(2) defines "small business" as a legal entity, including a corporation, partnership, or sole proprietorship, that is formed for the purpose of making a profit, is independently owned and operated, and has fewer than 100 employees or less than $6 million in annual gross receipts. Government Code §2006.001(1) defines "micro business" similarly to "small business" but specifies that such a business may not have more than 20 employees. Government Code §2006.001(1-a) defines a "rural community" as a municipality with a population of less than 25,000.

In accordance with Government Code §2006.002(c), the division has determined that the proposed amendments to §129.5 will not have an adverse economic effect on small businesses, micro-businesses, or rural communities. Therefore, a regulatory flexibility analysis is not required.

Government Code §2001.0221 requires that a state agency prepare a government growth impact statement describing the effects that a proposed rule may have during the first five years that the rule would be in effect. The proposed amendments to §129.5 will not create or eliminate a government program and will not require the creation or elimination of existing employee positions. The proposed amendments will not require an increase or decrease in future legislative appropriations to the division and will not result in an increase or decrease in fees paid to the division. The proposal does not create a new regulation, expand an existing regulation, or limit an existing regulation. The number of individuals subject to the rule's applicability has increased by the proposal because licensed physician assistants authorized to complete Work Status Reports under Labor Code §408.025 will now be included in the rule. The legislative amendment of HB 2546 created the increase in applicability. The proposal has no impact on the state's economy.

The division 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. Therefore, this proposal does not constitute a taking or require a takings impact assessment under Government Code §2007.043.

If you would like to comment on this proposal, please submit your written comments by 5:00 p.m. CST on May 21, 2018. A request for a public hearing must be sent separately from your written comments. Send written comments or hearing requests by email to rulecomments@tdi.texas.gov or by mail to Maria Jimenez, Texas Department of Insurance, Division of Workers' Compensation, Office of the General Counsel, MS-4D, 7551 Metro Center Drive, Suite 100, Austin, Texas 78744-1645. If a hearing is held, written comments and public testimony presented at the hearing will be considered.

Amended §129.5 is proposed under the authority of Labor Code §401.024, *Transmission of Information;* Labor Code §402.00111, *Relationship Between Commissioner of Insurance and Commissioner of Workers' Compensation;* Labor Code §402.00116, *Chief* Executive; *Separation of Authority; Rulemaking;* Labor Code §402.021, *Goals; Legislative Intent; General Workers' Compensation Mission of Department;* Labor Code §402.061, *Adoption of Rules;* Labor Code §408.004, *Required Medical Examinations: Administrative Violations;* Labor Code §415.0035, *Additional Violations by Insurance Carrier or Health Care Provider;* and Labor Code §408.025, *Reports and Records Required from Health Care Providers.*

Labor Code §401.024 states that the commissioner may prescribe the form and manner for transmitting any authorized or required electronic transmission.

Labor Code §402.00111 states that the commissioner of workers' compensation shall exercise all executive authority, including rulemaking authority, under the Texas Workers' Compensation Act.

Labor Code §402.00116 establishes the commissioner of workers' compensation as the division's chief executive and administrative officer, and requires the commissioner to administer and enforce the Act.

Labor Code §402.021 states two basic goals of the Texas workers' compensation system are to ensure that each employee has access to prompt, high-quality medical care and receives services to facilitate the employee's return to employment as soon as it is safe and appropriate. In implementing these goals, the system must take maximum advantage of technological advances to provide the highest levels of service possible to system participants.

Labor Code §402.061 states that the commissioner shall adopt rules as necessary for the implementation and enforcement of the Texas Workers' Compensation Act.

Labor Code §408.004 states that the commissioner may require an employee to submit to a medical examination to resolve a question about the appropriateness of health care received.

Labor Code §408.025 states that a treating doctor may delegate to a physician assistant the authority to complete and sign a Work Status Report.

Labor Code §415.0035 states that a health care provider commits an administrative violation if that person fails or refuses to timely file required reports.

§129.5. Work Status Reports.

(a) As used in this section:

(1) the term "doctor" means either the treating doctor or a referral doctor, as defined by §180.22(c) and (e) of this title (relating to Health Care Provider Roles and Responsibilities [~~§133.4 of this title (relating to Consulting and Referral Doctors)~~];

(2) "substantial change in activity restrictions" means a change in activity restrictions caused by a change in the injured employee's medical condition which either prevents the injured em-

ployee from working under the previous restrictions or which allows the injured employee to work in an expanded and more strenuous capacity than the prior restrictions permitted (approaching the injured employee's normal job);

(3) "change in work status" means a change in the injured employee's work status from one of the three choices listed in subsection (a)(4) of this section to another of the choices in that subsection; and

(4) the term "work status" refers to whether the injured employee's [~~(employee)~~] medical condition:

(A) allows the injured employee to return to work without restrictions (which is not equivalent to maximum medical improvement);

(B) allows the injured employee to a return to work with restrictions; or

(C) prevents the injured employee from returning to work.

(b) A treating doctor may delegate authority to complete, sign, and file a Work Status Report to a licensed health care practitioner authorized to accept the delegation under Texas Labor Code §408.025. The delegating treating doctor is responsible for the acts of the health care practitioner under this subsection.

(c) [~~(b)~~] The doctor or delegated health care practitioner shall file a Work Status Report in the form and manner prescribed by the division [~~Commission~~].

(d) [~~(c)~~] The doctor or delegated health care practitioner shall be considered to have filed a complete Work Status Report if the report is filed in the form and manner prescribed by the division [~~Commission~~], signed, and contains at minimum:

(1) identification of the injured employee's work status;

(2) effective dates and estimated expiration dates of current work status and restrictions (an expected expiration date is not binding and may be adjusted in future Work Status Reports, as appropriate, based on the condition and progress of the injured employee);

(3) identification of any applicable activity restrictions;

(4) an explanation of how the injured employee's workers' compensation injury prevents the injured employee from returning to work (if the doctor believes that the injured employee is prevented from returning to work); and

(5) general information that identifies key information about the claim (as prescribed on the report).

(e) [~~(d)~~] The doctor or delegated health care practitioner shall file the Work Status Report:

(1) after the initial examination of the injured employee, regardless of the injured employee's work status;

(2) when the injured employee experiences a change in work status or a substantial change in activity restrictions; and

(3) on the schedule requested by the insurance carrier [~~(carrier)~~], its agent, or the employer requesting the report through its insurance carrier, which shall not [~~to~~] exceed one report every two weeks and which shall be based upon the doctor's or delegated health care practitioner's scheduled appointments with the injured employee.

(f) [~~(e)~~] The Work Status Report filed as required by subsection (e) [~~(d)~~] of this section shall be provided to the injured employee at the time of the examination by hand delivery or electronic transmission if the injured employee agrees to receive the report by electronic transmission, and shall be sent, not later than the end of the second working day after the date of examination, to the insurance carrier and the employer.

(g) [~~(f)~~] In addition to the requirements under subsection (e) [~~(d)~~], the treating doctor or delegated health care practitioner shall file the Work Status Report with the insurance carrier, employer, and injured employee within seven days of the day of receipt of:

(1) functional job descriptions from the employer listing available modified duty positions that the employer is able to offer the injured employee as provided by §129.6(a) of this title (relating to Bona Fide Offers of Employment); or

(2) a required medical examination doctor's Work Status Report that indicates that the injured employee can return to work with or without restrictions.

(h) [~~(g)~~] Filing the Work Status Report as required by subsection (g) [~~(f)~~] of this section does not require a new examination of the injured employee.

(i) [~~(h)~~] The doctor or delegated health care practitioner shall file the Work Status Report as follows:

(1) A report filed with the insurance carrier or its agent shall be filed by facsimile or electronic transmission;

(2) A report filed with the employer shall be filed by facsimile or electronic transmission if the doctor or delegated health care practitioner has been provided the employer's facsimile number or e-mail address; otherwise, the report shall be filed by personal delivery or mail; and

(3) A report filed with the injured employee shall be hand delivered to the injured employee or delivered by electronic transmission if the injured employee agrees to receive the report by electronic transmission, unless the report is being filed pursuant to subsection (g) [~~(f)~~] of this section and the doctor or delegated health care practitioner is not scheduled to see the injured employee by the due date to send the report. In this case, the doctor or delegated health care practitioner shall file the report with the injured employee by [~~facsimile or~~] electronic transmission if the doctor or delegated health care practitioner has been provided the injured employee's facsimile number or e-mail address; otherwise, the report shall be filed by mail.

(j) [~~(i)~~] Notwithstanding any other provision of this title, a doctor or delegated health care practitioner may bill for, and an insurance [~~a~~] carrier shall reimburse, filing a complete Work Status Report required under this section or for providing a subsequent copy of a Work Status Report which was previously filed because the insurance carrier, its agent, or the employer through its insurance carrier[~~,~~] asks for an extra copy. The amount of reimbursement shall be $15. A doctor or delegated health care practitioner shall not bill in excess of $15 and shall not bill or be entitled to reimbursement for a Work Status Report which is not reimbursable under this section. Doctors or delegated health care practitioners are not required to submit a copy of the report being billed for with the bill if the report was previously provided. Doctors or delegated health care practitioners billing for Work Status Reports as permitted by this section shall do so as follows:

(1) CPT code "99080" with modifier "73" shall be used when the doctor or delegated health care practitioner is billing for a report required under subsections (e)(1), (e)(2), and (g) [~~(d)(1), (d)(2), and (f)~~] of this section;

(2) CPT code "99080" with modifiers "73" and "RR" (for "requested report") shall be used when the doctor or delegated health care practitioner is billing for an additional report requested by or

through the insurance carrier under subsection (e)(3) [~~(d)(3)~~] of this section; and

(3) CPT code "99080" with modifiers "73" and "EC" (for "extra copy") shall be used when the doctor or delegated health care practitioner is billing for an extra copy of a previously filed report requested by or through the insurance carrier.

(k) [~~(j)~~] As provided in §126.6(g) [~~§126.6(f)~~] of this title (relating to Order for Required Medical Examinations), a doctor who conducts a required medical examination [~~(on anyone's behalf)~~] in which the doctor determines that the injured employee can return to work immediately with or without restrictions[~~,~~] shall file the Work Status Report required by this section, but shall do so in accordance with the requirements of §126.6(g) [~~§126.6(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.

Filed with the Office of the Secretary of State on April 9, 2018.

TRD-201801511
Nicholas Canaday III
General Counsel
Texas Department of Insurance, Division of Workers' Compensation
Earliest possible date of adoption: May 20, 2018
For further information, please call: (512) 804-4703

♦ ♦ ♦

TITLE 31. NATURAL RESOURCES AND CONSERVATION

PART 2. TEXAS PARKS AND WILDLIFE DEPARTMENT

CHAPTER 51. EXECUTIVE

SUBCHAPTER O. ADVISORY COMMITTEES

31 TAC §§51.601, 51.606 - 51.611, 51.631, 51.671, 51.672

The Texas Parks and Wildlife Department (the department) proposes amendments to §§51.601, 51.606 - 51.611, 51.631, 51.671, and 51.672, concerning advisory committees. The proposed amendments would establish an expiration date of July 1, 2022, for the following existing advisory committees: White-tailed Deer Advisory Committee (WTDAC), Migratory Game Bird Advisory Committee (MGBAC), Upland Game Bird Advisory Committee (UGBAC), Private Lands Advisory Committee (PLAC), Bighorn Sheep Advisory Committee (BSAC), Wildlife Diversity Advisory Committee (WDAC), Freshwater Fisheries Advisory Committee (FFAC), State Parks Advisory Committee (SPAC), and Coastal Resources Advisory Committee (CRAC). The proposed amendments also realign the terms of current advisory committee members to facilitate the beginning of new terms on July 1, 2018.

Unless extended, these advisory committees will expire by rule on October 1, 2018. The department believes that these advisory committees continue to perform a valuable service for the department. Therefore, the department wishes to continue these advisory committees.

Parks and Wildlife Code, §11.0162, authorizes the Chairman of the Texas Parks and Wildlife Commission (the Commission) to "appoint committees to advise the commission on issues under its jurisdiction." Government Code, Chapter 2110, requires that rules be adopted regarding each state agency advisory committee. Unless otherwise provided by specific statute, the rules must (1) state the purpose of the committee; (2) describe the manner in which the committee will report to the agency; and (3) establish the date on which the committee will automatically be abolished, unless the advisory committee has a specific duration established by statute.

Ann Bright, Chief Operating Officer, has determined that for each of the first five years the amendments are in effect, there will be no fiscal implications to state or local government as a result of enforcing or administering the rules.

Ms. Bright also has determined that for each of the first five years the rules as proposed are in effect. the public benefit anticipated as a result of enforcing or administering the rules as proposed will be to ensure proper management and effective use of department advisory committees.

There will be no adverse economic effect on persons required to comply with the amendments as proposed.

The department has determined that small or micro-businesses and rural communities will not be affected by the proposed rules. Accordingly, the department has not prepared a regulatory flexibility analysis under Government Code, Chapter 2006.

The department has not filed a local impact statement with the Texas Workforce Commission as required by the Administrative Procedures Act, §2001.022, as the agency has determined that the rules as proposed will not impact local economies.

The department has determined that Government Code, §2001.0225 (Regulatory Analysis of Major Environmental Rules), does not apply to the proposed rules.

The department has determined that there will not be a taking of private real property, as defined by Government Code, Chapter 2007, as a result of the proposed rules.

The department has determined that because the rule as proposed does not impose a cost on regulated persons, it is not necessary to repeal or amend any existing rule.

In compliance with the requirements of Government Code, §2001.0241, the department has prepared the following Government Growth Impact Statement (GGIS). The rule as proposed, if adopted, will neither create nor eliminate a government program; not result in an increase or decrease in the number of full-time equivalent employee needs; not result in a need for additional General Revenue funding; not affect the amount of any fee; create a new regulation; not expand, limit, or repeal an existing regulation; neither increase nor decrease the number of individuals subject to regulation; and neither positively nor negatively affect the state's economy.

Comments on the proposed rules may be submitted to Ann Bright, Texas Parks and Wildlife Department, 4200 Smith School Road, Austin, Texas 78744; (512) 389-8558; or ann.bright@tpwd.state.tx.us.

The amendments are proposed under the authority of Parks and Wildlife Code, §11.0162 and Government Code, §2110.005 and §2110.008.

The proposed amendments affect Parks and Wildlife Code, §11.0162.

§51.601. General Requirements

(a) - (e) (No change.)

(f) Term of members. Unless expressly provided in this subchapter or other law, the term of advisory committee members shall be as follows:

(1) The term of each member of an agency advisory committee who was appointed prior to January 1, 2018 will expire on July 1, 2018 [~~serve a term of four years~~].

(2) The term of each member of an agency advisory committee member appointed on or after January 1, 2018 will expire July 1, 2022. [~~The terms may be staggered. Members' terms will expire at the end of four years or upon the termination of the advisory committee, whichever is earlier. Members may be reappointed. Members serve at the will of the chairman and may be removed at any time by the chairman.~~]

(g) - (m) (No change.)

§51.606. White-tailed Deer Advisory Committee (WTDAC).

(a) - (c) (No change.)

(d) The WTDAC shall expire on July 1, 2022 [~~October 1, 2018~~].

§51.607. Migratory Game Bird Advisory Committee (MGBAC).

(a) - (c) (No change.)

(d) The MGBAC shall expire on July 1, 2022 [~~October 1, 2018~~].

§51.608. Upland Game Bird Advisory Committee (UGBAC)

(a) - (c) (No change.)

(d) The UGBAC shall expire on July 1, 2022 [~~October 1, 2018~~].

§51.609. Private Lands Advisory Committee (PLAC).

(a) - (c) (No change.)

(d) The PLAC shall expire on July 1, 2022 [~~October 1, 2018~~].

§51.610. Bighorn Sheep Advisory Committee (BSAC).

(a) - (c) (No change.)

(d) The BSAC shall expire on July 1, 2022 [~~October 1, 2018~~].

§51.611. Wildlife Diversity Advisory Committee (WDAC).

(a) - (c) (No change.)

(d) The WDAC shall expire on July 1, 2022 [~~October 1, 2018~~].

§51.631. Freshwater Fisheries Advisory Committee (FFAC).

(a) - (c) (No change.)

(d) The FFAC shall expire on July 1, 2022 [~~October 1, 2018~~].

§51.671. State Parks Advisory Committee (SPAC).

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

(c) The SPAC shall expire on July 1, 2022 [~~October 1, 2018~~].

§51.672. Coastal Resources Advisory Committee (CRAC)

(a) - (c) (No change.)

(d) The CRAC shall expire on July 1, 2022 [~~October 1, 2018~~].

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

Filed with the Office of the Secretary of State on April 6, 2018.

TRD-201801503
Todd S. George
Acting General Counsel
Texas Parks and Wildlife Department
Earliest possible date of adoption: May 20, 2018
For further information, please call: (512) 389-4775

♦ ♦ ♦

CHAPTER 57. FISHERIES

SUBCHAPTER I. CONSISTENCY WITH FEDERAL REGULATIONS IN THE EXCLUSIVE ECONOMIC ZONE

31 TAC §57.801

The Texas Parks and Wildlife Department proposes an amendment to §57.801, concerning Powers of the Executive Director. The proposed amendment would authorize the executive director of the department to implement fishery management plans approved by the U.S. Secretary of Commerce, including but not limited to Exempted Fishing Permits (EFPs), when such action is deemed to be in the best interest of the State of Texas.

Despite increases in red snapper stocks to levels not seen before (SouthEast Data, Assessment, and Review 2013), the recreational season established by federal regulation for the red snapper fishery in Texas has steadily dwindled in length. In 2010 the federal recreational red snapper season was 77 days, but has since decreased precipitously, to the point that in 2017 it would have been just three days (Table 1). The proposed three-day recreational season resulted in controversy involving recreational anglers, communities, and elected officials at the local, state, and federal levels in all states bordering the Gulf of Mexico, prompting the U.S. Secretary of Commerce to initiate a process in which federal regulators worked with the affected states (Texas, Louisiana, Mississippi, Alabama, and Florida) to develop an eventual season of 42 days.

Table 1. Number of days allocated by National Marine Fisheries Service for recreational red snapper fishing in federal waters of the Gulf of Mexico, 2010 - 2017.

2010 - 77

2011 - 48

2012 - 46

2013 - 42

2014 - 9

2015 - 10

2016 - 11

2017 - 42

In September of 2017 the National Marine Fisheries Service sent the Gulf States marine fisheries directors a letter inviting them to apply for an Exempted Fishing Permit (EFP) that would authorize the individual states to take the lead on red snapper management activities in the Gulf of Mexico. This letter was prompted by Senate Report 114-239, which directed the National Oceanic and Atmospheric Administration (NOAA) to develop and support

a fishery management pilot program that would allow Gulf States to take the lead in reef fish management activities, specifically for red snapper. EFP's are issued for conducting research or other fishing activities that would otherwise be prohibited by regulations.

In response to this request the department submitted an EFP application requesting exemption from the federal red snapper season to test data collection and quota monitoring methodologies during 2018 and 2019. If approved, fishing under the EFP in Texas would begin this year for all sectors of the recreational red snapper fishery (private (approximately 24,000 anglers), charter-for-hire (212 federally-permitted charter boats), and headboat anglers (16 federally-permitted headboats)). Based on historical landings data, the department has requested 16% of the gulf-wide annual recreational allowable catch limit (ACL) as the quota for the Texas catch. In 2017 the gulf-wide ACL for the recreational fishery was just over 6.6 million pounds. If the gulf-wide ACL for 2018 and 2019 remained at this level, Texas' quota would be approximately 1.1 million pounds of red snapper annually. By comparison and for perspective, Texas anglers landed 500,000 pounds of red snapper in 2016.

Under the terms of the EFP, landings of red snapper would be monitored weekly from data collected through the Texas Marine Sport Harvest Monitoring Program, validated self-reported data from a smart-phone application (iSnapper), and data from the NOAA Headboat Survey. All red snapper landed in Texas will count against Texas' quota, and the fishery in both state and federal waters must be closed when the combined estimated recreational landings are projected to meet the quota. In order to avoid exceeding the quota, the department has determined that there must be a regulatory mechanism at the state level to allow the department to quickly close the fishery in state and federal waters when the quota is reached. Therefore, the proposed amendment would allow the executive director to take the necessary action to implement management plans ultimately approved by the U.S. Secretary of Commerce (including EFP's) in the Exclusive Economic Zone (federal waters).

Literature Cited

SEDAR 31. 2013. Stock assessment report Gulf of Mexico red snapper. Southeast Data, Assessment, and Review. North Charleston, South Carolina. http://www.sefsc.noaa.gov/sedar/.

Lance Robinson, Deputy Director of the Coastal Fisheries Division, has determined that for each of the first five years that the rule as proposed is in effect, there will be no fiscal implications to state or local governments as a result of enforcing or administering the rule.

Mr. Robinson has also determined that for each of the first five years the rule as proposed is in effect, the public benefit anticipated as a result of enforcing or administering the rule as proposed will be the potential for increased angling opportunity through longer seasons for recreational anglers to participate in the red snapper fishery in both state and federal waters of the Gulf of Mexico.

There will be no adverse economic effect on persons required to comply with the rule as proposed.

Under the provisions of Government Code, Chapter 2006, a state agency must prepare an economic impact statement and a regulatory flexibility analysis for a rule that may have an adverse economic effect on small businesses and micro-businesses. As required by Government Code, §2006.002(g), in April 2008, the Office of the Attorney General issued guidelines to assist state agencies in determining a proposed rule's potential adverse economic impact on small businesses. These guidelines state that "[g]enerally, there is no need to examine the indirect effects of a proposed rule on entities outside of an agency's regulatory jurisdiction." The guidelines state that an agency need only consider a proposed rule's "direct adverse economic impacts" to small businesses and micro-businesses to determine if any further analysis is required. The guidelines also list examples of the types of costs that may result in a "direct economic impact." Such costs may include costs associated with additional record-keeping or reporting requirements; new taxes or fees; lost sales or profits; changes in market competition; or the need to purchase or modify equipment or services.

The department has determined that the rule as proposed will not adversely affect small businesses, micro-businesses, or rural communities, and if anything will result in positive economic impacts for all three categories of entities. Accordingly the department has not prepared the economic impact statement or regulatory flexibility analysis described in Government Code, Chapter 2006.

The department has not drafted a local employment impact statement under the Administrative Procedures Act, §2001.022, as the agency has determined that the rule as proposed will not impact local economies.

The department has determined that Government Code, §2001.0225 (Regulatory Analysis of Major Environmental Rules), does not apply to the proposed rule.

The department has determined that there will not be a taking of private real property, as defined by Government Code, Chapter 2007, as a result of the proposed rule.

The department has determined that because the rule as proposed does not impose a cost on regulated persons, it is not necessary to repeal or amend any existing rule.

In compliance with the requirements of Government Code, §2001.0221, the department has prepared the following Government Growth Impact Statement (GGIS). The rule as proposed, if adopted, will neither create nor eliminate a government program, not result in an increase or decrease in the number of full-time equivalent employee needs, not result in a need for additional General Revenue funding, not affect the amount of any fee, not create a new regulation, neither increase nor decrease the number of individuals subject to regulation, expand, limit, or repeal an existing regulation (by authorizing the executive director to implement federal fisheries management plans), and not significantly affect the state's economy positively or adversely.

Comments on the proposed rule may be submitted to Dr. Tiffany Hopper, Texas Parks and Wildlife Department, 4200 Smith School Road, Austin, Texas 78744; (512) 389-4650 (e-mail: tiffany.hopper@tpwd.texas.gov).

The amendment is proposed under authority of Parks and Wildlife Code, §79.002, which authorizes the commission may delegate to the director the duties, responsibilities, and authority provided by this chapter for taking immediate action as necessary to modify state coastal fisheries regulations in order to provide for consistency with federal regulations in the exclusive economic zone.

The proposed amendment affects Parks and Wildlife Code, Chapter 79.

§57.801. Powers of the Executive Director.

(a) The executive director shall have the duties, responsibilities, and authority to take action as necessary, including but not limited to emergency rulemaking, to modify state coastal fisheries regulations to conform with federal regulations in the Exclusive Economic Zone and implement fishery management plans ultimately approved by the Secretary of Commerce, including but not limited to Exempted Fishing Permits (EFPs), when such action is deemed to be in the best interest of the State of Texas.

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

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

Filed with the Office of the Secretary of State on April 6, 2018.

TRD-201801508
Todd S. George
Acting General Counsel
Texas Parks and Wildlife Department
Earliest possible date of adoption: May 20, 2018
For further information, please call: (512) 389-4775

♦ ♦ ♦

CHAPTER 58. OYSTERS, SHRIMP, AND FINFISH

SUBCHAPTER A. STATEWIDE OYSTER FISHERY PROCLAMATION

31 TAC §58.70

The Texas Parks and Wildlife Department proposes new §58.70, concerning the Oyster License Buyback Program. The proposed new rule would create a buyback program for commercial oyster licenses by prescribing the application requirements and bidding procedures for prospective license offerors, setting forth the criteria to be used by the department in ranking bids from offerors and the selection of licenses to be purchased (if any), providing for notification of applicants of acceptance or rejection of bids, and authorizing the delegation of license buyback authority to third parties.

The 79th Legislature (2005) enacted Senate Bill 272, which directed the department to implement a license moratorium to promote efficiency and economic stability in the oyster industry. In the period between the passage of SB 272 and its effective date, commercial oyster license sales increased by 127% in comparison to the previous five-year average, which the department attributes to speculative behavior by persons anticipating a future opportunity to sell licenses back to the department at a profit. In 2017, the 85th Texas Legislature enacted House Bill 51, which, among other things, required the department to implement a commercial oyster license buyback program. Accordingly, the proposed new rule would create a mechanism for the purchase and retirement of commercial oyster licenses. Although some attrition in the number of licenses has occurred over the years and it appears that a significant number of licenses have never actually been used, the number of licenses remaining constitutes a risk to the recovery and sustainability of oyster resources in Texas, given the current state of the fishery and the resultant pressure on oyster resources.

Proposed new §58.70(a) would provide for the delegation of authority to the executive director of the department to administer the oyster license buyback program. Although such authority is implicit in the provisions of H.B. 51 that direct the department to implement and administer a license buyback program, the department has determined that the rule should be patterned after existing rules governing the license buyback program for shrimp (31 TAC §58.130) in order to avoid confusion.

Proposed new §58.70(b) would provide for the establishment of application periods based on the availability of funds, during which bids would be accepted by the department. The department anticipates that funds for license buyback will not be continuously available; therefore, the department believes it is efficient to conduct buyback activities during specific periods when funds are available.

Proposed new §58.70(c) would require an applicant to be the owner of a license offered for buyback and to submit a department-supplied application form by the stated deadline. The proposed new subsection would also prescribe the contents of the application form. The application form would require the applicant's full name, current residence address and social security number, documentation attesting that applicant is the sole owner of the vessel and holds the sole rights and privileges to the license (or that all members of a partnership or corporation have agreed to the application and the bid contained in the application), the federal vessel documentation number or state registration number for the vessel, a copy of the applicant's current commercial oyster boat license, and the applicant's bid offer, in U.S. dollars. The department believes that it is necessary and prudent to verify that a person seeking to sell a license is legally entitled to do so, which necessitates that the department verify the person's identity, legal residence, and licensure status, as well as vessel documentation.

Proposed new §58.70(d) would set forth the criteria that could be used by the department in evaluating applications and selecting licenses for buyback, such as vessel length, the funds available to the department; the number of commercial oyster boat licenses in the fishery issued in the license year of the specific bid offer application period, bid offers from previous application periods, established open market prices for licenses, and other relevant factors. The department has determined that since a variety of factors are in play at any given time, the department should have the latitude to consider all of them in the process of determining whether a license should be repurchased and at what price.

Proposed new §58.70(e) would establish the procedure used by the department to prioritize bid offers. The proposed new subsection would provide that applications be ranked from highest to lowest using the criteria in proposed new subsection (d), that licenses be purchased in order from highest to lowest evaluations, and that in the case of bid offers that are ranked equally, priority will be given to the larger vessel and after that, in alphabetical order of the applicant's last name. The department has determined that in cases where two bid offers have an equal ranking, the larger vessel should take precedence since the larger the vessel, the greater the harvest and storage capacity and, concomitantly, the greater the positive impact on oyster resources realized by the purchase of that license. Beyond that, there are no additional useful criteria and an alphabetical order is necessary simply to separate bid offers that are so similar as to be indistinguishable.

Proposed new §58.70(f) would require the department to notify applicants within 45 days of receipt of an application of the department's decisions to either accept or reject the applicant's bid offer, and would give accepted applicants 15 days from the date of notification to accept or reject the department's offer. The department considers that because the process set forth by the proposed rule takes place within a specified period, the timeframe of the decision to accept or refuse the department's decision cannot be open-ended, but must be definitive as of a date certain.

Proposed new §58.70(g) would provide for the delegation of purchasing authority to qualified agents. The department has determined that circumstances in some cases might make it more convenient and efficient for a qualified agent to analyze and accept or reject bids according to the provisions of the rule.

Lance Robinson, Deputy Director of the Coastal Fisheries Division, has determined that for each of the first five years that the rule as proposed is in effect, there will be no fiscal implications to state or local governments as a result of enforcing or administering the rule, as the administration of the oyster license buyback program will be performed by existing staff as part of current job duties.

Mr. Robinson also has determined that for each of the first five years the rule as proposed is in effect, the public benefit anticipated as a result of enforcing or administering the rule as proposed will be the long-term sustainable management of the oyster resource and increased social and economic benefits for the oyster fishery in Texas. The program should stabilize effort in the fishery through time, allowing for the long-term recovery and protection of the oyster fishery.

There will be no adverse economic effect on persons required to comply with the rule as proposed, as participation in the license buyback program is not mandatory, but at the discretion of the license holder.

Under the provisions of Government Code, Chapter 2006, a state agency must prepare an economic impact statement and a regulatory flexibility analysis for a rule that may have an adverse economic effect on small businesses, micro-businesses, or rural communities. As required by Government Code, §2006.002(g), in April 2008, the Office of the Attorney General issued guidelines to assist state agencies in determining a proposed rule's potential adverse economic impact on small businesses. These guidelines state that "generally, there is no need to examine the indirect effects of a proposed rule on entities outside of an agency's regulatory jurisdiction." The guidelines state that an agency need only consider a proposed rule's "direct adverse economic impacts" to small businesses and micro-businesses to determine if any further analysis is required. The guidelines also list examples of the types of costs that may result in a "direct economic impact." Such costs may include costs associated with additional recordkeeping or reporting requirements; new taxes or fees; lost sales or profits; changes in market competition; or the need to purchase or modify equipment or services.

The department has determined that the rule as proposed will not adversely affect small businesses, micro-businesses, or rural communities, as it compels no person, small business or microbusiness to comply with any rule other than those set forth for participation in a voluntary program under which the department may repurchase oyster licenses and for those same reasons exerts no direct effect on any rural community. Accordingly the department has not prepared the economic impact statement or regulatory flexibility analysis described in Government Code, Chapter 2006.

The department has not drafted a local employment impact statement under the Administrative Procedures Act, §2001.022, as the agency has determined that the rule as proposed will not impact local economies.

The department has determined that Government Code, §2001.0225 (Regulatory Analysis of Major Environmental Rules), does not apply to the proposed rule.

The department has determined that there will not be a taking of private real property, as defined by Government Code, Chapter 2007, as a result of the proposed rule.

The department has determined that because the rule as proposed does not impose a cost on regulated persons and is necessary to implement legislation, it is not necessary to repeal or amend any existing rule.

In compliance with the requirements of Government Code, §2001.0221, the department has prepared the following Government Growth Impact Statement (GGIS). The rule as proposed, if adopted, will, not eliminate a government program, but will create an oyster license buyback program; not result in an increase or decrease in the number of full-time equivalent employee needs; not result in a need for additional General Revenue funding; not affect the amount of any fee; create a new regulation (to administer the oyster license buyback program); decrease the number of individuals subject to regulation through time; not expand, limit, or repeal an existing regulation; and not significantly affect the state's economy positively or adversely.

Comments on the proposed rule may be submitted to Dr. Tiffany Hopper, Texas Parks and Wildlife Department, 4200 Smith School Road, Austin, Texas 78744; (512) 389-4650 (e-mail: *tiffany.hopper@tpwd.texas.gov)*.

The new rule is proposed under authority of Parks and Wildlife Code, §76.405, which authorizes the commission to implement a license buyback program for commercial oyster licenses as part of the oyster license moratorium program required by Parks and Wildlife Code, Chapter 76, Subchapter F and to establish criteria by rule for selecting oyster licenses to be purchased; and §76.404, which authorizes the commission to adopt any rules necessary for the administration of the program established under Parks and Wildlife Code, Chapter 76, Subchapter F.

The proposed new rule affects Parks and Wildlife Code, Chapter 76.

§58.70. Oyster License Buyback Program.

(a) Delegation of Authority. The commission delegates power and authority to the executive director to administer the Oyster License Buyback Program.

(b) License Buyback Bid Application Period.

(1) The department will open one or more license buyback bid offer application periods (hereinafter referred to as an application period) per license year if available funds permit.

(2) The department shall establish during each application period a deadline for receipt of all applications.

(c) License Buyback Application Requirements.

(1) The department shall consider all applications to the Oyster License Buyback Program provided the applicants meet the following requirements:

(A) A completed License Buyback Application form furnished by the department has been submitted to the department by the application deadline;

(B) The applicant is the owner of the license submitted for buyback; and

(C) The applicant has submitted to the department copies of all information as required in this subsection.

(2) A completed License Buyback Application shall contain:

(A) full name of the applicant;

(B) current address of applicant's residence;

(C) social security number of the applicant;

(D) a copy of legal documentation that:

(i) documents applicant as the sole owner of the vessel who holds the sole rights and privileges to the license; or

(ii) documents that all members of a partnership or corporation are in agreement to apply to the license buyback program and the submitted bid offer for license buyback;

(E) USCG vessel documentation number or State of Texas registration number;

(F) a copy of current commercial oyster boat license; and

(G) the applicant's bid offer, in U.S. dollars.

(3) Department records will be used to verify all information supplied by the applicant or pertaining to the applicant's history in the oyster fishery or will be used in cases where the applicant has not provided adequate information for proper consideration of the application.

(d) Oyster License Buyback Criteria.

(1) The department may establish criteria each license year which will be used to determine qualifications for license buybacks.

(2) The department may consider:

(A) length of vessel;

(B) amount of funds accumulated in the Oyster License Buyback Account and the Commercial License Buyback Subaccount;

(C) number of commercial oyster boat licenses in the fishery issued in the license year of the specific bid offer application period;

(D) bid offers from previous application periods;

(E) established open market prices for licenses; and

(F) other relevant factors.

(e) Application Ranking Procedures.

(1) Ranking values will be assigned to all applications based on the criteria set forth in subsection (d) of this section.

(2) The department will purchase licenses beginning with the highest ranking to the lowest.

(3) Equally ranked bid offers:

(A) If bid offers are equally ranked and both vessels are not the same length, the department will rank the larger vessel ahead of the smaller;

(B) If bid offers are equally ranked, the department will rank according to the ascending alphabetical order of the applicant's last name.

(f) Notification of Acceptance or Rejection of Application.

(1) Department will notify each applicant in writing within 45 days of receipt of application regarding acceptance or rejection of application bid offer.

(2) Applicants whose bids are accepted must then notify the department of their intent to accept or reject the offer from the department within 15 days of the postmark of the notification letter sent by the department.

(g) Delegation of purchasing authority.

(1) The department may designate other qualified agents to purchase licenses on behalf of the department provided all purchased licenses are surrendered to the department and retired.

(2) The designated qualified agents may utilize the Oyster License Buyback Criteria established in subsection (d) of this section to purchase licenses.

(h) The department shall set aside 20 percent of the fees from licenses issued under this subchapter for the purpose of buying back commercial oyster boat licenses from willing license holders.

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 6, 2018.

TRD-201801509
Todd S. George
Acting General Counsel
Texas Parks and Wildlife Department
Earliest possible date of adoption: May 20, 2018
For further information, please call: (512) 389-4775

♦ ♦ ♦

SUBCHAPTER B. STATEWIDE SHRIMP FISHERY PROCLAMATION

31 TAC §58.161

The Texas Parks and Wildlife Department proposes an amendment to §58.161, concerning Shrimping in Outside Waters. The proposed amendment provides that a person who is required to obtain a shrimp unloading license in order to unload (or allow to be unloaded) shrimp or other aquatic products at a port or point in Texas must stow all shrimp trawls and doors while in Texas waters. The amendment is necessary to comply with the provisions of House Bill 1260, which was enacted by the 85th Texas Legislature.

House Bill 1260 amended the Parks and Wildlife Code by adding new §77.034, which provides that except for holders of a Texas gulf shrimp boat license, no person may unload or allow to be unloaded at a port or point in this state shrimp or other aquatic products caught or taken from the outside water or from salt water outside the state without having been previously unloaded in some other state or foreign country, unless the person has obtained a commercial gulf shrimp unloading license and a federal commercial vessel permit for gulf shrimp from the National Oceanic and Atmospheric Administration. The bill also requires

the commission to adopt rules for the requirements of trawl gear storage for vessels required to obtain a shrimp unloading license.

To facilitate enforcement of commercial shrimp licensing rules and to protect marine resources from unlawful exploitation, the proposed amendment would require any shrimp boat required to obtain a shrimp unloading license to stow all trawls and doors within the confines of the hull while in Texas waters.

Brandi Reeder, Fisheries Law Administrator, has determined that for each of the first five years that the rule as proposed is in effect, there will be no fiscal implications to state and local governments as a result of enforcing or administering the rule as proposed, as department personnel currently allocated to the administration and enforcement of shrimping regulations will administer and enforce the rule as part of their current job duties and resources.

Ms. Reeder also has determined that for each of the first five years the new rule as proposed is in effect, the public benefit anticipated as a result of enforcing or administering the rule as proposed will be the management, protection, and enhancement of the shrimp resources of the state, thus ensuring the public of continued recreational and commercial access to shrimp and the continued beneficial economic impacts of the shrimp fishery to Texas.

There will be no adverse economic effect on persons required to comply with the rule as proposed.

Under the provisions of Government Code, Chapter 2006, a state agency must prepare an economic impact statement and a regulatory flexibility analysis for a rule that may have an adverse economic effect on small businesses and micro-businesses. As required by Government Code, §2006.002(g), in April 2008, the Office of the Attorney General issued guidelines to assist state agencies in determining a proposed rule's potential adverse economic impact on small businesses. These guidelines state that "[g]enerally, there is no need to examine the indirect effects of a proposed rule on entities outside of an agency's regulatory jurisdiction." The guidelines state that an agency need only consider a proposed rule's "direct adverse economic impacts" to small businesses and micro-businesses to determine if any further analysis is required. The guidelines also list examples of the types of costs that may result in a "direct economic impact." Such costs may include costs associated with additional record-keeping or reporting requirements; new taxes or fees; lost sales or profits; changes in market competition; or the need to purchase or modify equipment or services.

The department has determined that the rule as proposed will not affect small businesses, micro-businesses, or rural communities, since the rule requires certain vessels to house shrimping gear while transiting Texas state waters, where such vessels are not permitted to harvest shrimp. Therefore, the department has not prepared the economic impact statement or regulatory flexibility analysis described in Government Code, Chapter 2006.

The department has not drafted a local employment impact statement under the Administrative Procedures Act, §2001.022, as the agency has determined that the rule as proposed will not impact local economies.

The department has determined that Government Code, §2001.0225 (Regulatory Analysis of Major Environmental Rules), does not apply to the proposed rule.

The department has determined that there will not be a taking of private real property, as defined by Government Code, Chapter 2007, as a result of the proposed rule.

The department has determined that because the rule as proposed does not impose a cost on regulated persons, it is not necessary to repeal or amend any existing rule.

In compliance with the requirements of Government Code, §2001.0221, the department has prepared the following Government Growth Impact Statement (GGIS). The rule as proposed, if adopted, will neither create nor eliminate a government program, not result in an increase or decrease in the number of full-time equivalent employee needs, not result in a need for additional General Revenue funding, not affect the amount of any fee, create a new regulation,

not expand, limit, or repeal an existing regulation, neither increase nor decrease the number of individuals subject to regulation, and have an insignificant positive impact on the state's economy.

Comments on the proposed rule may be submitted to Brandi Reeder, Fisheries Law Administrator, Texas Parks and Wildlife Department, 4200 Smith School Road, Austin, Texas 78744; (512) 389-4853; email: brandi.reeder@tpwd.texas.gov via the department website at *www.tpwd.texas.gov.*

The amendment is proposed under Parks and Wildlife Code §77.034, which requires the commission to adopt rules for the requirements of trawl gear storage for a vessel who holds a commercial gulf shrimp unloading license while that vessel is making a nonstop progression through outside waters to a place of unloading, and Parks and Wildlife Code §77.007, which authorizes the commission to regulate the catching, possession, purchase, and sale of shrimp.

The proposed amendment affects Parks and Wildlife Code, Chapter 77.

§58.161. Shrimping in Outside Waters.

(a) - (d) (No change.)

(e) A vessel that is required under the provisions of Parks and Wildlife Code, §77.034, to obtain a commercial gulf unloading license shall, at all times the vessel is in state waters, store all trawls and trawl doors within the confines of the hull of the vessel. For the purposes of this subsection, "within the confines of the hull" means within a line perpendicular to and projected upwards from the gunwales of the vessel.

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 6, 2018.

TRD-201801507
Todd S. George
Acting General Counsel
Texas Parks and Wildlife Department
Earliest possible date of adoption: May 20, 2018
For further information, please call: (512) 389-4775

♦ ♦ ♦

CHAPTER 65. WILDLIFE

SUBCHAPTER B. DISEASE DETECTION AND RESPONSE

DIVISION 2. CHRONIC WASTING DISEASE - MOVEMENT OF DEER

31 TAC §§65.90, 65.91, 65.95, 65.97

The Texas Parks and Wildlife Department proposes amendments to §§65.90, 65.91, 65.95, and 65.97, concerning Chronic Wasting Disease-Movement of Deer. The proposed amendments would require facilities required to be registered with the department to receive white-tailed or mule deer under department-issued permits to be described by precise geospatial information regarding the locations where such deer are received.

Chronic wasting disease (CWD) is a fatal neurodegenerative disorder that affects some cervid species, including white-tailed deer, mule deer, elk, red deer, sika, and their hybrids (susceptible species). It is classified as a TSE (transmissible spongiform encephalopathy), a family of diseases that includes scrapie (found in sheep), bovine spongiform encephalopathy (BSE, found in cattle), and variant Creutzfeldt-Jakob Disease (vCJD) in humans.

Much remains unknown about CWD. The peculiarities of its transmission (how it is passed from animal to animal), infection rate (the frequency of occurrence through time or other comparative standard), incubation period (the time from exposure to clinical manifestation), and potential for transmission to other species are still being investigated. There is no scientific evidence to indicate that CWD is transmissible to humans. What is known is that CWD is invariably fatal to cervids, and is transmitted both directly (through deer-to-deer contact) and indirectly (through environmental contamination). Moreover, a high prevalence of the disease correlates with deer population decline in at least one free-ranging population, and human dimensions research suggests that hunters will avoid areas of high CWD prevalence. Additionally, the apparent persistence of CWD in contaminated environments represents a significant obstacle to eradication of CWD from either farmed or free-ranging cervid populations.

CWD has been discovered in multiple locations in Texas, in both captive and free-ranging populations of native deer, which the department believes constitutes an existential threat to those resources, as well as the economies dependent upon them. In response, the department has engaged in numerous rulemakings in recent years to protect free-ranging and captive cervid populations from the spread of CWD. A crucial component of that effort is the monitoring of free-ranging deer that are trapped and translocated under department-issued permits and captive-bred deer that are introduced to, transferred among, and released from captive herds under department-issued permits. Such activities occur in virtually every area of the state. Because of the sheer geographic scale involved, the accuracy of geographical information regarding the locations where deer have been transferred by humans is one of the most important components of efficacious disease management efforts. Knowing exactly where individual animals are and have been allows epidemiological investigators to quickly and accurately determine the source and extent of pathways for disease propagation and allows responders to focus resources efficiently and effectively.

The department is concerned that current rules governing the movement of live deer under various department-issued programs do not impose a consistent standard for identifying the locations where such deer are trapped, possessed, or transferred, which has the potential to complicate or even confound the department's CWD management efforts. The department has determined that the contents of applications and registrations relating to facility location and infrastructure should be specified by rule in order to avoid misunderstandings, confusion, or the implication that the information required in an application is voluntary rather than mandatory or that the accuracy of the information is open to interpretation by applicant. To that end, the department has determined that it is prudent to mandate all required facility registrations (deer breeding facilities (and associated transfer destinations), deer management permit facilities, sites associated with trap, transport, and transplant permits, and trap, transport, and process permits) to include a georeferenced map delineating the exact boundaries of each facility. This would allow the department to more quickly and effectively respond to CWD detections, promote efficiency in administrative processes, enhance enforcement of regulations, and prevent attempts to circumvent CWD testing requirements.

The proposed amendment to §65.90, concerning Definitions, would alter the definition of "facility" to include locations affected by permits for the trapping, transporting, and processing of game animals (TTP).

The proposed amendment to §65.91, concerning General Provisions, would provide that no person shall introduce into or remove deer from or allow or authorize deer to be introduced into or removed from any facility unless a georeferenced map (a map image incorporating a system of geographic ground coordinates, such as latitude/longitude or Universal Transverse Mercator (UTM) coordinates) showing the exact boundaries of the facility has been submitted to the department prior to any such introduction or removal.

The proposed amendment to §65.95, concerning Movement of Breeder Deer, would eliminate a reference to subsection (e) of §65.610 in subsection (a), which is necessary to prevent possible confusion with other provisions governing movement of deer under transfer permits.

The proposed amendment to 65.97, concerning Testing and Movement of Deer Pursuant to Triple T or TTP Permit, would remove subsection (a)(2), which would no longer be necessary if the proposed amendments discussed earlier in this preamble are adopted.

Mitch Lockwood, Big Game Program Leader, has determined that for each of the first five years that the rules as proposed are in effect, there will be no fiscal implications to state or local governments as a result of administering or enforcing the proposed amendments.

Mr. Lockwood also has determined that for each of the first five years that the rules as proposed are in effect the public benefit anticipated as a result of enforcing or administering the proposed rules will be will be the increase and enhanced ability of the department to respond quickly and effectively to CWD discoveries, thus ensuring the public of continued enjoyment of the resource and also ensuring the continued beneficial economic impacts of hunting in Texas.

There will be no adverse economic effect on persons required to comply with the rules as proposed.

Under the provisions of Government Code, Chapter 2006, a state agency must prepare an economic impact statement and a regulatory flexibility analysis for a rule that may have an adverse economic effect on small businesses and micro-businesses. As required by Government Code, §2006.002(g), in April 2008, the Office of the Attorney General issued guidelines to assist state agencies in determining a proposed rule's potential adverse economic impact on small businesses. These guidelines state that

"[g]enerally, there is no need to examine the indirect effects of a proposed rule on entities outside of an agency's regulatory jurisdiction." The guidelines state that an agency need only consider a proposed rule's "direct adverse economic impacts" to small businesses and micro-businesses to determine if any further analysis is required. The guidelines also list examples of the types of costs that may result in a "direct economic impact." Such costs may include costs associated with additional record-keeping or reporting requirements; new taxes or fees; lost sales or profits; changes in market competition; or the need to purchase or modify equipment or services.

The department has determined that the rules as proposed will not affect small businesses, micro-businesses, or rural communities, since the rules do not impose any direct economic impacts on the regulated community other than to submit a georeferenced map of facility locations, which can be easily done at virtually no expense by anyone. Therefore, the department has not prepared the economic impact statement or regulatory flexibility analysis described in Government Code, Chapter 2006.

The department has not drafted a local employment impact statement under the Administrative Procedures Act, §2001.022, as the agency has determined that the rules as proposed will not impact local economies.

The department has determined that Government Code, §2001.0225 (Regulatory Analysis of Major Environmental Rules), does not apply to the proposed rules.

The department has determined that there will not be a taking of private real property, as defined by Government Code, Chapter 2007, as a result of the proposed rules.

The department has determined that because the rules as proposed do not impose a significant cost on regulated persons, it is not necessary to repeal or amend any existing rule.

In compliance with the requirements of Government Code, §2001.0221, the department has prepared the following Government Growth Impact Statement (GGIS). The rules as proposed, if adopted, will neither create nor eliminate a government program; not result in an increase or decrease in the number of full-time equivalent employee needs; not result in a need for additional General Revenue funding; not affect the amount of any fee; create a new regulation (the requirement for georeferenced maps); neither increase nor decrease the number of individuals subject to regulation; not expand, limit, or repeal an existing regulation; and

not positively or adversely affect the state's economy.

Comments on the proposed rules be submitted to Robert Macdonald, Regulations Coordinator, e-mail: *robert.macdonald@tpwd.texas.gov.* Comments also may be submitted via the department's website at http://www.tpwd.texas.gov/business/feedback/public_comment/.

The amendments are proposed under the authority of Parks and Wildlife Code, Chapter 43, Subchapter C, which requires the commission to adopt rules to govern the collecting, holding, possession, propagation, release, display, or transport of protected wildlife for scientific research, educational display, zoological collection, or rehabilitation; Subchapter E, which requires the commission to adopt rules for the trapping, transporting, and transplanting of game animals and game birds, urban white-tailed deer removal, and trapping and transporting surplus white-tailed deer; Subchapter L, which authorizes the commission to make regulations governing the possession, transfer, purchase, sale, of breeder deer held under the authority of the subchapter; Subchapter R, which authorizes the commission to establish the conditions of a deer management permit, including the number, type, and length of time that white-tailed deer may be temporarily detained in an enclosure; Subchapter R-1, which authorizes the commission to establish the conditions of a deer management permit, including the number, type, and length of time that mule deer may be temporarily detained in an enclosure (although the department has not yet established a DMP program for mule deer authorized by Subchapter R-1); and §61.021, which provides that no person may possess a game animal at any time or in any place except as permitted under a proclamation of the commission.

The proposed amendments affect Parks and Wildlife Code, Chapter 43, Subchapters C, E, L, R, and R-1, and Chapter 61.

§65.90. Definitions.

The following words and terms shall have the following meanings, except in cases where the context clearly indicates otherwise.

(1) - (13) (No change.)

(14) Facility--Any location required to be registered in TWIMS under a deer breeder's permit, Triple T permit, TTP permit, or DMP, including release sites and/or trap sites.

(15) - (41) (No change.)

§65.91. General Provisions.

(a) - (i) (No change.)

(j) Except as provided in this division, no person shall introduce into, remove deer from or allow or authorize deer to be introduced into or removed from any facility unless a georeferenced map (a map image incorporating a system of geographic ground coordinates, such as latitude/longitude or Universal Transverse Mercator (UTM) coordinates) showing the exact boundaries of the facility has been submitted to the department prior to any such introduction or removal.

§65.95. Movement of Breeder Deer.

(a) General. Except as otherwise provided in this division, a TC 1 or TC 2 breeding facility may transfer breeder deer under a transfer permit that has been activated and approved by the department as provided in §65.610[~~(c)~~] of this title (relating to Transfer of Deer) to:

(1) another breeding facility;

(2) an approved release site as provided in paragraph (3) of this subsection;

(3) a DMP facility; or

(4) to another person for nursing purposes.

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

§65.97. Testing and Movement of Deer Pursuant to Triple T or TTP Permit.

(a) General.

(1) Unless expressly provided otherwise in this section, the provisions of §65.102 of this title (relating to Disease Detection Requirements) cease effect upon the effective date of this section.

[~~(2) The department may require a map of any Triple T trap site to be submitted as part of the application process.~~]

(2) [~~(3)~~] The department will not issue a Triple T permit authorizing deer to be trapped at a:

(A) release site that has received breeder deer within five years of the application for a Triple T permit;

(B) release site that has failed to fulfill testing requirements;

(C) any site where a deer has been confirmed positive for CWD;

(D) any site where a deer has tested "suspect" for CWD; or

(E) any site under a TAHC hold order or quarantine.

(3) [~~(4)~~] In addition to the reasons for denying a Triple T permit listed in §65.103(c) of this title (relating to Trap, Transport, and Transplant Permit), the department will not issue a Triple T permit if the department determines, based on epidemiological assessment and consultation with TAHC that to do so would create an unacceptable risk for the spread of CWD.

(4) [~~(5)~~] All deer released under the provisions of this section must be tagged prior to release in one ear with a button-type RFID tag approved by the department, in addition to the marking required by §65.102 of this title (relating to Disease Detection Requirements). RFID tag information must be submitted to the department.

(5) [~~(6)~~] Nothing in this section authorizes the take of deer except as authorized by applicable laws and regulations, including but not limited to laws and regulations regarding seasons, bag limits, and means and methods as provided in Subchapter A of this chapter (relating to Statewide Hunting Proclamation).

(6) [~~(7)~~] Except for a permit issued for the removal of urban deer, a test result is not valid unless the sample was collected and tested after the Saturday closest to September 30 of the year for which activities of the permit are authorized.

(7) [~~(8)~~] For permits issued for the removal of urban deer, test samples may be collected between April 1 and the time of application.

(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 April 6, 2018.

TRD-201801506
Todd S. George
Acting General Counsel
Texas Parks and Wildlife Department
Earliest possible date of adoption: May 20, 2018
For further information, please call: (512) 389-4775

♦ ♦ ♦

SUBCHAPTER O. COMMERCIAL NONGAME PERMITS

31 TAC §65.328, §65.331

1. Introduction

The Texas Parks and Wildlife Department proposes amendments to §65.328 and §65.331, concerning Commercial Nongame Permits. The proposed amendments would, collectively, prohibit the commercial take of four species of freshwater turtles in Texas.

The department received a petition for rulemaking in 2017 requesting the prohibition of unlimited commercial collection of four species of freshwater turtles (common snapper, red-eared slider, smooth softshell, and spiny softshell). Department staff reviewed the petitioners' evidence and arguments as well as department data and scientific literature and have concluded that there is sufficient scientific justification to prohibit the commercial collection of all four species.

Under Parks and Wildlife Code, Chapter 67, "nongame wildlife" is defined as "those species of vertebrate and invertebrate wildlife indigenous to Texas that are not classified as game animals, game birds, game fish, fur-bearing animals, endangered species, alligators, marine penaeid shrimp, or oysters." Chapter 67 requires the commission to "establish any limits on the taking, possession, propagation, transportation, importation, exportation, sale, or offering for sale of nongame fish or wildlife that the department considers necessary to manage the species," and authorizes the department to issue permits for the taking, possession, propagation, transportation, sale, importation, or exportation of a nongame species of fish or wildlife if necessary to properly manage that species, and to charge a fee for such permits. In 1999, the Parks and Wildlife Commission adopted the first regulations expressly intended to manage nongame wildlife in the state. In 2007, the commission, based on data reported to and information collected by the department, determined that additional protective measures were needed for nongame species and adopted rules that, among other things, prohibited the commercial take of all species of turtles in public waters and on public lands, and all species of turtles other than common snapping turtle, the red-eared slider, smooth softshell, and spiny softshell on private lands and in private waters.

Nongame species comprise over 90 percent of the wildlife species that occur in Texas. The department conducts ongoing research on many nongame species, and monitors research conducted by others. Among the nongame species of greatest concern are Chelonian species (turtles). Because of factors such as delayed sexual maturity, long lifespans, and low reproductive and survival rates, turtles are highly sensitive to population alterations, especially in older age classes. Long lifespans, long generation times, and relatively slow growth may give the appearance that populations are stable, even after recruitment has ceased or populations reach levels below which recovery is possible. Impacts to turtle populations, such as the loss of important nesting areas or unsustainable mortality of adults, may remain undetectable until populations reach critical levels or become extirpated. Known limiting factors such as water pollution, road mortality, and habitat loss are important components in turtle declines, but commercial collecting efforts in the wild intensify the impact of those threats by removing large numbers of adults and older juveniles from wild populations. The collection for food markets has devastated turtle populations in Asia, the destination of the bulk of turtles commercially collected in Texas. Analysis of turtle population demographics consistently showed skewing to the adult age categories - the mature specimens most sought by commercial collectors for use as food product. This characteristic reflects the natural history of turtle species and their strong dependency on adult survivors to offset high mortality rates in eggs and juvenile categories. This characteristic alone makes it unlikely that populations can remain stable when high numbers of adults and older juveniles are steadily removed from a population.

Analysis of collection and sales data from commercial collectors indicates little to no recent trade in common snapping turtles,

spiny softshell turtle, or smooth softshell turtles, which suggests that local populations of those species are no longer abundant enough to support market exploitation or have been exploited to the point that populations have become unstable. An additional concern is similarity of appearance. Failure to discriminate among similar species is a substantial threat to populations of rare freshwater turtle species. Similarity of appearance between the common snapping turtle and alligator snapping turtle and among the red-eared slider and western chicken turtle, Big Bend slider, Rio Grande cooter, and Cagle's map turtle is a serious concern in the face of mounting threats to these species. The alligator snapping turtle *(Macrochelys temminckii),* western chicken turtle *(Deirochelys reticularia miaria),* and Rio Grande cooter *(Pseudemys gorzugi)* have been petitioned for listing by the federal government under the Endangered Species Act, the Big Bend slider *(Trachemys gaigeae)* is a Species of Greatest Conservation Need (endemic to the Rio Grande River watershed) and the Cagle's map turtle *(Graptemys caglei)* is the rarest map turtle species in the world, with a range that is restricted to a single stretch of the Guadalupe River. Accidental removal of even a small number of adults from rare turtle populations could have profound implications for long-term survival and persistence. Therefore, by prohibiting the commercial collection of all turtle species, the threat of negative population impacts as a result of similarity of appearance is mitigated.

Literature Reviewed.

In developing the rules as adopted, the department reviewed and considered the following scientific publications:

Bailey, K. A., and C. Guyer. 1998. Demography and population status of the flattened musk turtle, Sternothrus depressus, in the Black Warrior river Basin of Alabama. Chelonian Conservation and Biology 3(1): 77-83.

Bailey, Lindley A., et al. 2008. Minimal Genetic Structure in the Rio Grande Cooter (Pseudemys Gorzugi). The Southwestern Naturalist, vol. 53, no. 3, 2008, pp. 406-411. *JSTOR,* JSTOR, www.jstor.org/stable/20424947.

Behler, J. L. 1997. Troubled times for turtles. Proceedings: conservation, restoration, and management of tortoises and turtles - an international conference. 7 p. (Available at: http://nytts.org/proceedings/proceed.htm).

Brooks, R. J., G. P. Brown, and D. A. Galbraith. 1991. Effects of a sudden increase in natural mortality of adults on a population of the common snapping turtle (Chelydra serpentine). Canadian Journal of Zoology 69: 1314-1320.

Brown, Donald J., et al. 2011. Freshwater Turtle Conservation in Texas: Harvest Effects and Efficacy of the Current Management Regime. The Journal of Wildlife Management, vol. 75, no. 3, 2011, pp. 486-94. *JSTOR,* JSTOR, www.jstor.org/stable/41418066.

Burke, V. J., J. L. Greene, and J. W. Gibbons. 1995. The effect of sample size and study duration on metapopulation estimates for slider turtles (Trachemys scripta). Herpetologica 51: 451-456. Ceballos, C. P. 2001. Native and exotic turtle trade in Texas. Thesis, Texas A&M University, College Station, Texas, USA.

Ceballos, C. P., L. A. Fitzgerald. 2004. The trade in native and exotic turtles in Texas. The Wildlife Society Bulletin 32(3):881-891.

Congdon, J. D., A. E. Dunham, and R. C. van Loben Sels. 1993. Delayed sexual maturity and demographics of blanding's turtles (Emydoidea blandingii): Implications for conservation and management of long-lived organisms. Conservation Biology 7: 826-833.

Congdon, J. D., A. E. Dunham, and R. C. van Loben Sels. 1994. Demographics of common snapping turtles (chelydra serpentine): Implications for conservation and management of long-lived organisms. American Zoologist 34: 397-408.

Congdon, J. D., r. D. Nagle, O. M. Kinney, M. Osentaski, H. W. Avery, R. C. van Loben Sels, and D. W. Tinkle. 2000. Nesting ecology and embryo mortality: Implications for hatchling success and demography of blanding's turtles (Emydoidea blandingii). Chelonian Conservation and Biology 3(4): 569-579.

Converse, SJ, Iverson JB, and Savidge JA 2005 Demographics of an ornate box turtle (Terrapene ornata ornata) population experiencing minimal human-induced disturbances. Ecological Applications 15:2171-2179

Crother, B. I. 2000. Scientific and standard English names of amphibians and reptiles of North America north of Mexico, with comments regarding confidence in our understanding. SSAR Herpetological Circular No. 29: 1-82.

Dixon, J. R. 2000. Amphibians and reptiles of Texas. Texas A&M University Press, second edition, College Station, Texas, USA.

Dodd, C. K., Jr. 1990. Effects of habitat fragmentation on stream-dwelling species, the flattened musk turtle Sternotherus depressus. Biological Conservation 54: 33-45.

Doroff, A. M., and L. B. Keith. 1990. Demography and ecology of an ornate box turtle (Terrapene ornate) population in south-central Wisconsin. Copeia 1990: 387-399.

Fitzgerald, L.A., C.W. Painter, A. Reuter, and C. Hoover. 2004. Harvest and trade in reptiles of the Chihuahuan Desert Ecoregion. TRAFFIC North America, World Wildlife Fund. (Peer-reviewed).

Franke, J., and T. M. Telecky. 2001. Reptiles as pets: an examination of the trade in live reptiles in the United States. The Humane Society of the United States. Washington, D.C., USA.

Garber, S. D., and J. Burger. 1995. A 20-yr study documenting the relationship between turtle decline and human recreation. Ecological Applications 5: 1151-1162.

Gibbons, J. W. 1990. Turtle studies at SREL : A research perspective. Pages 19-44 in J. W. Gibbons (ed.). Life history and ecology of the slider turtle. Smithsonian Institution Press, Washington D.C.

Gibbons, J. W., J. E. Lovich, A. D. Tucker, N. N. Fitzsimmons, and J. L. Greene. 2001. Demographics and ecological factors affecting conservation and management of the diamondback terrapin (Malaclemys terrapin) in South Carolina. Chelonian Conservation and Biology 4(1): 66-74

Gibbons, J. W., J. L. Greene, and J. D. Congdon. 1983. Drought-related responses of aquatic turtle populations. Journal of Herpetology 17: 242-246.

Gibbons, J.W., D.E. Scott, T.J. Ryan, K.A. Buhlmann, T.D. Tuberville, B.S. Metts, J.L. Greene, T. Mills, Y. Leiden, S. Poppy, and C.T. Winne. 2000. The global decline of reptiles, Déjà Vu amphibians. Bioscience 50:563-666.

Graham, T. E., 1995. Habitat use and population parameters of the spotted turtle, Clemmys guttata, a species of special concern

in Massachusetts. Chelonian Conservation and Biology 1: 207-214.

Hall, C. D., and F. J. Cuthbert. 2000. Impact of controlled wetland drawdown on blanding's turtles in Minnesota. Chelonian Conservation and Biology 3(4): 643-649.

Harrel, J. B., C. M. Allen, and S. J. Herbert. 1996. Movements and habitat use of subadult alligator snapping turtles (Macroclemys teminickii) in Louisiana. American Midland Naturalist 135: 60-67.

Heppell SS, Caswell H, and Crowder LB 2000b Life histories and elasticity patterns: Perturbation analysis for species with minimal demographic data. Ecology 81:654-665

Heppell, SS, Crouse DT, and Crowder LB 1996 A model evaluation of headstarting as a management tool for long-lived turtles. Ecological Applications 6:556-565

Heppell SS, Crouse DT, and Crowder LB 2000a Using Matrix Models to Focus Research and Management Efforts in Conservation. In: Ferson S, Burgman M (eds.), Quantitative Methods for Conservation Biology pp 148-168

Heppell, S.S. 1998. Application of life history theory and population model analysis to turtle conservation. Copeia 1998(2): 367-375.

Hoover, C. 1998. The U.S. role in the international live reptile trade: Amazon tree boas to Zululand dwarf chameleons. Traffic North America, WWF - IUCN, Washington, D.C., USA.

Jester S. L. 1992. A national assessment of reptile and amphibian regulation and case study of nongame trade in Texas. Thesis. Texas A&M University, College Station, Texas, USA.

King, F. W., and R. L. Burke (Editors). 1989. Crocodilian, tuatara, and turtle species of the world: a taxonomic and geographic reference. Association of Systematics Collections, Washington, D.C., USA.

Lowe, H. 2009. The globalization of the turtle trade. Turtle Survival Alliance August: 47-52.

Klemens, M. W., and D. Moll. 1995. An assessment of the effects of commercial exploitation on the pancake tortoise, Malacochersus tornieri, in Tanzania. Chelonian Conservation and Biology 1: 197-206.

Morlock, H. and M. Harless. Turtles Perspectives and Research Malabar, Florida: Robert E. Krieger Publishing Company, 1989.

Morreale, S. J., J. W. Gibbons, and J. D. Congdon. 1984. Significance of activity and movement in the yellow-bellied slider turtle (Pseudemys scripta). Canadian Journal of Zoology 62: 1038-1042.

Polisar, J., and R. Horwich. 1994. Conservation of the large economically important river turtle Dermatemys mawii in Belize. Conservation Biology 8:338-342.

Standing, K. L., T. B. Herman, M. Shallow, T. Power, I. P. Morrison. 2000. Results of the nest protection program for blandings turtle in Kejimkujik National Park, Canada: 1987-1997. Chelonian Conservation and Biology 3(4): 637-642.

Wilbur, H.M., and P. J. Morin. 1988. Life history evolution in turtles. Pages 387-439 in C. Gans and R. B. Huey (eds.). The Biology of Reptilia. Vol 16B, Defense and Life History. Alan R. Liss, NewYork.

Williams, E. C. and W. S. Packer. 1987. A long-term study of a box turtle (Terrapene carolina) population of Allee Memorial Woods, Indiana, with emphasis on survivorship. Herpetologica 43: 328-335.

2. Fiscal Note.

Meredith Longoria, Nongame and Rare Species Program Leader, has determined that for each of the first five years that the rules as proposed are in effect, there will be no fiscal implications to state or local governments as a result of administering or enforcing the rules.

3. Public Benefit/Cost Note.

Mrs. Longoria also has determined that for each of the first five years that the rules as proposed are in effect:

(A) The public benefit anticipated as a result of enforcing or administering the rules as proposed will be the protection and conservation of publicly-owned nongame wildlife resources and the protection of native ecosystems from harmful alterations caused by overharvest of nongame species, which will be beneficial to all other organisms in the complex ecological systems associated with nongame wildlife.

(B) Under the provisions of Government Code, Chapter 2006, a state agency must prepare an economic impact statement and a regulatory flexibility analysis for a rule that may have an adverse economic effect on small businesses, micro-businesses, or rural communities. As required by Government Code, §2006.002(g), the Office of the Attorney General has prepared guidelines to assist state agencies in determining a proposed rule's potential adverse economic impacts to small businesses, micro-businesses, or rural communities. Those guidelines state that an agency need only consider a proposed rule's "direct adverse economic impacts" to small businesses and micro-businesses to determine if any further analysis is required. For that purpose, the department considers "direct economic impact" to mean a requirement that would directly impose recordkeeping or reporting requirements; impose taxes or fees; result in lost sales or profits; adversely affect market competition; or require the purchase or modification of equipment or services. There will be adverse economic effects on small businesses, microbusinesses, and persons required to comply with the amendments as proposed, but no adverse economic impacts on rural communities. For the purposes of this analysis, the department considers that most if not all entities affected by the proposed amendments meet the statutory definition of a small business or microbusiness as set forth in Government Code, Chapter 2006. The rules as proposed would effectively prohibit commercial activities involving freshwater turtles. Since it is unlawful to engage in commercial activities without acquiring a commercial nongame or commercial nongame dealer permit and all collections, sales, and purchases are required to be reported annually to the department, the universe of affected entities is known. The department surveyed all permittees who reported buying or selling turtles between 2015 and 2017 (n=71). Therefore, the number of affected small businesses and microbusinesses is approximately 71. The department received 12 responses to the survey.

With respect to red-eared sliders, one respondent reported sales worth $45 in 2017, one respondent reported sales worth $65 in 2016, and one respondent reported sales worth $50 in 2015. There were no other sales of red-eared sliders reported.

With respect to common snapping turtles, no respondents reported sales during 2015-2017.

With respect to spiny softshell turtles, one respondent reported sales of $5,000 in 2017 and one respondent reported sales of $1,500 in 2016. No respondents reported sales in 2015.

With respect to smooth softshell turtles, no respondent reported sales between 2015-2017.

On the basis of the survey responses, analysis of department records and reporting information, and anecdotal observations, the department has determined that the rules as proposed will not result in lost sales of greater than $5,000 to any permittee, and likely less, because that figure represents a single year of reported sales and therefore does not indicate any particular continuity or trend.

The department has determined that the rules will not otherwise directly affect small businesses or micro-businesses. The department has determined that the small dollar value of any trade that might be occurring is of insignificance at either the micro or macro levels with respect to impacts on rural communities.

The department considered several alternatives to the rules as proposed, all of which were rejected because they were either more burdensome to the regulated community or did not achieve the goal of the proposed rules.

The first alternative was to maintain the status quo. This alternative was rejected because the department has an affirmative duty to manage nongame wildlife resources and the department has determined that without action, that duty would be breached.

Another alternative considered was to impose a system of seasons and bag limits for the four species of turtles. This alternative was rejected because the department lacks precise enough information at the micro level to determine appropriate levels of sustainable harvest and because the department lacks the resources to monitor population impacts from harvest at that level, such a system would have to include mandatory check stations or some other form of self-reporting, which would be burdensome.

The department also considered some form of allotment or quota system, but rejected that alternative because of difficulties inherent in determining where exploitable populations might exist and how much harvest pressure they could withstand.

(C) The department has not drafted a local employment impact statement under the Administrative Procedures Act, §2001.022, as the agency has determined that the rules as proposed will not impact local economies.

(D) The department has determined that Government Code, §2001.0225 (Regulatory Analysis of Major Environmental Rules), does not apply to the proposed rules.

(E) The department has determined that there will not be a taking of private real property, as defined by Government Code, Chapter 2007, as a result of the proposed rules.

(F) The department has determined that because the rules as proposed are necessary to implement legislation, it is not necessary to repeal or amend any existing rule.

(G) In compliance with the requirements of Government Code, §2001.0221, the department has prepared the following Government Growth Impact Statement (GGIS). The rule as proposed, if adopted, will:

(1) neither create nor eliminate a government program;

(2) not result in an increase or decrease in the number of full-time equivalent employee needs;

(3) not result in a need for additional General Revenue funding;

(4) not affect the amount of any fee;

(5) not create a new regulation;

(6) not limit or repeal an existing regulation but will expand a current regulation (by prohibiting commercial collection of four species of freshwater turtles);

(7) neither increase nor decrease the number of individuals subject to regulation; and

(8) not positively or adversely affect the state's economy.

4. Request for Public Comment.

Comments on the proposal may be submitted to Meredith Longoria at (512) 389-4410, e-mail: meredith.longoria@tpwd.texas.gov. Comments also may be submitted via the department's website at http://www.tpwd.texas.gov/business/feedback/public_comment/.

5. Statutory Authority.

The amendments are proposed under the authority of Parks and Wildlife Code, §67.004, which authorizes the commission to establish any limits on the taking, possession, propagation, transportation, importation, exportation, sale, or offering for sale of nongame fish or wildlife that the department considers necessary to manage the species; and §67.0041, which authorizes the department to issue permits for the taking, possession, propagation, transportation, sale, importation, or exportation of a nongame species of fish or wildlife if necessary to properly manage that species.

The proposed amendments affect Parks and Wildlife Code, Chapter 67.

§65.328. Means and Methods.

[~~(a)~~] Any device employed or emplaced to take or attempt to take nongame wildlife shall be marked with a gear tag. The gear tag must bear the name and address of the person using the device and the date the device was set out. The information on the gear tag must be legible. The gear tag is valid for 30 days following the date indicated on the tag.

[~~(b) Any device used to take turtles shall be set such that:~~]

[~~(1) the opening or entrance to the device remains above water at all times; and~~]

[~~(2) the holding area of trap provides a sufficient area above water to prevent trapped turtles from drowning.~~]

§65.331. Commercial Activity.

(a) (No change.)

(b) Turtles.

[~~(1) The holder of a nongame permit may possess, transport, sell, import, or export common snapping turtle (Chelydra serpentina), red-eared slider (Trachemys scripta), or softshell turtle (Apalone spinifera, A. muticus) in accordance with the provisions of this subchapter, provided that take occurs on private land or private water.~~]

[~~(2) The holder of a nongame dealer's permit may possess, transport, sell, resell, import, or export common snapping turtle (Chelydra serpentina), red-eared slider (Trachemys scripta), or softshell turtle (Apalone spinifera, A. muticus) in accordance with the provisions of~~

this subchapter, provided that take occurs on private land or private water.]

[(3)] No person while on or in public water may possess or use a net or trap capable of catching a turtle. This section does not apply to:

(1) [(A)] dip nets; or

(2) [(B)] minnow traps, provided the minnow trap is less than 24 inches in length or has a throat smaller than one by three inches.

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

(e) No person shall engage in commercial activity involving any nongame species not listed in subsection (d) of this section, except as provided in §65.327 of this title (relating to Permit Required) [and subsection (b) of this section]. This prohibition on commercial activity includes, but is not limited to, the following species:

Figure: 31 TAC §65.331(e)

[Figure: 31 TAC §65.331(e)]

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

Filed with the Office of the Secretary of State on April 6, 2018.

TRD-201801505

Todd S. George

Acting General Counsel

Texas Parks and Wildlife Department

Earliest possible date of adoption: May 20, 2018

For further information, please call: (512) 389-4775

♦ ♦ ♦

SUBCHAPTER P. ALLIGATOR PROCLAMATION

31 TAC §65.352, §65.363

The Texas Parks and Wildlife Department proposes amendments to §65.352 and §65.363, concerning the Alligator Proclamation.

The proposed amendment to §65.352, concerning Definitions, would define "subpermittee" as "a person who is registered with the department to assist a permittee in performing nuisance alligator control activities." The proposed amendment to §65.363 would authorize permittees to utilize assistants to help perform nuisance alligator control activities and set forth various provisions regarding the registration and supervision of such persons. Thus, a definition is necessary to establish a regulatory identity for such persons.

The proposed amendment to §65.363, concerning Nuisance Alligator Control, would consist of several components.

The proposed amendment to subsection (a) would allow permittees to designate subpermittees to assist the permittee in nuisance alligator control activities. The amendment as proposed would require subpermittees to be approved by the department, provide for an application process, require permittees to directly supervise all nuisance control activities conducted by their subpermittees, and stipulate that permittees possess the subpermittee authorization issued by the department on their person at all times that their subpermittees are engaged in nuisance alligator control activities. The department agrees in principle that the nature of nuisance alligator control makes it convenient and in some cases necessary for a nuisance control hunter to utilize assistants. However, because alligators are a public resource that the department is charged with managing and conserving (as well as an export commodity subject to federal and international laws governing trade in endangered species and lookalike species), it is necessary to ensure that subpermittees are appropriately vetted and supervised.

Therefore, the proposed amendment would allow the use of subpermittees, subject to department approval. The proposed amendment would allow the department to deny subpermittee authorization to persons who have been convicted of, pleaded nolo contendere to, or received deferred adjudication for a violation of Parks and Wildlife Code, Chapter 43, Subchapters C, E, L, or R, or Parks and Wildlife Code, Chapter 65; a violation of the Parks and Wildlife Code that is a Class B misdemeanor, a Class A misdemeanor, or felony; a violation of Parks and Wildlife Code, §63.002; or a violation of 16 U.S.C. §§3371-3378 (the Lacey Act). Under the current rule, the department may refuse issuance of a nuisance alligator control permit on the basis of a violation listed above. The department promulgated the current provision because the department believes that a person should not be allowed to engage in the activity involving live wildlife resources, particularly for commercial gain, if the person has engaged in prior serious criminal behavior related to conservation laws. The purpose of the provision is to prevent persons who have been proven to exhibit disregard for statutes and regulations governing wildlife and fisheries from participating in nuisance alligator control activities. The proposed amendment would extend the same standard to encompass subpermittees. The department notes that it does not intend for a conviction or administrative penalty to be an automatic bar to obtaining subpermittee authorization. The factors that may be considered by the department in determining whether to deny subpermittee authorization based on a conviction or deferred adjudication would include the seriousness of the offense, the number of offenses, the existence or absence of a pattern of offenses, the length of time between the offense and the permit application, and any other pertinent factors.

The proposed amendment to subsection (a) also would require subpermittees to be directly supervised by the permittee at all times that a subpermittee is engaged in permitted activities, which is necessary to ensure that nuisance alligator control activities are performed correctly and lawfully. Finally, the proposed amendment to subsection (a) would require the department's authorization for the subpermittee to be maintained on the person of the permittee during permitted activities, which is necessary to facilitate prompt on-site verification of the status of anyone purporting to be a subpermittee.

The proposed amendment would eliminate current subsection (b), which establishes a deadline for permit applications. The department has determined that eliminating the application deadline would allow for additional prospective nuisance alligator control hunters to be permitted at times when nuisance control calls are at high volumes or there is a shortage of nuisance control hunters available.

The proposed amendment would alter subsection (d) by implementing a more structured approach to nuisance alligator control activities and requiring explicit department approval on a case-by-case basis for the capture or killing of alligators in excess of 10 feet in length.

Under the current rule, a nuisance control hunter may contract directly with a landowner (or authorized agent), political subdivision, governmental entity, or property owner's association for the removal of nuisance alligators. The current rules were promulgated in 2011 in response to a steadily rising number of nuisance alligator complaints. The department intended for nuisance control hunters to determine, in any given instance, whether or not an alligator was indeed a nuisance as defined by §65.352 ("an alligator that is depredating or a threat to human health or safety") and then proceed accordingly. In practice, however, the department has discovered that this approach can lead to confusion and perhaps misunderstanding. Therefore, the proposed amendment would require nuisance control hunters, prior to engaging in permitted activities, to contact the department via one of the department's Law Enforcement Division communications centers to receive a control number for each nuisance alligator that the nuisance control hunter seeks to remove. In this way, the department has a method for tracking exactly when and where nuisance control activities are taking place, which allows the department the ability to selectively monitor nuisance alligator control activities and ensure compliance with federal tagging requirements for crocodilian species.

Finally, the proposed amendment would require written authorization from the department on a case-by-case basis for the capture or killing of alligators greater than 10 feet in length. The justification for this amendment is twofold. First, large alligators are critical components of aquatic ecosystems. These individuals (usually males) are apex predators that directly impact the social and breeding structures, home ranges, and population densities of alligator populations across Texas. Requiring additional confirmation that large alligators are verified nuisance animals before their removal from the environment is a safeguard for ensuring that alligators remain a sustainable natural resource in Texas. Second, large alligators are economically valuable as live attractions or when sold as hides or parts. Similar to other "trophy" animals, these animals are also highly valuable to hunters who seek to legally harvest large alligators during the Texas alligator hunting season. During the past year the department received complaints from the public that large alligators were being captured by nuisance alligator control hunters not because the alligators were legitimate nuisances but solely for their value as desirable trophy animals.

Jonathan Warner, Alligator Program Leader, has determined that for each of the first five years that the rules as proposed are in effect, there will be no fiscal implications to state or local governments as a result of administering or enforcing the proposed amendments.

Dr. Warner also has determined that for each of the first five years that the rules as proposed are in effect, the public benefit anticipated as a result of enforcing or administering the proposed rules will be the control of nuisance alligators and protection of alligator resources in Texas.

There will be no adverse economic effect on persons required to comply with the rules as proposed.

Under the provisions of Government Code, Chapter 2006, a state agency must prepare an economic impact statement and a regulatory flexibility analysis for a rule that may have an adverse economic effect on small businesses and micro-businesses. As required by Government Code, §2006.002(g), in April 2008, the Office of the Attorney General issued guidelines to assist state agencies in determining a proposed rule's potential adverse economic impact on small businesses. These guidelines state that "[g]enerally, there is no need to examine the indirect effects of a proposed rule on entities outside of an agency's regulatory jurisdiction." The guidelines state that an agency need only consider a proposed rule's "direct adverse economic impacts" to small businesses and micro-businesses to determine if any further analysis is required. The guidelines also list examples of the types of costs that may result in a "direct economic impact." Such costs may include costs associated with additional record-keeping or reporting requirements; new taxes or fees; lost sales or profits; changes in market competition; or the need to purchase or modify equipment or services.

The department has determined that the rules as proposed will not affect small businesses, micro-businesses, or rural communities, since the rules do not impose any direct economic impacts on the regulated community. Therefore, the department has not prepared the economic impact statement or regulatory flexibility analysis described in Government Code, Chapter 2006.

The department has not drafted a local employment impact statement under the Administrative Procedures Act, §2001.022, as the agency has determined that the rule as proposed will not impact local economies.

The department has determined that Government Code, §2001.0225 (Regulatory Analysis of Major Environmental Rules), does not apply to the proposed rule.

The department has determined that there will not be a taking of private real property, as defined by Government Code, Chapter 2007, as a result of the proposed rule.

The department has determined that because the rule as proposed does not impose a cost on regulated persons, it is not necessary to repeal or amend any existing rule.

In compliance with the requirements of Government Code, §2001.0221, the department has prepared the following Government Growth Impact Statement (GGIS). The rule as proposed, if adopted, will: neither create nor eliminate a government program; not result in an increase or decrease in the number of full-time equivalent employee needs; not result in a need for additional General Revenue funding; not affect the amount of any fee; not create a new regulation; expand, limit, or repeal an existing regulation (creation of subpermittee status); increase the number of individuals subject to regulation (creation of subpermittee status); and neither positively nor adversely affect the state's economy.

Comments on the proposed rule may be submitted to Robert Macdonald, Regulations Coordinator, e-mail: robert.macdonald@tpwd.texas.gov. Comments also may be submitted via the department's website at http://www.tpwd.texas.gov/business/feedback/public_comment/.

The amendments are proposed under the authority of Parks and Wildlife Code, §65.003, which authorizes the commission to regulate taking, possession, propagation, transportation, exportation, importation, sale, and offering for sale of alligators, alligator eggs, or any part of an alligator that the commission considers necessary to manage this species, including regulations to provide for the periods of time when it is lawful to take, possess, sell, or purchase alligators, alligator hides, alligator eggs, or any part of an alligator; and limits, size, means, methods, and places in which it is lawful to take or possess alligators, alligator hides, alligator eggs, or any part of an alligator; and control of nuisance alligators.

The proposed amendments affect Parks and Wildlife Code, Chapter 65.

§65.352. Definitions.

The following words and terms, when used in this subchapter, shall have the following meanings, unless the context clearly indicates otherwise. All other words and terms shall have the meanings assigned in Subchapter A of this chapter (relating to the Statewide Hunting and Fishing Proclamation) and in the Parks and Wildlife Code.

(1) - (13) (No change.)

(14) Subpermittee--A person who is registered with the department to assist a permittee in performing nuisance alligator control activities.

(15) [~~(14)~~] Wholesale dealer--A person who operates a place of business (mobile or permanent) for the purpose of buying nonliving alligators for resale, canning, preserving, processing, or handling for shipment or sale.

(16) [~~(15)~~] Skull length--the distance from the anterior edge of the premaxilla to the posterior edge of the parietal, measured along the mid-line of the skull.

§65.363. Nuisance Alligator Control.

(a) Permit Required; Subpermittees.

(1) Except as provided in this subchapter or §65.49(g) of this title (relating to Alligators), no person may take, kill, transport, sell, or release a nuisance alligator, or offer to take, kill, transport, sell, or release a nuisance alligator unless that person possesses a valid nuisance alligator control permit issued by the department.

(2) A permittee may utilize a subpermittee or subpermittees to assist in the performance of nuisance alligator control activities.

(A) A subpermittee must be approved by the department prior to engaging in any activities under this section. The department will not authorize any person to act as a subpermittee if:

(i) the person has been convicted of, pleaded nolo contendere to, or received deferred adjudication for an offense listed in subsection (g)(1) - (4) of this section; or

(ii) the department determines is incapable, unqualified, or otherwise unfit to act as a subpermittee.

(B) To register a subpermittee, the permittee must complete and submit an application on a form provided by the department for that purpose. Upon approval, the department will send a written authorization for the subpermittee to the permittee.

(C) A permittee utilizing a subpermittee must be in direct supervision of the subpermittee at all times that the subpermittee is engaging in permitted activities.

(D) The written authorization provided for in subparagraph (B) of this paragraph must be in the physical possession of the permittee at all times that permitted activities are being performed by the subpermittee.

(b) Permit Application and Issuance.

(1) (No change.)

[~~(2) In order to be considered for permit issuance in any given year, an applicant shall submit a completed application to the department by no later than November 1.~~]

(2) [~~(3)~~] The department may refuse to issue a permit to any person who, in the department's determination, lacks the skill, experience, or aptitude to adequately perform the activities typically involved in nuisance alligator control.

(c) (No change.)

(d) Permit Privileges and Restrictions.

(1) (No change.)

(2) A permittee or subpermittee may not:

(A) capture or kill an alligator without being in physical possession of a complaint number issued by a department Law Enforcement Division Communication Center that corresponds to the date and place the permittee captures or kills, or attempts to capture or kill an alligator; [~~that is not a nuisance alligator; or~~]

(B) capture or kill more than one alligator per complaint number issued by the department;

(C) [~~(B)~~] use any means, method, or procedure not approved by the department for the capture, immobilization, transport, or dispatch of a nuisance alligator; or[~~.~~]

(D) capture or kill an alligator over 10 feet in length without prior written authorization from the department's Alligator Program in addition to a complaint number issued by the department as prescribed in subparagraph (A) of this paragraph.

(e) - (i) (No change.)

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

Filed with the Office of the Secretary of State on April 6, 2018.

TRD-201801504
Todd S. George
Acting General Counsel
Texas Parks and Wildlife Department
Earliest possible date of adoption: May 20, 2018
For further information, please call: (512) 389-4775

♦ ♦ ♦

TITLE 34. PUBLIC FINANCE

PART 1. COMPTROLLER OF PUBLIC ACCOUNTS

CHAPTER 9. PROPERTY TAX ADMINISTRATION

SUBCHAPTER A. PRACTICE AND PROCEDURE

34 TAC §9.103

The Comptroller of Public Accounts proposes the repeal of §9.103, concerning audits of school district taxable property values to replace it with a new §9.103 in a separate filing.

Tom Currah, Chief Revenue Estimator, has determined that repeal of the rule will not result in any significant fiscal implications to the state, units of local government, or individuals.

Mr. Currah also has determined during the first five years that the proposed rule repeal is in effect, the repeal: will not create or eliminate a government program; will not require the creation or elimination of employee positions; will not require an increase or

decrease in future legislative appropriations to the agency; will not require an increase or decrease in fees paid to the agency; will not increase or decrease the number of individuals subject to the rules' applicability; and will not positively or adversely affect this state's economy. This proposal repeals an existing rule.

The proposed rule repeal would have no significant fiscal impact on small businesses or rural communities.

Comments on the proposed repeal may be submitted to Mike Esparza, Director, Property Tax Assistance Division, P.O. Box 13528, Austin, Texas 78711 or to the email address: ptad.rulecomments@cpa.texas.gov. Comments must be received no later than 30 days from the date of publication of the proposal in the *Texas Register.*

The repeal is proposed under Government Code, §403.302(h) (Determination of School District Property Values) and §403.303(c) (Protest), which authorize the comptroller to adopt procedural rules governing the conduct of protest hearings.

The repeal implements Government Code, §403.302(h) (Determination of School District Property Values) and §403.303(c) (Protest).

§9.103. Audits of School District Taxable Property Values.

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 6, 2018.

TRD-201801467
Victoria North
Chief Counsel Fiscal and Agency Affairs Legal Services Division
Comptroller of Public Accounts
Earliest possible date of adoption: May 20, 2018
For further information, please call: (512) 475-0387

♦ ♦ ♦

34 TAC §9.103

The Comptroller of Public Accounts proposes new §9.103, concerning audits of school district taxable property values. In addressing the requirements concerning audits to revise findings of the Property Value Study under Government Code, §403.302(h), new §9.103 serves several purposes. New §9.103 identifies and describes the required submission of specific data sets and related forms to be included with all requests for audit. The circumstances under which a limited request for audit will be accepted is clarified. New §9.103 also provides stringent conditions under which a request submitted with incomplete data will be accepted. In addition, new §9.103 clarifies the definitions section; eliminates certain deadlines and clarifies others; updates references regarding the Property Tax Assistance Division of the comptroller's office and its operations; and eliminates the requirement to adopt certain audit forms by rule. The repeal of existing §9.103 is being proposed by a separate filing.

Tom Currah, Chief Revenue Estimator, has determined that during the first five years that the proposed new rule is in effect, the rule: will not create or eliminate a government program; will not require the creation or elimination of employee positions; will not require an increase or decrease in future legislative appropriations to the agency; will not require an increase or decrease in fees paid to the agency; will not increase or decrease the number of individuals subject to the rules' applicability; and will not positively or adversely affect this state's economy. This proposal creates a new rule that replaces an existing rule.

Mr. Currah also has determined that the proposed new rule would have no significant fiscal impact on small businesses or rural communities. The new rule would have no significant fiscal impact on the state government, units of local government, or individuals. There would be no anticipated significant economic cost to the public and the rule will benefit the public by improving administration of local property valuation and taxation.

Comments on the proposed new section may be submitted to Mike Esparza, Director, Property Tax Assistance Division, P.O. Box 13528, Austin, Texas 78711 or to the email address: ptad.rulecomments@cpa.texas.gov. Comments must be received no later than 30 days from the date of publication of the proposal in the *Texas Register.*

The new section is proposed under Government Code, §403.302(h) (Determination of School District Property Values) and §403.303(c)(Protest), which authorize the comptroller to adopt procedural rules governing the conduct of protest hearings.

The new section implements Government Code, §403.302(h) (Determination of School District Property Values) and §403.303(c) (Protest).

§9.103. Audits of School District Taxable Property Values.

(a) Definitions. The following phrases, words, and terms, when used in this section shall have the following meanings, unless the context clearly indicates otherwise.

(1) Audit or taxable value audit--An investigation or review permitted under Government Code, §403.302(h), to determine if the certified property value study findings of a school district's taxable property values under Government Code, Chapter 403, should be changed to correct clerical errors, as defined in Tax Code, §1.04(18), in the comptroller's records, or to reflect changes in the local appraisal roll that occurred after the school district's most recent submission of appraisal roll data to the comptroller for the year at issue.

(2) Division--The Property Tax Assistance Division (PTAD) of the comptroller's office.

(3) Year at issue--The tax year for which the comptroller certified the school district's final taxable values, as determined by the property value study under Government Code, Chapter 403, that is the subject of the audit.

(4) Effective date--The single date identified in the audit request on which all values and other reported information for the year at issue are contended to be correct.

(b) Taxable value audit requestors, initiation of the request, and designated agent.

(1) The superintendent of a school district or the commissioner of education may file a request for a taxable value audit for a particular school district.

(2) The request for audit shall be made in writing and filed with the division. A request from the school district's superintendent shall be made by filing the *Request for School District Taxable Value Audit* (Form 50-302) accompanied by the documentation required under subsection (c) of this section. A request from the commissioner of education may be made in any written form and shall be signed by the commissioner with the school district submitting all documentation required under subsection (c)(2) - (7) of this section within thirty days of

notification from the division that the commissioner of education made an audit request.

(3) Each school district request for audit shall identify an individual such as a Chief Appraiser, Registered Professional Appraiser, school district Superintendent, or other knowledgeable professional, to act as the school district's designated agent in connection with the taxable value audit. The designated agent shall be the primary point of contact for all communications and questions regarding the audit.

(c) The audit request submission. Each request for audit, except a request which meets the requirements of subsection (f) of this section, is initiated by completion and submission of the following seven items:

(1) *Request for School District Taxable Value Audit* (Form 50-302), which the school district's superintendent signs, and which identifies: the school district for which the taxable value audit is requested; the school district's superintendent; the school district's designated agent with contact information; the property value study year at issue; and the effective date of the audit;

(2) *School District Report of Property Value* (Form 50-108), which provides the correct value for each line item on the form as of the effective date of the audit, and is signed by the designated agent;

(3) *Report on Value Lost Because of Deferred Tax Collections Under Tax Code Sections 33.06 and 33.065* (Form 50-851);

(4) *Report on Value Lost Because of the School Tax Limitation on Homesteads of the Elderly/Disabled* (Form 50-253);

(5) *Report on Value Lost Because of School District Participation in Tax Increment Financing (TIF)* (Form 50-755) for each reinvestment zone of the school district, with the required account list;

(6) *Report on Value Lost Because of Value Limitations Under Tax Code Chapter 313* (Form 50-767) for each Tax Code, Chapter 313 agreement of the school district, with the required account list; and

(7) A recapitulation of the school district's values, which consists of one or more computer-generated summaries of appraisal roll data, that:

(A) is generated from the same database system(s) that is used to submit appraisal roll data and tax collection data to the taxing unit as required by statute; and

(B) shows, as of the audit's effective date, the certified values that match each value shown as a line item on the *School District Report of Property Value* (Form 50-108).

(d) Deadline to file a request for audit. Each request for taxable value audit under subsection (c) of this section must be filed with the division not later than the third anniversary of the date the comptroller initially certifies, under Government Code, §403.302(j), the final taxable property value findings for the school district for the year at issue.

(e) Number of audit requests. Up to three separate taxable value audit requests pertaining to the same property value study year may be submitted under subsection (c) of this section at any time before the deadline under subsection (d) of this section. This subsection does not apply to limited requests for audit under subsection (f) of this section. An audit request that subsequently is withdrawn under subsection (m) or resubmitted under subsection (j) of this section is considered an audit request for purposes of this subsection.

(f) Limited request for audit based on qualifying orders to change value findings older than three years. A request for audit to correct final taxable property value findings that are past the third anniversary of the date the comptroller initially certified, under Government Code, §403.302(j), the final taxable property value findings for the school district for the year at issue, may be filed under the following limited conditions:

(1) the request for audit rests on an appraisal review board order issued under Tax Code, §25.25, or a court order issued under Tax Code, §42.41, for an appraisal roll correction;

(2) the correction certified is more than $20 million or 2.0% of the total taxable value in the school district, whichever is less, as determined under Government Code, §403.302 or §403.303, for the year at issue; and

(3) not later than the first anniversary of the date the appraisal roll correction is certified, a *Request for School District Taxable Value Audit* (Form 50-302), a copy of each qualifying order, and documentation regarding the value before it was corrected, are submitted to the comptroller's office.

(g) Methods of delivery and address information. A taxable value audit request submission may be delivered by the applicable deadline to the division by the following methods:

(1) personal delivery or express mail service at the division's physical address at 1711 San Jacinto Blvd., Third Floor, Austin, Texas, 78701;

(2) first-class U.S. mail, with postage prepaid and bearing a post office cancellation mark, addressed to the Property Tax Assistance Division, Attention: Audit, P.O. Box 13528, Austin, Texas 78711-3528; or

(3) electronically through the use of email to ptad.audit@cpa.texas.gov with the word "AUDIT REQUEST" in the subject line or by File Transfer Protocol (FTP) after contacting the division for instructions at 1-800-252-9121 (press 2 and ask for the audit coordinator).

(h) Incomplete request submissions. An audit request submission under subsection (c) that omits any of the information required under paragraphs (1) - (7), is incomplete and may not be accepted under subsection (i) of this section. Failure to provide an item or any portion of an item required by subsection (c)(2) - (7) of this section may be excused, if, in the discretion of the division director, a sworn, signed, factually-detailed affidavit with supporting documentation sufficiently demonstrates the following:

(1) that at least three attempts were made to secure the required information from the entity that has possession of it;

(2) that each of the three attempts to secure the required information failed; and

(3) that the school district's failure to provide the missing information required for the audit does not result in a materially incorrect final taxable value for the school district for the year at issue.

(i) Audit request acceptance. The comptroller may not accept an audit request, or any part of an audit request, if the audit request submission:

(1) does not meet the requirements of this section;

(2) subject to subsection (h) of this section, lacks any item or any information required for completion of any item required under subsection (c) of this section;

(3) raises an issue previously determined in a protest filed under Subchapter L of this chapter (relating to Procedures for Protesting Comptroller Property Value Study and Audit Findings);

(4) asks for corrections that duplicate corrections requested in a previous audit request for which the division previously issued audit findings; or

(5) involves a property value study year for which the relevant comptroller records, computer programs, or property value study procedures do not exist or cannot accurately be replicated.

(j) Audit request resubmission. A taxable value audit request that was not accepted under subsection (i)(2) of this section may be brought into compliance and resubmitted before the applicable audit request deadline.

(k) Additional information. The division may request additional information from the school district, its appraisal district, or any other source, as needed, to complete the taxable value audit. If the school district, or its appraisal district does not provide the additional information within 15 calendar days of the division's request, the division may deny any adjustments related to the additional information without notice. The 15 calendar day period may be extended for an additional 15 calendar days if the school district cannot obtain the information within the original 15 calendar day period for reasons outside the school district's control.

(l) Amending an audit request. An audit request may be amended at any time before the date the division certifies the final audit findings to the commissioner of education pursuant to Government Code, §403.302(h), but may not be amended to change the effective date of the audit. A change in an effective date must be submitted as part of a new audit request.

(m) Withdrawal of an audit request. An audit request may be withdrawn at any time before the date the division certifies the final audit findings to the commissioner of education pursuant to Government Code, §403.302(h). After issuance of the final audit findings, an audit request may be withdrawn only upon the request of the commissioner of education.

(n) Protest. Upon issuance of the preliminary taxable value audit findings to the school district's superintendent and designated agent, the school district may protest the preliminary findings as provided by the terms of Government Code, §403.303, and the procedures prescribed in Subchapter L of this chapter (relating to Procedures for Protesting Comptroller Property Value Study and Audit Findings).

(o) Taxable value certification. After considering all the relevant information submitted by the school district and from other reliable sources, and including the final results of a protest if one is filed under subsection (n) of this section, the division will determine the corrections to be made, recalculate the school district's total taxable value for the year at issue, and certify final taxable value audit findings to the commissioner of education pursuant to Government Code, §403.302(h). The total taxable value certified in the final taxable value audit findings may be greater than, less than, or the same as the most recent total taxable value certified to the commissioner of education under Government Code, Chapter 403, for the year at issue, but shall not affect the validity presumption of the initial certification previously issued for the year at issue.

(p) Forms for audit request. The forms identified in this section are available on the comptroller's website or may be obtained from the Comptroller of Public Accounts, Property Tax Assistance Division, P.O. Box 13528, Austin, Texas 78711-3528. These forms may be revised at the discretion of the comptroller.

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 6, 2018.

TRD-201801468
Victoria North
Chief Counsel Fiscal and Agency Affairs Legal Services Division
Comptroller of Public Accounts
Earliest possible date of adoption: May 20, 2018
For further information, please call: (512) 475-0387

♦ ♦ ♦

TITLE 40. SOCIAL SERVICES AND ASSISTANCE

PART 2. DEPARTMENT OF ASSISTIVE AND REHABILITATIVE SERVICES

CHAPTER 106. DIVISION FOR BLIND SERVICES

The Health and Human Services Commission (HHSC) proposes the repeal of Texas Administrative Code Title 40, Part 2, Chapter 106, Subchapter A, concerning Criss Cole Rehabilitation Center, §§106.101, 106.103, 106.105, 106.107, 106.109, 106.111, 106.113; Subchapter D, concerning Independent Living Services for Older Individuals Who Are Blind, §§106.901, 106.903, 106.905, 106.1001, 106.1101, 106.1105, 106.1107, 106.1109, 106.1111, 106.1201, 106.1203, 106.1205, 106.1301, 106.1303, 106.1351, 106.1371; and Subchapter N, concerning Business Enterprises of Texas, §§106.1901, 106.1903, 106.1905, 106.1907, 106.1909, 106.1911, 106.1913, 106.1915, 106.1917, 106.1919, 106.1921, 106.1923, 106.1925, 106.1927, 106.1929, 106.1931, 106.1933, 106.1935.

BACKGROUND AND PURPOSE

As required by Senate Bills 200 and 208, 84th Legislature, Regular Session, 2015, the Department of Assistive and Rehabilitative Services (DARS) was abolished after all of its functions were transferred to HHSC or the Texas Workforce Commission (TWC). TWC has already adopted rules to replace those proposed for repeal, found in Texas Administrative Code Title 40, Part 20, Chapter 854, concerning Division for Blind Services. Therefore, the rules proposed for repeal are no longer necessary.

FISCAL NOTE

Greta Rymal, Deputy Executive Commissioner for Financial Services, has determined that for each year of the first five years that the sections will be repealed, there will be no fiscal implications to state or local governments as a result of the repeals.

GOVERNMENT GROWTH IMPACT STATEMENT

HHSC has determined that during the first five years that the sections will be repealed:

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

(2) the repealed rules will not affect the number of employee positions;

(3) the repealed rules will not require an increase or decrease in future legislative appropriations;

(4) the repealed rules will not affect fees paid to the agency;

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

(6) the repealed rules will not expand, limit, or repeal an existing rule;

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

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

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

Ms. Rymal has also determined that there will be no adverse economic effect on small businesses, micro-businesses, or rural communities. These rules are already in effect under TWC. The proposed repeals have no effect.

ECONOMIC COSTS TO PERSONS AND IMPACT ON LOCAL EMPLOYMENT

There are no anticipated economic costs to persons who are required to comply with the sections as proposed.

There is no anticipated negative impact on local employment.

COSTS TO REGULATED PERSONS

Texas Government Code, §2001.0045 does not apply to this rule because the rule does not impose a cost on regulated persons.

PUBLIC BENEFIT

Charles Smith, Executive Commissioner, has determined that for each year of the first five years the sections are repealed, the public will benefit from adoption of the repeals. The public benefit anticipated as a result of the repeals is clarity that these programs now operate under TWC instead of DARS.

TAKINGS IMPACT ASSESSMENT

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

PUBLIC COMMENT

Written comments on the proposal may be submitted to Rules Coordination Office, P.O. Box 149030, Mail Code H600, Austin, Texas 78714-9030, or street address 4900 North Lamar Boulevard, Austin, Texas 78751; or e-mailed to HHSRulesCoordinationOffice@hhsc.state.tx.us.

To be considered, comments must be submitted no later than 30 days after the date of this issue of the *Texas Register.* Comments must be: (1) postmarked or shipped before the last day of the comment period; (2) hand-delivered before 5:00 p.m. on the last working day of the comment period; or (3) e-mailed by midnight on the last day of the comment period. When e-mailing comments, please indicate "Comments on DARS 106/107" in the subject line.

SUBCHAPTER A. CRISS COLE REHABILITATION CENTER

40 TAC §§106.101, 106.103, 106.105, 106.107, 106.109, 106.111, 106.113

STATUTORY AUTHORITY

The repeals are authorized by Texas Government Code §§531.0055, 531.02014, and 531.0202, and Human Resources Code §111.018 and §117.073.

§106.101. Purpose.

§106.103. Legal Authority.

§106.105. Definitions.

§106.107. Eligibility.

§106.109. Services.

§106.111. Consumer Participation and Comparable Services and Benefits.

§106.113. Payment of Shift Differentials.

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 6, 2018.

TRD-201801485
Karen Ray
Chief Counsel
Department of Assistive and Rehabilitative Services
Earliest possible date of adoption: May 20, 2018
For further information, please call: (512) 487-3419

♦ ♦ ♦

SUBCHAPTER D. INDEPENDENT LIVING SERVICES FOR OLDER INDIVIDUALS WHO ARE BLIND

DIVISION 1. GENERAL RULES

40 TAC §§106.901, 106.903, 106.905

STATUTORY AUTHORITY

The repeals are authorized by Texas Government Code §§531.0055, 531.02014, and 531.0202, and Human Resources Code §111.018 and §117.073.

§106.901. Purpose.

§106.903. Legal Authority.

§106.905. 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 April 6, 2018.

TRD-201801486
Karen Ray
Chief Counsel
Department of Assistive and Rehabilitative Services
Earliest possible date of adoption: May 20, 2018
For further information, please call: (512) 487-3419

♦ ♦ ♦

DIVISION 2. ALLOCATION OF FUNDS

40 TAC §106.1001

STATUTORY AUTHORITY

The repeals are authorized by Texas Government Code §§531.0055, 531.02014, and 531.0202, and Human Resources Code §111.018 and §117.073.

§106.1001. Allocation of Funds.

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 6, 2018.

TRD-201801487
Karen Ray
Chief Counsel
Department of Assistive and Rehabilitative Services
Earliest possible date of adoption: May 20, 2018
For further information, please call: (512) 487-3419

♦ ♦ ♦

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 repeals are authorized by Texas Government Code §§531.0055, 531.02014, and 531.0202, and Human Resources Code §111.018 and §117.073.

§106.1101. Purpose.

§106.1105. Eligibility.

§106.1107. Independent Living Plan.

§106.1109. Waiting List.

§106.1111. Scope 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 April 6, 2018.

TRD-201801488
Karen Ray
Chief Counsel
Department of Assistive and Rehabilitative Services
Earliest possible date of adoption: May 20, 2018
For further information, please call: (512) 487-3419

♦ ♦ ♦

DIVISION 4. CONSUMER PARTICIPATION

40 TAC §§106.1201, 106.1203, 106.1205

STATUTORY AUTHORITY

The repeals are authorized by Texas Government Code §§531.0055, 531.02014, and 531.0202, and Human Resources Code §111.018 and §117.073.

§106.1201. Consumer Participation System.

§106.1203. Fee Schedule Amount.

§106.1205. Insurance Payments.

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 6, 2018.

TRD-201801490
Karen Ray
Chief Counsel
Department of Assistive and Rehabilitative Services
Earliest possible date of adoption: May 20, 2018
For further information, please call: (512) 487-3419

♦ ♦ ♦

DIVISION 5. CONSUMER RIGHTS

40 TAC §106.1301, §106.1303

STATUTORY AUTHORITY

The repeals are authorized by Texas Government Code §§531.0055, 531.02014, and 531.0202, and Human Resources Code §111.018 and §117.073.

§106.1301. Rights of Consumers.

§106.1303. Complaint Process.

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 6, 2018.

TRD-201801489
Karen Ray
Chief Counsel
Department of Assistive and Rehabilitative Services
Earliest possible date of adoption: May 20, 2018
For further information, please call: (512) 487-3419

♦ ♦ ♦

DIVISION 6. TECHNICAL ASSISTANCE AND TRAINING

40 TAC §106.1351

STATUTORY AUTHORITY

The repeals are authorized by Texas Government Code §§531.0055, 531.02014, and 531.0202, and Human Resources Code §111.018 and §117.073.

§106.1351. Administering Agency's Role in Providing Technical Assistance.

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

Filed with the Office of the Secretary of State on April 6, 2018.

TRD-201801491
Karen Ray
Chief Counsel
Department of Assistive and Rehabilitative Services
Earliest possible date of adoption: May 20, 2018
For further information, please call: (512) 487-3419

♦ ♦ ♦

DIVISION 7. REFERRALS

40 TAC §106.1371

STATUTORY AUTHORITY

The repeals are authorized by Texas Government Code §§531.0055, 531.02014, and 531.0202, and Human Resources Code §111.018 and §117.073.

§106.1371. Expectations of Administering Agency's Employees.

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

Filed with the Office of the Secretary of State on April 6, 2018.

TRD-201801492
Karen Ray
Chief Counsel
Department of Assistive and Rehabilitative Services
Earliest possible date of adoption: May 20, 2018
For further information, please call: (512) 487-3419

♦ ♦ ♦

SUBCHAPTER N. BUSINESS ENTERPRISES OF TEXAS

40 TAC §§106.1901, 106.1903, 106.1905, 106.1907, 106.1909, 106.1911, 106.1913, 106.1915, 106.1917, 106.1919, 106.1921, 106.1923, 106.1925, 106.1927, 106.1929, 106.1931, 106.1933, 106.1935

STATUTORY AUTHORITY

The repeals are authorized by Texas Government Code §§531.0055, 531.02014, and 531.0202, and Human Resources Code §111.018 and §117.073.

§106.1901. Purpose.
§106.1903. Legal Authority.
§106.1905. Definitions.
§106.1907. General Policies.
§106.1909. BET Administration.
§106.1911. Training of Potential Applicants and Licensees.
§106.1913. BET Licenses.
§106.1915. Initial and Career Advancement Assignment Procedures.
§106.1917. Fixtures, Furnishings, and Equipment; Initial Inventory; and Expendables.
§106.1919. Set-Aside Fees.
§106.1921. Duties and Responsibilities of Managers.
§106.1923. Responsibilities of the Department of Assistive and Rehabilitative Services, Division for Blind Services.
§106.1925. BET Elected Committee of Managers.
§106.1927. Termination of License for Reasons Other Than Unsatisfactory Performance.
§106.1929. Administrative Action Based on Unsatisfactory Performance.
§106.1931. Procedures for Resolution of Manager's Dissatisfaction.
§106.1933. Establishing and Closing Facilities.
§106.1935. Forms.

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 6, 2018.

TRD-201801493
Karen Ray
Chief Counsel
Department of Assistive and Rehabilitative Services
Earliest possible date of adoption: May 20, 2018
For further information, please call: (512) 487-3419

♦ ♦ ♦

CHAPTER 107. COMPREHENSIVE REHABILITATION SERVICES

SUBCHAPTER A. VOCATIONAL REHABILITATION SERVICES PROGRAM

The Health and Human Services Commission (HHSC) proposes the repeal of Texas Administrative Code Title 40, Part 2, Chapter 107, Subchapter A, concerning Vocational Rehabilitation Services Program.

BACKGROUND AND PURPOSE

As required by Senate Bills 200 and 208, 84th Legislature, Regular Session, 2015, the Department of Assistive and Rehabilitative Services (DARS) was abolished after all of its functions were transferred to HHSC or the Texas Workforce Commission (TWC). TWC has already adopted rules to replace those proposed for repeal, found in Texas Administrative Code Title 40, Part 20, Chapter 856, concerning Vocational Rehabilitation Services. Therefore, the rules proposed for repeal are no longer necessary.

FISCAL NOTE

Greta Rymal, Deputy Executive Commissioner for Financial Services, has determined that for each year of the first five years that the sections will be repealed, there will be no fiscal implications to state or local governments as a result of the repeals.

GOVERNMENT GROWTH IMPACT STATEMENT

HHSC has determined that during the first five years that the sections will be repealed:

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

(2) the repealed rules will not affect the number of employee positions;

(3) the repealed rules will not require an increase or decrease in future legislative appropriations;

(4) the repealed rules will not affect fees paid to the agency;

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

(6) the repealed rules will not expand, limit, or repeal an existing rule;

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

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

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

Ms. Rymal has also determined that there will be no adverse economic effect on small businesses, micro-businesses, or rural communities. These rules are already in effect under TWC. The proposed repeals have no effect.

ECONOMIC COSTS TO PERSONS AND IMPACT ON LOCAL EMPLOYMENT

There are no anticipated economic costs to persons who are required to comply with the sections as proposed.

There is no anticipated negative impact on local employment.

COSTS TO REGULATED PERSONS

Texas Government Code, §2001.0045 does not apply to this rule because the rule does not impose a cost on regulated persons.

PUBLIC BENEFIT

Charles Smith, Executive Commissioner, has determined that for each year of the first five years the sections are repealed, the public will benefit from adoption of the repeals. The public benefit anticipated as a result of the repeals is clarity that this program now operates under TWC instead of DARS.

TAKINGS IMPACT ASSESSMENT

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

PUBLIC COMMENT

Written comments on the proposal may be submitted to Rules Coordination Office, P.O. Box 149030, Mail Code H600, Austin, Texas 78714-9030, or street address 4900 North Lamar Boulevard, Austin, Texas 78751; or e-mailed to *HHSRulesCoordinationOffice@hhsc.state.tx.us.*

To be considered, comments must be submitted no later than 30 days after the date of this issue of the *Texas Register.* Comments must be: (1) postmarked or shipped before the last day of the comment period; (2) hand-delivered before 5:00 p.m. on the last working day of the comment period; or (3) e-mailed by midnight on the last day of the comment period. When e-mailing comments, please indicate "Comments on DARS 106/107" in the subject line.

DIVISION 1. PROGRAM AND SUBCHAPTER PURPOSE

40 TAC §§107.101, 107.103, 107.105, 107.107, 107.109

STATUTORY AUTHORITY

The repeals are authorized by Texas Government Code §§531.0055, 531.02014, and 531.0202, and Human Resources Code §111.018 and §117.073.

§107.101. Purpose.

§107.103. Legal Authority.

§107.105. Definitions.

§107.107. Statewideness.

§107.109. Consultation Regarding the Administration of the State 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 April 6, 2018.

TRD-201801494

Karen Ray

Chief Counsel

Department of Assistive and Rehabilitative Services

Earliest possible date of adoption: May 20, 2018

For further information, please call: (512) 487-3419

♦ ♦ ♦

DIVISION 2. ELIGIBILITY

40 TAC §§107.207, 107.209, 107.211, 107.213, 107.215

STATUTORY AUTHORITY

The repeals are authorized by Texas Government Code §§531.0055, 531.02014, and 531.0202, and Human Resources Code §111.018 and §117.073.

§107.207. Eligibility.

§107.209. Prohibited Factors.

§107.211. Extended Evaluation.

§107.213. Determination of Ineligibility.

§107.215. Case Closure.

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 6, 2018.

TRD-201801495

Karen Ray

Chief Counsel

Department of Assistive and Rehabilitative Services

Earliest possible date of adoption: May 20, 2018

For further information, please call: (512) 487-3419

♦ ♦ ♦

DIVISION 3. PROVISION OF VOCATIONAL REHABILITATION SERVICES

40 TAC §§107.307, 107.309, 107.311, 107.313, 107.315, 107.317, 107.319, 107.321, 107.323, 107.325, 107.327, 107.329, 107.331, 107.333

STATUTORY AUTHORITY

The repeals are authorized by Texas Government Code §§531.0055, 531.02014, and 531.0202, and Human Resources Code §111.018 and §117.073.

§107.307. Provision of Services.

§107.309. Assessment.

§107.311. Counseling, Guidance, and Referral.

§107.313. Physical Restoration Services.

§107.315. Mental Restoration Services.

§107.317. Vocational and Other Training Services.

§107.319. Maintenance.

§107.321. Transportation.

§107.323. Interpreter Services for the Deaf and Hard of Hearing.

§107.325. Job Development, Placement and Retention.

§107.327. Post-Employment Services.

§107.329. Occupational Licenses, Tools, Equipment, and Training Supplies.

§107.331. Individualized Plan for Employment (IPE).

§107.333. Consumers Determined to Have Achieved Employment Outcome.

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 6, 2018.

TRD-201801496
Karen Ray
Chief Counsel
Department of Assistive and Rehabilitative Services
Earliest possible date of adoption: May 20, 2018
For further information, please call: (512) 487-3419

♦ ♦ ♦

DIVISION 4. CONSUMER PARTICIPATION

40 TAC §107.407

STATUTORY AUTHORITY

The repeals are authorized by Texas Government Code §§531.0055, 531.02014, and 531.0202, and Human Resources Code §111.018 and §117.073.

§107.407. Basic Living Requirements (BLR).

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 6, 2018.

TRD-201801497
Karen Ray
Chief Counsel
Department of Assistive and Rehabilitative Services
Earliest possible date of adoption: May 20, 2018
For further information, please call: (512) 487-3419

♦ ♦ ♦

DIVISION 5. COMPARABLE BENEFITS

40 TAC §107.507, §107.509

STATUTORY AUTHORITY

The repeals are authorized by Texas Government Code §§531.0055, 531.02014, and 531.0202, and Human Resources Code §111.018 and §117.073.

§107.507. Comparable Services and Benefits.

§107.509. Availability of Comparable Services and Benefits.

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 6, 2018.

TRD-201801498
Karen Ray
Chief Counsel
Department of Assistive and Rehabilitative Services
Earliest possible date of adoption: May 20, 2018
For further information, please call: (512) 487-3419

♦ ♦ ♦

DIVISION 6. METHODS OF ADMINISTRATION OF VOCATIONAL REHABILITATION

40 TAC §§107.607, 107.609, 107.611

STATUTORY AUTHORITY

The repeals are authorized by Texas Government Code §§531.0055, 531.02014, and 531.0202, and Human Resources Code §111.018 and §117.073.

§107.607. Statewide Studies and Program Evaluation.

§107.609. Annual Evaluation.

§107.611. Order of Selection.

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 6, 2018.

TRD-201801499
Karen Ray
Chief Counsel
Department of Assistive and Rehabilitative Services
Earliest possible date of adoption: May 20, 2018
For further information, please call: (512) 487-3419

♦ ♦ ♦