PROPOSED RULES

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

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

TITLE 4. AGRICULTURE

PART 1. TEXAS DEPARTMENT OF AGRICULTURE

CHAPTER 3. BOLL WEEVIL ERADICATION PROGRAM

SUBCHAPTER K. MAINTENANCE PROGRAM

The Texas Department of Agriculture (department), upon the request and recommendation of the Texas Boll Weevil Eradication Foundation (Foundation), proposes the repeal of Title 4, Part 1, Chapter 3, Subchapter K, §3.705, relating to Penalty and Remedies, and proposes new §§3.705 - 3.707, and §3.711, concerning the implementation and operation of a boll weevil eradication maintenance program to be conducted in an area known as the East Texas Maintenance Area.

Cotton growers, in partnership with the state and federal governments, have made significant investments and progress toward the eradication of boll weevils and pink bollworms in this state. Texas Agriculture Code, Chapter 74, Subchapter F (Subchapter F) provides the department with the authority to establish rules to fund and implement a maintenance area upon the request of the Foundation, to eliminate any potential areas of unexpected infestation once a zone has been declared functionally eradicated and the Foundation ceases to collect the grower assessment in a zone. An existing eradication zone is eligible for inclusion in a maintenance area if the Commissioner determines that the boll weevil has been functionally eradicated in that zone, no debt is owed to the foundation by the zone and the grower steering committee for the zone has been consulted regarding inclusion of the zone in a maintenance area. The requisite determinations and consultation have been made for counties proposed to be included in the East Texas Maintenance Area. The new sections are necessary to establish the East Texas Maintenance Area, impose a per-bale maintenance fee on all cotton grown in the East Texas Maintenance Area, and to establish the method, manner, and mechanism by which maintenance fees are collected for the boll weevil eradication maintenance program, as provided for in Subchapter F.

The new sections establish the East Texas Maintenance Area and the maximum per-bale maintenance fee to be paid by producers in the maintenance area, provide procedures for collecting maintenance fees, and provide for penalties and remedies for violations of the sections. The new sections were developed with recommendations made by the Foundation and cotton grower steering committees in affected boll weevil eradication zones.

Stuart Strnad, Coordinator for Agriculture Commodity Boards and Producer Relations, has determined that for the first five years the new sections are in effect, there will be no anticipated costs to state or local government, because any costs incurred will be covered by the Foundation from maintenance fees. Maintenance fees are paid to the Foundation and are not state revenue.

Mr. Strnad has also determined that for each year of the first five years the proposed new sections are in effect, the public benefit anticipated as a result of administering and enforcing the new sections will be to provide for the continued protection of the cotton industry from the boll weevil and pink bollworm. There is an anticipated cost to individuals, microbusinesses and small businesses (cotton producers) required to comply with the new sections. The anticipated economic cost to cotton producers will be the cost of the maintenance fee, not to exceed $5 per bale, which is based on the quantity of cotton sold by the producer. The maintenance fee will replace the current assessment on cotton producers, and in some cases will result in a cotton grower paying less than the current assessment. There may also be a cost to central collection points of cotton in order to comply with collection requirements in new §3.707. It is not possible to determine the central collection points' costs, if any, at this time.

Comments on the proposal may be submitted to Stuart Strnad, P.O. Box 12847, Austin, Texas 78711-2847, or emailed to *Stuart.Strnad@TexasAgriculture.gov.* Comments must be received no later than 30 days from the date of publication of the proposal in the *Texas Register.*

4 TAC §3.705

The proposal is made under Texas Agriculture Code, §74.204, which provides the department with the authority to adopt rules to implement and operate a boll weevil maintenance program under the Code.

The code provisions affected by the proposal are the Texas Agriculture Code, Chapter 74, Subchapter F.

§3.705. Penalty and Remedies.

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 August 26, 2016.

TRD-201604535
Jessica Escobar
Assistant General Counsel
Texas Department of Agriculture
Earliest possible date of adoption: October 9, 2016
For further information, please call: (512) 463-4075

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4 TAC §§3.705 - 3.707, 3.711

The proposal is made under Texas Agriculture Code, §74.204, which provides the department with the authority to adopt rules to implement and operate a boll weevil maintenance program under the Code.

The code provisions affected by the proposal are the Texas Agriculture Code, Chapter 74, Subchapter F.

§3.705. East Texas Maintenance Area.

(a) The East Texas Maintenance Area shall consist of the following four (4) existing contiguous eradication zones: Northern Blacklands, Southern Blacklands, South Texas/Wintergarden, and Upper Coastal Bend.

(b) In each of the four (4) existing contiguous eradication zones listed in subsection (a) of this section, the Commissioner has determined that:

(1) the boll weevil has been functionally eradicated;

(2) the zone has satisfied any debt owed to the Foundation;

(3) the cotton grower steering for each zone was consulted by the Foundation regarding the inclusion of the zone in the East Texas maintenance area; and

(4) the Foundation board has requested that each zone be included in the East Texas Maintenance Area.

§3.706. East Texas Maintenance Area- Maintenance Fees.

(a) A maximum per-bale maintenance fee shall be assessed on all cotton grown in the East Texas Maintenance Area. The fee shall be set by the Commissioner on an annual basis and shall be in an amount up to a maximum of $5 per bale.

(b) The Board shall submit an annual recommendation to the Commissioner by March 15 regarding the maintenance fee to be used each crop year. Each year, prior to submitting its recommendation to the Commissioner, the Board shall consult with the cotton grower steering committees within the East Texas Maintenance Area to develop a maintenance fee recommendation to submit to the Commissioner.

(c) The Board shall consider the following factors, as applied to the East Texas Maintenance Area, when determining the annual maintenance fee recommendation:

(1) number of cotton acres;

(2) potential for reinfestation;

(3) the length of the growing season;

(4) epidemiology;

(5) historical weather conditions;

(6) expected costs of maintenance program; and

(7) need for an adequate reserve to respond to potential re-infestations in a rapid, effective manner.

(d) The Commissioner shall consider the Board's recommendation, and may accept, reject or modify the Board's recommendation.

(e) The Commissioner shall set the annual per-bale maintenance fee by April 1 each year.

(f) The Board, on annual basis, shall provide the following information by certified mail to the central collection points described in §3.707 of this subchapter (relating to East Texas Maintenance Area - Collection of Maintenance Fees): the duty to collect the maintenance fee, the amount of the annual fee, and instructions on remittance of the fee to the Foundation.

§3.707. East Texas Maintenance Area - Collection of Maintenance Fees.

(a) The first central collection points receiving and shipping cotton produced in the East Texas Maintenance Area shall collect the per-bale maintenance fee on all cotton produced in the area, beginning upon receipt of notifications from the Commissioner and the Foundation, and continuing until such time as the Commissioner gives notice otherwise.

(b) Beginning on the effective date of this subchapter and continuing for each year thereafter, until such time as the Commissioner gives notice otherwise, the first central collection points shall forward all East Texas Maintenance Area maintenance fees to the Foundation, for cotton grown in the year 2017 or later, on the following schedule:

(1) for all cotton that is sold, paid and shipped by February 15, and not previously submitted and reported, submit to the Foundation by March 1;

(2) for all cotton that is sold, paid and shipped by May 15, and not previously submitted and reported, submit to the Foundation by June 1; and

(3) for all cotton that is sold, paid and shipped by September 15, and not previously submitted and reported, submit to the Foundation by October 1.

(c) The first central collection point shall submit a report with each maintenance fee submission listing all East Texas Maintenance Area cotton received and shipped and the maintenance fees and remitted from such cotton proceeds, on a form promulgated by the Foundation.

(d) In the event a central collection point collects and remits a maintenance fee on cotton that was produced outside of the East Texas Maintenance Area, and the cotton producer from whom the fee was collected submits a refund request to the Foundation, along with documentation demonstrating that the cotton was not produced in the East Texas Maintenance Area, the Foundation shall issue a maintenance fee refund to such cotton producer.

(e) Maintenance fees collected and received by the Foundation are not state funds.

§3.711. Penalty and Remedies.

A violation of this subchapter is subject to an administrative penalty not to exceed $5,000 per violation, as prescribed in §12.020 of the Texas Agriculture Code. Each day a violation continues may be considered a separate violation for purposes of a penalty assessment.

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

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Jessica Escobar
Assistant General Counsel
Texas Department of Agriculture
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PART 2. TEXAS ANIMAL HEALTH COMMISSION

CHAPTER 38. TRICHOMONIASIS

4 TAC §§38.1, 38.4, 38.6

The Texas Animal Health Commission (commission) proposes amendments to §38.1, concerning Definitions, §38.4, concerning Certified Veterinary Practitioners, and §38.6, concerning Official Trichomoniasis Tests, in Chapter 38, which is entitled "Trichomoniasis".

The purpose of the amendments is to change the Trichomoniasis (Trich) certification period for veterinarians and reduce the shipping time for sample submission.

The Trich organism causes abortion and extended calving seasons. Bulls will remain persistently infected and spread infection from cow to cow. Older bulls are typically the main reservoir of infection in a herd; this is because older bulls often have deeper preputial folds (crypts) creating a more favorable environment for Trich.

The Bovine Trich Working Group (TWG) had an annual meeting on April 26, 2016, to evaluate the effectiveness of current rules. The TWG discussed the program overview to date, the management of infected herds, entry requirements, and the need for possible revisions to the program.

The TWG recommended extending the certification period of veterinarians certified to perform Trich program functions from 3 years to 5 years. The TWG also recommended reducing the time of arrival of Trich samples sent to the lab for testing. The group discussed the integrity of the sample to be tested at 120 hours, which provides a longer chance for inhibitors to negatively impact testing. Literature shows that after 30 hours there is a decline; therefore, the group recommended changing the arrival time at the lab from 120 hours to 96 hours.

The definition of cattle in this chapter includes bison and is being amended to exclude bison from the test requirements. Research has failed to show that bison pose a significant risk to spread or carry Trich and the Executive Director has routinely waived the test requirement in the past.

FISCAL NOTE

Ms. Larissa Schmidt, Director of Administration, Texas Animal Health Commission, has determined for the first five-year period the rules are in effect, there will be no significant additional fiscal implications for state or local government as a result of enforcing or administering the rules. An Economic Impact Statement (EIS) is required if the proposed rule has an adverse economic effect on small businesses. The agency has evaluated the requirements and determined that there is not an adverse economic impact and, therefore, there is no need to do an EIS. Implementation of this rule poses no significant fiscal impact on small or micro-businesses, or to individuals.

PUBLIC BENEFIT NOTE

Ms. Schmidt 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 enforcing the rules will be more efficient rules to allow veterinarians to be recertified for a longer period, as well as adjust the time for samples to be submitted to the lab for testing within the recommended timeframe.

LOCAL EMPLOYMENT IMPACT STATEMENT

In accordance with Texas Government Code §2001.022, this agency has determined that the proposed rules will not impact local economies and, therefore, did not file a request for a local employment impact statement with the Texas Workforce Commission.

TAKINGS ASSESSMENT

The agency has determined that the proposed governmental action will not affect private real property. The proposed amendments are an activity related to the handling of animals, including requirements for testing, movement, inspection, identification, reporting of disease, and treatment, in accordance with 4 TAC §59.7, and are, therefore, compliant with the Private Real Property Preservation Act in Government Code, Chapter 2007.

REQUEST FOR COMMENT

Comments regarding the proposal may be submitted to Amanda Bernhard, Texas Animal Health Commission, 2105 Kramer Lane, Austin, Texas 78758, by fax at (512) 719-0719 or by email at "comments@tahc.texas.gov".

STATUTORY AUTHORITY

The amendments are proposed under the following statutory authority as found in Chapter 161 of the Texas Agriculture Code. The commission is vested by statute, §161.041(a), with the requirement to protect all livestock, domestic animals, and domestic fowl from disease. The commission is authorized, through §161.041(b), to act to eradicate or control any disease or agent of transmission for any disease that affects livestock.

Pursuant to §161.005, entitled "Commission Written Instruments", the commission may authorize the executive director or another employee to sign written instruments on behalf of the commission. A written instrument, including a quarantine or written notice signed under that authority, has the same force and effect as if signed by the entire commission.

Pursuant to §161.006, entitled "Documents to Accompany Shipment", if required that a certificate or permit accompany animals or commodities moved in this state, the document must be in the possession of the person in charge of the animals or commodities, if the movement is made by any other means.

Pursuant to §161.0417, entitled "Authorized Personnel for Disease Control", a person, including a veterinarian, must be authorized by the commission in order to engage in an activity that is part of a state or federal disease control or eradication program for animals. Section 161.0417 requires the commission to adopt necessary rules for the authorization of such persons and, after reasonable notice, to suspend or revoke a person's authorization if the commission determines that the person has substantially failed to comply with Chapter 161 or rules adopted under that chapter. Section 161.0417 does not affect the requirement for a license or an exemption under Chapter 801, Occupations Code, to practice veterinary medicine.

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

Pursuant to §161.048, entitled "Inspection of Shipment of Animals or Animal Products", the commission may require testing, vaccination, or another epidemiologically sound procedure be-

fore or after animals are moved. An agent of the commission is entitled to stop and inspect a shipment of animals or animal products being transported in this state in order to determine if the shipment originated from a quarantined area or herd; or determine if the shipment presents a danger to the public health or livestock industry through insect infestation or through a communicable or noncommunicable disease.

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

Pursuant to §161.113, entitled "Testing or Treatment of Livestock", if the commission requires testing or vaccination under this subchapter, the testing or vaccination must be performed by an accredited veterinarian or qualified person authorized by the commission. The state may not be required to pay the cost of fees charged for the testing or vaccination. And if the commission requires the dipping of livestock under this subchapter, the livestock shall be submerged in a vat, sprayed, or treated in another sanitary manner prescribed by rule of the commission.

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

§38.1. Definitions.

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

(1) Accredited Veterinarian--A licensed veterinarian who is approved to perform specified functions required by cooperative state-federal disease control and eradication programs pursuant to Title 9 of the Code of Federal Regulations, Parts 160 and 161.

(2) Affected Herd--Any herd in which any cattle have been classified as Tritrichomonas foetus positive on an official test and which has not completed the requirements for elimination of the disease from the herd.

(3) Cattle--All dairy and beef animals (genus Bos), excluding [~~and~~] bison (genus Bison).

(4) Certified Veterinarians--Veterinarians certified with, and approved by the commission to collect Trichomoniasis samples for official Trichomoniasis testing and to perform any other official function under the Trichomoniasis program.

(5) Commission--The Texas Animal Health Commission.

(6) Executive Director--The Executive Director of the Texas Animal Health Commission or his designee.

(7) Exempt Cattle (from testing requirements)--Cattle that have been physically rendered incapable of intromission at a facility recognized by the commission.

(8) Exposed Cattle--Cattle that are part of an affected herd or cattle that have been in contact with Trichomoniasis infected cattle.

(9) Herd--

(A) All cattle under common ownership or supervision or cattle owned by a spouse that are on one premise; or

(B) All cattle under common ownership or supervision or cattle owned by a spouse on two or more premises that are geographically separated, but on which the cattle have been interchanged or where there has been contact among the cattle on the different premises. Contact between cattle on the different premises will be assumed unless the owner establishes otherwise and the results of the epidemiological investigation are consistent with the lack of contact between premises; or

(C) All cattle on common premises, such as community pastures or grazing association units, but owned by different persons. Other cattle owned by the persons involved which are located on other premises are considered to be part of this herd unless the epidemiological investigation establishes that cattle from the affected herd have not had the opportunity for direct or indirect contact with cattle from that specific premises. Approved feedlots and approved pastures are not considered to be herds.

(10) Herd Test--An official test of all non-virgin bulls in a herd.

(11) Hold Order--A document restricting movement of a herd, unit, or individual animal pending the determination of disease status.

(12) Infected Cattle--Any cattle determined by an official test or diagnostic procedure to be infected with Trichomoniasis or diagnosed by a veterinarian as infected.

(13) Infected Herd--The non-virgin bulls in any herd in which any cattle have been determined by an official test or diagnostic procedure to be infected with Trichomoniasis or diagnosed by a veterinarian as being infected.

(14) Movement Permit--Authorization for movement of infected or exposed cattle from the farm or ranch of origin through marketing channels to slaughter or for movement of untested animals to a location where the animals will be held under hold order until testing has been accomplished.

(15) Movement Restrictions--A "Hold Order," "Quarantine," or other written document issued or ordered by the commission to restrict the movement of livestock or exotic livestock.

(16) Negative--Cattle that have been tested with official test procedures and found to be free from infection with Trichomoniasis.

(17) Official Identification/Officially Identified--The identification of livestock by means of an official identification device, official eartag, registration tattoo, or registration brand, or any other method approved by the commission and/or Administrator of APHIS that provides unique identification for each animal. Official identification includes USDA alpha-numeric metal eartags (silver bangs tags), 840 RFID tags, 840 bangle tags, official breed registry tattoos, and official breed registry individual animal brands.

(18) Official Trichomoniasis Test--A test for bovine Trichomoniasis, approved by the commission, applied and reported by TVMDL or any other laboratory approved as an official laboratory by the commission. The test document is valid for 60 days, provided the bull is isolated from female cattle at all times, and may be transferred within that timeframe with an original signature of the consignor.

(19) Official Laboratory Pooled Trichomoniasis test samples--Up to five samples individually collected by a veterinarian and packaged and submitted to an official laboratory which can then pool the samples.

(20) Positive--Cattle that have been tested with official test procedures and found to be infected with Trichomoniasis.

(21) Quarantine--A written commission document or a verbal order followed by a written order restricting movement of animals because of the existence of or exposure to Trichomoniasis. The commission may establish a quarantine on the affected animals or on the affected place. The quarantine of an affected place may extend to any af-

fected area, including a county, district, pasture, lot, ranch, farm, field, range, thoroughfare, building, stable, or stockyard pen. The commission may establish a quarantine to prohibit or regulate the movement of any article or animal that the commission designates to be a carrier of Trichomoniasis and/or an animal into an affected area, including a county district, pasture, lot, ranch, farm, field, range, thoroughfare, building, stable, or stockyard pen.

(22) Test-Eligible Cattle--All sexually intact non-virgin male cattle and all sexually intact male cattle which have erupting or erupted permanent incisor teeth (or older), which are being sold, leased, gifted or exchanged in the state of Texas for breeding purposes.

(23) Trichomoniasis--A venereal disease of cattle caused by the organism Tritrichomonas foetus.

(24) TVMDL--The official laboratory for testing is the Texas A&M Veterinary Medical Diagnostic Laboratory.

(25) Virgin Bull--Sexually intact male cattle which have not serviced a cow and which are not more than 18 months of age as determined by the eruption of the two permanent central incisors or birth date on breed registry papers certified by the breeder; or not more than 30 months of age and certified by both the breeder based on birth date and confirmed by his veterinarian that the bull facility is sufficient to prevent contact with female cattle. The certification by the breeder is valid for 60 days, provided the bull is isolated from female cattle at all times, and may be transferred within that timeframe with an original signature of the consignor.

§38.4. Certified Veterinary Practitioners.

(a) Only veterinarians certified through the Commission may perform Trichomoniasis program procedures, including but not limited to, collection of samples for official tests for Trichomoniasis within the state of Texas, submission of samples to official laboratories, identification of tested bulls and virgin bulls, management of Trichomoniasis infected bull herds, movement of infected bulls, and reporting of test results. In order to collect and submit Trichomoniasis samples a veterinary practitioner shall be certified to perform Trichomoniasis program procedures. In order to be certified, a veterinarian shall also be licensed to practice veterinary medicine in the state of Texas and be accredited through USDA.

(b) All veterinarians desiring to perform Trichomoniasis program functions shall participate in a certification program on Trichomoniasis program requirements and procedures before performing any Tichomoniasis program functions, including but not limited to review of the disease, proper sample collection techniques, sample preservation and laboratory submission, identification of animals, management of infected herds and shipment of infected or exposed animals to slaughter. The official certification program shall be conducted by or under the auspices of the Commission. Certified veterinarians shall be recertified every five [~~three~~] years.

(c) Certified veterinarians shall utilize approved procedures for collection of samples, identification of animals and submission of samples to laboratories.

(d) Certified veterinarians shall only utilize the official laboratories for culture of Trichomoniasis samples.

(e) Certified veterinarians shall submit all Trichomoniasis samples including all official identification on official Trichomoniasis test and report forms to the TVMDL in accordance with §38.6 of this chapter (relating to Official Trichomoniasis Tests).

§38.6. Official Trichomoniasis Tests.

Approved Tests. Approved tests for Trichomoniasis testing within the State of Texas shall include the culture or Real Time Polymerase Chain Reaction (RT-PCR) testing of samples collected into an InPouch by certified veterinarians following approved collection, handling and shipping protocols, then tested in approved laboratories.

(1) Official Culture Tests. An official test is one in which the sample is received in the official laboratory, in good condition, within 48 hours of collection and such sample is tested according to the "Official Protocol for Culture of Trichomoniasis." Samples in transit for more than 48 hours will not be accepted for official culture testing. During transportation, the organisms should be protected from exposure to daylight and extremes of temperature, which should remain above 15 degrees Celsius (59 degrees Fahrenheit) and below 37 degrees Celsius (98.6 degrees Fahrenheit).

(2) Official Polymerase Chain Reaction Tests. Polymerase Chain Reaction is accepted as an official test or an official confirmatory test when completed by a qualified laboratory, approved by the Executive Director, and the sample is received in good condition by the laboratory within 48 hours after collection, or is incubated by the collecting veterinarian [~~for 48 hours~~] after collection, then submitted to arrive at the laboratory within 96 [~~120~~] hours of collection. Trichomoniasis samples pooled at the laboratory may qualify as official tests at a ratio of up to five individually collected samples pooled for one test. Veterinary practitioners may not submit pooled samples for an official test.

(3) Other Official Tests. Other tests for Trichomoniasis may be approved by the Commission, as official tests, after the tests have been proven effective by research, have been evaluated sufficiently to determine efficacy, and a protocol for use of the test has been established.

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

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Gene Snelson
General Counsel
Texas Animal Health Commission
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CHAPTER 40. CHRONIC WASTING DISEASE

4 TAC §40.4, §40.6

The Texas Animal Health Commission (commission) proposes amendments to §40.4, concerning Entry Requirements, and a new §40.6, concerning Chronic Wasting Disease (CWD) Movement Restriction Zones, in Chapter 40, which is entitled "Chronic Wasting Disease".

Elsewhere in this issue of the *Texas Register,* the commission contemporaneously proposes the repeal of the existing §40.6, concerning CWD Movement Restriction Zone.

The purpose of the amendments to §40.4 is to prohibit the entry of the carcasses or parts of susceptible species outside of Texas where Chronic Wasting Disease (CWD) has been detected in free-ranging or captive herds, unless certain conditions have been met. The purpose of a new §40.6 is to create additional CWD movement restriction zones in areas where animals have been disclosed as CWD positive.

CWD is a transmissible spongiform encephalopathy (TSE). CWD is a progressive, fatal, degenerative neurological disease of farmed and free-ranging deer, elk, and moose. TSEs include a number of different diseases affecting animals or humans including bovine spongiform encephalopathy (BSE) in cattle, scrapie in sheep and goats, and Creutzfeldt-Jacob disease (CJD) in humans. Although CWD shares certain features with other TSEs, it is a distinct disease affecting only deer, elk, and moose. The species known to be susceptible to CWD are North American elk or wapiti (Cervus Canadensis), red deer (Cervus elaphus), mule deer (Odocoileus hemionus), black-tailed deer (Odocoileus hemionus), white-tailed deer (Odocoileus virginianus), Sika deer (Cervus Nippon), and moose (Alces alces). The species that are found in Texas are white-tailed deer, mule deer, elk, red deer, and Sika deer.

The agent that causes CWD and other TSEs has not been completely characterized; however, the theory supported by most scientists is that TSE diseases are caused by proteins called prions. The most recent research suggests that CWD is directly transmitted from one animal to another through saliva, feces, urine, and/or antler velvet which contain abnormal prions shed in those body fluids and tissues. Direct transmission can also occur between cervids and infected carcasses. The disease has a long incubation period, and animals infected with CWD may not produce any visible signs of the disease for a number of months to years after they become infected. An animal may shed prions without obvious clinical symptoms for an unknown amount of time. The disease can also be indirectly transmitted through contaminated environments and since prions are very resistant to degradation persistence may be in some environments for years.

Clinical signs of CWD may include weight loss, salivation, incoordination, behavior changes, and pneumonia. CWD primarily affects the nervous system in cervids but accumulation of the prion also occurs in other body systems including the lymphatic system. Therefore, the official tests (i.e. Elisa and IHC) designated by USDA target the identification of prions in the nervous and lymphatic systems. Presently, the only confirmatory diagnostic test for CWD is the Immunohistochemistry (IHC) test performed on the obex tissue of the brain and specific lymphoid tissues. This is a post-mortem test in which the animal must be dead to be tested. There is no known treatment or vaccine for CWD.

The commission works in coordination and collaboration with the Texas Parks and Wildlife Department (TPWD) to address CWD issues and concerns. All mule deer, white-tailed deer, and native species are under the jurisdiction of TPWD. They are classified as property of the state of Texas and TPWD manages them as a valuable and important resource of the state. TPWD through specific statutory authorization does allow for individuals to breed, trade, sell, and move white-tailed or mule deer that meet certain legal requirements.

Elk, Sika deer, and red deer are also classified as CWD susceptible species, but are not indigenous to the state and therefore, not subject to the jurisdiction of TPWD. They are classified as exotic livestock that are privately owned and are subject to the disease requirements of the commission. Texas has an unknown number of exotic cervid species that are maintained on private property behind high fences. Many of these facilities are hunting ranches, which are not subject to the seasonal and regulatory hunting restrictions of TPWD.

Surveillance testing is a key, critical component to early detection of the disease and also the monitoring of the disease prevalence in all areas of the state where any CWD susceptible species inhabit. Risk based surveillance is directing surveillance activities in a particular geographic area where CWD is most likely to be found based on host factors and potential exposure. An inadequate surveillance program promotes the spread of disease unnoticed and ultimately makes the task of disease freedom exponentially more difficult. In today's current environment, the mobility and transportation of agricultural animals throughout the state and country has greatly increased the spread of diseases and makes risk mitigation more difficult and complex. A good surveillance system supports our animal industries by having confidence in the health and marketability of their animals.

Though the white-tailed deer population in Texas has had significant historical surveillance, very few elk, red deer or Sika deer herds have participated in a CWD monitoring program providing very little CWD testing surveillance for these cervid species. The purpose of this proposal is to have surveillance where CWD has been detected and poses a risk.

CWD was first recognized in 1967 in captive mule deer in Colorado. The disease has since been documented in captive and/or free-ranging deer and elk in 23 states and 2 Canadian provinces, including Texas. In 2012, CWD was first discovered in Texas in a free-ranging mule deer in the Hueco Mountains along the New Mexico border in far West Texas.

On June 30, 2015, a two year old white-tailed deer at a breeding facility (Index facility) located in Medina County was confirmed positive for CWD. Through testing requirements associated with tracing of deer either from or moved to this facility, CWD has also been confirmed in 24 other captive white-tailed deer as of July 30, 2016 which includes three facilities other than the Index facility. Two of the three additional facilities are in Medina and Uvalde counties and one facility is in Lavaca County. To date, CWD detected in white-tailed deer have all originated in the deer breeder population rather than a native origin. Also, a free-ranging mule deer buck, harvested in Hartley County, was confirmed positive for CWD on March 3, 2016. Hartley County is located in the Texas Panhandle immediately to the south of Dalhart and borders New Mexico.

A task force comprised of members of deer and exotic livestock associations, private veterinary practitioners, and wildlife biologists assisted the TPWD and commission staff in developing a CWD response plan for restriction zones. They provided support for both agencies on a strategy to address the risk of exposure of CWD to susceptible species in Texas. In 2012, both TPWD and the commission created a restricted zone in the area of far West Texas that requires testing of susceptible species and restricts movement of live animals and carcasses from the zone. The commission and TPWD are proposing additional restricted zones which will require testing of susceptible species in those areas and restricted movement of live animals. TPWD has proposed its movement restriction zones in the July 22, 2016, issue of the *Texas Register* (41 TexReg 5391).

Deer populations in other states where CWD exists have experienced significant population declines. As the prevalence rates increase and geographic distribution expands, hunters may alter hunting behaviors which may include avoiding areas with high CWD prevalence. This could have an adverse economic impact on local communities dependent on hunting revenue and could negatively affect cervid populations. Considering that CWD has

been found within these identified zones, it may be established in the population and in the environment at this time.

CWD has been proven to be transmissible by direct contact between susceptible species and through environmental contamination. Those realties can create adverse economic impacts through the reluctance to purchase or to hunt a susceptible species from a facility in an area where CWD has been confirmed. CWD contaminates the environments which creates a serious obstacle for controlling and eradicating the disease. This can negatively impact ranching, hunting, real estate, tourism, and wildlife management-related economies, unless it is contained and controlled. The purpose of the restriction zones is to both reduce the risk of CWD being spread from areas where it might exist and to increase detection of CWD by increased surveillance.

This rule is for the purpose of protecting the susceptible species and their associated economic value from being exposed to CWD as well as to provide the necessary surveillance in these areas to epidemiologically determine the presence and potentially identify a source of the exposure for animals in an area. Ultimately, the goal is to be able to make a determination with a high confidence rate regarding the presence of the disease. The data collected from the testing in these areas can help to either classify the area as free of exposure or hopefully pinpoint a source or specific area for focusing disease eradication. Thus, the proposed rules, by providing a mechanism to minimize the spread of CWD, could also protect the economic interests of those involved in this industry.

Section 40.6(a) creates definitions that are specifically applied to this section and include "Check Station", "CWD Containment Zone", "CWD Surveillance Zone", "CWD Non-Native Susceptible Species", "CWD Native Susceptible Species", "Department", "High Fence Premise" and "Unnatural Movement".

Section 40.6(b) provides for a declaration of area(s) being restricted for CWD in order to protect other areas of the state from the risk of exposure to and the spread of CWD and to have the necessary surveillance to epidemiologically assess the risk.

Section 40.6(b)(1) defines the boundaries for the Containment Zone 1 and 2 and indicates that the Containment Zone 3 in Medina and Uvalde counties is limited to facilities already restricted by herd plans of the commission.

Section 40.6(b)(2) defines the boundaries for the Surveillance Zone 1, 2 and 3.

Section 40.6(c) provides requirements for animals within the Containment Zone. It provides that for movement from a CZ, no non-native CWD susceptible species may be transported outside the CZ unless from a herd with a certified status as established through §40.3(c)(6) (relating to Herd Status Plans for Cervidae) of this chapter. This is to prevent unmonitored animals from being transported outside the zone and potentially posing a risk of exposing or spreading CWD to another part of the state. It also addresses that non-native CWD susceptible species may be released within the CZ. It provides test requirements for these species, as well as carcass movement restrictions. Any escaped non-native CWD susceptible species which originated or resided in a CZ shall be captured and returned to the high fence premise of origin. Herd plans will have primacy for facilities within the zone and all non-native CWD susceptible species released in a CZ shall be officially identified.

Section 40.6(d) provides requirements for animals within the Surveillance Zone. It provides that prior to movement of a non-native CWD susceptible species, the premise of origin shall have an epidemiological risk assessment conducted by the commission. This will allow the agency to individually evaluate the risk of movement from a facility based on that facility's testing history, current status, and other epidemiological factors. It provides test requirements for these species, as well as carcass movement restrictions. Any escaped non-native CWD susceptible species which originated or resided in an SZ shall be captured and returned to the high fence premise of origin. Herd plans will have primacy for facilities within the zone and all non-native CWD susceptible species released in an SZ shall be officially identified.

Section 40.6(e) provides for Carcass Movement Restrictions, which states that no person shall transport or cause the transport of any part of a susceptible species from a property within a CZ or SZ unless it meets certain requirements.

Section 40.6(f) provides for the Executive Director to authorize movement if necessary or desirable to promote the objectives of this chapter and/or to minimize the economic impact of the restricted susceptible species without endangering those objectives or the health and safety of other susceptible species within the state.

Section 40.6(g) provides for the commission staff to annually review the movement restrictions zones and make recommendations to the commission on whether the zones should be modified or rescinded.

FISCAL NOTE

Ms. Larissa Schmidt, Director of Administration, Texas Animal Health Commission, has determined for the first five-year period the rules are in effect, there will be no significant additional fiscal implications for state or local government as a result of enforcing or administering the rules. The commission will administer and enforce the rules as part of their current functions and handle it within current budgetary resources.

Chapter 2006 of the Texas of Government Code, provides that 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. Government Code, §2006.001(1), defines a small or micro-business as a legal entity "formed for the purpose of making a profit" and "independently owned and operated." A micro-business is a business with 20 or fewer employees. A small business is defined as a business with fewer than 100 employees, or less than $6 million in annual gross receipts. The commission does not have any requirement that someone who has these susceptible species must provide financial information to the commission, but believes that there are facilities which would qualify as a small or micro-business. Since the rules as proposed would impact the ability of someone to engage in certain activities undertaken to generate a profit, the proposed rules may have an adverse impact on persons having susceptible exotic species. The extent of such adverse economic impact could consist of loss of revenue as a result of being unable to move susceptible species from a Containment Zone. However, based on the risk of disease exposure the need for the requirement is merited.

Surveillance testing is a key, critical competent to determine whether a disease exists as well as helping to establish a prevalence number for how many animals may be affected. Surveillance also helps to support Texas' animal industries

because it allows individuals to have confidence in the health of these animals, which makes them more marketable. Failure to perform adequate surveillance allows a disease to circulate unnoticed among animal hosts that spread the disease creating a greater disease problem and a far more difficult response task. In today's current environment the mobility and transportation of animals throughout the state and country has greatly increased exposure to diseases. The presence of CWD could greatly affect how the deer population is perceived by in-state and out-of-state hunters and could have serious negative consequences on the vital heritage and economic industry of hunting these animals in Texas.

The commission has a voluntary CWD Certified Status Program which requires 100% testing of all mortalities in order to maintain and advance in status. The cost of testing is assumed by the herd owner. The requirements for this program are located in 4 Texas Administrative Code §40.3. The movement requirements for CWD susceptible species which are classified as exotic livestock is that herd owners are required to test 20% of disclosed mortalities in order to move these animals intrastate. The cost of testing is assumed by the herd owner. These movement requirements are found in 4 Texas Administrative Code §40.5. Though the white-tailed deer population in Texas has had significant historical surveillance, very few elk, red deer or Sika deer herds historically participated in a CWD monitoring program providing very little CWD testing surveillance for these susceptible exotic cervid species.

These rules are for the purpose of obtaining risk based surveillance by directing surveillance activities in a particular geographic area where CWD has been disclosed. An inadequate surveillance program promotes the spread of disease unnoticed and ultimately makes the task of disease freedom exponentially more difficult. In today's current environment, the mobility and transportation of agricultural animals throughout the state and country has greatly increased the spread of diseases and makes risk mitigation more difficult and complex. A good surveillance system supports our animal industries by having confidence in the health and marketability of their animals. The presence of this disease could greatly affect how the deer population is perceived by Texans and could have serious negative consequences on the vital heritage and economic industry of hunting these animals in Texas. The purpose of these rules is not to adversely affect small business, but rather to protect valuable statewide resources through surveillance.

It is also impossible to properly estimate the number of small businesses subject to the proposed rule. The rule proposal applies to limited areas within the state. Elk, Sika deer, and red deer are classified as exotic livestock and there is no registration requirement, which makes it almost impossible for the commission to properly estimate who owns or maintains them. In addition, Texas has an unknown number of exotic cervid species that are maintained on private property behind high fences.

It should be noted that the commission has had a restriction zone in far West Texas since 2012 and identified as CZ and SZ 1 in this proposal. There have never been any businesses identified, other than hunting of these exotic susceptible species, in that zone that were negatively impacted. The commission will hold public meetings in these areas to identify all those locations or facilities that could be negatively impacted. The commission believes that only the zone for Medina and Uvalde counties would have a limited number of facilities that would be affected. For that area, the Containment Zone is focused on locations where positive animals were disclosed and those are already handled through individual herd plans developed by the commission, with the animals being restricted. Regarding the Surveillance Zone for this area, TPWD has engaged its white-tailed deer stakeholders and developed a voluntary strategy based on an identified testing target for their biological census for the area and are pursuing that as a viable option other than presently putting regulatory restrictions in place. The commission believes this approach is viable and preferable with adequate surveillance testing; however, the commission has been hampered by not having a method to adequately estimate the exotic cervid population for this area to obtain a target testing number similar to TPWD. The commission believes it is necessary to propose such requirements in order to promote the testing profile for this area with the upcoming fall hunting season. The commission will also use this time, prior to any adoption, to fully develop a voluntary strategy that will allow the agency to refrain from adopting certain mandatory requirements within that zone.

As indicated throughout the preamble the economic impact on these businesses is hard to quantify, particularly when countered with the fact that full participation in the testing requirements coupled with no further positives being disclosed provides some disease assurances for those who economically benefit from the value of these animals within these zones. The rule will only have impact on a facility that is located in a restricted zone and has these susceptible exotic CWD species for the purpose of either being hunted or moved. If the animal is being hunted, it will be necessary to have the animal tested and this is to provide adequate surveillance as well as to give disease status assurance that any exotic susceptible species taken is not positive for the disease. If the animal is located in a Containment Zone, then it would be restricted from movement. That said, there are no known locations or facilities located in the Trans-Pecos area that have any such animals for that purpose. Currently, the same would apply to the Hartley County Restriction Zone.

There are no identified alternative methods available to achieve the purpose of this rule and the disease surveillance needs of the state. This model for disease surveillance in disease eradication and control efforts is proven. The agency has historically identified cattle herds and fowl flocks that have been classified as potentially exposed to a disease of concern. In the vast majority of disease efforts the testing is performed on a live animal with results disclosed in a relatively short period of time that allows the agency to classify the disease exposure with the herd or flock and then accordingly take appropriate veterinary response. Because the official test for CWD is post mortem based, the solution waiting for animals to be test eligible which creates the greatest adverse impact and one over which the commission has no control or alternative.

The approach of creating these restriction zones is consistent with the duty of the commission to protect all livestock, exotic livestock, domestic fowl, and exotic fowl from diseases recognized as communicable by the veterinary profession and a serious threat to the susceptible cervid species industries and their associated economic security. This approach does minimize adverse impacts on small businesses that operate with the animals outside the zones by protecting them from exposure. Further, the commission provides that for those facilities located within a Surveillance Zone, the commission will work with each facility wanting to move an animal to determine the epidemiological risk for those animals.

No other small or micro-businesses or persons required to comply would incur any immediate direct adverse economic impact.

PUBLIC BENEFIT NOTE

Ms. Schmidt has also determined that the public benefit anticipated as a result of enforcing or administering the rules will be the protection of CWD susceptible species from a serious disease risk, thus ensuring a quality assurance for those locations or facilities participating as well as provide the public confidence in their enjoyment of the resource. The commission believes that there is also a collateral benefit of protecting captive herds, and maintaining their economic viability.

LOCAL EMPLOYMENT IMPACT STATEMENT

In accordance with Texas Government Code §2001.022, this agency has determined that the proposed rules will not impact local economies and, therefore, did not file a request for a local employment impact statement with the Texas Workforce Commission.

TAKINGS ASSESSMENT

The agency has determined that the proposed governmental action will not affect private real property. The proposed amendments are an activity related to the handling of animals, including requirements for testing, movement, inspection, identification, reporting of disease, and treatment, in accordance with 4 TAC §59.7, and are, therefore, compliant with the Private Real Property Preservation Act in Government Code, Chapter 2007. This rule does not authorize physical seizure or occupation of private real property. The regulation could affect activities occurring on private real property, if and only if, the owner/caretaker of such property is located in the restriction zones, possesses CWD susceptible species, and requests to move the animals. Further, if someone wanted to take any susceptible species into the zones to be released, then similar limitations or restrictions would apply to those animals, but that is based on the animal and not the property. This rule does not diminish or destroy the right to exclude others or affect their ability to possess or dispose of their property. Any impacts resulting from the discovery of CWD in or near private real property would be the result of the discovery of disease and the rule has no negative effect on real property as it is focused on disease response and mitigation of risk.

REQUEST FOR COMMENT

Comments regarding the proposal may be submitted to Amanda Bernhard, Texas Animal Health Commission, 2105 Kramer Lane, Austin, Texas 78758, by fax at (512) 719-0719 or by email at "comments@tahc.texas.gov".

STATUTORY AUTHORITY

The amendments are proposed under the following statutory authority as found in Chapter 161 of the Texas Agriculture Code. The commission is vested by statute, §161.041(a), with the requirement to protect all livestock, domestic animals, and domestic fowl from disease. The commission is authorized, through §161.041(b), to act to eradicate or control any disease or agent of transmission for any disease that affects livestock.

Pursuant to §161.005, entitled "Commission Written Instruments", the commission may authorize the executive director or another employee to sign written instruments on behalf of the commission. A written instrument, including a quarantine or written notice signed under that authority, has the same force and effect as if signed by the entire commission.

Pursuant to §161.006, entitled "Documents to Accompany Shipment", if required that a certificate or permit accompany animals or commodities moved in this state, the document must be in the possession of the person in charge of the animals or commodities, if the movement is made by any other means.

Pursuant to §161.0415, entitled "Disposal of Diseased or Exposed Livestock", the commission by order may require the slaughter of livestock, under the direction of the commission, or the sale of livestock for immediate slaughter.

Pursuant to §161.0417, entitled "Authorized Personnel for Disease Control", a person, including a veterinarian, must be authorized by the commission in order to engage in an activity that is part of a state or federal disease control or eradication program for animals. Section 161.0417 requires the commission to adopt necessary rules for the authorization of such persons and, after reasonable notice, to suspend or revoke a person's authorization if the commission determines that the person has substantially failed to comply with Chapter 161 or rules adopted under that chapter. Section 161.0417 does not affect the requirement for a license or an exemption under Chapter 801, Occupations Code, to practice veterinary medicine.

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

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

Pursuant to §161.049, entitled "Dealer Records", the commission may require a livestock, exotic livestock, domestic fowl, or exotic fowl dealer to maintain records of all livestock, exotic livestock, domestic fowl, or exotic fowl bought and sold by the dealer.

Pursuant to §161.054, entitled "Regulation of Movement of Animals", the commission, by rule, may regulate the movement of animals. The commission may restrict the intrastate movement of animals even though the movement of the animals is unrestricted in interstate or international commerce.

Pursuant to §161.0541, entitled "Elk Disease Surveillance Program", the commission by rule may establish a disease surveillance program for elk.

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

Pursuant to §161.055, entitled "Slaughter Plant Collection", the commission may require slaughter plants to collect and submit blood samples and other diagnostic specimens for testing for disease.

Pursuant to §161.056(a), entitled "Animal Identification Program", the commission, in order to provide for disease control

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

Pursuant to §161.057, entitled "Classification of Areas", the commission by rule may prescribe criteria for classifying areas in the state for disease control. The criteria must be based on sound epidemiological principles. The commission may prescribe different control measures and procedures for areas with different classifications.

Pursuant to §161.061, entitled "Establishment", if the commission determines that a disease listed in §161.041 of this code or an agency of transmission of one of those diseases exists in a place in this state or among livestock, exotic livestock, domestic animals, domestic fowl, or exotic fowl, or that a place in this state or livestock, exotic livestock, domestic animals, domestic fowl, or exotic fowl are exposed to one of those diseases or an agency of transmission of one of those diseases.

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

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

§40.4. Entry Requirements.

(a) The entry requirements are located in Chapter 51, §51.10 of this title (relating to Cervidae).

(b) CWD Susceptible Species Carcass Movement Restrictions for Entering the State. No person may:

(1) Transport into this state or possess any part of a susceptible species from a state, Canadian province, or other place outside of Texas where CWD has been detected in free-ranging or captive herds, except as provided in this section.

(2) Subsection (b)(1) of this section does not apply to susceptible species processed in accordance with this section as follows:

(A) meat that has been cut up and packaged (boned or filleted);

(B) a carcass that has been reduced to quarters with no brain or spinal tissue present;

(C) a cleaned hide (skull and soft tissue must not be attached or present);

(D) a whole skull (or skull plate) with antlers attached, provided the skull plate has been completely cleaned of all soft tissue;

(E) finished taxidermy products;

(F) cleaned teeth; or

(G) tissue prepared and packaged for delivery to and use by a diagnostic or research laboratory.

(c) The skinned or unskinned head of a susceptible species from a state, Canadian province, or other place outside of Texas may be transported to a taxidermist for taxidermy purposes, provided all brain material, soft tissue, spinal column and any unused portions of the head are disposed of in a landfill in Texas permitted by the Texas Commission on Environmental Quality.

§40.6. CWD Movement Restriction Zones.

(a) Definitions:

(1) Check Station--Department established mandatory check stations in any CZ or SZ or any portion of a CZ or SZ for the purpose of collecting biological information on Chronic Wasting Disease (CWD) susceptible species taken within a CZ or SZ.

(2) CWD Containment Zone (CZ)--A geographic area which would include a known affected area or a (quarantined) premise under a herd plan because a positive result was obtained in a CWD susceptible species or an area within Texas where CWD has been detected or where there is a high risk of CWD existing or where the commission has determined may exist.

(3) CWD Surveillance Zone (SZ)--A geographic area in the state which the commission has determined there is a risk of CWD existing and surveillance is necessary.

(4) CWD Non-Native Susceptible Species--A non-native cervid species which includes North American elk or wapiti (Cervus Canadensis), red deer (Cervus elaphus), Sika deer (Cervus Nippon), moose (Alces alces), and any associated subspecies and hybrids.

(5) CWD Native Susceptible Species--All mule deer, white-tailed deer, and native species under the jurisdiction of the Texas Parks and Wildlife Department are excluded from the application of this section.

(6) Department--Texas Parks and Wildlife Department.

(7) High fence premise--A premise enclosed on all sides by a fence adequate to prevent the ingress or egress of all non-native CWD susceptible species.

(8) Unnatural Movement--Any artificially induced movement of a live susceptible species or the carcass of a susceptible species.

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

(1) Containment Zone Boundaries:

(A) Containment Zone 1. That portion of the state within the boundaries of a line beginning in Culberson County where U.S. Highway (U.S.) 62-180 enters from the State of New Mexico; thence southwest along U.S. 62-180 to Farm-to-Market Road (F.M.) 1111 in Hudspeth County; thence south on F.M. 1111 to I.H. 10 thence west along I.H. 10 to S.H. 20; thence northwest along S.H. 20 to F.M. 1088; thence south along F.M. 1088 to the Rio Grande River; thence northwest along the Rio Grande River to the Texas-New Mexico border.

(B) Containment Zone 2. That portion of the state within the boundaries of a line beginning where I.H. 40 enters from the State of New Mexico in Deaf Smith County; thence east along I.H. 40 to U.S. 385 in Oldham County; thence north along U.S. 385 to the Oklahoma state line.

(C) Containment Zone 3. Boundaries consist of properties under the same ownership or management for facilities operating

under a herd plan due to a positive result in a CWD susceptible species in Medina and Uvalde counties.

(2) Surveillance Zone Boundaries:

(A) Surveillance Zone 1. That portion of the state within the boundaries of a line beginning where U.S. 285 enters from the State of New Mexico in Reeves County; thence southeast along U.S. 285 to R.M. 652; thence west along R.M. 652 to Rustler Springs Rd./FM 3541 in Culberson County; thence south along Rustler Springs Rd./F.M. 3541 to F.M. 2185; thence south along F.M. 2185 to Nevel Road; thence west along Nevel Road to County Road 501; thence south along County Road 501 to Weatherby Road; thence south along Weatherby Road to F.M. 2185; thence southwest along F.M. 2185 to S.H. 54; thence south on S.H. 54 to U.S. 90; thence south along U.S. 90 to the Culberson County line; thence southwest along the Culberson County line to the Rio Grande River in Hudspeth County; thence north along the Rio Grande River to F.M. 1088; thence northeast along F.M. 1088 to S.H. 20; thence southeast along S.H. 20 to I.H. 10; thence southeast along I.H. 10 to F.M. 1111; thence north on F.M. 1111 to U.S. 62/180; thence east and north along U.S. 62/180 to the New Mexico state line in Culberson County.

(B) Surveillance Zone 2. That portion of the state within the boundaries of a line beginning at the New Mexico state line where U.S. 60 enters Texas; thence northeast along U.S. 60 to U.S. 87 in Randall County; thence north along U.S. 87 to I.H. 27; thence north along U.S. 87/I.H. 27 to U.S. 287 in Moore County; thence north along U.S. 287 to the Oklahoma state line.

(C) Surveillance Zone 3. That portion of the state within the boundaries of a line beginning at U.S. 90 in Hondo in Medina County; thence west along U.S. 90 to F.M. 187 in Uvalde County; thence north along F.M. 187 to F.M. 470 in Bandera County; thence east along F.M. 470 to Tarpley in Bandera County; thence south along F.M. 462 to U.S. 90 in Hondo.

(c) Containment Zone Requirements:

(1) Movement. No non-native CWD susceptible species may be transported outside the CZ unless from a herd with a certified status as established through §40.3(c)(6) (relating to Herd Status Plans for Cervidae) of this chapter.

(2) Released Animals. No non-native CWD susceptible species may be released within the CZ outside a high fence premise.

(3) Testing. All non-native CWD susceptible species, 16 months of age or older, that are hunter harvested shall be tested for CWD. No part of a carcass of a susceptible species, either killed or found dead may be removed from the CZ unless a testable CWD sample from the carcass is collected and tested. The results shall be provided to the commission or the Department within 30 days of receiving the test results.

(4) Carcass Movement Restrictions. No part of a carcass of a susceptible species, either killed or found dead, within the CZ may be removed from the CZ unless it is in accordance with the requirements of §40.6(e) of this section.

(5) Escaped Animals. Any escaped non-native CWD susceptible species which originated or resided in a CZ shall be captured and returned to the high fence premise of origin.

(6) Herd Plans. Facilities and associated properties in the CZ that have been issued a herd plan shall operate in accordance with the herd plan requirements as determined by the commission.

(7) Identification. All non-native CWD susceptible species released in a CZ shall be identified with a visible official identification device, which may include an eartag that conforms to the USDA alphanumeric national uniform ear tagging system and/or an animal identification number (AIN) and may include an RFID device. If a susceptible species is liberated into a high fence premise, the animal shall retain the acceptable official identification.

(d) Surveillance Zone Requirements:

(1) Movement. Prior to movement of a non-native CWD susceptible species outside an SZ or from one premise in the SZ to another premise within the SZ, the premise of origin shall have an epidemiological risk assessment conducted by the commission.

(2) Released Animals. No non-native CWD susceptible species may be released within the SZ outside a high fence premise.

(3) Testing. All non-native CWD susceptible species, 16 months of age or older, that are hunter harvested shall be tested for CWD. No part of a carcass of a susceptible species, either killed or found dead may be removed from the SZ unless a testable CWD sample from the carcass is collected and tested. The results shall be provided to the commission or the Department within 30 days of receiving the test results.

(4) Carcass Movement Restrictions. No part of a carcass of a susceptible species, either killed or found dead, within the SZ may be removed from the SZ unless it is in accordance with the requirements of §40.6(e) of this section.

(5) Escaped Animals. Any escaped non-native CWD susceptible species which originated or resided in a SZ shall be captured and returned to the high fence premise of origin.

(6) Herd Plans. Facilities and associated properties in the SZ that have been issued a herd plan shall operate in accordance with the herd plan requirements as determined by the commission.

(7) Identification. All non-native CWD susceptible species released in a SZ shall be identified with a visible official identification device, which may include an eartag that conforms to the USDA alphanumeric national uniform ear tagging system and/or an animal identification number (AIN), which may include a RFID device. If a susceptible species is liberated into a high fence premise, the animal shall retain the acceptable official identification.

(e) Carcass Movement Restrictions:

(1) No person shall transport or cause the transport of any part of a susceptible species from a property within a CZ or SZ unless:

(A) meat has been cut up and packaged (boned or filleted);

(B) a carcass has been reduced to quarters with no brain or spinal tissue present;

(C) a cleaned hide (skull and soft tissue must not be attached or present);

(D) a whole skull (or skull plate) with antlers attached, provided the skull plate has been completely cleaned of all soft tissue;

(E) finished taxidermy products;

(F) cleaned teeth; or

(G) tissue has been prepared and packaged for delivery to and use by a diagnostic or research laboratory with results accessible to the commission.

(2) A susceptible species harvested in a CZ or SZ may be transported from the CZ or SZ, provided it is accompanied by a Department-issued check-station receipt, which shall remain with the suscep-

tible species until it reaches the possessor's permanent residence. The skinned or unskinned head of a susceptible species from a CZ or SZ, may be transported to a taxidermist for taxidermy purposes, provided all brain material, soft tissue, spinal column, and any unused portions of the head are disposed of in a landfill in Texas permitted by the Texas Commission on Environmental Quality.

(f) The Executive Director may authorize movement. If movement is necessary or desirable to promote the objectives of this chapter and/or to minimize the economic impact of the restricted susceptible species without endangering those objectives or the health and safety of other susceptible species within the state, the Executive Director may authorize movement in a manner that creates minimal risk to the other susceptible animals in the state.

(g) Commission staff shall annually review the movement restriction zones and make recommendations to the commission on whether the zones should be modified or rescinded.

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 August 26, 2016.

TRD-201604492
Gene Snelson
General Counsel
Texas Animal Health Commission
Earliest possible date of adoption: October 9, 2016
For further information, please call: (512) 719-0722

♦ ♦ ♦

4 TAC §40.6

The Texas Animal Health Commission (commission) proposes the repeal of §40.6, concerning CWD Movement Restriction Zone, in Chapter 40, which is entitled "Chronic Wasting Disease".

Elsewhere in this issue of the *Texas Register,* the commission proposes new §40.6, concerning CWD Movement Restriction Zones, which replaces the repealed section in its entirety.

FISCAL NOTE

Ms. Larissa Schmidt, Director of Administration, Texas Animal Health Commission, has determined there will be no significant additional fiscal implications for state or local government as a result of repealing the rule.

PUBLIC BENEFIT NOTE

Ms. Schmidt has also determined that the public benefit anticipated as a result of repealing the rule will be that the proposed new section will create additional zones in the state which will place certain restrictions on areas where Chronic Wasting Disease (CWD) has been disclosed, in addition to enhancing surveillance efforts, thus protecting captive herds from the spread of CWD and maintaining their economic viability.

LOCAL EMPLOYMENT IMPACT STATEMENT

In accordance with the Texas Government Code §2001.022, this agency has determined that the proposed repeal will not impact local economies and, therefore, did not file a request for a local employment impact statement with the Texas Workforce Commission.

TAKINGS ASSESSMENT

The agency has determined that the proposed repeal will not affect private real property and is, therefore, compliant with the Private Real Property Preservation Act in Government Code, Chapter 2007.

REQUEST FOR COMMENT

Comments regarding the proposal may be submitted to Amanda Bernhard, Texas Animal Health Commission, 2105 Kramer Lane, Austin, Texas 78758, by fax at (512) 719-0719 or by email at "comments@tahc.texas.gov".

STATUTORY AUTHORITY

The repeal is authorized by the Texas Agriculture Code §161.046, which provides the commission with authority to adopt rules relating to the protection of livestock, exotic livestock, domestic fowl or exotic fowl, as well as Texas Government Code §2001.039, which authorizes a state agency to repeal a rule.

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

§40.6. CWD Movement Restriction Zone.

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 August 26, 2016.

TRD-201604493
Gene Snelson
General Counsel
Texas Animal Health Commission
Earliest possible date of adoption: October 9, 2016
For further information, please call: (512) 719-0722

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TITLE 10. COMMUNITY DEVELOPMENT

PART 1. TEXAS DEPARTMENT OF HOUSING AND COMMUNITY AFFAIRS

CHAPTER 1. ADMINISTRATION

SUBCHAPTER A. GENERAL POLICIES AND PROCEDURES

10 TAC §1.3

The Texas Department of Housing and Community Affairs (the "Department") proposes the repeal of 10 TAC Chapter 1, Administration, §1.3. Delinquent Audits and Related Issues. The purpose of the proposed repeal is to effectuate a reorganization of the rules in which the topic covered under this section will now be addressed in a new and separately proposed section of Chapter 1; this repeal will therefore remove redundancy and avoid confusion.

FISCAL NOTE. Timothy K. Irvine, Executive Director, has determined that, for each year of the first five years the repeal will be in effect, enforcing or administering the repeal does not have any foreseeable implications related to costs or revenues for the state or local governments.

PUBLIC BENEFIT/COST NOTE. Mr. Irvine also has determined that, for each year of the first five years the repeal will be in effect, the public benefit anticipated as a result of the repeal will be to provide clearer guidance to Subrecipients through more

organized and direct rules. There are no anticipated additional new economic costs to individuals required to comply with the repeal as a result of this action.

ADVERSE IMPACT ON SMALL OR MICRO-BUSINESSES. The Department has determined that there will be no economic effect on small or micro-businesses.

REQUEST FOR PUBLIC COMMENT. The public comment period will be held September 9, 2016, to October 10, 2016, to receive input on the proposed repeal. Written comments may be submitted to the Texas Department of Housing and Community Affairs, Attention: Brooke Boston, CA Rule Comments, P.O. Box 13941, Austin, Texas 78711-3941, or by email to the following address: brooke.boston@tdhca.state.tx.us. ALL COMMENTS MUST BE RECEIVED BY 5:00 P.M. Austin local time on OCTOBER 10, 2016. A copy of the proposed repeal will be available on the Department's website at http://www.tdhca.state.tx.us/public-comment.htm under Items Open for Public Comment during the public comment period.

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

The proposed repeal affects no other code, article, or statute.

§1.3. Delinquent Audits and Related Issues.

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 August 26, 2016.

TRD-201604458
Timothy K. Irvine
Executive Director
Texas Department of Housing and Community Affairs
Earliest possible date of adoption: October 9, 2016
For further information, please call: (512) 475-1762

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10 TAC §1.21

The Texas Department of Housing and Community Affairs (the "Department") proposes the repeal of 10 TAC Chapter 1, Administration, §1.21, Action by Department if Outstanding Balance Exists. The purpose of the proposed repeal is to remove this section and, under separate action, propose this section as new to effectuate a redrafting of this rule that will more clearly reflect that the rule is not only applicable to multifamily activities, that disallowed costs are considered to be outstanding balances, to indicate the opportunity for a repayment plan, and other associated changes.

FISCAL NOTE. Timothy K. Irvine, Executive Director, has determined that, for each year of the first five years the repeal will be in effect, enforcing or administering the repeal does not have any foreseeable implications related to costs or revenues for the state or local governments.

PUBLIC BENEFIT/COST NOTE. Mr. Irvine also has determined that, for each year of the first five years the repeal will be in effect, the public benefit anticipated as a result of the repeal will be to provide clearer guidance to Subrecipients through more organized and direct rules. There are no anticipated additional new economic costs to individuals required to comply with the repeal as a result of this action.

ADVERSE IMPACT ON SMALL OR MICRO-BUSINESSES. The Department has determined that there will be no economic effect on small or micro-businesses.

REQUEST FOR PUBLIC COMMENT. The public comment period will be held September 9, 2016, to October 10, 2016, to receive input on the proposed repeal. Written comments may be submitted to the Texas Department of Housing and Community Affairs, Attention: Brooke Boston, CA Rule Comments, P.O. Box 13941, Austin, Texas 78711-3941, or by email to the following address: brooke.boston@tdhca.state.tx.us. ALL COMMENTS MUST BE RECEIVED BY 5:00 P.M. Austin local time on OCTOBER 10, 2016. A copy of the proposed repeal will be available on the Department's website at http://www.tdhca.state.tx.us/public-comment.htm under Items Open for Public Comment during the public comment period.

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

The proposed repeal affects no other code, article, or statute.

§1.21. Action by Department if Outstanding Balances Exist.

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 August 26, 2016.

TRD-201604460
Timothy K. Irvine
Executive Director
Texas Department of Housing and Community Affairs
Earliest possible date of adoption: October 9, 2016
For further information, please call: (512) 475-1762

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10 TAC §1.21

The Texas Department of Housing and Community Affairs (the "Department") proposes new 10 TAC Chapter 1, Administration, §1.21, Action by Department if Outstanding Balances Exist. The purpose of the proposed new section is to effectuate a redrafting of this rule that will more clearly reflect that the rule is not only applicable to multifamily activities, that disallowed costs are considered to be outstanding balances, to indicate the opportunity for a repayment plan, and to make other associated changes.

FISCAL NOTE. Timothy K. Irvine, Executive Director, has determined that, for each year of the first five years the proposed new section will be in effect, enforcing or administering the proposed new section does not have any foreseeable additional costs or revenues for the state or local governments.

PUBLIC BENEFIT/COST NOTE. Mr. Irvine also has determined that, for each year of the first five years the new proposed section is in effect, the public benefit anticipated as a result of the new section will be to provide clearer guidance to Subrecipients through more direct rules. There are no anticipated additional new economic costs to individuals required to comply with the new section as a result of this action.

ADVERSE IMPACT ON SMALL OR MICRO-BUSINESSES. The Department has determined that there will be no economic effect on small or micro-businesses.

REQUEST FOR PUBLIC COMMENT. The public comment period will be held September 9, 2016, to October 10, 2016, to

receive input on the proposed section. Written comments may be submitted to the Texas Department of Housing and Community Affairs, Attention: Brooke Boston, CA Rule Comments, P.O. Box 13941, Austin, Texas 78711-3941, or by email to the following address: brooke.boston@tdhca.state.tx.us. ALL COMMENTS MUST BE RECEIVED BY 5:00 P.M. Austin local time on OCTOBER 10, 2016. A copy of the proposed new chapter will be available on the Department's website at *http://www.tdhca.state.tx.us/public-comment.htm* under Items Open for Public Comment during the public comment period.

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

The proposed new section affects no other code, article, or statute.

§1.21. Action by Department if Outstanding Balances Exist.

(a) Purpose. The purpose of this section is to inform Persons or entities requesting Form(s) 8609, application amendments, LURA amendments, new Contracts (with the exception of a Household Commitment Contract), Contract amendments, Contract extensions, Contract renewals or loan modifications that, with the exceptions noted by this rule, if fees or loan payments (principal or interest) are past due, or Disallowed Costs have not been repaid, to the Department, the request may be denied, delayed, or the Subrecipient/ Administrator/Developer's Contract(s) terminated.

(b) Definitions.

(1) Capitalized words used herein have the meaning assigned in the specific Chapters and Rules of this Part that govern the program associated with the request, or assigned by federal or state law.

(2) Disallowed Costs: Expenses claimed by a Subrecipient/Administrator/Developer, paid by the Department, and subsequently determined by the Department to be ineligible and subject to repayment.

(c) Except in the case of interim construction loans, the Department will not issue Form(s) 8609, amend applications, LURAs or Contracts, extend or renew Contracts or modify loan documents if fees or loan payments are past due to the Department related to the subject of the request.

(d) Except in the case of Contracts for CSBG non-discretionary funds, the Department will not issue Contracts or amend Contracts when Disallowed Costs identified by the Department remain unpaid, unless the entity has entered into, and is complying with, an agreed-upon repayment plan that is approved by the Department's Executive Director or Enforcement Committee.

(e) Once the Department notifies a Person or entity that they are responsible for the payment of a required fee or payment that is past due, if no corrective action is taken within five business days of notification, the Executive Director may deny the requested action for failure to comply with this rule.

(f) Exception for a Work Out Development. If fees (not including application or amendment fees) or payments affiliated with a work out are past due, then the past due amounts affiliated with a work out may be excepted from this rule so long as the work out is actively underway by Department staff. In which case, in the Department's sole discretion, LURA or any other kinds of amendments may be considered for the subject Development or Contract.

(g) In accordance with Subchapter C of this Chapter (relating to Previous Participation Reviews), if a Person or entity applies for funding or an award from the Department, any payment of principal or interest to the Department that is past due beyond any grace period provided for in the applicable loan documents and any past due fees (not just those related to the subject of the request) will be reported to the EARAC.

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 August 26, 2016.

TRD-201604459
Timothy K. Irvine
Executive Director
Texas Department of Housing and Community Affairs
Earliest possible date of adoption: October 9, 2016
For further information, please call: (512) 475-1762

SUBCHAPTER C. PREVIOUS PARTICIPATION

10 TAC §1.302

The Texas Department of Housing and Community Affairs (the "Department") proposes the repeal of 10 TAC Chapter 1, Administration, §1.302, Previous Participation Reviews for CSBG, LIHEAP, and WAP. The purpose of the proposed repeal is to remove this section and, under separate action, propose this section as new to effectuate a redrafting and consolidation of this rule that will more clearly provide for guidance on the previous participation process for non-multifamily applicants.

FISCAL NOTE. Timothy K. Irvine, Executive Director, has determined that, for each year of the first five years the repeal will be in effect, enforcing or administering the repeal does not have any foreseeable implications related to costs or revenues for the state or local governments.

PUBLIC BENEFIT/COST NOTE. Mr. Irvine also has determined that, for each year of the first five years the repeal will be in effect, the public benefit anticipated as a result of the repeal will be to provide clearer guidance to Subrecipients through more organized and direct rules. There are no anticipated additional new economic costs to individuals required to comply with the repeal as a result of this action.

ADVERSE IMPACT ON SMALL OR MICRO-BUSINESSES. The Department has determined that there will be no economic effect on small or micro-businesses.

REQUEST FOR PUBLIC COMMENT. The public comment period will be held September 9, 2016, to October 10, 2016, to receive input on the proposed repeal. Written comments may be submitted to the Texas Department of Housing and Community Affairs, Attention: Brooke Boston, CA Rule Comments, P.O. Box 13941, Austin, Texas 78711-3941, or by email to the following address: brooke.boston@tdhca.state.tx.us. ALL COMMENTS MUST BE RECEIVED BY 5:00 P.M. Austin local time on OCTOBER 10, 2016. A copy of the proposed repeal will be available on the Department's website at http://www.tdhca.state.tx.us/public-comment.htm under Items Open for Public Comment during the public comment period.

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

The proposed repeal affects no other code, article, or statute.

§1.302. Previous Participation Reviews for CSBG, LIHEAP, and WAP.

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 August 26, 2016.

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Timothy K. Irvine
Executive Director
Texas Department of Housing and Community Affairs
Earliest possible date of adoption: October 9, 2016
For further information, please call: (512) 475-1762

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10 TAC §1.302

The Texas Department of Housing and Community Affairs (the "Department") proposes new 10 TAC Chapter 1, Administration, §1.302, Previous Participation Reviews for Department Program Awards Not Covered by §1.301 of this Subchapter. The purpose of the proposed new section is to effectuate a redrafting of this rule, consolidate what had previously been covered by both §1.302 and §1.303 of this Subchapter and more clearly provide for guidance on the previous participation process for non-multifamily applicants.

FISCAL NOTE. Timothy K. Irvine, Executive Director, has determined that, for each year of the first five years the proposed new section will be in effect, enforcing or administering the proposed new section does not have any foreseeable additional costs or revenues for the state or local governments.

PUBLIC BENEFIT/COST NOTE. Mr. Irvine also has determined that, for each year of the first five years the new proposed section is in effect, the public benefit anticipated as a result of the new section will be to provide clearer guidance to Subrecipients through more direct rules. There are no anticipated additional new economic costs to individuals required to comply with the new section as a result of this action.

ADVERSE IMPACT ON SMALL OR MICRO-BUSINESSES. The Department has determined that there will be no economic effect on small or micro-businesses.

REQUEST FOR PUBLIC COMMENT. The public comment period will be held September 9, 2016, to October 10, 2016, to receive input on the proposed section. Written comments may be submitted to the Texas Department of Housing and Community Affairs, Attention: Brooke Boston, CA Rule Comments, P.O. Box 13941, Austin, Texas 78711-3941, or by email to the following address: brooke.boston@tdhca.state.tx.us. ALL COMMENTS MUST BE RECEIVED BY 5:00 P.M. Austin local time on OCTOBER 10, 2016. A copy of the proposed new chapter will be available on the Department's website at *http://www.tdhca.state.tx.us/public-comment.htm* under Items Open for Public Comment during the public comment period.

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

The proposed new section affects no other code, article, or statute.

§1.302. Previous Participation Reviews for Department Program Awards Not Covered by §1.301 of This Subchapter.

(a) This section applies to program awards not covered by §1.301 of this subchapter. With the exception of a household or project commitment contract, prior to awarding or allowing access to Department funds through a Contract or through a Reservation Agreement a previous participation review will be performed in conjunction with the presentation of award actions to the Department's Board.

(b) Capitalized terms used in this section herein have the meaning assigned in the specific Chapters and Rules of this Part that govern the program associated with the request, or assigned by federal or state laws. For this Section, the word Applicant means the entity that the Department's Board will consider for an award of funds or a Contract.

(c) Upon Department request, Applicants will be required to submit:

(1) A listing of the members of its board of directors, council, or other governing body as applicable or certification that the same relevant information in the Community Affairs contract system is current and accurate;

(2) A description of any pending state or federal litigation (including administrative proceedings including, but not limited to, proceedings to impose any penalty or revoke or suspend any funding, license, or permit) and any final decrees within the last three years that involve federal or state program administration or funds (if the requested judgment or notice against or with respect to an entity would represent a twenty percent reduction or more in the entity's current year operating budget) or any conviction of any Applicant or Affiliate for a crime of moral turpitude that would relate to their fitness to act in their Applicant or Affiliate role, or final notice of any termination or reduction of any program or programmatic award;

(3) A list of any multifamily Developments owned or Controlled by the Applicant or Affiliate that are monitored by the Department; and

(4) Identification of all Department programs that the Applicant or Affiliate has participated in within the last three years.

(5) In addition to direct requests for information from the Applicant or Affiliate, information is considered to be requested for purposes of this section if the requirement to submit such information is made in a notice of funding availability or application for funding.

(6) Applicants will be provided a reasonable period of time, but not less than five business days, to provide the requested information.

(d) The Applicant's/Affiliate's financial obligations to the Department will be reviewed to determine if any of the following conditions exist:

(1) The Applicant or an Affiliate owes an outstanding balance in accordance with §1.21 of Chapter 1 of this Title, and a repayment plan has not been executed between the Subrecipient and the Department or the repayment plan has been violated;

(2) The Department has requested and not been provided evidence that the Owner has maintained required insurance on any collateral for any loan held by the Department; or

(3) The Department has requested and not been provided evidence that property taxes have been paid or satisfactory evidence of a tax exemption on any collateral for any loan held by the Department.

(e) The information provided by the Applicant, the results of the most recent Single Audit, any noncompliance identified in the sections above and summary information regarding monitoring Deficiencies, Findings and Concerns identified during any monitoring visits

conducted within the last three years (whether or not the Findings were corrected during the corrective action period), and Department's record of complaints concerning the Applicant will be compiled and a summary provided to EARAC.

(f) EARAC will review the information and may recommend approval, denial or approval with conditions. During the monitoring process and the Single Audit review process Subrecipients will be notified that Deficiencies, Findings, and Concerns are reported to EARAC, and provided the opportunity to submit comments for consideration. If an Applicant submitted comments during the monitoring or Single Audit process, those will be shared with EARAC. EARAC may request any other information from the Department staff or the Applicant.

(g) Any Applicant which will be recommended for denial or an award with conditions will be informed in writing. If EARAC recommends denial or if the Applicant does not agree with the conditions recommended by EARAC, the Applicant will have the opportunity to appeal EARAC's recommendation in accordance with §1.304 of this subchapter.

(h) Consistent with §1.403 of Subchapter D of this chapter, concerning Single Audit Requirements, the Department will not enter into a Contract or extend a Contract with any Applicant who is delinquent in the submission of their Single Audit unless an extension has been approved in writing by the cognizant federal agency except as required by law, and in the case of certain programs, funds may be reserved for the Applicant or the service area covered by the Applicant.

(i) Except as required by law, the Department will not enter into a Contract with any entity who has a Board member on the Department's debarment list or the federal debarred and suspended listing. Applicants will be notified of the debarred status of a board member and will be given an opportunity to remove and replace that board member so that funding may proceed. However, individual Board member's participation in other Department programs is not required to be disclosed and will not be taken into consideration.

(j) Except as required by law, the Department will not enter into a Contract with any Applicant who is on the Department's or the federal debarred and suspended listing.

(k) Previous Participation reviews will not be conducted for Contract extensions. However, if the Applicant is delinquent in submission of its Single Audit, the Contract will not be extended except as required by law.

(l) For non-discretionary CSBG, EARAC will only evaluate the considerations under subsections (i) and (j) of this section, but the Board Action on the award may contain the information gathered as part of the previous participation review.

(m) Previous Participation reviews will not be conducted for Contract Amendments that staff is authorized to approve if the increase in funds is 15% or less of the initial award of funds. Previous Participation reviews will be conducted for Contract amendments if the increase in funds from the initial award is greater than 15%.

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 August 26, 2016.

TRD-201604461

Timothy K. Irvine
Executive Director
Texas Department of Housing and Community Affairs
Earliest possible date of adoption: October 9, 2016
For further information, please call: (512) 475-1762

10 TAC §1.303

The Texas Department of Housing and Community Affairs (the "Department") proposes the repeal of 10 TAC Chapter 1, Administration, §1.303, Previous Participation Reviews for Department Program Awards Not Covered by §1.301 or §1.302 of This Subchapter. The purpose of the proposed repeal is to remove this section and, under separate action, propose this section as new to effectuate a redrafting and consolidation of this rule that will more clearly provide for guidance on the previous participation process for non-multifamily applicants.

FISCAL NOTE. Timothy K. Irvine, Executive Director, has determined that, for each year of the first five years the repeal will be in effect, enforcing or administering the repeal does not have any foreseeable implications related to costs or revenues for the state or local governments.

PUBLIC BENEFIT/COST NOTE. Mr. Irvine also has determined that, for each year of the first five years the repeal will be in effect, the public benefit anticipated as a result of the repeal will be to provide clearer guidance to Subrecipients through more organized and direct rules. There are no anticipated additional new economic costs to individuals required to comply with the repeal as a result of this action.

ADVERSE IMPACT ON SMALL OR MICRO-BUSINESSES. The Department has determined that there will be no economic effect on small or micro-businesses.

REQUEST FOR PUBLIC COMMENT. The public comment period will be held September 9, 2016, to October 10, 2016, to receive input on the proposed repeal. Written comments may be submitted to the Texas Department of Housing and Community Affairs, Attention: Brooke Boston, CA Rule Comments, P.O. Box 13941, Austin, Texas 78711-3941, or by email to the following address: brooke.boston@tdhca.state.tx.us. ALL COMMENTS MUST BE RECEIVED BY 5:00 P.M. Austin local time on OCTOBER 10, 2016. A copy of the proposed repeal will be available on the Department's website at http://www.tdhca.state.tx.us/public-comment.htm under Items Open for Public Comment during the public comment period.

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

The proposed repeal affects no other code, article, or statute.

§1.303. Previous Participation Reviews for Department Program Awards Not Covered by §1.301or §1.302 of This Subchapter.

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

Filed with the Office of the Secretary of State on August 26, 2016.

TRD-201604463

Timothy K. Irvine
Executive Director
Texas Department of Housing and Community Affairs
Earliest possible date of adoption: October 9, 2016
For further information, please call: (512) 475-1762

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SUBCHAPTER D. UNIFORM GUIDANCE FOR RECIPIENTS OF FEDERAL AND STATE FUNDS

10 TAC §§1.401 - 1.409

The Texas Department of Housing and Community Affairs (the "Department") proposes new 10 TAC Chapter 1, Administration, Subchapter D, Uniform Guidance for Recipients of Federal and State Funds, §§1.401 - 1.409. The purpose of the proposed new sections is to establish more clearly for program participants in one central rule location the federal and state guidance applicable to Department subrecipients and administrators and includes such types of issues as Cost Principles, Travel, Single Audit Requirements, Purchase and Procurement, Inventory Reports, Bonding, and Record Retention.

FISCAL NOTE. Timothy K. Irvine, Executive Director, has determined that, for each year of the first five years the proposed new subchapter will be in effect, enforcing or administering the proposed new sections does not have any foreseeable additional costs or revenues for the state or local governments.

PUBLIC BENEFIT/COST NOTE. Mr. Irvine also has determined that, for each year of the first five years the new subchapter is in effect, the public benefit anticipated as a result of the new sections will be to provide clearer guidance to Subrecipients through more direct rules. There are no anticipated additional new economic costs to individuals required to comply with the new sections as a result of this action.

ADVERSE IMPACT ON SMALL OR MICRO-BUSINESSES. The Department has determined that there will be no economic effect on small or micro-businesses.

REQUEST FOR PUBLIC COMMENT. The public comment period will be held September 9, 2016, to October 10, 2016, to receive input on the proposed subchapter. Written comments may be submitted to the Texas Department of Housing and Community Affairs, Attention: Brooke Boston, CA Rule Comments, P.O. Box 13941, Austin, Texas 78711-3941, or by email to the following address: brooke.boston@tdhca.state.tx.us. ALL COMMENTS MUST BE RECEIVED BY 5:00 P.M. Austin local time on OCTOBER 10, 2016. A copy of the proposed new chapter will be available on the Department's website at http://www.tdhca.state.tx.us/public-comment.htm under Items Open for Public Comment during the public comment period.

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

The proposed new sections affects no other code, article, or statute.

§1.401. Definitions.

The following words and terms, when used in this subchapter, shall have the following meanings, unless the context clearly indicates otherwise. Capitalized words used herein have the meaning assigned in the specific Chapters and Rules of this Title that govern the program associated with the request, or assigned by federal or state law.

(1) Affiliate--Shall have the meaning assigned by the specific program or programs described in this title.

(2) Department--The Texas Department of Housing and Community Affairs.

(3) Equipment--tangible personal property having a useful life of more than one year or a per-unit acquisition cost which equals or exceeds the lesser of the capitalization level established by entity for financial statement purposes, or $5,000. Entities not subject to UGMS do not have to include information technology systems unless the item exceeds the lesser of the capitalization level established by entity for financial statement purposes, or $5,000.

(4) Executive Award Review and Advisory Committee ("EARAC")--the Committee established in Tex. Gov't Code chapter 2306, that recommends the award or allocation of any Department funds.

(5) Professional services--for a unit of government is as defined by state law. For Private Nonprofit Organizations it means services:

(A) within the scope of the practice, as defined by state law, of:

(i) accounting;

(ii) architecture;

(iii) landscape architecture;

(iv) land surveying;

(v) medicine;

(vi) optometry;

(vii) professional engineering;

(viii) real estate appraising;

(ix) professional nursing; or

(x) legal services; or

(B) provided in connection with the professional employment or practice of a person who is licensed or registered as:

(i) a certified public accountant;

(ii) an architect;

(iii) a landscape architect;

(iv) a land surveyor;

(v) a physician, including a surgeon;

(vi) an optometrist;

(vii) a professional engineer;

(viii) a state certified or state licensed real estate appraiser;

(ix) attorney; or

(x) a registered nurse.

(6) Single Audit--The audit required by Office of Management and Budget ("OMB"), 2 CFR Part 200, Subpart F, or Tex. Gov't Code, chapter 783, Uniform Grant and Contract Management, as reflected in an audit report.

(7) Single Audit Certification Form--A form that lists the source(s) and amount(s) of Federal funds and/or State funds expended by the Subrecipient during their fiscal year along with the outstanding

balance of any loans made with federal or state funds if there are continuing compliance requirements other than repayment of the loan.

(8) Subrecipient--Includes any entity, or Administrator as defined under Chapter 20, receiving or applying for federal or state funds from the Department. Except as otherwise noted, the definition does not include Applicants/Owners in the Multifamily program, except for CHDO Operating funds.

(9) Supplies--means tangible personal property other than "Equipment" in this section.

(10) Uniform Grant Management Standards ("UGMS")--The standardized set of financial management procedures and definitions established by Tex. Gov't Code, chapter 783 to promote the efficient use of public funds by requiring consistency among grantor agencies in their dealings with grantees, and by ensuring accountability for the expenditure of public funds. State agencies are required to adhere to these standards when administering grants and other financial assistance agreements with cities, counties and other political subdivisions of the state. This includes all Public Organizations including public housing and housing finance agencies. In addition, Tex. Gov't Code Chapter 2105, subjects subrecipients of federal block grants (as defined therein) to the Uniform Grant and Contract Management Standards.

§1.402. Cost Principles and Administrative Requirements.

(a) Subrecipients shall comply with the cost principles and uniform administrative requirements set forth in UGMS provided, however, that all references therein to "local government" shall be construed to mean Subrecipient. Private Nonprofit Subrecipients of ESG, HOME, NSP, National Housing Trust Fund, and DOE WAP do not have to comply with UGMS unless otherwise required by Notice of Funding Availability ("NOFA") or Contract. For federal funds, Subrecipients will also follow 2 CFR Part 200, as interpreted by the federal funding agency.

(b) In order to maintain adequate separation of duties, the Subrecipient shall ensure that no individual has the ability to perform more than one of the functions described in paragraphs (1) - (5) that might result in a release of funds without appropriate controls:

(1) Requisition authorization;

(2) Encumbrance into software;

(3) Check creation and/or automated payment disbursement;

(4) Authorized signature/electronic signature; and

(5) Distribution of paper check.

§1.403. Single Audit Requirements.

(a) For this section, the word Subrecipient includes Multifamily Development Owners who have Direct Loan Funds from the Department who are or have an Affiliate that is required to submit a Single Audit, i.e. units of government and nonprofit organizations.

(b) Procurement of a Single Auditor. A Subrecipient or Affiliate must procure their single auditor in the following manner unless subject to a different requirement in the Local Government Code:

(1) Competitive Proposal procedures whereby competitors' qualifications are evaluated and a contract awarded to the most qualified competitor. Proposals should be advertised broadly, which may include going outside the entity's service area, and solicited from an adequate number (usually two or more) of qualified sources. Procurements must be conducted in a manner that prohibits the use of in-state or local geographical preferences in the evaluation of bids or proposals;

(2) Subrecipients may not use a sealed bid method for procurement of the Single Auditor. There is no requirement that the selected audit firm be geographically located near the Subrecipient. If a Subrecipient does not receive proposals from firms with appropriate experience or responses with a price that is not reasonable compared to the cost price analysis, the submissions must be rejected and procurement must be re-performed.

(c) Subrecipients and Affiliates must confirm that they are contracting with an audit firm that is properly licensed to perform the Single Audit and is not on a limited scope status or under any other sanction, reprimand or violation with the Texas State Board of Public Accountancy. The Subrecipient must ensure that the Single Audit is performed in accordance with the limitations on the auditor's license.

(d) Subrecipients are required to submit a Single Audit Certification form within two (2) months after the end of their fiscal year indicating the amount they expended in Federal and State funds during their fiscal year and the outstanding balance of any loans made with federal funds if there are continuing compliance requirements other than repayment of the loan.

(e) Subrecipients that expend $750,000 or more in federal and/or state awards or have an outstanding loan balance associated with a federal or state resource with continuing compliance requirements, or a combination thereof must have a Single Audit or program-specific audit conducted. If the Subrecipient's Single Audit is required by 2 CFR 200, subpart F, the report must be submitted to the Federal Audit Clearinghouse the earlier of 30 days after receipt of the auditor's report or nine (9) months after the end of its respective fiscal year. If a Single Audit is required but not under 2 CFR 200, subpart F, the report must be submitted to the Department the earlier of 30 days after receipt of the auditor's report or nine months after the end of its respective fiscal year.

(f) Subrecipients are required to submit a notification to the Department within five business days of submission to the Federal Audit Clearinghouse. Along with the notice, the Subrecipient must indicate if the auditor issued a management letter. If a management letter was issued by the auditor, a copy must be sent to the Department.

(g) The Department will review the Single Audit and issue a management decision letter. If the Single Audit results in disallowed costs, those amounts must be repaid or an acceptable repayment plan must be entered into with the Department in accordance with 10 TAC §1.21.

(h) In evaluating a Single Audit, the Department will consider both audit findings and management responses in its review. The Department will notify Subrecipients and Affiliates (if applicable) of any Deficiencies or Findings from within the Single Audit for which the Department requires additional information or clarification and will provide a deadline by which that resolution must occur.

(i) All findings identified in the most recent Single Audit will be reported to EARAC through the Previous Participation review process described in Subchapter C of this Chapter. The Subrecipient may submit written comments for consideration within five (5) business days of the Department's management decision letter.

(j) If the Subrecipient disagreed with the auditor's finding(s), and the issue is related to administration of one of the Department's programs, an appeal process is available to provide an opportunity for the auditee to explain its disagreement to the Department. This is not an appeal of audit findings themselves. The Subrecipient may submit a letter of appeal and documentation to support the appeal. The Department will take the documentation and written appeal into consideration prior to issuing a management decision letter. If the Subrecipient did

not disagree with the auditor's finding, no appeal to the Department is available.

(k) In accordance with 2 CFR Part 200 and the State of Texas Single Audit Circular §.225, with the exception of nondiscretionary CSBG funds except as otherwise required by federal laws or regulations, the Department may suspend and cease payments under all active Contracts until the Single Audit is received. In addition, the Department may fail to renew, amend, extend and/or not enter into a new Contract with a Subrecipient until receipt of the required Single Audit Certification form or the submission requirements detailed in subparagraph (e) of this section.

(l) In accordance with Subchapter C of this Chapter (relating to Previous Participation Reviews), if a Subrecipient applies for funding or an award from the Department, findings noted in the Single Audit and the failure to timely submit a Single Audit Certification Form or Single Audit will be reported to EARAC.

§1.404. Purchase and Procurement Standards.

(a) The procurement of all goods and services shall be conducted, to the maximum extent practical, in a manner providing full and open competition consistent with the standards of 2 CFR Part 200 and UGMS, as applicable.

(b) Subrecipients shall establish, and require Subcontractors to establish, written procurement procedures that when followed, result in procurements that comply with federal, state and local standards, and grant award contracts. Procedures must:

(1) include a cost or price analysis that provides for a review of proposed procurements to avoid purchase of unnecessary or duplicative items. Where appropriate, analyzing lease versus purchase alternatives, performing the proposed service in-house, and performing any other appropriate analysis to determine the most economical approach.

(2) require that solicitations for goods and services provide for a clear and accurate description of the technical requirements for the material, product or service to be procured. In competitive procurements, such a description shall not contain features which unduly restrict competition, but must contain requirements that the bidder/offeror must fulfill and all other factors to be used in evaluating bids or proposals. A description, whenever practicable, of technical requirements in terms of functions to be performed or performance required, including the range of acceptable characteristics or minimum acceptable standards. The specific features of "brand name or equal value" descriptions that bidders are required to meet when such items are included in the solicitation.

(3) include a method for conducting technical evaluations of the proposals received and for selecting awardees.

(c) Documentation of procurement processes, to include but not be limited to, rationale for the type of procurement, cost or price analysis, procurement package, advertising, responses, selection process, contractor selection or rejection, certification of conflict of interest requirements being satisfied, and evidence that the awardee is not an excluded entity in the System for Award Management ("SAM") must be maintained by the Subrecipient in accordance with the record retention requirements of the applicable program.

(d) In accordance with 34 Texas Administrative Code §20.13, each Subrecipient shall make a good faith effort to utilize the state's Historically Underutilized Business Program in contracts for construction, services (including consulting and Professional Services) and commodities purchases.

(e) The State of Texas conducts procurement for many materials, goods, and appliances. Use of the State of Texas Co-Op Purchasing Program does not satisfy the requirements of 2 CFR 200. For more detail about how to purchase from the state contract, please contact: State of Texas Co-Op Purchasing Program, Texas Comptroller of Public Accounts. If Subrecipients choose to use the Cooperative Purchasing Program, documentation of annual fee payment is required.

(f) All vehicles considered for purchase with state or federal funds must be pre-approved by the Department via written correspondence from the Department. Procurement procedures must include provisions for free and open competition. Any vehicle purchased without approval may result in disallowed costs.

§1.405. Bonding Requirements.

(a) The requirements described in this subsection relate only to construction or facility improvements for DOE WAP, HOME, CDBG, NSP, and ESG Subrecipients.

(1) For contracts exceeding $100,000, the Subrecipient must request and receive Department approval of the bonding policy and requirements of the Subrecipient to ensure that the Department is adequately protected.

(2) For contracts in excess of $100,000, and for which the Department has not made a determination that the Department's interest is adequately protected, a "bid guarantee" from each bidder equivalent to 5% of the bid price shall be requested. The "bid guarantee" shall consist of a firm commitment such as a bid bond, certified check, or other negotiable instrument accompanying a bid as assurance that the bidder will, upon acceptance of his bid, execute such contractual documents as may be required within the time specified. A bid bond in the form of any of the documents described in this paragraph may be accepted as a "bid guarantee."

(A) A performance bond on the part of the Subrecipient for 100% of the contract price. A "performance bond" is one executed in connection with a contract, to secure fulfillment of all Subcontractors' obligations under such contract.

(B) A payment bond on the part of the Subcontractor for 100% of the contract price. A "payment bond" is one executed in connection with a contract to assure payment as required by statute of all persons supplying labor and material in the execution of the work provided for in the contract.

(C) Where bonds are required, in the situations described herein, the bonds shall be obtained from companies holding certificates of authority as acceptable sureties pursuant to 31 CFR Part 223, "Surety Companies Doing Business with the United States."

(b) A unit of government must comply with the bond requirements of Texas Civil Statutes, Articles 2252, 2253, and 5160, and Local Government Code, §252.044 and §262.032, as applicable.

§1.406. Fidelity Bond Requirements.

The Department is required to assure that fiscal control and accounting procedures for federally funded entities will be established to assure the proper disbursal and accounting for the federal funds paid to the state. In compliance with that assurance the Department requires program Subrecipients to maintain adequate fidelity bond coverage. A fidelity bond is a bond indemnifying the Subrecipient against losses resulting from the fraud or lack of integrity, honesty or fidelity of one or more of its employees, officers, or other persons holding a position of trust.

(1) In administering Contracts, Subrecipients shall observe their regular requirements and practices with respect to bonding and insurance. In addition, the Department may impose bonding and insurance requirements by Contract.

(2) If a Subrecipient is a non-governmental organization, the Department requires an adequate fidelity bond. If the amount of the fidelity bond is not prescribed in the contract, the fidelity bond must be for a minimum of $10,000 or an amount equal to the contract if less than $10,000. The bond must be obtained from a company holding a certificate of authority to issue such bonds in the State of Texas.

(3) The fidelity bond coverage must include all persons authorized to sign or counter-sign checks or to disburse sizable amounts of cash. Persons who handle only petty cash (amounts of less than $250) need not be bonded, nor is it necessary to bond officials who are authorized to sign payment vouchers, but are not authorized to sign or counter-sign checks or to disburse cash.

(4) The Subrecipient must receive an assurance letter from the bonding company or agency stating the type of bond, the amount and period of coverage, the positions covered, and the annual cost of the bond. Compliance must be continuously maintained thereafter. A copy of the actual policy shall remain on file with the Subrecipient and shall be subject to monitoring by the Department.

(5) Subrecipients are responsible for filing claims against the fidelity bond when a covered loss is discovered.

(6) The Department may take any one or more of the actions described in Chapter 2, of this Part, titled "Enforcement" in association with issues identified as part of filing claims against the fidelity bond.

§1.407. Inventory Report.

(a) The Department requires the submission of an inventory report for all Contracts on an annual basis to be submitted to the Department, no later than 45 days after the end of the Contract Term, or a more frequent period as reflected in the Contract. Real Property and Equipment must be inventoried and reported on the Department's required form. The form and instructions are found on the Department's website.

(b) Real property and Equipment purchased with funds under a Contract with the Department must be inventoried and reported to the Department during the Contract term.

§1.408. Travel.

The governing body of each Subrecipient must adopt travel policies that adhere to 2 CFR Part 200, for cost allowability. The Subrecipient must follow either the federal travel regulations or State of Texas travel rules and regulations found on the Comptroller of Public Accounts website at www.cpa.state.tx.us, as applicable.

§1.409. Records Retention.

(a) Client Records including Multifamily Development Owners. The Department requires Subrecipient organizations to document client services and assistance. Subrecipient organizations must arrange for the security of all program-related computer files through a remote, online, or managed backup service. Confidential client files must be maintained in a manner to protect the privacy of each client and to maintain the same for future reference. Subrecipient organizations must store physical client files in a secure space in a manner that ensures confidentiality and in accordance with Subrecipient organization policies and procedures. To the extent that it is financially feasible, archived client files should be stored offsite from Subrecipient headquarters, in a secure space in a manner that ensures confidentiality and in accordance with organization policies and procedures.

(b) Records of client eligibility must be retained for five (5) years starting from the date the household activity is completed, unless otherwise provided in federal regulations governing the program.

(c) Other records must be maintained as described in the Contract or the LURA, and in accordance with federal or state law for the programs described in the Chapters of this Part.

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

Filed with the Office of the Secretary of State on August 26, 2016.

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Timothy K. Irvine
Executive Director
Texas Department of Housing and Community Affairs
Earliest possible date of adoption: October 9, 2016
For further information, please call: (512) 475-1762

CHAPTER 2. ENFORCEMENT
SUBCHAPTER A. GENERAL

10 TAC §2.102

The Texas Department of Housing and Community Affairs (the "Department") proposes amendments to 10 TAC Chapter 2, Subchapter A, General, §2.102, Definitions. The purpose of the proposed amendments is to revise the introductory language to more clearly indicate that definitions refer back to other Chapters in this Title, and to revise the definition of Enforcement Committee.

FISCAL NOTE. Timothy K. Irvine, Executive Director, has determined that, for each year of the first five years the amendments will be in effect, enforcing or administering the amendments does not have any foreseeable implications related to costs or revenues for the state or local governments.

PUBLIC BENEFIT/COST NOTE. Mr. Irvine also has determined that, for each year of the first five years the amendments will be in effect, the public benefit anticipated as a result of the amendments will be to provide clearer guidance to Subrecipients through more organized and direct rules. There are no anticipated additional new economic costs to individuals required to comply with the amendments as a result of this action.

ADVERSE IMPACT ON SMALL OR MICRO-BUSINESSES. The Department has determined that there will be no economic effect on small or micro-businesses.

REQUEST FOR PUBLIC COMMENT. The public comment period will be held September 9, 2016, to October 10, 2016, to receive input on the proposed amendment. Written comments may be submitted to the Texas Department of Housing and Community Affairs, Attention: Brooke Boston, CA Rule Comments, P.O. Box 13941, Austin, Texas 78711-3941, or by email to the following address: *brooke.boston@tdhca.state.tx.us.* ALL COMMENTS MUST BE RECEIVED BY 5:00 P.M. AUSTIN LOCAL TIME ON OCTOBER 10, 2016. A copy of the proposed amendment will be available on the Department's website at http://www.tdhca.state.tx.us/public-comment.htm under Items Open for Public Comment during the public comment period.

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

The proposed amendments affect no other code, article, or statute.

§2.102. Definitions.

The words and terms, when used in this chapter, shall have the following meanings, unless the context clearly indicates otherwise. Capitalized words used herein have the meaning assigned in the specific Chapters of this Title that govern the program associated with the request, or assigned by federal or state law.

(1) Consultant--One who provides services or advice for a fee and not as an employee.

(2) Enforcement Committee ("Committee")--A committee of employees of the Department appointed by the Executive Director. The voting members of that Committee shall be no fewer than five (5) and no more than nine (9). The Executive Director may designate certain members as ex officio and non-voting. The Legal Division will designate person(s) to attend meetings and advise the Committee, but not be members of the Committee. Staff from the Compliance Division will attend at the Committee's request but will not be members of the Committee or be present during any actual deliberations in which the affected person(s) are not also present. A Legal Division designee will also serve as Secretary to the Committee. The Executive Director may designate a substitute for voting committee members who shall be permitted to attend and vote in their absence.

[~~(2) Enforcement Committee (Committee)--A committee of employees of the Department appointed by the Executive Director. The members of that Committee shall be no fewer than five (5) and no more than nine (9). The Executive Director may designate certain members as ex officio and non-voting. Legal Services and Compliance will each designate persons to attend meetings and advise the Committee, but not be members of the Committee. A Legal Services designee will also serve as Secretary to the Committee. Voting Committee members may designate a substitute who shall be permitted to attend and vote in their absence.~~]

(3) Legal Requirements--All requirements of state, federal, or local statute, rule, regulation, ordinance, order, court order, official interpretation, policy issuance, OMB Circulars, representations to secure awards, or any similar memorialization of requirement including a requirement of a purely contractual nature, no matter how designated, applicable to a matter.

(4) Program Agreements include:

(A) agreements between the Department and a person setting forth Legal Requirements; and

(B) agreements between a person subject to a Program Agreement and a third party to carry out one or more of those Legal Requirements as the agent, consultant, partner, contractor, subcontractor, or otherwise for a person described in paragraph (1) of this section.

(5) Responsible Party--Any Person subject to a Program Agreement.

(6) Vendor--A person who is procured by a subrecipient to provide goods or services in any way relating to a Department program or activity.

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

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Timothy K. Irvine
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Texas Department of Housing and Community Affairs
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SUBCHAPTER B. ENFORCEMENT REGARDING COMMUNITY AFFAIRS CONTRACT SUBRECIPIENTS

10 TAC §2.201, §2.202

The Texas Department of Housing and Community Affairs (the "Department") proposes the repeal of 10 TAC Chapter 2, Enforcement, Subchapter B, Enforcement Regarding Community Affairs Contract Subrecipients. The purpose of the proposed repeal is to remove this subchapter and, under separate action, rename this subchapter, revise the sections previously covered by this subchapter relating to cost reimbursement, sanctions and contract closeout, and add a new section to address Termination and Reduction of Funding for CSBG Eligible Entities.

FISCAL NOTE. Timothy K. Irvine, Executive Director, has determined that, for each year of the first five years the repeal will be in effect, enforcing or administering the repeal does not have any foreseeable implications related to costs or revenues for the state or local governments.

PUBLIC BENEFIT/COST NOTE. Mr. Irvine also has determined that, for each year of the first five years the repeal will be in effect, the public benefit anticipated as a result of the repeal will be to provide clearer guidance to Subrecipients through more organized and direct rules. There are no anticipated additional new economic costs to individuals required to comply with the repeal as a result of this action.

ADVERSE IMPACT ON SMALL OR MICRO-BUSINESSES. The Department has determined that there will be no economic effect on small or micro-businesses.

REQUEST FOR PUBLIC COMMENT. The public comment period will be held September 9, 2016, to October 10, 2016, to receive input on the proposed repeal. Written comments may be submitted to the Texas Department of Housing and Community Affairs, Attention: Brooke Boston, CA Rule Comments, P.O. Box 13941, Austin, Texas 78711-3941, or by email to the following address: brooke.boston@tdhca.state.tx.us. ALL COMMENTS MUST BE RECEIVED BY 5:00 P.M. Austin local time on OCTOBER 10, 2016. A copy of the proposed repeal will be available on the Department's website at http://www.tdhca.state.tx.us/public-comment.htm under Items Open for Public Comment during the public comment period.

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

The proposed repeal affects no other code, article, or statute.

§2.201. Modified Reimbursement.
§2.202. Sanctions and Contract Closeout.

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

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10 TAC §§2.201 - 2.204

The Texas Department of Housing and Community Affairs (the "Department") proposes new 10 TAC Chapter 2, Enforcement, Subchapter B, Enforcement for Noncompliance with Program Requirements of Chapters 6. The purpose of the proposed new section is to effectuate a redrafting of this rule that recrafts the sections previously covered by this subchapter relating to cost reimbursement, sanctions and contract closeout, and adds a new section to address Termination and Reduction of Funding for CSBG Eligible Entities.

FISCAL NOTE. Timothy K. Irvine, Executive Director, has determined that, for each year of the first five years the proposed new subchapter will be in effect, enforcing or administering the proposed new section does not have any foreseeable additional costs or revenues for the state or local governments.

PUBLIC BENEFIT/COST NOTE. Mr. Irvine also has determined that, for each year of the first five years the new subchapter is in effect, the public benefit anticipated as a result of the new section will be to provide clearer guidance to Subrecipients through more direct rules. There are no anticipated additional new economic costs to individuals required to comply with the new section as a result of this action.

ADVERSE IMPACT ON SMALL OR MICRO-BUSINESSES. The Department has determined that there will be no economic effect on small or micro-businesses.

REQUEST FOR PUBLIC COMMENT. The public comment period will be held September 9, 2016, to October 10, 2016, to receive input on the proposed subchapter. Written comments may be submitted to the Texas Department of Housing and Community Affairs, Attention: Brooke Boston, CA Rule Comments, P.O. Box 13941, Austin, Texas 78711-3941, or by email to the following address: brooke.boston@tdhca.state.tx.us. ALL COMMENTS MUST BE RECEIVED BY 5:00 P.M. AUSTIN LOCAL TIME ON OCTOBER 10, 2016. A copy of the proposed new chapter will be available on the Department's website at http://www.tdhca.state.tx.us/public-comment.htm under Items Open for Public Comment during the public comment period.

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

The proposed new section affects no other code, article, or statute.

§2.201. Cost Reimbursement.

(a) The Department may place on Cost Reimbursement any contract, other than non-Discretionary CSBG. Cost reimbursement requires Subrecipients to submit supporting documentation and back up for Expenditures or Obligations prior to the Department releasing funds. The Department staff shall establish appropriate review protocols for each party placed on cost reimbursement status, indicating whether all expenses will be reviewed or a sample, and the nature of any additional documentation that will be required in connection therewith. Approving the release of funds in a cost review situation does not constitute final approval of the expenditure. Funds so advanced remain subject to future reviews, monitorings, and audits and in no way serve to constrain or limit them. By way of example and not by way of limitation, a cost reimbursement might appear facially compliant and appropriate but if it related to a matter that required procurement and a future review, monitoring, or audit identified noncompliance with the procurement, the funds could be subject to disallowance and requiring repayment from unrestricted non-federal funds.

(b) In addition to the reporting requirements outlined in Chapter 6, §6.7 of this Part (relating to Subrecipient Reporting Requirements) an entity on Cost Reimbursement must submit, at a minimum, their expanded general ledger, chart of accounts, cost allocation plan, and bank reconciliations for the previous three months. Upon review of those items the Department will request submission of back up for some or all of the reported Expenditures.

(c) The budget caps for each budget category will be enforced each month the entity is on Cost Reimbursement.

(d) An entity will be removed from Cost Reimbursement when the Department determines that identified risks or concerns have been sufficiently mitigated.

(e) An entity on Cost Reimbursement remains subject to monitoring.

(f) The Department reserves the right to outsource some or all of its work associated with the Cost Reimbursement process to a third party.

§2.202. Sanctions and Contract Closeout.

(a) Subrecipients that enter into a Contract with the Department to administer programs are required to follow all Legal Requirements governing these programs.

(b) If a Subrecipient fails to comply with program and Contract requirements, rules, or regulations and in the event monitoring or other reliable sources reveal material Deficiencies or Findings in performance, or if the Subrecipient fails to correct any Deficiency or Finding within the time allowed by federal or state law, the Department, in order to protect state or federal funds, may take reasonable and appropriate actions, including but not limited to one or more of the items described in paragraphs (1) - (6) of this subsection. In so doing, the Department will not take any action that exceeds what it is permitted to do under applicable state and federal law. The Department, as appropriate, may provide written notice of its actions and the rights of a Subrecipient to appeal.

(1) Place it on Cost Reimbursement.

(2) With the exception of non-Discretionary CSBG, withhold all payments from the Subrecipient (both reimbursements and advances) until acceptable confirmation of compliance with the rules and regulations are received by the Department;

(3) Reduce the allocation of funds to Subrecipients as described in §2.203 of this subchapter (relating to Termination and Reduction of Funding for CSBG Eligible Entities) and as limited for LIHEAP funds as outlined in Tex. Gov't Code, Chapter 2105;

(4) With the exception of non-Discretionary CSBG, suspend performance of the Contract or reduce funds until proof of compliance with the rules and regulations are received by the Department or a decision is made by the Department to initiate proceedings for Contract termination;

(5) If permitted by applicable state and federal statute and regulations, elect not to provide future grant funds to the Subrecipient, either prospectively in general or until appropriate actions are taken to ensure compliance; or

(6) Terminate the Contract. Adhering to the requirements governing each specific program administered by the Department, as needed, the Department may determine to proceed with the termination of a Contract, in whole or in part, at any time the Department establishes there is good cause for termination. Such cause may include, but is not limited to, fraud, waste, abuse, fiscal mismanagement, or other serious Findings in the Subrecipient's performance. For CSBG contract termination procedures, refer to §2.203 of this subchapter.

(c) Contract Closeout. When a Contract is terminated, or voluntarily relinquished, the procedures described in paragraphs (1) - (12) of this subsection will be implemented. The terminology of a "terminated" Subrecipient below is intended to include a Subrecipient that is voluntarily terminating the Contract.

(1) The Department will issue a termination letter to the Subrecipient no less than 30 days prior to terminating the Contract. If the entity is an Eligible Entity the Department, following the CSBG Act, will simultaneously initiate proceedings to terminate the Eligible Entity status and the effectiveness of the contractual termination will be stayed automatically pending the outcome of those proceedings. The Department may determine to take one of the following actions: suspend funds immediately or allow a temporary transfer to another provider; require Cost Reimbursement for closeout proceedings, or provide instructions to the Subrecipient to prepare a proposed budget and written plan of action that supports the closeout of the Contract. The plan must identify the name and current job titles of staff that will perform the closeout and an estimated dollar amount to be incurred. The plan must identify the CPA or firm which will perform the Single Audit. The Department will issue an official termination date to allow all parties to calculate deadlines which are based on such date.

(2) If the Department determines that Cost Reimbursement is appropriate to accomplish closeout, the Subrecipient will submit backup documentation for all current Expenditures associated with the closeout. The required documentation will include, but not be limited to, the chart of accounts, detailed general ledger, revenue and expenditure statements, time sheets, payment vouchers and/or receipts, and bank reconciliations.

(3) No later than 30 calendar days after the Contract is terminated, the Subrecipient will take a physical inventory of client files, including case management files.

(4) The terminated Subrecipient will have 30 calendar days from the date of the physical inventory to make available all current client files, which must be boxed by county of origin. Current and active case management files also must be inventoried, and boxed by county of origin.

(5) Within 60 calendar days following the Subrecipient due date for preparing and boxing client files, Department staff will retrieve the client files.

(6) The terminated Subrecipient will prepare and submit no later than 30 calendar days from the date the Department retrieves the client files, a final report containing a full accounting of all funds expended under the contract.

(7) A final monthly expenditure report and a final monthly performance report for all remaining expenditures incurred during the closeout period must be received by the Department no later than 45 calendar days from the date the Department determines that the closeout of the program and the period of transition are complete.

(8) The Subrecipient will submit to the Department no later than 45 calendar days after the termination of the Contract, an inventory of the non-expendable personal property acquired in whole or in part with funds received under the Contract.

(9) The Department may require transfer of title to Equipment to the Department or to any other entity receiving funds under the program in question. The Department will make arrangements to remove Equipment covered by this paragraph within 90 calendar days following termination of the Contract.

(10) Upon selection of a new service provider, the Department will transfer to the new provider client files and, as appropriate, Equipment.

(11) A current year Single Audit must be performed for all entities that have exceeded the federal expenditure threshold under 2 CFR Part 200, Subpart F or the State expenditure threshold under UGMS, as applicable. The Department will allow a proportionate share of program funds to pay for accrued audit costs, when an audit is required, for a Single Audit that covers the date up to the closeout of the contract. The terminated subrecipient must have a binding contract with a CPA firm on or before the termination date of the contract. The actual costs of the Single Audit and accrued audit costs including support documentation must be submitted to the Department no later than 45 calendar days from the date the Department determines the closeout is complete.

(12) Subrecipients shall submit within 45 calendar days after the date of the closeout process all financial, performance, and other applicable reports to the Department. The Department may approve extensions when requested by the Subrecipient. However, unless the Department authorizes an extension, the Subrecipient must abide by the 45 calendar day requirement of submitting all referenced reports and documentation to the Department.

§2.203. Termination and Reduction of Funding for CSBG Eligible Entities.

(a) This section describes the Department's process for implementing HHS Information Memorandum 116 (Corrective Action, Termination, or Reduction of Funding) ("IM 116") and 42 U.S.C. 9915.

(b) Deficiencies may be identified through failure to resolve issues identified in an onsite monitoring review, a review of the Subrecipient's Single Audit, a review prompted by a complaint, through the Department's procedures for reviewing performance and expenditure reports, or in any other review under 42 U.S.C. §9914(a)(1)-(4).

(c) If a Deficiency is identified, the Department will review the training and technical assistance that has been provided to the Eligible Entity and determine if further training and technical assistance is warranted. If so, concurrent with the notification of the Deficiency, the Eligible Entity will be offered additional training and technical assistance that specifically focuses on the Deficiencies. After training and technical assistance has been delivered, the Eligible Entity will be provided the opportunity to submit corrective action or a plan for correction.

(d) If an entity does not respond, does not resolve the Deficiency, or does not propose a reasonable corrective action plan, the uncorrected Deficiency (or Deficiencies) will be considered a final decision in a review pursuant to the CSBG Act and cause for proceedings to terminate Eligible Entity status or reduce funding in accordance with IM 116 and 42 U.S.C. §§9908(b)(8) and 9915; such a determination will be issued in a final determination letter from the Department.

(e) If the Department determines that the development and implementation of a QIP is an appropriate requirement and/or that additional training and technical assistance are needed, that requirement

will be stated in the final determination letter. The Eligible Entity will be provided 20 days to submit an acceptable QIP compliant with §2.204 of this Subchapter, indicating that steps are under way and identifying dates for correction. Within 30 calendar days from the date it receives the proposed QIP, the Department will review the QIP and either approve it or specify the reasons it cannot be approved.

(f) The CSBG Act requires that a QIP be implemented not later than 60 calendar days following the notification in the final determination letter. That requirement precludes a process of extended review and feedback and iterative QIP submissions (unless the QIP has been submitted sufficiently early to allow time for such Department review); a QIP that cannot be approved within the timeframe for implementation not later than the 60 calendar day deadline will generally serve to trigger the commencement of formal legal proceedings to terminate Eligible Entity status.

(g) If it is determined and/or documented that training and technical assistance is not appropriate, that the QIP has not been approved, or the processes described in subsection (d) of this section have failed to resolve the Deficiency, the Department will contact all members of the Subrecipient's Board, and the Department will arrange and set a date for a hearing with the State Office of Administrative Hearings ("SOAH"). If the Eligible Entity does not respond or appear for the SOAH hearing, the consideration of termination of the Eligible Entity's status will be heard at the next regularly scheduled meeting of the Department's Governing Board. An entity receiving notice of the initiation of a contested case before SOAH is reminded that they will need to read and comply with SOAH's requirements in the way they handle and respond to the matter.

(h) SOAH will issue a proposal for decision to the TDHCA Board recommending whether there is cause, as defined by the CSBG Act, 42 U.S.C. §9908(c), to terminate or reduce funding to the Subrecipient. The TDHCA Board will be provided the proposal for decision and it will be considered as part of any final order by the Board in the matter.

(i) If the TDHCA Board determines that there is cause to terminate or reduce funding, pursuant to 42 U.S.C. §9915, the Department will notify the Subrecipient that it has the right under 42 U.S.C. §9915 to seek review of the decision by the HHS. If HHS does not overturn the decision, or if the Subrecipient does not seek HHS review, the entity's status as an Eligible Entity under the CSBG Act, and all active CSBG Contracts will be terminated on the 90th day after the Board decision.

(j) Any right or remedy given to the Department by this Chapter does not preclude the existence of any other right or remedy, nor shall any action or lack of action by the Department in the exercise of any right or remedy be deemed a waiver of any other right or remedy.

§2.204. Contents of a Quality Improvement Plan.

(a) If a QIP is required of a Subrecipient under §2.203(d) of this Subchapter, it must be developed compliant with the guidance in this section. While each QIP developed by a Subrecipient is unique and must be responsive to the specific Deficiencies identified, all of the items below, at a minimum, must be addressed.

(1) A QIP must initially provide a clear and explicit acknowledgement of each of the Deficiencies that have prompted the need for such a plan, and must be described in sufficient detail to affirm that the Subrecipient's board and management have a solid grasp of the needed improvement.

(2) Although commencement of the implementation of a QIP is specified in statute (42 USC §9915(a)(4)) the timeline for completion is important. The QIP must set forth an aggressive but achievable timeline that plans for implementation of the planned remedies to be actively underway not later than the sixtieth day after the day on which the Department notified the Subrecipient of a final determination consistent with §2.203(c) above. The timeline should take into account the possible impact on achievement of benchmarks, plans, and other objectives. As a general rule the Subrecipient should not expect to receive an extension of any timeframes described herein.

(3) The QIP must be specific. A general statement, such as "the Subrecipient will ensure it has a compliant tripartite board" or "the Subrecipient will obtain a compliant Single Audit" will not suffice. Many such matters involve multiple steps from analysis and planning at the management level, to board presentation and approval, to procurement, to contracting, to execution under the Contract, often with follow-on requirements. If any of the steps will also require expenditure of funds, it may also be necessary to review and update the budget and possibly other matters, such as plans. Specificity must include at a minimum addressing the following questions:

(A) Whom within the Subrecipient's staff will do what specific steps/tasks, when will they do it, and what resources will they need?

(B) If staff is to be redirected or released from existing duties, how will those duties be covered?

(C) How will the agency ensure the Deficiency does not reoccur?

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 August 26, 2016.

TRD-201604466
Timothy K. Irvine
Executive Director
Texas Department of Housing and Community Affairs
Earliest possible date of adoption: October 9, 2016
For further information, please call: (512) 475-1762

CHAPTER 6. COMMUNITY AFFAIRS PROGRAMS

The Texas Department of Housing and Community Affairs (the "Department") proposes new 10 TAC Chapter 6, Community Affairs Programs. The purpose of the proposed new Chapter 6 is to effectuate a reorganization of the rules that govern the Community Affairs programs including Community Services Block Grant, Comprehensive Energy Assistance Program, and Weatherization Assistance Program so that the rules addressing those programs that currently are provided for in Chapter 5 relating to the Community Affairs Programs will now be addressed in a new and separately proposed chapter.

FISCAL NOTE. Timothy K. Irvine, Executive Director, has determined that, for each year of the first five years the proposed new Chapter will be in effect, enforcing or administering the proposed new Chapter does not have any foreseeable additional costs or revenues for the state or local governments.

PUBLIC BENEFIT/COST NOTE. Mr. Irvine also has determined that, for each year of the first five years the new Chapter is in effect, the public benefit anticipated as a result of the new Chapter will be to provide clearer guidance to Subrecipients through more organized and direct rules. There are no anticipated addi-

tional new economic costs to individuals required to comply with the new Chapter as a result of this action.

ADVERSE IMPACT ON SMALL OR MICRO-BUSINESSES. The Department has determined that there will be no economic effect on small or micro-businesses.

REQUEST FOR PUBLIC COMMENT. The public comment period will be held September 9, 2016, to October 10, 2016, to receive input on the proposed Chapter. Written comments may be submitted to the Texas Department of Housing and Community Affairs, Attention: Brooke Boston, CA Rule Comments, P.O. Box 13941, Austin, Texas 78711-3941, or by email to the following address: brooke.boston@tdhca.state.tx.us. ALL COMMENTS MUST BE RECEIVED BY 5:00 P.M. Austin local time on OCTOBER 10, 2016. A copy of the proposed new chapter will be available on the Department's website at http://www.tdhca.state.tx.us/public-comment.htm under Items Open for Public Comment during the public comment period.

SUBCHAPTER A. GENERAL PROVISIONS

10 TAC §§6.1 - 6.10

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

The proposed new Chapter affects no other code, article, or statute.

§6.1. Purpose and Goals.

(a) The rules established herein are for CSBG, LIHEAP, and DOE-WAP. Additional program specific requirements are contained within each program subchapter and Chapters 1 and 2 of this Title.

(b) Programs administered by the Community Affairs ("CA") Division of the Texas Department of Housing and Community Affairs (the "Department") support the Department's statutorily assigned mission.

(c) The Department accomplishes its mission chiefly by acting as a conduit for federal grant funds and other assistance for housing and community affairs programs. Ensuring program compliance with the state and federal laws that govern the CA programs is another important part of the Department's mission. Oversight and program mandates ensure state and federal resources are expended in an efficient and effective manner.

§6.2. Definitions.

(a) To ensure a clear understanding of the terminology used in the context of the CSBG, LIHEAP, and DOE-WAP programs of the Community Affairs Division, a list of terms and definitions has been compiled as a reference.

(b) The words and terms in this chapter shall have the meanings described in this subsection unless the context clearly indicates otherwise. Refer to Subchapters B, C, and D of this chapter for program specific definitions.

(1) Affiliate--An entity related to an Applicant that controls by contract or by operation of law the Applicant or has the power to control the Applicant or a third entity that controls, or has the power to control both the Applicant and the entity. Examples include but are not limited to entities submitting under a common application, or instrumentalities of a unit of government. This term also includes any entity that is required to be reported as a component entity under Generally Accepted Accounting Standards, is required to be part of the same Single Audit as the Applicant, is reported on the same IRS Form 990, or is using the same federally approved indirect cost rate.

(2) Awarded Funds--The amount of funds or proportional share of funds committed by the Department's Board to a Subrecipient or service area.

(3) Categorical Eligible/Eligibility: Households determined to be income eligible because at least one member receives:

(A) SSI payments from the Social Security Administration; or

(B) Means Tested Veterans Program payments.

(4) Child--Household member not exceeding eighteen (18) years of age.

(5) Code of Federal Regulations ("CFR")--The codification of the general and permanent rules and regulations of the federal government as adopted and published in the *Federal Register*.

(6) Community Action Agencies ("CAAs")--Private Nonprofit Organizations and Public Organizations that carry out the Community Action Program, which was established by the 1964 Economic Opportunity Act to fight poverty by empowering the poor in the United States.

(7) Community Services Block Grant ("CSBG")--An HHS-funded program which provides funding for CAAs and other Eligible Entities that seek to address poverty at the community level.

(8) Comprehensive Energy Assistance Program ("CEAP")--A LIHEAP-funded program to assist low-income Households, in meeting their immediate home energy needs.

(9) Concern--A policy, practice or procedure that has not yet resulted in a Finding or Deficiency but if not changed will or may result in Findings, Deficiencies and/or disallowed costs.

(10) Contract--The executed written Agreement between the Department and a Subrecipient performing an Activity related to a program that describes performance requirements and responsibilities assigned by the document; for which the first day of the contract period is the point at which programs funds may be considered by a Subrecipient for expenditure unless otherwise directed in writing by the Department.

(11) Contracted Funds--The gross amount of funds obligated by the Department to a Subrecipient as reflected in a Contract.

(12) Cost Reimbursement--A Contract sanction whereby reimbursement of costs incurred by the Subrecipient is made only after the Department has conducted such review as it deems appropriate, which may be complete or limited, such as on a sampling basis, and approved backup documentation provided by the Subrecipient to support such costs. Such a review and approval does not serve as a final approval and all uses of advanced funds remain subject to review in connection with future or pending reviews, monitoring, or audits.

(13) Declaration of Income Statement ("DIS")--A Department-approved form used only when it is not possible for an applicant to obtain third party or firsthand verification of income.

(14) Deficiency--Consistent with the CSBG Act, a Deficiency exists when an Eligible Entity has failed to comply with the terms of an agreement or a State plan, or to meet a State requirement. The Department's determination of a Deficiency may be based on the Eligible Entity's failure to provide CSBG services, or to meet appropriate standards, goals, and other requirements established by the State, including performance objectives. A Finding, Observation, or Concern that is not corrected, or is repeated, may become a Deficiency.

(15) Deobligation--The partial or full removal of Contracted Funds from a Subrecipient. Partial Deobligation is the removal

of some portion of the full Contracted Funds from a Subrecipient, leaving some remaining balance of Contracted Funds to be administered by the Subrecipient. Full Deobligation is the removal of the full amount of Contracted Funds from a Subrecipient. This definition does not apply to CSBG non-discretionary funds.

(16) Department of Energy ("DOE")--Federal department that provides funding for a weatherization assistance program.

(17) Department of Health and Human Services ("HHS")--Federal department that provides funding for CSBG and LIHEAP energy assistance and weatherization.

(18) Dwelling Unit--A house, including a stationary mobile home, an apartment, a group of rooms, or a single room occupied as separate living quarters.

(19) Elderly Person--

(A) for CSBG, a person who is fifty-five (55) years of age or older; and

(B) for CEAP and WAP, a person who is 60 years of age or older.

(20) Emergency--defined as:

(A) a natural disaster;

(B) a significant home energy supply shortage or disruption;

(C) significant increase in the cost of home energy, as determined by the Secretary of HHS;

(D) a significant increase in home energy disconnections reported by a utility, a state regulatory agency, or another agency with necessary data;

(E) a significant increase in participation in a public benefit program such as the food stamp program carried out under the Food Stamp Act of 1977 (7 U.S.C. §§2011, *et seq.*), the national program to provide supplemental security income carried out under Title XVI of the Social Security Act (42 U.S.C. §§1381, *et seq.*) or the state temporary assistance for needy families program carried out under Part A of Title IV of the Social Security Act (42 U.S.C. §§601, *et seq.*), as determined by the head of the appropriate federal agency;

(F) a significant increase in unemployment, layoffs, or the number of Households with an individual applying for unemployment benefits, as determined by the Secretary of Labor; or

(G) an event meeting such criteria as the Secretary of HHS, at the discretion of the Secretary of HHS, may determine to be appropriate.

(21) Expenditure--An amount of money spent.

(22) Families with Young Children--A Household that includes a Child age five (5) or younger including a Household that has a pregnant woman.

(23) Finding--A Subrecipient's material failure to comply with rules, regulations, the terms of the Contract or to provide services under each program to meet appropriate standards, goals, and other requirements established by the Department or funding source (including performance objectives). A Finding impacts the organization's ability to achieve the goals of the program and jeopardizes continued operations of the Subrecipient. Findings include the identification of an action or failure to act that results in disallowed costs.

(24) High Energy Burden--Households with energy burden which exceeds 11% of annual gross income (as defined by the applicable program), determined by dividing a Household's annual home energy costs by the Household's annual gross income.

(25) High Energy Consumption --A Household that is billed more for the use of gas and electricity in their Dwelling Unit than the median of Low Income home energy expenditures. The amount is identified in the Contract.

(26) Household--Any individual or group of individuals who are living together as one economic unit. For DOE WAP this includes all persons living in the Dwelling Unit. For LIHEAP these persons customarily purchase residential energy in common or make undesignated payments for energy.

(27) Inverse Ratio of Population Density Factor--The number of square miles of a county divided by the number of poverty Households of that county.

(28) Low Income Household--defined as:

(A) For DOE WAP, a Household whose total combined annual income is at or below 200% of the HHS Poverty Income guidelines;

(B) For CEAP and LIHEAP WAP, a Household whose total combined annual income is at or below 150% of the HHS Poverty Income guidelines or a Household who is Categorically Eligible; and

(C) For CSBG, a Household whose total combined annual income is at or below 125% of the HHS Poverty Income guidelines.

(29) Low Income Home Energy Assistance Program ("LIHEAP")--An HHS-funded program which serves low income Households who seek assistance for their home energy bills and/or weatherization services.

(30) Means Tested Veterans Program--A program whereby applicants receive payments under §§415, 521, 541, or 542 of title 38, United States Code, or under § 306 of the Veterans' and Survivors' Pension Improvement Act of 1978.

(31) Observation--A notable policy, practice or procedure observed though the course of monitoring.

(32) Office of Management and Budget ("OMB")--Office within the Executive Office of the President of the United States that oversees the performance of federal agencies and administers the federal budget.

(33) OMB Circulars--Instructions and information issued by OMB to Federal agencies that set forth principles and standards for determining costs for federal awards and establish consistency in the management of grants for federal funds. Uniform cost principles and administrative requirements for local governments and for nonprofit organizations, as well as audit standards for governmental organizations and other organizations expending federal funds are set forth in 2 CFR Part 200, unless different provisions are required by statute or approved by OMB.

(34) Outreach--The method that attempts to identify customers who are in need of services, alerts these customers to service provisions and benefits, and helps them use the services that are available. Outreach is utilized to locate, contact and engage potential customers.

(35) Performance Statement--A document which identifies the services to be provided by a Subrecipient.

(36) Persons with Disabilities--Any individual who is:

(A) a handicapped individual as defined in 29 U.S.C. §701 or has a disability under 42 U.S.C. §§12131 - 12134;

(B) disabled as defined in 42 U.S.C. 1382(a)(3)(A), 42 U.S.C. §423, or in 42 U.S.C. 15001; or

(C) receiving benefits under 38 U.S.C. Chapter 11 or 15.

(37) Population Density--The number of persons residing within a given geographic area of the state.

(38) Poverty Income Guidelines--The official poverty income guidelines as issued by HHS annually.

(39) Private Nonprofit Organization--An organization described in §501(c) of the Internal Revenue Code (the "Code") of 1986 and which is exempt from taxation under subtitle A of the Code and that is not a Public Organization.

(40) Production Schedule--The estimated monthly and quarterly performance targets and expenditures for a Contract period. The Production schedule must be signed by the applicable approved signatory and approved by the Department.

(41) Program Year--January 1 through December 31 of each calendar year for CSBG and LIHEAP and July 1 through June 30 of each calendar year for DOE WAP.

(42) Public Organization--A unit of government, as established by the Legislature of the State of Texas. Includes, but may not be limited to, cities, counties, and councils of governments.

(43) Referral--The documented process of providing information to a customer Household about an agency, program, or professional person that can provide the service(s) needed by the customer.

(44) Reobligation--The reallocation of deobligated funds to other Subrecipients.

(45) Single Audit-- Single Audit--The audit required by Office of Management and Budget (OMB), 2 CFR Part 200, Subpart F, or Tex. Gov't Code, Chapter 738, Uniform Grant and Contract Management, as reflected in an audit report.

(46) State--The State of Texas or the Department, as indicated by context.

(47) Subcontractor--A person or an organization with whom the Subrecipient contracts with to provide services.

(48) Subgrant--An award of financial assistance in the form of money, made under a grant by a Subrecipient to an eligible Subgrantee. The term includes financial assistance when provided by contractual legal agreement, but does not include procurement purchases.

(49) Subgrantee--The legal entity to which a Subgrant is awarded and which is accountable to the Subrecipient for the use of the funds provided.

(50) Subrecipient--An organization that receives federal funds passed through the Department to operate the CSBG, CEAP, DOE WAP and/or LIHEAP program(s).

(51) Supplemental Security Income (SSI)--A means tested program run by the Social Security Administration.

(52) System for Award Management ("SAM")--Combined federal database that includes the Excluded Parties List System ("EPLS").

(53) Systematic Alien Verification for Entitlements ("SAVE")--Automated intergovernmental database that allows authorized users to verify the immigration status of applicants.

(54) Texas Administrative Code ("TAC")--A compilation of all state agency rules in Texas.

(55) Uniform Grant Management Standards ("UGMS")--The standardized set of financial management procedures and definitions established by Tex. Gov't Code Chapter 783 to promote the efficient use of public funds by requiring consistency among grantor agencies in their dealings with grantees, and by ensuring accountability for the expenditure of public funds. State agencies are required to adhere to these standards when administering grants and other financial assistance agreements with cities, counties and other political subdivisions of the state. This includes all Public Organizations. In addition, Tex. Gov't Code Chapter 2105, subjects subrecipients of federal block grants (as defined therein) to the Uniform Grant and Contract Management Standards.

(56) United States Code ("U.S.C.")--A consolidation and codification by subject matter of the general and permanent laws of the United States.

(57) Vendor Agreement--An agreement between the Subrecipient and energy vendors that contains assurances regarding fair billing practices, delivery procedures, and pricing for business transactions involving LIHEAP beneficiaries.

(58) Vulnerable Populations- Elderly persons, Persons with a Disability, and Households with a Child at or below the age of five.

(59) Weatherization Assistance Program ("WAP")--DOE and LIHEAP funded program designed to reduce the energy cost burden of Low Income Households through the installation of energy efficient weatherization materials and education in energy use.

§6.3. Subrecipient Contract.

(a) Subject to prior Board approval, the Department and a Subrecipient shall enter into and execute a Contract for the disbursement of program funds. The Department, acting by and through its Executive Director or his/her designee, may authorize, execute, and deliver authorized modifications and/or amendments to the contract, as allowed by state and federal laws and rules.

(b) The governing body of the Subrecipient must pass a resolution authorizing its Executive Director or his/her designee to have signature authority to enter into contracts, sign amendments, and review and approve reports. All Contract actions including extensions, amendments or revisions must be ratified by the governing body at the next regularly scheduled meeting. Minutes relating to this resolution must be on file at the Subrecipient level.

(c) Within 45 calendar days following the conclusion of a Contract issued by the Department, the Subrecipient shall provide a final expenditure and final performance report regarding funds expended under the terms of the Contract.

(d) A performance statement and budget are attachments to the Contract between the Subrecipient and the Department. Execution of the Contract enables the Subrecipient to access funds through the Department's Community Affairs contract system.

(e) Amendments and Extensions to Contracts.

(1) Except for quarterly amendments to non-discretionary CSBG Contracts to add funds as they are received from HHS, and excluding amendments that move funds within budget categories but do not extend time or add funds, amendments and extension requests must be submitted in writing by the Subrecipient and will not be granted if any of the following circumstances exist:

(A) if the award for the Contract was competitively awarded and the amendment would materially change the scope of Contract performance;

(B) if the funds associated with the Contract will reach their federal expiration date within 45 calendar days of the request;

(C) if the Subrecipient is delinquent in the submission of their Single Audit or the Single Audit Certification form required by §1.403 in Chapter 1 of this Title;

(D) if the Subrecipient owes the Department disallowed amounts in excess of $1,000 and a Department-approved repayment plan is not in place or has been violated;

(E) for amendments adding funds (not applicable to amendments for extending time) if the Department has cited the Subrecipient for violations within §6.10 of this Subchapter (related to Compliance Monitoring) and the corrective action period has expired without correction of the issue or a satisfactory plan for correction of the issue;

(F) the Contract has expired; or

(G) a member of the Subrecipient's board has been debarred and has not been removed.

(2) Within 30 calendar days of a Subrecipient's request for a Contract amendment or extension request the request will be processed or denied in writing. If denied, the applicable reason from this subsection (e) will be cited. The Subrecipient may appeal the decision to the Executive Director consistent with Chapter 1, §1.7, of this Title.

§6.4. Income Determination.

(a) Eligibility for program assistance is determined under the Poverty Income Guidelines and calculated as described herein. Income means cash receipts earned and/or received by the applicant before taxes during applicable tax year(s), but not the excluded income listed in paragraph (2) of this subsection. Gross income is to be used, not net income, except that from non-farm or farm self-employment net receipts must be used (*i.e.,* receipts from a person's own business or from an owned or rented farm after deductions for business or farm expenses), and net income from gambling or lottery winnings.

(1) If an income source is not excluded below, it must be included when determining income eligibility.

(2) Excluded Income:

(A) Capital gains;

(B) Any assets drawn down as withdrawals from a bank;

(C) Balance of funds in a checking or savings account;

(D) Any amounts in an "individual development account" as provided by the Assets for Independence Act, as amended in 2002 (Pub. L. 107-110, 42 U.S.C. 604(h)(4));

(E) Proceeds from the sale of property, a house, or a car;

(F) One-time payments from a welfare agency to a family or person who is in temporary financial difficulty;

(G) Tax refunds, Earned Income Tax Credit refunds;

(H) Jury duty compensation;

(I) Gifts, loans, and lump-sum inheritances;

(J) One-time insurance payments, or compensation for injury;

(K) Non-cash benefits, such as the employer-paid or union-paid portion of health insurance or other employee fringe benefits;

(L) Reimbursements (for mileage, gas, lodging, meals, etc.);

(M) Employee fringe benefits such as food or housing received in lieu of wages;

(N) The value of food and fuel produced and consumed on farms;

(O) The imputed value of rent from owner-occupied non-farm or farm housing;

(P) Federal non-cash benefit programs as Medicare, Medicaid, SNAP, WIC, and school lunches, and housing assistance (Medicare deduction from Social Security Administration benefits should not be counted as income);

(Q) Combat zone pay to the military;

(R) Veterans (VA) Disability Payments;

(S) College scholarships, Pell and other grant sources, assistantships, fellowships and work study, VA Education Benefits ("GI Bill"), Bureau of Indian Affairs student assistance programs (20 U.S.C. 1087uu);

(T) Child support payments (amount paid by payor may not be deducted from income);

(U) Income of Household members under eighteen (18) years of age;

(V) Stipends from senior companion programs, such as Retired Senior Volunteer Program and Foster Grandparents Program;

(W) AmeriCorps Program payments, allowances, earnings, and in-kind aid;

(X) Depreciation for farm or business assets;

(Y) Reverse mortgages;

(Z) Payments for care of Foster Children;

(AA) Payments or allowances made under the Low-Income Home Energy Assistance Program (42 U.S.C. 8624(f));

(BB) Any amount of crime victim compensation (under the Victims of Crime Act) received through crime victim assistance (or payment or reimbursement of the cost of such assistance) as determined under the Victims of Crime Act because of the commission of a crime against the applicant under the Victims of Crime Act (42 U.S.C. 10602(c));

(CC) Major disaster and emergency assistance received by individuals and families under the Robert T. Stafford Disaster Relief and Emergency Assistance Act (93, as amended) and comparable disaster assistance provided by States, local governments, and disaster assistance organizations (42 U.S.C. 5155(d));

(DD) Allowances, earnings, and payments to individuals participating in programs under the Workforce Innovation and Opportunity Act (29 U.S.C. 3101);

(EE) Payments received from programs funded under Title V of the Older Americans Act of 1965 (42 U.S.C. 3056(g));

(FF) The value of any child care provided or arranged (or any amount received as payment for such care or reimbursement for costs incurred for such care) under the Child Care and Development Block Grant Act of 1990 (42 U.S.C. 9858(q));

(GG) Certain payments received under the Alaska Native Claims Settlement Act (43 U.S.C. 1626(c));

(HH) Income derived from certain submarginal land of the United States that is held in trust for certain Indian tribes (25 U.S.C. 459(e));

(II) Income derived from the disposition of funds to the Grand River Band of Ottawa Indians (94, §6);

(JJ) The first $2,000 of per capita shares received from judgment funds awarded by the National Indian Gaming Commission or the U.S. Claims Court, the interests of individual Indians in trust or restricted lands, and the first $2000 per year of income received by individual Indians from funds derived from interests held in such trust or restricted lands (25 U.S.C. 1407 - 1408). This exclusion does not include proceeds of gaming operations regulated by the Commission;

(KK) Payments received on or after January 1, 1989, from the Agent Orange Settlement Fund (101) or any other fund established pursuant to the settlement in In Re Agent Orange Liability Litigation, M.D.L. No. 381 (E.D.N.Y.);

(LL) Payments received under the Maine Indian Claims Settlement Act of 1980 (96, 25 U.S.C. 1728);

(MM) Payments by the Indian Claims Commission to the Confederated Tribes and Bands of Yakima Indian Nation or the Apache Tribe of Mescalero Reservation (95);

(NN) Any allowance paid under the provisions of 38 U.S.C. 1833(c) to children of Vietnam veterans born with spina bifida (38 U.S.C. 1802 - 05), children of women Vietnam veterans born with certain birth defects (38 U.S.C. 1811 - 16), and children of certain Korean service veterans born with spina bifida (38 U.S.C. 1821);

(OO) Payments, funds, or distributions authorized, established, or directed by the Seneca Nation Settlement Act of 1990 (25 U.S.C. 1774f(b));

(PP) Payments from any deferred U.S. Department of Veterans Affairs disability benefits that are received in a lump sum amount or in prospective monthly amounts (42 U.S.C. §1437a(b)(4));

(QQ) A lump sum or a periodic payment received by an individual Indian pursuant to the Class Action Settlement Agreement in the case entitled Elouise Cobell et al. v. Ken Salazar et al., 816 F.Supp.2d 10 (Oct. 5, 2011 D.D.C.), for a period of one year from the time of receipt of that payment as provided in the Claims Resolution Act of 2010 (Pub. L. 111-291);

(RR) Per capita payments made from the proceeds of Indian Tribal Trust Cases as described in PIH Notice 2013-30 "Exclusion from Income of Payments under Recent Tribal Trust Settlements" (25 U.S.C. 117b(a)); and

(SS) Any other items which are excluded by virtue of federal or state legislation or by properly adopted federal regulations have taken effect. The Department will, from time to time, provide on its website updated links to such federal exceptions. Notwithstanding such information, a Subrecipient may rely on any adopted federal exception on and after the date on which it took effect.

(b) The requirements for determining whether an applicant Household is eligible for assistance require the Subrecipient to annualize the Household income based on verifiable documentation of income, 30 days prior to date of application. Income is based on the Gross Annual Income for all household members 18 years or older. Annual gross income is the total amount of money earned annually before taxes or any deductions.

(c) The Subrecipient must document all sources of income, including excluded income, for 30 days prior to the date of application, for all household members 18 years of age or older.

(d) Identify all income sources, not on the excluded list, for income calculation.

(1) The Subrecipient must calculate projected annual income by annualizing current income. Income that may not last for a full 12 months (*e.g.,* unemployment compensation) should be calculated assuming current circumstances will last a full 12 months, unless it can be documented that employment is less than 12 months/year and pay is not prorated over the entire 12 month period. For incomes not able to be annualized over a twelve month period, the income shall be calculated on the total annual earning period (*e.g.,* for a teacher paid only nine months a year, the annual income should be the income earned during those nine months). In limited cases where income is not paid hourly, weekly, bi-weekly, semi-monthly nor monthly, the Subrecipient may contact the Department to determine an alternate calculation method in unique circumstances on a case-by-case basis.

(2) For all customers including those with categorical eligibility, the Subrecipient must collect verifiable documentation of Household income received in the 30 days prior to the date of application.

(3) Once all sources of income are known, Subrecipient must convert reported income to an annual figure. Convert periodic wages to annual income by multiplying:

(A) Hourly wages by the number of hours worked per year (2,080 hours for full-time employment with a 40-hour week and no overtime);

(B) Weekly wages by 52;

(C) Bi-weekly wages (paid every other week) by 26;

(D) Semi-monthly wages (paid twice each month) by 24; and

(E) Monthly wages by 12.

(4) Except where a more frequent period is required by federal regulation, re-certification of income eligibility must occur at least every twelve months.

(e) If a federal or state requirement provides an updated definition of income or method for calculating income, the Department will provide written notice to Subrecipients about the implementation date for the new requirements.

(f) If proof of income is unobtainable, the applicant must complete and sign a Declaration of Income Statement (DIS).

(g) For CSBG and LIHEAP, a live in aide or attendant is not considered part of the Household for purposes of determining Household income, but is considered for a benefit based on the size of the Household. Example 4(1): A Household applies for assistance. There are four people in the Household. One of the four people is a live-in aide. To determine if the Household is qualified, annualize the income of the other three Household members and compare it to the three person income limit. However, if the amount of benefit is based on Household size (such as benefit level based on the number of people in the Household), then this is a four person Household.

(h) Subrecipients shall not discourage anyone from applying for assistance. Subrecipients shall provide all potential customers with an opportunity to apply for programs.

§6.5. Documentation and Frequency of Determining Customer Eligibility

(a) For LIHEAP and CSBG, income must be verified annually, with a new application each Program Year.

(b) For DOE-WAP income must be verified at the initial application. If the customer is on a wait-list for over 12 months since initial application, household income must be updated within at least 12 months of the unit being initially inspected.

§6.6. Subrecipient Contact Information and Required Notifications.

(a) In accordance with §1.22 of this title (relating to Providing Contact Information to the Department), Subrecipients will notify the Department through the CA contract system and provide contact information for key management staff (Executive Director, Chief Financial Officer, Program Director/Manager/Coordinator or any other person, regardless of title, generally performing such duties) vacancies and new hires within 30 days of such occurrence.

(b) As vacancies exceed the 90 day threshold within the organization's advisory board of directors, the Department will be notified of such vacancies and, if applicable, the sector the advisory board member represented.

(c) Contact information for all members of the board of directors or advisory board of directors must be provided to the Department and shall include: each board member's name, the position they hold, their term, their mailing address (which must be different from the organization's mailing address), phone number (different from the organization's phone number), fax number (if applicable), and the direct e-mail address for the chair of the advisory board.

(d) The Department will rely solely on the contact information supplied by the Subrecipient in the Department's web-based Community Affairs System. It is the Subrecipient's sole responsibility to ensure such information is current, accurate, and complete. Correspondence sent to the email or physical address shown in CA Contract System will be deemed delivered to the Subrecipient. Correspondence from the Department may be directly uploaded to the Subrecipient's CA contract account using a secure electronic document attachment system. Once uploaded, notification of the attachment will be sent electronically to the email address listed in the CA contract system. The Department is not required to send a paper copy and if it does so it does as a voluntary and non-precedential courtesy only.

(e) Upon the hiring of a new program Coordinator (*e.g.,* the weatherization program coordinator) the Subrecipient is required to contact the Department with written notification within 30 days of the hiring and request training and technical assistance.

(f) Contact information for a primary and secondary contact are required to be provided to the Department and accurately maintained as it relates to the handling of disaster response and emergency services as provided for in §6.207(d).

§6.7. Subrecipient Reporting Requirements.

(a) Subrecipients must submit a monthly performance and expenditure report through the Community Affairs Contract System not later than the fifteenth (15th) day of each month following the reported month of the contract period. Reports are required even if a fund reimbursement or advance is not being requested.

(b) Subrecipient shall reconcile their expenditures with their performance on at least a monthly basis before seeking a request for funds for the following month. If the Subrecipient is unable to reconcile on a month-to-month basis, the Subrecipient must provide at the request of the Department, a written explanation for the variance and take appropriate measures to reconcile the subsequent month. It is the responsibility of a Subrecipient to ensure that it has documented the compliant use of all funds provided prior to receipt of additional funds, or if this cannot be done to address the repayment of such funds.

(c) Subrecipient shall electronically submit to the Department no later than 45 days after the end of the Subrecipient Contract term a final expenditure or reimbursement and programmatic report utilizing the expenditure report and the performance report.

(d) If the Department has provided funds to a Subrecipient in excess of the amount of reported expenditures in the ensuing month's report, no additional funds will be released until those excess funds have been expended. For example, in January a Subrecipient requests and is advanced $50,000. In February, if the Subrecipient reports $10,000 in Expenditures and an anticipated need for $30,000, no funds will be released.

(e) CSBG Annual Report and National Survey. Federal requirements mandate all states to participate in the preparation of an annual performance measurement report. To comply with the requirements of 42 U.S.C. §9917, all CSBG Eligible Entities and other organizations receiving CSBG funds are required to participate.

(f) The Subrecipient shall submit other reports, data, and information on the performance of the DOE and LIHEAP-WAP program activities as required by DOE pursuant to 10 CFR §440.25 or by the Department.

(g) Subrecipient shall submit other reports, data, and information on the performance of the federal program activities as required by the Department.

§6.8. Applicant/Customer Denials and Appeal Rights

(a) Subrecipient shall establish a denial of service complaint procedure to address written complaints from program applicants/customers. At a minimum, the procedures described in paragraphs (a)(1) - (8) of this subsection shall be included:

(1) Subrecipients shall provide a written denial of assistance notice to applicant within ten (10) calendar days of the determination. Such a determination is defined as a denial of assistance, but does not include a level of assistance lower than the possible program limits or a reduction in assistance, as long as such process is in accordance with the Subrecipient's written policy. This notification shall include written notice of the right of a hearing and specific reasons for the denial by program. The applicant wishing to appeal a decision must provide written notice to Subrecipient within twenty (20) days of receipt of the denial notice.

(2) A Subrecipient must establish an appeals committee composed of at least three persons. Subrecipient shall maintain documentation of appeals in their customer files.

(3) Subrecipients shall hold a private appeal hearing (unless otherwise required by law) by phone or in person in an accessible location within ten (10) business days after the Subrecipient received the appeal request from the applicant and must provide the applicant notice in writing of the time/location of the hearing at least seven (7) calendar days before the appeal hearing.

(4) Subrecipient shall record the hearing.

(5) The hearing shall allow time for a statement by Subrecipient staff with knowledge of the case.

(6) The hearing shall allow the applicant at least equal time, if requested, to present relevant information contesting the decision.

(7) Subrecipient shall notify applicant of the decision in writing. The Subrecipient shall mail the notification by close of business on the third calendar day following the decision (three day turnaround).

(8) If the denial is solely based on income eligibility, the provisions described in paragraphs (2) - (7) of this subsection do not

apply and the applicant may request a recertification of income eligibility based on initial documentation provided at the time of the original application. The recertification will be an analysis of the initial calculation based on the documentation received with the initial application for services and will be performed by an individual other than the person who performed the initial determination. If the recertification upholds the denial based on income eligibility documents provided at the initial application, the applicant is notified in writing.

(b) If the applicant is not satisfied, the applicant may further appeal the decision in writing to the Department within ten (10) days of notification of an adverse decision.

(c) Applicants/customers who allege that the Subrecipient has denied all or part of a service or benefit in a manner that is unjust, violates discrimination laws, or without reasonable basis in law or fact, may request a contested hearing under Tex. Gov't Code, Chapter 2001.

(d) The hearing under subsection (c) shall be conducted by the State Office of Administrative Hearings on behalf of the Department in the locality served by the Subrecipient.

(e) If the applicant/customer appeals to the Department, the funds should remain encumbered until the Department completes its decision.

§6.9. Training Funds for Conferences.

The Department may provide financial assistance to Subrecipients for training and technical activities for state sponsored, federally sponsored, and other relevant workshops and conferences. Subrecipients may use program training funds to attend conferences provided the conference agenda includes topics directly related to administering the program. Costs to attend the conference must be prorated by program for the appropriate portion. Only staff billed to the specific program, directly or indirectly, may charge any training and travel costs to the program.

§6.10. Compliance Monitoring.

(a) Purpose and Overview

(1) This section provides the procedures that will be followed for monitoring for compliance with the programs in 10 TAC Chapter 6.

(2) Any entity administering any or all of the programs detailed in 10 TAC Chapter 6 is a Subrecipient. A Subrecipient may also administer other programs, including programs administered by other state or federal agencies and privately funded programs. If the Subrecipient has contracts for other programs through the Department, including but not limited to the HOME Partnerships Program, the Neighborhood Stabilization Program, or the Texas Housing Trust Fund, the Department may, but is not required to and does not commit to, coordinate monitoring of those programs with monitoring of community affairs programs under this subchapter.

(3) Any entity administering any or all of the programs provided for in subsection (a) of this section as part of a Memorandum of Understanding ("MOU"), contract, or other legal agreement with a Subrecipient is a Subgrantee.

(b) Frequency of Reviews, Notification and Information Collection.

(1) In general, Subrecipients or Subgrantees will be scheduled for monitoring based on state or federal monitoring requirements and/or a risk assessment. Factors to be included in the risk assessment include but are not limited to: the number of Contracts administered by the Subrecipient or Subgrantee, the amount of funds awarded and expended, the length of time since the last monitoring, findings identified during previous monitoring, issues identified through the submission or lack of submission of a single audit, complaints received by the Department, and reports of fraud, waste and/or abuse. The risk assessment will also be used to determine which Subrecipients or Subgrantees will have an onsite review and which may have a desk review.

(2) The Department will provide a Subrecipient or Subgrantee with written notice of any upcoming onsite or desk monitoring review, and such notice will be given to the Subrecipient and Subgrantee by email to the Subrecipient's and Subgrantee's chief executive officer at the email address most recently provided to the Department by the Subrecipient or Subgrantee. In general, a 30 day notice will be provided. However, if a credible complaint of fraud or other egregious noncompliance is received the Department reserves the right to conduct unannounced monitoring visits. It is the responsibility of the Subrecipient to provide to the Department the current contact information for the organization and the Board in accordance with §6.6 of this chapter (relating to Subrecipient Contact Information) and §1.22 of this title (relating to Providing Contact Information to the Department).

(3) Upon request, Subrecipients or Subgrantees must make available to the Department all books and records that the Department determines are reasonably relevant to the scope of the Department's review. Typically, these records may include (but are not limited to):

(A) Minutes of the governing board and any committees thereof, together with all supporting materials;

(B) Copies of all internal operating procedures or other documents governing the Subrecipient's operations;

(C) The Subrecipient's Board approved operating budget and reports on execution of that budget;

(D) The Subrecipient's strategic plan or comparable document if applicable and any reports on the achievement of that plan;

(E) Correspondence to or from any independent auditor;

(F) Contracts with any third parties for goods or services and files documenting compliance with any applicable procurement and property disposition requirements;

(G) All general ledgers and other records of financial operations (including copies of checks and other supporting documents);

(H) Applicable customer files with all required documentation;

(I) Applicable human resources records;

(J) Monitoring reports from other funding entities;

(K) Customer files regarding complaints, appeals and termination of services; and

(L) Documentation to substantiate compliance with any other applicable state or federal requirements including, but not limited to, the Davis-Bacon Act, Lead Based Paint, the Personal Responsibility and Work Opportunity Act, and limited English proficiency requirements.

(c) Post Monitoring Procedures.

(1) In general, within 30 calendar days of the last day of the monitoring visit, a written monitoring report will be prepared for the Subrecipient describing the monitoring assessment and any corrective actions, if applicable. The monitoring report will be emailed to the Board Chair and the Subrecipient's and Subgrantee Executive Director.

Issues of concern over which there is uncertainty or ambiguity may be discussed by the Department with the staff of cognizant agencies overseeing federal funding. Certain types of suspected or observed improper conduct may trigger requirements to make reports to other oversight authorities, state and federal, including but not limited to the State Auditor's Office and applicable Inspectors General.

(2) Subrecipient Response. If there are any findings of noncompliance requiring corrective action, the Subrecipient will be provided 30 calendar days, from the date of the email, to respond which may be extended by the Department for good cause. In order to receive an extension, the Subrecipient must submit a written request to the Chief of Compliance within the corrective action period, stating the basis for good cause that justifies the extension. The Department will approve or deny the extension request within five (5) calendar days.

(3) Monitoring Close Out. Within 45 calendar days after the end of the corrective action period, a close out letter will be issued to the Subrecipient. If the Subrecipient supplies evidence establishing continual compliance that negates the finding of noncompliance, the issue of noncompliance will be rescinded. If the Subrecipient's timely response satisfies all findings and concerns noted in the monitoring letter, the issue of noncompliance will be noted as corrected. In some circumstances, the Subrecipient may be unable to secure documentation to correct a finding. In those instances, if there are mitigating circumstances, the Department may note the finding is not corrected but close the issue with no further action required. If the Subrecipient's response does not correct all findings noted, the close out letter will identify the documentation that must be submitted to correct the issue.

(4) Options for Review. If, following the submission of corrective action documentation, Compliance staff continues to find the Subrecipient or Subgrantee in noncompliance, and the Subrecipient disagrees, the Subrecipient may request or initiate review of the matter using the following options, where applicable:

(A) If the issue is related to a program requirement or prohibition of a federal program, the Subrecipients may contact the applicable federal program officer for guidance or request that the Department contact applicable federal program officer for guidance without identifying the Subrecipient.

(B) If the issue is related to application of a provision of the Contract or a requirement of the Texas Administrative Code, the Subrecipient may request to submit an appeal to the Executive Director consistent with §1.7, Staff Appeals Process, in Chapter 1 of this Title.

(C) Subrecipients may request Alternative Dispute Resolution ("ADR"). A Subrecipient may send a proposal to the Department's Dispute Resolution Coordinator to initiate ADR pursuant to §1.17 of this title.

(5) If Subrecipients do not respond to a monitoring letter or fail to provide acceptable evidence of compliance, the matter be handled through the procedures described in Chapter 2 of this Title, relating to Enforcement.

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

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SUBCHAPTER B. COMMUNITY SERVICES BLOCK GRANT (CSBG)

10 TAC §§6.201 - 6.214

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

The proposed new Chapter affects no other code, article, or statute.

§6.201 . Background and Definitions.

(a) In addition to this subchapter, except where noted, the rules established in Subchapter A of this chapter (relating to General Provisions) and Chapters 1 and 2 of this Part apply to the CSBG Program. The CSBG Act was amended by the "Community Services Block Grant Amendments of 1994" and the Coats Human Services Reauthorization Act of 1998. The Secretary is authorized to establish a community services block grant program and make grants available through the program to states to ameliorate the causes of poverty in communities within the states. Although Eligible Entities receive an allocation of CSBG funds, the CSBG program is not an entitlement program for eligible customers.

(b) The Texas Legislature designates the Department as the lead agency for the administration of the CSBG program pursuant to Tex. Gov't Code, §2306.092. CSBG funds are made available to Eligible Entities to carry out the purposes of the CSBG program.

(c) Definitions

(1) Community Action Plan ("CAP")--An annual plan required by the CSBG Act which describes the local Eligible Entity service delivery system, how coordination will be developed to fill identified gaps in services, how funds will be coordinated with other public and private resources, and how the local entity will use the funds to support innovative community and neighborhood based initiatives related to the grant. A comprehensive CAP developed with extensive input from the local community and an engaged tripartite board is a fundamental underpinning of an Eligible Entity's role in administering its programs to ameliorate poverty and its causes and to transition eligible Households it serves out of poverty.

(2) CSBG Act--The CSBG Act is a law passed by Congress authorizing the Community Services Block Grant. The CSBG Act was amended by the Community Services Block Grant Amendments of 1994 and the Coats Human Services Reauthorization Act of 1998 under 42 U.S.C. §§9901, *et seq.* The CSBG Act authorized establishing a community services block grant program to make grants available through the program to states to ameliorate the causes of poverty in communities within the states.

(3) Direct Customer Support--includes salaries and fringe benefits of case management staff as well as direct benefits provided to customers.

(4) Discretionary Funds--CSBG funds, excluding the 90% of the state's annual allocation that is designated for statewide allocation to CSBG Eligible Entities under §6.203 of this Subchapter and

state administrative funds, maintained by the Department, at its discretion, for CSBG allowable uses as authorized by the CSBG Act.

(5) Eligible Entity--Those local organizations in existence and designated by the federal and state government to administer programs created under the Federal Economic Opportunity Act of 1964. This includes CAAs, limited-purpose agencies, and units of local government. The CSBG Act defines an eligible entity as an organization that was an eligible entity on the day before the enactment of the Coats Human Services Reauthorization Act of 1998 (October 27, 1998), or is designated by the Governor to serve a given area of the state and that has a tripartite board or other mechanism specified by the state for local governance.

(6) National Performance Indicator ("NPI")--A federally defined measure of performance within the Department's Community Affairs Contract System for measuring performance and results of Subrecipients of funds.

(7) Needs Assessment--An assessment of community needs in the areas to be served with CSBG funds.

(8) Quality Improvement Plan ("QIP")--A plan developed by a CSBG Eligible Entity to correct Deficiencies identified by the Department.

(9) Transitioned Out of Poverty ("TOP")--a Household who was CSBG eligible and as a result of the delivery of case management services attains an annual income in excess of 125% of the poverty guidelines for 90 calendar days.

(d) Use of certain terminology. In these rules and in the Department's administration of its programs, including the CSBG program, certain terminology is used that may not always align completely with the terminology employed in the CSBG Act. The term "monitoring" is used interchangeably with the CSBG Act term "review" as used in 42 USC §9915 of the CSBG Act. Similarly, the terms "findings," "concerns," and "violations" are used interchangeably with the term "deficiencies as used in 42 USC §9915 of the CSBG Act although, in a given context, they may be assigned more specific, different, or more nuanced meanings, as appropriate.

§6.202. Purpose and Goals.

The Department passes through CSBG funds to a network of Public Organizations and Private Nonprofits that are to comply with the purposes of the CSBG Act.

§6.203. Formula for Distribution of CSBG Funds.

(a) The CSBG Act requires that no less than 90% of the state's annual allocation be allocated to Eligible Entities. The Department currently utilizes a multi-factor fund distribution formula to equitably provide CSBG funds throughout the state to the CSBG Eligible Entities. The formula is subject to adjustment from time to time when amended as part of the CSBG State Plan.

(b) The distribution formula incorporates the most current U.S. Census Bureau Decennial Census and data from the American Community Survey for information on persons at 124% of poverty. The formula is applied as follows:

(1) each Eligible Entity receives a $50,000 base award;

(2) then, the factors of poverty population, weighted at 98% and inverse population density, weighted at 2%, are applied to the state's allocation required to be distributed among Eligible Entities;

(3) if the base combined with the calculation resulting from the weighted factors in subparagraph (2) do not reach a minimum floor of $150,000, then a minimum floor of $150,000 is reserved for each of those CSBG eligible entities, resulting in a proportional reduction in other funds available for formula-based distribution;

(4) then, the formula is re-applied to the balance of the 90% funds for distributing the remaining funds to the remaining CSBG eligible entities.

(c) Following the use of the decennial Census data, then on a biennial basis, the Department will use the most recent American Community Survey five year estimate data that is available. To the extent that there are significant reductions in CSBG funds received by the Department, the Department may revise the CSBG distribution formula through a rulemaking process.

(d) In years where permitted by the federal government, Subrecipients that do not obligate more than 20% of their base allocation in a Program Year (excluding any additional funds that may be distributed by the Department) by the end of the first quarter of the year following the allocation year for two consecutive years will have funding recaptured consistent with 42 U.S.C. §9907(a)(3). This recapture of funds does not trigger the procedures or protections of HHS Information Memorandum 116. The Subrecipient of the funds will be provided a Contract for the average percentage of funds that they expended over the last two years. The Eligible Entity will be provided an opportunity to redistribute the funds through a competitive request for proposals to a Private Nonprofit Organization, located within the community served by the Eligible Entity. If the Eligible Entity selects this option it will be responsible for monitoring the Private Nonprofit Organization selected. If the Subrecipient does not provide them to an eligible Private Nonprofit Organization, located within the community served by the Subrecipient, the Department in accordance with CSBG IM 42 shall redistribute the funds to another Eligible Entity to be used in accordance with the CSBG and Department rules.

(e) Five percent of the Department's annual allocation of CSBG funds may be expended on activities listed in 42 U.S.C. §9907(b)(A) - (H) and further described in the annual plan or by Board approval. The Department may also opt to distribute unexpended funds described in subsection (f) of this section for these activities.

(f) Up to 5% of the State's annual allocation of CSBG funds will be used for the Department's administrative purposes consistent with state and federal law.

§6.204. Use of Funds.

(a) CSBG funds are contractually obligated to Eligible Entities, and accessed through the Department's web-based Community Affairs contract system. Prior to executing a Contract for CSBG funds, the Department will verify that neither the entity, nor any member of the Eligible Entity's Board is federally debarred or excluded. Unless modified by Contract, the annual allocation has a beginning date of January 1 and an end date of December 31, regardless of the Eligible Entity's fiscal year. Eligible Entities may use the funds for administrative support and/or for direct services such as: education, employment, housing, health care, nutrition, transportation, linkages with other service providers, youth programs, emergency services, *i.e.,* utilities, rent, food, shelter, clothing etc.

(b) Except in the case of a Subrecipient whose total Contract is $250,000 or less, at least 20% of a Contract must be used for Direct Customer Support for customers not enrolled in TOP case management.

(c) Except in the case of a Subrecipient whose total Contract is $250,000 or less, an additional 10% of a Contract year's funds must be expended on direct benefits for customers enrolled in TOP case management. This amount does not include case manager salary or fringe.

(d) In the event that a Subrecipient does not expend the funds allocated through the formula described in §6.203 of this chapter, the Subrecipient may request an extension no earlier than October 1 and no later than December 1. If granted, the Subrecipient will have two active Contracts, and the funds spent after the original Contract period in the Contract that was extended must only be used for direct services, not including case manager salaries or fringe.

§6.205. Limitations on Use of Funds.

(a) Construction of Facilities. CSBG funds may not be used for the purchase, construction or improvement of land, or facilities as described in (42 U.S.C. §9918(a)).

(b) The CSBG Act prohibits the use of program funds for political activity, voter registration activity, or voter registration, (for example, contacting a congressional office to advocate for a change to any law is a prohibited activity).

(c) Utility and rent deposit refunds from Vendors must be reimbursed to the Subrecipient and not the customer. Refunds must be treated as program income, and returned to the Department within ten days of receipt.

§6.206. CSBG Needs Assessment, Community Action Plan, and Strategic Plan.

(a) In accordance with the CSBG Act each Eligible Entity must submit a Community Action Plan on an annual basis. The Community Action Plan is required to be submitted to the Department by a date directed by the Department, for approval prior to execution of a Contract.

(b) Consistent with organizational standards relating to Data Analysis and Performance, the Eligible Entity must present to its governing board for review or action, at least every twelve months, an analysis of the agency's outcomes and any operational or strategic program adjustments and improvements identified as necessary; and the organization must submit its annual CSBG Information Survey data report which reflects customer demographics and organization-wide outcomes.

(c) Every three (3) years each Eligible Entity shall complete a Community Needs Assessment, upon which the annual Community Action Plan will be based. Guidance on the content and requirements of the Community Needs Assessment will be released by the Department. Information related to the Community Needs Assessment shall be submitted to the Department on or before a date specified by the Department in the previous year's Contract. The Needs Assessment will require, among other things, that the top five needs of the service area are identified.

(d) Services to Poverty Population. Eligible Entities administering services to customers in one or more CSBG service area counties shall ensure that such services are rendered reasonably and in an equitable manner to ensure fairness among all potential applicants eligible for services. Services rendered must reflect the poverty population ratios in the service area and services should be distributed based on the proportionate representation of the poverty population within a county. A variance of greater than plus or minus 20% may constitute a Deficiency. Eligible Entities with a service area of a single county shall demonstrate marketing and outreach efforts to make available direct services to a reasonable percentage of the county's eligible population based on the most recent census or American Community Survey data, as directed by the Department. Services should also be distributed based on the proportionate representation of the poverty population within a county. Other CSBG-funded organizations shall ensure that services are rendered in accordance with requirements of the CSBG contract.

(e) The Community Action Plan shall be derived from the Needs Assessment and at a minimum include a budget, a description of the delivery of case management services, in accordance with the National Performance Indicators, and include a performance statement that describes the services, programs, activities, and planned outcomes to be delivered by the organization.

(f) The Community Action Plan must take into consideration the outcomes expected by previous Community Action Plan(s). If past outcomes were not achieved as reported in the CA contract system, or outcomes exceed the targeted goals, the Subrecipient must assess the reasons for the variance in outcomes, determine what will be done differently if continuing to include those outcome goals, and identify how any of issues or obstacles will be mitigated or addressed. An effective CAP should be constantly monitored and adjusted to optimize achievement of results consistent with CSBG Act goals.

(g) The Community Needs Assessment and the CAP both require Department approval; those that do not meet the Department's requirements as articulated in these rules or in Department actions described and contemplated in these rules will be required to be revised until they meet the Department's satisfaction. If circumstances warrant amendments to the Community Needs Assessment or the CAP, the Department must approve amendments.

(h) Hearing. In conjunction with the submission of the CAP, the Eligible Entity must submit to the Department a certification from its board that a public hearing was conducted on the proposed use of funds.

(i) Every five (5) years each Eligible Entity shall complete a strategic plan, with which the annual Community Action Plan should be consistent. Information related to the strategic plan shall be submitted to the Department on or before a date specified by the Department in the previous year's Contract.

(j) Each CSBG Subrecipient must develop a performance statement which identifies the services, programs, and activities to be administered by that organization.

§6.207. Subrecipient Requirements.

(a) Eligible Entities shall submit information regarding the planned use of funds as part of the CAP as described in §6.206 of this chapter.

(b) HHS issues terms and conditions for receipt of funds under the CSBG. Subrecipients will comply with the requirements of the terms and conditions of the CSBG award.

(c) CSBG Eligible Entities, and other CSBG organizations where applicable, are required to coordinate CSBG funds and form partnerships and other linkages with other public and private resources and coordinate and establish linkages between governmental and other social service programs to assure the effective delivery of services and avoid duplication of services.

(d) CSBG Eligible Entities are required to provide, on an emergency basis, the provision of supplies and services, nutritious foods, and related services, to counteract the conditions of starvation and malnutrition. The nutritional needs may be met through a referral source that has resources available to meet the immediate needs.

(e) CSBG Eligible Entities and other CSBG organizations are required to coordinate for the provision of employment and training activities through local workforce investment systems under the Workforce Innovation and Opportunity Act, as applicable.

(f) CSBG Eligible Entities are required to inform custodial parents in single-parent families that participate in programs, activities, or services about the resources available through the Texas At-

torney General's Office with respect to the collection of child support payments and refer eligible parents to the Texas Attorney General's Office of Child Support Services Division.

(g) Documentation of Services. Subrecipients must maintain a record of referrals and services provided.

(h) Intake Form. To fulfill the requirements of 42 U.S.C. §9917, CSBG Subrecipients must complete and maintain an intake form that screens for income, assesses customer needs, and captures the demographic and household characteristic data required for the monthly performance and expenditure report, referenced in Subchapter A of this chapter (relating to General Provisions), for all Households receiving a community action service. CSBG Subrecipients must complete and maintain a manual or electronic intake form for all customers for each program year.

(i) Case Management.

(1) Subrecipients are required to provide integrated case management services. Subrecipients are required to identify and set goals for households they serve through the case management process. Subrecipients are required to evaluate and assess the effect their case management system has on the short-term (less than three months) and long-term (greater than three months) impact on customers, such as enabling the customer to move from poverty to self-sufficiency, to maintain stability. CSBG funds may be used for short term case management to meet immediate needs. In addition, CSBG funds may be used to provide long-term case management to persons working to transition out of poverty and achieve self-sufficiency.

(2) Subrecipients must have and maintain documentation of case management services provided.

(3) Eligible Entities are each assigned a minimum TOP goal by the Department. Eligible Entities must provide ongoing case management services for these transitioning out of poverty "TOP" households. The case management services must include the components described in subparagraphs (A) - (N) of this paragraph. The forms or systems utilized for each component may be manual or electronic forms provided by the Department or manual or electronic forms created by the Eligible Entity that at minimum contain the same information as the Department-issued form, including but not limited to:

(A) Self-Sufficiency Customer Questionnaire to assess a customer's status in the areas of employment, job skills, education, income, housing, food, utilities, child care, child and family development, transportation, healthcare, and health insurance;

(B) Self-Sufficiency Outcomes Matrix to assess the customer's status in the self-sufficiency domains noted in subparagraph (A) of this paragraph;

(C) Case Management Screening Questions to assess the customer's willingness to participate in case management services on an ongoing basis;

(D) For customers who are willing to engage in long term case management services, a Case Management Agreement between Subrecipient and customer;

(E) Release of Information Form;

(F) Case Management Service Plan to document planned goals agreed upon by the case manager and customer along with steps and timeline to achieve goals;

(G) Case management follow-up - A system to document customer progress at completing steps and achieving goals. Case management follow-up should occur, at a minimum, every 30 days, either through a meeting, phone call or e-mail. In person meetings should occur, at a minimum, once a quarter;

(H) A record of referral resources and documentation of the results;

(I) A system to document services received and to collect and report NPI data;

(J) A system to document case closure for persons that have exited case management;

(K) A system to document income for persons that have maintained an income level above 125% of the Poverty Income Guidelines for 90 days;

(L) Customer Satisfaction Survey;

(M) A system to document and notify customers of termination of case management services; and

(N) Evaluation System. On an annual basis, Eligible Entities should determine the effectiveness of their case management services and identify strategies for improvement, including identification of reasons for customer terminations and strategies to limit their occurrence.

(j) Effective January 1, 2016, Eligible Entities shall meet the CSBG Organizational Standards as issued by HHS in Information Memorandum #138 (as revised), except that where the word bylaws is used the Department has modified the standards to read Certificate of Formation/Articles of Incorporation and bylaws; also, Eligible Entities must follow the requirements in UGMS including State of Texas Single Audit Circular. Failure to meet the CSBG Organizational Standards may result in HHS Information Memorandum #116 proceedings as described in Chapter 2 of this Title.

§6.208. Designation and Re-designation of Eligible Entities in Unserved Areas.

If any geographic area of the state ceases to be served by an Eligible Entity, the requirements of 42 U.S.C. §9909 will be followed.

§6.209. CSBG Requirements for Tripartite Board of Directors.

(a) General Board Requirements:

(1) The Coats Human Services Reauthorization Act (Public Law 105-285) addresses the CSBG program and requires that Eligible Entities administer the CSBG program through a tripartite board. The Act requires that governing boards or a governing body be involved in the development, planning, implementation, and evaluation of the programs serving the low-income sector.

(2) Federal requirements for establishing a tripartite board require board oversight responsibilities for public entities, which differ from requirements for private organizations. Where differences occur between private and public organizations, requirements for each entity have been noted in related sections of the rule.

(b) Each CSBG Eligible Entity shall comply with the provisions of this rule and if necessary, the Eligible Entity's by-laws/Certificate of Formation/Articles of Incorporation shall be amended to reflect compliance with these requirements.

§6.210. Board Structure.

(a) Eligible Entities that are Private Nonprofit Organizations shall administer the CSBG program through a tripartite board that fully participates in the development, planning, implementation, and evaluation of the program to serve low-income communities. Records must be retained for all seated board members in relation to their elections to

the board for the longer of the board member's term on the Board, or the federal record retention period. Some of the members of the board shall be selected by the Private Nonprofit Organization, and others through a democratic process; the board shall be composed so as to assure that the requirements of the CSBG Act are followed and are composed as:

(1) One-third of the members of the board shall be elected public officials, holding office on the date of the selection, or their representatives. In the event that there are not enough elected public officials reasonably available and willing to serve on the board, the entity may select appointive public officials to serve on the board. The public officials selected to serve on the board may each choose one permanent representative or designate an alternate to serve on the board. Appointive public officials or their representatives or alternates may be counted in meeting the 1/3 requirement.

(2) Not fewer than 1/3 of the members are persons chosen in accordance with the Eligible Entity's Board-approved written democratic selection procedures adequate to assure that these members are representative of low-income individuals and families in the neighborhood served; and each representative of low-income individuals and families selected to represent a specific neighborhood within a community resides in the neighborhood represented by the member.

(3) The remainder are members of business, industry, labor, religious, law enforcement, education, or other major groups and interests in the community served.

(b) For a Public Organization that is an Eligible Entity, the entity shall administer the CSBG grant through an advisory board that fully participates in the development, planning, implementation and evaluation of programs that serve low-income communities or through another mechanism specified by the state and that satisfies the requirements of a tripartite board in subsection (a) above. The advisory board is the only alternative mechanism for administration the Department has specified.

(c) Eligible Entities administering the Head Start Program must comply with the Head Start Act (42 U.S.C. §9837) that requires the governing body membership to comply with the requirements of §642(c)(1) of the Head Start Act.

(d) Selection.

(1) Public Officials:

(A) Elected public officials or appointed public officials, selected to serve on the board, shall have either general governmental responsibilities or responsibilities which require them to deal with poverty-related issues; and

(B) Permanent Representatives and Alternates. The public officials selected to serve on the board may each choose one permanent representative or designate an alternate to serve on the board.

(i) Permanent Representatives. The representative need not be a public official but shall have full authority to act for the public official at meetings of the board. Permanent representatives may hold an officer position on the board. If a permanent representative is not chosen, then an alternate may be designated by the public official selected to serve on the board. Alternates may not hold an officer position on the board.

(ii) Alternate Representatives. If the Private Nonprofit Entity or Public Organization advisory board chooses to allow alternates, the alternates for low-income representatives shall be elected at the same time and in the same manner as the board representative is elected to serve on the board. Alternates for representatives of private sector organizations may be designated to serve on the board and should be selected at the same time the board representative is selected. In the event that the board member or alternate ceases to be a member of the organization represented, he/she shall no longer be eligible to serve on the board. Alternates may not hold an officer position on the board.

(2) Low-Income Representatives:

(A) The CSBG Act and its amendments require representation of low-income individuals on boards. The CSBG statute requires that not fewer than one-third of the members shall be representatives of low-income individuals and families and that they shall be chosen in accordance with democratic selection procedures adequate to assure that these members are representative of low-income individuals and families in the neighborhoods served; and that each representative of low-income individuals and families selected to represent a specific neighborhood within a community resides in the neighborhood represented by the member.

(B) Board members representing low-income individuals and families must be selected in accordance with a democratic procedure. This procedure, as detailed in subparagraph (D) of this paragraph, may be either directly through election, public forum, or, if not possible, through a similar democratic process such as election to a position of responsibility in another significant service or community organization such as a school PTA, a faith-based organization leadership group; or an advisory board/governing council to another low-income service provider; For a Private Nonprofit Entity the democratic selection process must be detailed in the agency's Certificate of Formation/Articles of Incorporation; failure to comply could result in a default procedure that does not meet the CSBG requirements and potentially jeopardizes the Eligible Entity status of the organization as detailed in §6.213 of this Subchapter. For Public Organizations the democratic procedure must be written in the advisory board's procedures and approved at a board meeting.

(C) Every effort should be made by the Private Nonprofit Entity or Public Organization to assure that low-income representatives are truly representative of current residents of the geographic area to be served, including racial and ethnic composition, as determined by periodic selection or reselection by the community. "Current" should be defined by the recent or annual demographic changes as documented in the needs/community assessment. This does not preclude extended service of low-income community representatives on boards, but it does suggest that continued board participation of longer term members be revalidated and kept current through some form of democratic process.

(D) The procedure used to select the low-income representative must be documented to demonstrate that a democratic selection process was used. Among the selection processes that may be utilized, either alone or in combination, are:

(i) Selection and elections, either within neighborhoods or within the community as a whole; at a meeting or conference, to which all neighborhood residents, and especially those who are poor, are openly invited;

(ii) Selection of representatives to a community-wide board by members of neighborhood or sub-area boards who are themselves selected by neighborhood or area residents;

(iii) Selection, on a small area basis (such as a city block); or

(iv) Selection of representatives by existing organizations whose membership is predominately composed of poor persons.

(3) Representatives of Private Groups and Interests:

(A) The Private Nonprofit or Public Organization shall select the remainder of persons to represent the private sector on the board or it may select private sector organizations from which representatives of the private sector organization would be chosen to serve on the board; and

(B) The individuals and/or organizations representing the private sector shall be selected in such a manner as to assure that the board will benefit from broad community involvement. The board composition for the private sector shall draw from officials or members of business, industry, labor, religious, law enforcement, education, school districts, representatives of education districts and other major groups and interests in the community served.

(e) Eligible Entities must have written procedures under which a low-income individual, community organization, religious organization, or representative of such may petition for adequate representation as described in (a) - (f) of this section if such persons or organizations consider there to be inadequate representation on the board of the Eligible Entity.

§6.211. Board Administrative Requirements.

(a) Compensation. Board members are not entitled to compensation for their service on the board. Reimbursement of reasonable and necessary expenses incurred by a board member in carrying out his/her duties is allowed.

(b) Conflict of Interest. No board member may participate in the selection, award, or administration of a subcontract supported by CSBG funds if:

(1) the board member;

(2) any member of his/her family related within three degrees of consanguinity, adoption, or by marriage;

(3) the board member's partner or Household member; or

(4) any organization which employs or is about to employ any of the individuals described in paragraphs (1) - (3) of this subsection, has a financial or person interest in the firm or person selected to perform a subcontract.

(c) No employee of the local CSBG Subrecipient or of the Department may serve on the board.

(d) A seated board member is permitted to be appointed to serve as an interim Executive Director for up to 180 days so long as the Department is so notified, the board member did not participate in the vote that designated them as the interim Executive Director, the board member does not vote during the period for which they serve as the interim Executive Director, and the member is not considered a member for purposes of quorum. The board member seat is not considered vacated, and is available for that board member to return.

§6.212. Board Size.

(a) Board Service Limitations for Private Nonprofit Entities and Public Organizations Subrecipient boards may establish term limits and/or procedures for the removal of board members.

(b) Vacancies/Removal of Board Members.

(1) Vacancies. In no event shall the board allow 25% or more of either the public, private, or low-income sector board positions to remain vacant for more than 90 days. CSBG Subrecipients shall report the number of board vacancies by sector in their monthly performance reports. Compliance with the CSBG Act requirements for board membership is a condition for Eligible Entities to receive CSBG funding. There is no provision for a waiver or exception to these requirements.

(2) Removal of Board Members/Private Nonprofit Entities. Public officials or their representatives, may be removed from the board either by the board or by the entity that appointed them to serve on the board. Other members of the board may be removed by the board or pursuant to any procedure provided in the private nonprofit's Certificate of Formation/Articles of Incorporation or bylaws.

(3) Removal of Board Members/Public Organizations. Public officials or their representatives may be removed from the advisory board by the Public Organization, or by the advisory board if the board is so empowered by the Public Organization. The board may petition the Public Organization to remove a board member. All other board members may be removed by the advisory board.

(4) In order to meet the 1/3 requirement for the Public Official representation detailed in §6.210 of this rule board size shall be a number divisible by 3.

§6.213. Board Responsibility.

(a) Tripartite boards have a fiduciary responsibility for the overall operation of the Eligible Entity. Members are expected to carry out their duties as any reasonably prudent person would do.

(b) At a minimum, board members are expected to:

(1) Maintain regular attendance of board and committee meetings;

(2) Develop thorough familiarity with core agency information as appropriate, such as the agency's bylaws, Certificate of Formation/Articles of Incorporation, sources of funding, agency goals and programs, federal and state CSBG statutes;

(3) Exercise careful review of materials provided to the board;

(4) Make decisions based on sufficient information;

(5) Ensure that proper fiscal systems and controls, as well as a legal compliance system, are in place;

(6) Maintain knowledge of all major actions taken by the agency; and

(7) Receive regular reports that include:

(A) Review and approval of all funding requests (including budgets);

(B) Review of reports on the organization's financial situation;

(C) Regular reports on the progress of goals specified in the performance statement or program proposal;

(D) Regular reports addressing the rate of expenditures as compared to those projected in the budget;

(E) Updated modifications to policies and procedures concerning employee's and fiscal operations; and

(F) Updated information on community conditions that affect the programs and services of the organization.

(c) Individuals that agree to participate on a tripartite governing board, accept the responsibility to assure that the agency they represent continues to:

(1) assess and respond to the causes and conditions of poverty in their community;

(2) achieve anticipated family and community outcomes; and

(3) remains administratively and fiscally sound.

(4) Excessive absenteeism of board members compromises the mission and intent of the program.

(d) Residence Requirement. All board members shall reside within the Subrecipient's CSBG service area designated by the CSBG contract. Board members should be selected so as to provide representation for all geographic areas within the designated service area; however, greater representation may be given on the board to areas with greater low-income population. Low-income representatives must reside in the area that they represent.

(e) Improperly Constituted Board. If the Department determines that a board of an Eligible Entity is improperly constituted, the Department shall prescribe the necessary remedial action, a timeline for implementation and possible sanctions which may include:

(1) cost reimbursement method of payment;

(2) withholding of funds;

(3) Contract suspension; or

(4) termination of funding.

§6.214. Board Meeting Requirements.

(a) Boards of Eligible Entities must meet at least once per calendar quarter and at a minimum five (5) times per year and, must give each Board member a notice of meeting five (5) calendar days in advance of the meeting.

(b) Tex. Gov't Code, Chapter 551, Texas Open Meetings Act, addresses specific requirements regarding meetings and meeting notices. Tex. Gov't Code, §551.001(3)(J), includes in the definition of a governmental body and of a nonprofit corporation that is eligible to receive funds under the federal CSBG program and that is authorized by the state to serve a geographic area of the state. All Eligible Entities must follow the requirements of the Texas Open Meetings Act. As set forth in that law, there is the potential for individual criminal liability for violations.

(c) Tex. Gov't Code, §551.005 requires elected or appointed officials to receive training in Texas Open Government laws. The Department requires that all board members receive training in Texas Open Government laws, according to the requirements of §551.005.

(d) A copy of the attendance roster for all Board trainings shall be maintained at the Subrecipient level.

(e) The minimum number of members required to meet quorum is three unless the Subrecipient's Certification of Formation/Articles of Incorporation, Bylaws, or the Texas Open Meetings Act requires a greater number.

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

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Timothy K. Irvine
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Texas Department of Housing and Community Affairs
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For further information, please call: (512) 475-1762

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SUBCHAPTER C. COMPREHENSIVE ENERGY ASSISTANCE PROGRAM (CEAP)

10 TAC §§6.301 - 6.313

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

The proposed new Chapter affects no other code, article, or statute.

§6.301. Background and Definitions.

(a) The Comprehensive Energy Assistance Program ("CEAP") is funded through the Low Income Home Energy Assistance Act of 1981 (Title XXVI of the Omnibus Budget Reconciliation Act of 1981, Public Law 97-35, as amended). LIHEAP has been in existence since 1982. LIHEAP is a federally funded block grant program that is implemented to serve low income Households who seek assistance for their home energy bills. LIHEAP is not an entitlement program, and there are not sufficient funds to serve all eligible customers or to provide the maximum benefit for which a customer may qualify.

(b) Definitions.

(1) Extreme Weather Conditions--For winter months (November, December, January, and February), extreme weather conditions will exist when the temperature has been 2 degrees below the lowest winter month's temperature or below 32 degrees, for at least three days during the billing cycle. For summer months (June, July, August, and September), when the temperature is 2 degrees above the highest summer month's temperature for at least three days during the billing cycle. Extreme weather conditions will be based on data for "1981-2010 Normals" temperatures recorded by National Centers for Environmental Information of the National Oceanic and Atmospheric Administration ("NOAA") and available at http://www.ncdc.noaa.gov/cdo-web/datatools/normals. Subrecipients must maintain documentation of local temperatures and data from the NOAA.

(2) Household Crisis--A bona fide Household Crisis exists when extraordinary events or situations resulting from extreme weather conditions and/or fuel supply shortages have depleted or will deplete Household financial resources and/or have created problems in meeting basic Household expenses, particularly bills for energy so as to constitute a threat to the well-being of the Households, particularly Vulnerable Population Households.

(3) Life Threatening Crisis--A life threatening crisis exists when at least one person in the applicant Household could lose their life without the Subrecipient's utility assistance because there is a shut-off notice or a delivered fuel source is below a ten (10) day supply (by customer report) and any member of the Household is dependent upon equipment that is prescribed by a medical professional, operated on electricity or gas, and is necessary to sustain the person's life. Examples of life-sustaining equipment include, but are not limited to, kidney dialysis machines, oxygen concentrators, cardiac monitors, and in some cases heating and air conditioning when ambient temperature control is prescribed by a medical professional. Documentation must not be requested about the medical condition of the applicant/customer but must state that such a device is required in the Dwelling Unit to sustain life.

§6.302. Purpose and Goals.

The purpose of CEAP is to assist low-income Households, particularly those with the lowest incomes, and High Energy Consumption Households to meet their immediate home energy needs. The LIHEAP Statute requires priority be given to those with the highest home energy

needs, meaning low income Households with High Energy Consumption, a High Energy Burden and/or the presence of Vulnerable Population in the Household. CEAP services include: energy education, needs assessment, budget counseling (as it pertains to energy needs), utility payment assistance, repair of existing heating and cooling units, and crisis-related purchase of portable heating and cooling units.

§6.303. Distribution of CEAP Funds.

(a) The Department distributes funds to Subrecipients by an allocation formula.

(b) The formula allocates funds based on the number of Low Income Households in a service area and takes into account the special needs of individual service areas. The need for energy assistance in an area is addressed through a weather factor (based on heating and cooling degree days). The extra expense in delivering services in sparsely populated areas is addressed by an inverse population density factor. The lack of additional services available in very poor counties is addressed by a county median income factor. Finally, the Elderly are given priority by giving greater weight to this population. The five factors used in the formula are calculated as:

(1) County Non-Elderly Poverty Household Factor (weight of 40%)--Defined by the Department as the number of Non-Elderly Poverty Households in the county divided by the number of Non-Elderly Poverty Households in the State;

(2) County Elderly Poverty Household Factor (weight of 40%)--Defined by the Department as the number of Elderly Poverty Households in the county divided by the number of Elderly Poverty Households in the State; and

(3) County Inverse Household Population Density Factor (weight of 5%)--Defined by the Department as:

(A) The number of square miles of the county divided by the number of Poverty Households of the county (equals the Inverse Poverty Household Population Density of the county); and

(B) Inverse Poverty Household Population Density of the county divided by the sum of Inverse Household Densities.

(4) County Median Income Variance Factor (weight of 5%)--Defined by the Department as:

(A) State Median Income minus the County Median Income (equals county variance); and

(B) County Variance divided by sum of the State County Variances.

(5) County Weather Factor (weight of 10%)--Defined by the Department as:

(A) County heating degree days plus the county cooling degree days, multiplied by the poverty Households, divided by the sum of county heating degree days and county cooling degree days of counties (equals County Weather); and

(B) County Weather divided by the total sum of the State County Weather.

(C) All demographic factors are based on the most recent decennial U.S. Census for which Census Bureau published information is available.

(D) Total sum of paragraphs (1) - (5) of this subsection multiplied by total funds allocation equals the county's allocation of funds. The sum of the county allocations within each Subrecipient service area equals the Subrecipient's total allocation of funds.

(c) To the extent balances remain in Subrecipient contracts that the Subrecipient appears to be unable to utilize or should additional funds become available, those funds will be allocated using the formula set out in this section or other method approved by the Board to ensure full utilization of funds within a limited timeframe.

(d) The Department may, in the future, undertake to reprocure the Subrecipients that comprise the network of CEAP providers, in which case this allocation formula will be reassessed and, if material changes are needed, amended by rulemaking.

§6.304. Deobligation and Reobligation of CEAP Funds.

(a) Based on the progress reported by the Subrecipient in their Monthly Expenditure Report for the month of May (submitted on June 15), Subrecipients shall have obligated at least 50% of their contracted CEAP funds for the current Program year that are budgeted to customer assistance under §6.310 and §6.311 of this Subchapter. Subrecipients that show documented obligations of less than 50%, will have their Contract for that same year deobligated by an amount that is the lesser of 24.99% of the CEAP contract or the amount that brings their current obligations to be 50% of their annual award.

(1) The deobligation will include amounts proportionally from all budget categories.

(2) Subrecipient obligations will be analyzed after the submission of the May expenditure report as noted above. Within 48 hours of the Subrecipient's submission of the May report to the Department, Subrecipients must provide a report reflecting their obligations generated directly from their customer tracking software detailing the Households and amounts of pledged obligations through December 31 of that year. Failure to provide a timely filed May report or the required backup obligation documentation from the customer tracking software within the required 48 hours will automatically result in deobligation of 24.99% of the CEAP contract.

(b) The Department may determine, rather than deobligate from all Subrecipients meeting the criteria in subsection (a) above, to deobligate funds only from those Subrecipients who fall within the lowest 20% of Subrecipients based on combined expenditures and obligations as of the May report and whose expenditures are less than 80%.

(c) Whether deobligated funds are generated from option (a) or (b) above, the cumulative amount of deobligated funds will be allocated proportionally by formula amongst all Subrecipients that did not have any funds deobligated.

(d) Subrecipients which have had funds deobligated under option (a) or (b) above that fully expend the reduced amount of their Contract, will have access to the full amount of their following Program Year CEAP allocation. Subrecipients which have had funds deobligated under option (a) or (b) above that fail to fully expend the reduced amount of their Contract will automatically have their following Program Year CEAP allocation deobligated by the lesser of 24.99% or the proportional amount that had been deobligated in the prior year.

(e) The cumulative balance of the funds made available through subsection (d) above will be allocated proportionally by formula to the Subrecipients not having funds reduced under that subsection.

(f) In no event will deobligations that occur through any of the clauses above exceed 24.99% of the Subrecipient's Program Year CEAP formula allocation.

§6.305. Subrecipient Eligibility.

(a) The Department administers the program through the existing Subrecipients that have demonstrated that they are operating the

program in accordance with their Contract, the Economic Opportunity Act of 1964, the Low-Income Home Energy Assistance Act of 1981, as amended (42 U.S.C. §§8621, *et seq.*), and the Department rules. If a Subrecipient is successfully administering the program, the Department may offer to renew the Contract.

(b) If the Department determines that a Subrecipient is not administering the program satisfactorily, the Subrecipient will be required to take corrective actions to remedy the problem. If Subrecipient fails to correct the Finding, in order to ensure continuity of services, the Department may reassign up to 24.99% of the funds for the service area to one or more other existing Subrecipients.

(c) If the Subrecipient does not complete the corrective action within the required timeframe, the Department may conduct a solicitation for selection of an interim Subrecipient. The affected Subrecipient may request a hearing in accordance with the Tex. Gov't Code, §2105.204.

(d) If it is necessary to designate a new Subrecipient to administer CEAP, the Department shall give special consideration to Eligible Entities and entities administering Weatherization in the service area.

§6.306. Service Delivery Plan.

Prior to any expenditure of funds, Subrecipients are required to submit on an annual basis a Department formatted Service Delivery Plan ("SDP"), which includes information on how they plan to implement CEAP in their service area. The Department will notify CEAP Subrecipients when the SDP template and the annual updated forms are posted on the Department's website. The SDP must establish the priority rating sheet and priority households, the alternate billing method, how customer education is being addressed, and how the Subrecipient is determining the number of payments to be made and which types of Households are qualified for a given number of payments.

§6.307. Subrecipient Requirements for Customer Eligibility Criteria and Establishing Priority for Eligible Households.

(a) The customer income eligibility level is at or below 150% of the federal poverty level in effect at the time the customer makes an application for services.

(b) A complete application is required for all Households. Subrecipients shall determine customer income using the definition of income and process described in §6.4 (relating to income). Household income documentation must be collected by the Subrecipient for the purposes of determining the Household's benefit level.

(c) Social security numbers are not required for applicants for CEAP.

(d) Subrecipients must establish a written procedure to serve Households that have a Vulnerable Population Household member, Households with High Energy Burden, and Households with High Energy Consumption. High Energy Burden shall be the highest rated item in sliding scale priority determinations. The Subrecipient must maintain documentation of the use of the criteria.

(e) A Household unit cannot be served if the meter is utilized by another Household that is not a part of the application for assistance. In instances where separate structures share a meter and the applicant is otherwise eligible for assistance, Subrecipient must provide services if:

(1) the members of the separate structures that share a meter meet the definition of a Household per §6.2 of this Chapter;

(2) the members of the separate structures that share a meter submit one application as one Household; and

(3) all persons and applicable income from each structure are counted when determining eligibility.

§6.308. Allowable Subrecipient Administrative, Program Services Costs, and Assurance 16.

(a) Funds available for Subrecipient administrative activities will be calculated by the Department as a percentage of direct services expenditures. Administrative costs shall not exceed the maximum percentage of total direct services expenditures as indicated in the Contract. All other administrative costs, exclusive of administrative costs for program services, must be paid with nonfederal funds. Allowable administrative costs for administrative activities includes costs for general administration and coordination of CEAP, and all indirect (or overhead) cost, and activities as described in paragraphs (1) - (7) of this subsection:

(1) salaries;

(2) fringe benefits;

(3) non-training travel;

(4) equipment;

(5) supplies;

(6) audit (limited to percentage of the contract expenditures, excluding training/travel costs as indicated in the Contract); and

(7) office space (limited to percentage of the contract expenditures, excluding training/travel costs as indicated in the Contract).

(b) Program Services costs shall not exceed the maximum percentage of total direct services Expenditures as indicated in the Contract. Program Services costs are allowable when associated with providing customer direct services. Program services costs may include outreach activities and expenditures on the information technology and computerization needed for tracking or monitoring required by CEAP, and activities as described in paragraphs (1) - (8) of this subsection:

(1) direct administrative cost associated with providing the customer direct service;

(2) salaries and benefits cost for staff providing program services;

(3) supplies;

(4) equipment;

(5) travel;

(6) postage;

(7) utilities; and

(8) rental of office space.

(c) Assurance 16. Assurance 16 services encourage and enable households to reduce their home energy needs and thereby the need for energy assistance. The Department calculates Assurance 16 based on total Contract Expenditure. Subrecipients must provide an energy-related needs assessment and referrals, budget counseling, and energy conservation education to each CEAP customer. Subrecipients may provide education to identify energy waste, manage Household energy use, and strategies to promote energy savings. Subrecipients must maintain documentation of the assessment, referrals, counseling and education provided.

§6.309. Types of Assistance and Benefit Levels.

(a) Allowable CEAP expenditures include customer education, utility payment assistance; repair of existing heating and cooling units, and crisis-related purchase of portable heating and cooling units.

(b) Total maximum possible annual Household benefit (all allowable benefits combined) shall not exceed $5,400 during a Program Year.

(c) Benefit determinations are based on the Household's income (even if the Household is Categorically Eligible), the Household size, Vulnerable Populations in the Household, plus other priority status, and the availability of funds;

(d) Benefit determinations for the Utility Payment Assistance Component and the Household Crisis Component cannot exceed the sliding scale described in paragraphs (1) - (3) of this paragraph:

(1) Households with Incomes of 0 to 50% of Federal Poverty Guidelines may receive an amount not to exceed $1,200 per Component;

(2) Households with Incomes of 51% to 75% of Federal Poverty Guidelines may receive an amount not to exceed $1,100 per Component; and

(3) Households with Incomes of 76% to at or below 150% of Federal Poverty Guidelines may receive an amount not to exceed $1,000 per Component; and

(e) Service and Repair of existing heating and cooling units: Households may receive up to $3,000 for service and repair of existing heating and cooling units when the Household has an inoperable heating or cooling system based on requirements in §6.310, Relating to Household Crisis Component.

(f) Assistance with service and repair or purchase of portable air conditioning/evaporative coolers and heating units not to exceed $3,000 for Households that include a Vulnerable Population member, when the Household does not have an operable or non-existing heating or cooling system, regardless of weather conditions.

(g) Subrecipients shall provide only the types of assistance described in paragraphs (1) - (11) of this subsection with funds from CEAP:

(1) Payment to vendors and suppliers of fuel/utilities, goods, and other services, such as past due or current bills related to the procurement of energy for heating and cooling needs of the residence, not to include security lights and other items unrelated to energy assistance as follows:

(A) Subrecipients may make utility payments on behalf of Households based on the previous twelve (12) month's home energy consumption history, including allowances for cost inflation. If a twelve (12) month's home energy consumption history is unavailable, Subrecipient may base payments on current Program Year's bill or utilize a Department-approved alternative method. Subrecipients will note such exceptions in customer files. Benefit amounts exceeding the actual bill shall be treated as a credit for the customer with the utility company.

(B) Vulnerable Households can receive benefits to cover up to the eight highest remaining bills within the Program Year, as long as the cost does not exceed the maximum annual benefit.

(C) Households that do not contain a Vulnerable Population member can receive benefits to cover up to the six highest remaining bills within the Program Year as long as the cost does not exceed the maximum annual benefit.

(2) Payment to vendors--only one energy bill payment per month;

(3) Needs assessment and energy conservation tips, coordination of resources, and referrals to other programs;

(4) Payment of water bills only when such costs include expenses from operating an evaporative water cooler unit or when the water bill is an inseparable part of a utility bill and documented in the Vendor Agreement. As a part of the intake process, outreach, and coordination, the Subrecipient shall confirm that a customer owns an operational evaporative cooler and has used it to cool the dwelling within 60 days prior to application. Payment of other utility charges such as wastewater and waste removal are allowable only if these charges are an inseparable part of a utility bill and documented in the Vendor Agreement. Documentation from vendor is required. Whenever possible, Subrecipient shall negotiate with the utility providers to pay only the "home energy" (heating and cooling) portion of the bill;

(5) Energy bills already paid may not be reimbursed by the program;

(6) Payment of reconnection fees in line with the registered tariff filed with the Public Utility Commission and/or Texas Railroad Commission. Payment cannot exceed that stated tariff cost. Subrecipient shall negotiate to reduce the costs to cover the actual labor and material and to ensure that the utility does not assess a penalty for delinquency in payments;

(7) Payment of security deposits only when state law requires such a payment, or if the Public Utility Commission or Texas Railroad Commission has listed such a payment as an approved cost, and where required by law, tariff, regulation, or a deferred payment agreement includes such a payment. Subrecipients shall not pay such security deposits that the energy provider will eventually return to the customer;

(8) While rates and repair charges may vary from vendor to vendor, Subrecipient shall negotiate for the lowest possible payment. Prior to making any payments to an energy vendor a Subrecipient shall have a signed vendor agreement on file from the energy vendor receiving direct CEAP payments from the Subrecipient;

(9) Subrecipient may make payments to landlords on behalf of eligible renters who pay their utility and/or fuel bills indirectly. Subrecipient shall notify each participating Household of the amount of assistance paid on its behalf. Subrecipient shall document this notification. Subrecipient shall maintain proof of utility or fuel bill payment. Subrecipient shall ensure that amount of assistance paid on behalf of customer is deducted from customer's rent;

(10) In lieu of deposit required by an energy vendor, Subrecipient may make advance payments. The Department does not allow CEAP expenditures to pay deposits, except as noted in paragraph (7) of this subsection. Advance payments may not exceed an estimated two months' billings; and

(11) Funds for the CEAP shall not be used to weatherize dwelling units, for medicine, food, transportation assistance (*i.e.,* vehicle fuel), income assistance, or to pay for penalties or fines assessed to customers.

§6.310. Household Crisis Component.

(a) Crisis assistance can be provided under the following conditions:

(1) A Life Threatening Crisis exists, as defined in §6.301 of this Subchapter;

(2) Disconnection notice - a utility disconnection notice may constitute a Household Crisis. Assistance provided to Households based on a utility disconnection notice is limited to two (2) payments per year. Weather criterion is not required to provide assistance due to a disconnection notice. The notice of disconnection must have been provided to the Subrecipient within the effective contract term and the

notice of disconnection must have been issued within no more than 60 days from receipt by the Subrecipient.; or,

(3) Extreme Weather Conditions exist, as defined in §6.301 of this Subchapter.

(b) Benefit Level for Crisis Assistance.

(1) Crisis assistance payments cannot exceed the minimum amount needed to resolve the crisis; *e.g.,* when a shut-off notice requires a certain amount to be paid to avoid disconnection and the same notice indicates that there are balances due other than the required amount. Crisis assistance payments that are less than the amount needed to resolve the crisis may only be made when other funds or options are available to resolve the Household's remaining crisis need and are documented in the customer file.

(2) Crisis assistance for one Household cannot exceed the maximum allowable benefit level in one Program Year as defined in §6.309 of this Subchapter relating to Types of Assistance and Benefit Levels. If a Household's crisis assistance needs exceed that maximum allowable benefit, Subrecipient may pay up to the Household crisis assistance limit only if the remaining amount of Household need can be paid from other funds. If the Household's crisis requires more than the Household limit to resolve and no other funds are available, the crisis exceeds the scope of this component.

(3) Payments may not exceed Household's actual utility bill.

(4) Crisis funds, whether for utility payment assistance, disconnection notice, life threatening crisis, temporary shelter, emergency fuel deliveries, assistance related to natural disasters shall be considered part of the total maximum Household allowable assistance.

(5) Service and repair or purchase of heating and or cooling units for up to $3,000 will not be counted towards the total maximum Household allowable assistance under the utility assistance and crisis components.

(c) Where necessary to prevent undue hardships from a qualified crisis, Subrecipients may provide:

(1) Payment of utility bill(s) during the month(s) when Extreme Weather Conditions exist, as defined in §6.301 of this Subchapter.

(2) Temporary shelter not to exceed the annual Household expenditure limit for the duration of the contract period in the limited instances that supply of power to the dwelling is disrupted--causing temporary evacuation;

(3) Emergency deliveries of fuel up to 250 gallons per crisis per Household, at the prevailing price. This benefit may include coverage for tank pressure testing;

(4) For Vulnerable Population Households regardless of weather conditions, service and repair of existing heating and cooling units when the Household has an inoperable heating or cooling system when the county is experiencing Extreme Weather Conditions. If any component of the central system cannot be repaired using parts, the Subrecipient can replace the component in order to repair the central system. Documentation of service/repair and related warranty must be included in the customer file. Costs are not to exceed $3,000 during the Contract period.

(5) For Vulnerable Population Households regardless of weather conditions, service and repair or purchase of portable air conditioning/evaporative coolers and heating units (portable electric heaters are allowable only as a last resort), when the Household has an inoperable or there is a nonexistent heating or cooling system.. If any component of the central system cannot be repaired using parts, the Subrecipient can replace the component in order to repair the central system. Any service or repair of air conditioning or heating units must comply with the 2015 International Residential Code ("IRC") to ensure proper installation. Documentation of service/repair and related warranty must be included in the customer file. Costs are not to exceed $3,000 during the Contract period.

(6) When a Household's crisis meets the definition of Life Threatening Crisis and the Household has a utility disconnection notice or is low on fuel, regardless of whether the county is experiencing Extreme Weather Conditions, utility or fuel assistance can be provided.

(d) When portable heating/cooling units are purchased and/or repaired, the following requirements must be met:

(1) Purchase of more than two portable heating/cooling units per Household requires prior written approval from the Department;

(2) Purchase of portable heating/cooling units which require performance of electrical work for proper installation requires prior written approval from the Department;

(3) Replacement of central systems and combustion heating units is not an approved use of crisis funds; and

(4) Portable heating/cooling units must be Energy Star®. In cases where the type of unit is not rated by Energy Star®, or if Energy Star® units are not available due to supply shortages, Subrecipient may purchase the highest rated unit available.

(e) When natural disasters result in energy supply shortages or other energy-related emergencies, LIHEAP will allow home energy related expenditures for:

(1) Costs to temporarily shelter or house individuals in hotels, apartments or other living situations in which homes have been destroyed or damaged, *i.e.,* placing people in settings to preserve health and safety and to move them away from the crisis situation;

(2) Costs for transportation (such as cars, shuttles, buses) to move individuals away from the crisis area to shelters, when health and safety is endangered by loss of access to heating or cooling;

(3) Utility reconnection costs;

(4) Blankets, as tangible benefits to keep individuals warm;

(5) Crisis payments for utilities and utility deposits; and

(6) Purchase of fans, air conditioners and generators. The number, type, size and cost of these items may not exceed the minimum needed to resolve the crisis.

(f) Time Limits for Assistance--Subrecipients shall ensure that for customers who have already lost service or are in immediate danger of losing service, some form of assistance to resolve the crisis shall be provided within a 48-hour time limit (18 hours in life-threatening situations). The time limit commences upon completion of the application process. The application process is considered to be complete when an agency representative accepts an application and completes the eligibility process.

(g) Subrecipients must maintain written documentation in customer files showing crises resolved within appropriate timeframes. Subrecipients must maintain documentation in customer files showing that a utility bill used as evidence of a crisis was received by the Subrecipient during the effective contract term. The Department may disallow improperly documented expenditures.

§6.311. Utility Assistance Component.

(a) Subrecipients may use home energy payments to assist Low Income Households to reduce their home energy costs. Subrecipients shall combine home energy payments with energy conservation tips, participation by utilities, and coordination with other services in order to assist Low Income Households to reduce their home energy needs.

(b) Subrecipients must make payments directly to vendors and/or landlords on behalf of eligible Households.

§6.312. Payments to Subcontractors and Vendors.

(a) A bi-annual vendor agreement is required to be implemented by the Subrecipient and shall contain assurances as to fair billing practices, delivery procedures, and pricing procedures for business transactions involving CEAP beneficiaries. The Subrecipient must use the Department's current Vendor Agreement template, found on the CEAP Program Guidance page of the Department's website. These agreements are subject to monitoring procedures performed by the Department staff.

(b) Subrecipient shall maintain proof of payment to Subcontractors and vendors as required by Chapter 1, Subchapter D of this Title.

(c) Subrecipient shall notify each participating Household of the amount of assistance paid on its behalf. Subrecipient shall document this notification.

(d) Subrecipients shall use the vendor payment method for CEAP components. Subrecipient shall not make cash payments directly to eligible Household for any of the CEAP components.

(e) Payments to vendors for which a valid Vendor Agreement is not in place may be subject to disallowed costs unless prior written approval is obtained from the Department.

§6.313. Outreach, Accessibility, and Coordination.

(a) The Department may continue to develop interagency collaborations with other low-income program offices and energy providers to perform outreach to targeted groups.

(b) Subrecipients shall conduct outreach activities.

(c) Outreach activities may include:

(1) providing information through home visits, site visits, group meetings, or by telephone for disabled low-income persons;

(2) distributing posters/flyers and other informational materials at local and county social service agencies, offices of aging, Social Security offices, etc.;

(3) providing information on the program and eligibility criteria in articles in local newspapers or broadcast media announcements;

(4) coordinating with other low-income services to provide CEAP information in conjunction with other programs;

(5) providing information on one-to-one basis for applicants in need of translation or interpretation assistance;

(6) providing CEAP applications, forms, and energy education materials in English and Spanish (and other appropriate language);

(7) working with energy vendors in identifying potential applicants;

(8) assisting applicants to gather needed documentation; and

(9) mailing information and applications.

(d) Subrecipients shall accept applications at sites that are geographically and physically accessible to all Households requesting assistance. If Subrecipient's office is not accessible, Subrecipient shall make reasonable accommodations to ensure that all Households can apply for assistance.

(e) Subrecipients shall coordinate with other social service agencies through cooperative agreements to provide services to customer Households. Cooperative agreements must clarify procedures, roles, and responsibilities of all involved entities.

(f) Subrecipients shall coordinate with other energy related programs. Specifically, Subrecipient shall make documented referrals to the local WAP Subrecipient.

(g) Subrecipients shall coordinate with local energy vendors to arrange for arrearage reduction, reasonably reduced payment schedules, or cost reductions.

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

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Timothy K. Irvine
Executive Director
Texas Department of Housing and Community Affairs
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SUBCHAPTER D. WEATHERIZATION ASSISTANCE PROGRAM

10 TAC §§6.401 - 6.417

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

The proposed new Chapter affects no other code, article, or statute.

§6.401. Background.

The Weatherization Assistance Program was established by the Energy Conservation in Existing Buildings Act of 1976, as amended 42 U.S.C. §§6851, *et seq.* The Department funds the Weatherization Programs through the Department of Energy Weatherization Assistance Program (DOE-WAP) which is funded through the U.S. Department of Energy Weatherization Assistance Program for Low Income Persons grant and the Low Income Home Energy Assistance Program Weatherization Assistance Program ("LIHEAP-WAP") which is funded through the U.S. Department of Health and Human Services' Low-Income Home Energy Assistance Program (LIHEAP) grant.

§6.402. Purpose and Goals.

(a) DOE-WAP and LIHEAP-WAP offers awards to Private Nonprofit Organizations, and Public Organizations with targeted beneficiaries being Households with low incomes, with priority given to Vulnerable Populations, High Energy Burden, and Households with High Energy Consumption. In addition to meeting the income-eligibility criteria, the weatherization measures to be installed must meet specific energy-savings goals. Neither of these programs are entitlement programs and there are not sufficient funds to serve all customers that may be eligible.

(b) The programs fund the installation of weatherization materials and provide energy conservation education. The programs help control energy costs to ensure a healthy and safe living environment.

(c) Organizations administering a Department-funded weatherization program must administer both the DOE-WAP and the LIHEAP-WAP. Organizations that have one Weatherization program removed will have both programs removed.

(d) The Department shall administer and implement the DOE-WAP program in accordance with DOE rules (10 CFR Part 440), except that Categorical Eligibility will follow the eligibility reflected in LIHEAP plan. The Department shall administer and implement the LIHEAP-WAP program in accordance with a combination of LIHEAP statute (42 U.S.C. §§6861, *et seq.*) and DOE rules. LIHEAP Weatherization measures may be leveraged with DOE Weatherization measures in which case all DOE rules and requirements will apply.

§6.403. Definitions.

(a) Department of Housing and Urban Development ("HUD")--Federal department that provides funding for certain housing and community development activities.

(b) Electric Base-Load Measure--Weatherization measures which address the energy efficiency and energy usage of lighting and appliances.

(c) Energy Audit--The energy audit software and procedures used to determine the cost effectiveness of Weatherization measures to be installed in a Dwelling Unit. The Energy Audit shall be used for any Dwelling Unit weatherized utilizing DOE funds.

(d) Energy Repairs--Weatherization-related repairs necessary to protect or complete regular Weatherization energy efficiency measures.

(e) Multifamily Dwelling Unit--A structure containing more than one Dwelling Unit.

(f) Rental Unit--A Dwelling Unit occupied by a person who pays rent for the use of the Dwelling Unit.

(g) Renter--A person who pays rent for the use of the Dwelling Unit.

(h) Reweatherization--Consistent with 10 CFR §440.18(e)(2), if a Dwelling Unit has been damaged by fire, flood, or act of God and repair of the damage to Weatherization materials is not paid for by insurance; or if a Dwelling Unit was partially weatherized under a federal program during the period September 30, 1975, through September 30, 1994, the Dwelling Unit may receive further financial assistance for Reweatherization.

(i) Shelter-- a Dwelling Unit or Units whose principal purpose is to house on a temporary basis individuals who may or may not be related to one another and who are not living in nursing homes, prisons, or similar institutional care facilities.

(j) Single Family Dwelling Unit--A structure containing no more than one Dwelling Unit.

(k) Weatherization Assistance Program Policy Advisory Council ("WAP PAC")--The WAP PAC was established by the Department in accordance with 10 CFR §440.17 to provide advisory services in regards to the DOE WAP program.

(l) Weatherization Material--The material listed in Appendix A of 10 CFR Part 440.

(m) Weatherization --A program conducted to reduce heating and cooling demand of Dwelling Units that are energy inefficient.

§6.404. Distribution of WAP Funds.

(a) Except for the reobligation of deobligated funds, the Department distributes funds to Subrecipients by an allocation formula.

(b) The allocation formula allocates funds based on the number of Low Income Households in a service area and takes into account certain special needs of individual service areas, as set forth below. The need for energy assistance in an area is addressed through a weather factor (based on heating and cooling degree days). The extra expense in delivering services in sparsely populated areas is addressed by an inverse Population Density factor. The lack of additional services available in very poor counties is addressed by a county median income factor. Finally, the Elderly are given priority by giving greater weight to this population. The five factors used in the formula are calculated as follows:

(1) County Non-Elderly Poverty Household Factor--The number of Non-Elderly Poverty Households in the County divided by the number of Non-Elderly Poverty Households in the State;

(2) County Elderly Poverty Household Factor--The number of Elderly Poverty Households in the county divided by the number of Elderly Poverty Households in the State;

(3) County Inverse Household Population Density Factor--

(A) The number of square miles of the county divided by the number of Households of the county (equals the inverse Household population density of the county); and

(B) Inverse Household Population density of the county divided by the sum of inverse Household densities.

(4) County Median Income Variance Factor--

(A) State median income minus the county median income (equals county variance); and

(B) County variance divided by sum of the State county variances;

(5) County Weather Factor--

(A) County heating degree days plus the county cooling degree days, multiplied by the poverty Households, divided by the sum of county heating and cooling degree days of counties (equals County Weather); and

(B) County Weather divided by the total sum of the State County Weather.

(C) The five factors carry the following weights in the allocation formula: number of Non-Elderly Poverty Households (40%), number of poverty Households with at least one member who is 60 years of age or older (40%), Household density as an inverse ratio (5%), the median income of the county (5%), and a weather factor based on heating degree days and cooling degree days (10%). All demographic factors are based on the most current decennial U.S. Census. The formula is as follows:

(i) County Non-Elderly Poverty Household Factor (0.40) plus;

(ii) County Elderly Poverty Household Factor (0.40) plus;

(iii) County Inverse Household Population Density Factor (0.05) plus;

(iv) County Median Income Variance Factor (0.05) plus;

(v) County Weather Factor (0.10);

(vi) Total sum of clauses (i) - (v) of this subparagraph multiplied by total funds allocation equals the county's allocation of funds.

(vii) The sum of the county allocation within each Subrecipient service area equals the Subrecipient's total allocation of funds.

(c) To the extent that Contract funds have been deobligated, or should additional funds become available, those funds will be allocated using this formula or other method approved by the Department's Board to ensure full utilization of funds within a limited timeframe, including possible allocation of WAP funds to Subrecipients in varying populations from each funding source (DOE and LIHEAP), based on availability of the source.

(d) Subrecipients that do not expend more than 20% of Program Year formula allocation (excluding any additional funds that may be distributed by the Department) by the end of the first quarter of the year following the Program Year for two consecutive years will have funding recaptured. LIHEAP-WAP funding recapture will be consistent with Chapter 2105. The Subrecipient of the funds will be provided a Contract for the average percentage of funds that they expended over the last two years.

(e) The cumulative balance of the funds made available through subsections (d) above will be allocated proportionally by formula to the entities that expended 90% of the prior year's Contract by the end of the original Contract Term.

(f) To the extent federal funding awarded to Texas is limited from one of the two WAP funding sources, possible allocations of funds to Subrecipients may be made in varying proportions from each source to maximize efficient program administration.

(g) The Department may, in the future, undertake to reprocure the Subrecipients that comprise the network of Weatherization providers, in which case this allocation formula will be reassessed and, if material changes are needed, amended by rulemaking.

§6.405. Deobligation and Reobligation of Awarded Funds.

(a) At any time that a Subrecipient believes they may be at risk of meeting one of the criteria noted in subsection (l) of this section relating to criteria for deobligation of funds, notification must be provided to the Department unless excepted under subsection (m) of this section.

(b) A written 'Notification of Possible Deobligation' will be sent to the Executive Director of the Subrecipient by the Department as soon as a criterion listed in subsection (l) of this section is at risk of being met. Written notice will be sent electronically and/or by mail. The notice will include an explanation of the criteria met. A copy of the written notice will be sent to the Board of Directors of the Subrecipient by the Department seven (7) business days after the notice to the Executive Director has been released.

(c) Within fifteen (15) days of the date of the "Notification of Possible Deobligation" referenced in subsection (b) of this section, a Mitigation Action Plan must be submitted to the Department by the Subrecipient in the format prescribed by the Department unless excepted under subsection (m) of this section.

(d) A Mitigation Action Plan is not limited to but must include:

(1) Explanation of why the identified criteria under this section occurred setting out all fully relevant facts.

(2) Explanation of how the criteria will be immediately, permanently, and adequately mitigated such that funds are expended during the Contract Period. For example, if production or expenditures appear insufficient to complete the Contract timely, the explanation would need to address how production or expenditures will be increased in the short- and long-term to restore projected full and timely execution of the contract.

(3) If applicable because of failure to produce Unit Production or Expenditure targets under the existing Production Schedule, a detailed narrative of how the Production Schedule will be adjusted, going forward, to assure achievement of sufficient, achievable Unit Production and Expenditures to ensure timely and compliant full utilization of all funds.

(4) An explanation of how the other criteria under this section will be mitigated. For example, if Unit Production criteria for a time period were not met, then the explanation will need to include how the other criteria will not be triggered.

(5) If relating to a Unit Production or expenditure criteria, a description of activities currently being undertaken including an accurate description of the number of units in progress, broken down by number of units in each of these categories: units that have been qualified, audited, assessed, contracted, inspected, and invoiced and as reflected in an updated Production Schedule.

(6) Provide any request for a reduction in Contracted Funds, reasons for the request, desired Contracted Funds and revised Production Schedule reflecting the reduced Contracted Funds.

(e) At any time after sending a Notification of Deobligation, the Department or a third-party assigned by the Department may monitor, conduct onsite visits or other assessments or engage in any other oversight of the Subrecipient that is determined appropriate by the Department under the facts and circumstances.

(f) The Department or a third-party assigned by the Department will review the Mitigation Action Plan, and where applicable, assess the Subrecipient's ability to meet the revised Production Schedule or remedy other concern.

(g) After the Department's receipt of the Mitigation Action Plan, the Department will provide the Subrecipient a written Corrective Action Notice which may include one or more of the criteria identified in this section (relating to deobligation and other mitigating actions) or other acceptable solutions or remedies.

(h) The Subrecipient has seven (7) calendar days from the date of the Corrective Action Notice to appeal the Corrective Action Notice to the Executive Director. Appeals may include:

(1) Request to retain for the full Fund Award if Partial Deobligation was indicated;

(2) Request for only partial Deobligation of the full Contracted Fund if full Deobligation was indicated in the Corrective Action Notice;

(3) Request for other lawful action consistent with the timely and full completion of the contract and Production Schedule for all Contracted Funds.

(i) In the event that an appeal is submitted to the Executive Director, the Executive Director may grant extensions or forbearance of targets included in the Production Schedule, continued operation of a Contract, authorize Deobligation, or take other lawful action that is designed to ensure the timely and full completion of the Contract for all Contracted Funds.

(j) In the event the Executive Director denies an appeal, the Subrecipient will have the opportunity to have their appeal presented at the next meeting of the Department's governing board for which the

matter may be posted in accordance with law and submitted for final determination by the Board.

(k) In the event an appeal is not submitted within seven (7) calendar days from the date of the Corrective Action Notice, the Corrective Action Notice will automatically become final without need of any further action or notice by the Department, and the Department will amend/terminate the contract with the Subrecipient to effectuate the Corrective Action Notice.

(l) The criteria noted in this subsection will prompt the Deobligation process under this rule. If the criteria are met, then notification and ensuing processes discussed elsewhere in this subchapter will apply.

(1) Subrecipient fails to provide the Department with a Production Schedule for their current Contract within 30 days of receipt of the draft Contract. The Production Schedule must be signed by the Subrecipient Executive Director/Chief Executive Officer and approved by the Department;

(2) By the third program reporting deadline, for DOE units, Subrecipient must report at least one unit weatherized and inspected by a certified Quality Control Inspector ("QCI");

(3) By the fifth program reporting deadline, less than 25% of total expected unit production has occurred based on the Production Schedule, or less than 20% of total Awarded Funds have been expended;

(4) By the seventh program reporting deadline, less than 50% of total expected unit production has occurred based on the Production Schedule, or less than 50% of total Awarded Funds have been expended;

(5) The Subrecipient fails to submit a required monthly report explaining any variances between the Production Schedule and actual results on Production Schedule criteria;

(m) Notification of deobligation will not be required to be sent to a Subrecipient, and a Mitigation Action Plan will not be required to be provided to the Department, if any one or more of the following are satisfied:

(1) The total cumulative unit production for the Subrecipient, based on the monthly report as reported in the Community Affairs contract system, is at least 75% of the total cumulative number of units to be completed as of the end of the month according to the Subrecipient's forecast unit production within the Production Schedule for the time period applicable (i.e. cumulative through the month for which reporting has been made).

(2) The total cumulative expenditures for the Subrecipient, based on the monthly report as reported in the Community Affairs contract system, is at least 75% of the total cumulative estimated expenditures to be expended as of the end of the month according to the Subrecipient's forecast expenditures within the Production Schedule for the time period applicable (*i.e.,* cumulative through the month for which reporting has been made).

(3) The Subrecipient's monthly reports as reported in the Community Affairs contract system, for the prior two months, as required under the Contract, reflects unit production that is 80% or more of the expected unit production amount to be completed as of the end of the month according to the Subrecipient's forecast unit production within the Production Schedule.

(n) Subrecipients which have funds deobligated under this section that fully expend the reduced amount of their Contract, will have access to the full amount of their following Program Year WAP allocation. Subrecipients which have had funds deobligated under this section that fail to fully expend the reduced amount of their Contract will automatically have their following Program Year WAP allocation deobligated by the lesser of 24.99% or the proportional amount that had been deobligated in the prior year.

§6.406. Subrecipient Requirements for Establishing Priority for Eligible Households and Customer Eligibility Criteria.

(a) Subrecipients shall establish eligibility and priority criteria to increase the energy efficiency of dwellings owned or occupied by Low Income persons who are particularly vulnerable such as the Elderly, Persons with Disabilities, Families with Young Children, Households with High Energy Burden, and Households with High Energy Consumption.

(b) Subrecipients shall follow the Department rules and established state and federal guidelines for determining eligibility for Multifamily Dwelling Units as referenced in §6.414 of this chapter (relating to Eligibility for Multifamily Dwelling Units).

(c) Subrecipient shall determine applicant income eligibility in compliance with §6.4 of this chapter (relating to Income Determination).

(d) Social Security numbers are not required for applicants.

§6.407. Program Requirements.

(a) Each Dwelling Unit weatherized requires completion of a written whole house assessment. Subrecipients must perform the whole house assessment then let that assessment guide whether the Dwelling Unit is best served through DOE funds using the audit or through LIHEAP WAP funds using the priority list or a combination of DOE and LIHEAP funds.

(b) Any Dwelling Unit that is weatherized using DOE funds must use the audit as a guide for installed measures. Subgrantees combining DOE funds with LIHEAP WAP funds may not mix the use of the audit and the priority list.

(c) Any Dwelling Unit that is weatherized using LIHEAP only must be completed using the priority list as a guide for installed measures. Failure to complete a written whole house assessment as indicated in §6.416 of this Subchapter prior to Weatherization may lead to unit failure during quality control inspection.

(d) If a Subrecipient's Weatherization work does not consistently meet DOE Standard Work Specifications Weatherization standards, the Department may proceed with the removal of the programs from the Subrecipient.

(e) A Subrecipient may refer a contractor to the Department for debarment consistent with Chapter 1 of this Part.

§6.408. Department of Energy Weatherization Requirements.

(a) In addition to cost principles and administrative requirements listed in §1.402 in Chapter 1 of this Part (relating to Cost Principles and Administrative Requirements), Subrecipients administering DOE programs must also adhere to 10 CFR Part 440 10 CFR Part 600 and the International Residential Code.

(b) WAP Policy Advisory Council. In accordance with Tex. Gov't Code, §2110.005 and 10 CFR §440.17, the Department shall establish the Weatherization Assistance Program Policy Advisory Council (WAP PAC), with which it will consult prior to the submission of the annual plan and award of funds to DOE.

(c) Adjusted Average Expenditure Per Dwelling Unit. Expenditures of financial assistance provided under DOE-WAP funding for

the Weatherization services for labor, weatherization materials, and program support shall not exceed the DOE adjusted average expenditure limit for the current program year per Dwelling Unit as provided by DOE, and as cited in the Contract, without special agreement via an approved waiver from the Department.

(d) Electric Base Load Measures. DOE has approved the inclusion of selected Electric Base Load (EBL) measures as part of the Weatherization of eligible residential units. EBL measures must be determined cost effective with a Savings to Investment Ratio ("SIR") of one or greater by audit analysis. Refrigerators must be metered for a minimum of two (2) hours.

(e) Subrecipients may not enter into vehicle lease agreements for vehicles used in the WAP and paid for with WAP funds.

(f) Energy Audit. Subrecipients are required to complete a State of Texas approved Energy Audit to determine allowable weatherization measures prior to commencing Weatherization work.

(g) Energy Audit Procedures.

(1) SIR for the Energy Audit procedures will determine the installation of allowable Weatherization measures. The Weatherization measures must result in energy cost savings over the lifetime of the measure(s), discounted to present value, that equal or exceed the cost of materials, and installation. An Energy Audit may consist of Incidental Repairs, Energy-Saving Measures (starting with Duct Sealing and Infiltration Reduction), and Health and Safety Measures. All Energy-Saving Measures must rank with an SIR of one or greater. The total Cumulative SIR, prior to Health and Safety measures, must be a one or greater in order to weatherize the dwelling unit.

(2) The Energy Audit has not been approved for multifamily buildings containing 25 or more units. Subrecipients that propose weatherizing a building containing 25 or more units must contact the Department for assistance prior to beginning any Weatherization activity.

(3) Energy Auditors must use the established R-values for existing measures provided in the International Energy Conservation Code ("IECC") when entering data into the Energy Audit. Subrecipients must follow minimum requirements set in the State of Texas adopted International Residential Code ("IRC") or jurisdictions authorized by state law to adopt later editions.

(4) Subrecipients utilizing the Energy Audit must enter into the audit all materials and labor measures proposed to be installed.

§6.409. LIHEAP Weatherization Requirements.

(a) Allowable Expenditure per Dwelling Unit. Expenditures of financial assistance provided under LIHEAP-WAP funding for the weatherization services for labor, Weatherization materials, and program support shall not exceed the allowable figure as set forth in the current Contract term, without prior written approval from the Department. The cumulative cost per unit (materials, labor and program support), shall not exceed the maximum allowable by the end of the contract term.

(b) Allowable Activities. Subrecipients are allowed to perform Weatherization measures as detailed in the priority list Exhibit to the Weatherization Contract. Measures must be performed in the order detailed in the Exhibit. Subrecipient shall include in the customer file detailed documentation to explain omitted measures.

(c) Outreach and Accessibility.

(1) Subrecipients shall conduct outreach activities, which may include but are not limited to:

(A) providing information through home visits, site visits, group meetings, or by telephone for disabled low-income persons;

(B) distributing posters/flyers and other informational materials at local and county social service agencies, offices of aging, social security offices, etc.;

(C) providing information on the program and eligibility criteria in articles in local newspapers or broadcast media announcements;

(D) coordinating with other low-income services to provide LIHEAP information in conjunction with other programs;

(E) providing information on one-to-one basis for applicants in need of translation or interpretation assistance;

(F) providing LIHEAP applications, forms, and energy education materials in English and Spanish (and other appropriate language);

(G) working with energy vendors in identifying potential applicants;

(H) assisting applicants to gather needed documentation; and

(I) mailing information and applications.

(2) Subrecipients and their field offices shall accept applications at sites that are geographically accessible to all Households requesting assistance.

(d) Priority Assessment. Subrecipients must conduct an assessment of Dwelling Units using the LIHEAP Priority List, including all required Health and Safety and energy efficiency measures.

(e) LIHEAP Subrecipient Eligibility.

(1) The Department administers the program through the existing Subrecipients that have demonstrated that they are operating the program in accordance with their Contract, the Economic Opportunity Act of 1964, the Low-Income Home Energy Assistance Act of 1981, as amended (42 U.S.C. §§8621, *et seq.*), and the Department rules. If a Subrecipient is successfully administering the program, the Department may offer to renew the Contract.

(2) If the Department determines that a Subrecipient is not administering the program satisfactorily, the Subrecipient will be required to take corrective actions to remedy the problem within the timeframe referenced in the issued monitoring report, unless it is a case of customer health or safety. If Subrecipient fails to correct the Deficiency or Finding, in order to ensure continuity of services, the Department may reassign up to 24.99% of the funds for the service area to one or more other existing Subrecipient.

(3) If the Subrecipient does not complete the corrective action within the required timeframe, the Department may conduct a solicitation for selection of an interim Subrecipient. The affected Subrecipient may request a hearing in accordance with the Tex. Gov't Code, §2105.204.

(4) If it is necessary to designate a new Subrecipient to administer LIHEAP-WAP, the Department shall give special consideration to Eligible Entities and entities administering CEAP in the service area.

§6.410. Liability Insurance and Warranty Requirement.

Subrecipient Weatherization work shall be covered by general liability insurance for an amount not less than combined total of materials, labor, support and health and safety. The Department strongly recommends Pollution Occurrence Insurance to be part of or an addendum

to Subrecipients' general liability insurance coverage. Subrecipients must ensure that each Subcontractor performing Weatherization activities maintain adequate insurance coverage for all units to be weatherized. Weatherization contractors must provide a one-year warranty on their work for parts and labor; the period for the warranty coverage shall begin at the completion of installation. If Subrecipient relinquishes its Weatherization program, Weatherization work completed within 12 months of the date of surrender of the program, must be covered by general liability insurance or contractor warranty. Public Organizations that have self insurance complying with Tex. Gov't Code Chapter 2259 covering weatherization work, may, but are not required to, purchase additional coverage.

§6.411. Customer Education.

Subrecipients shall provide customer education to each WAP customer on energy conservation practices. Subrecipients shall provide education to identify energy waste, manage Household energy use, and strategies to promote energy savings. Subrecipients are encouraged to use oral, written, and visual educational materials. These activities are allowable program support Expenditures.

§6.412. Mold-Like Substances.

(a) If the Subrecipient's energy auditor discovers the presence of mold-like substances that the Weatherization Subcontractor cannot adequately address, then the Dwelling Unit shall be referred to the Texas Department of State Health Services or its successor agency.

(b) The Subrecipient shall provide the applicant written notification that their home cannot, at this time, be weatherized and why. They should also be informed of which agency they should contact to report the presence of mold-like substances. The applicant should be advised that when the issue is resolved they may reapply for Weatherization. Should the applicant reapply for Weatherization, the Subrecipient must obtain written documentation of resolution of the issue from the applicant prior to proceeding with any Weatherization work.

(c) If the energy auditor determines that the mold-like substance is treatable and covers less than the 25 contiguous square feet limit allowed to be addressed by the Texas Department of State Health Services' guidelines, the Subrecipient shall notify the applicant of the existence of the mold-like substance and potential health hazards, the proposed action to eliminate the mold-like substance, and that no guarantee is offered that the mold-like substance will be eliminated and that the mold-like substance may return. The auditor must obtain written approval from the applicant to proceed with the Weatherization work and maintain the documentation in the customer file.

(d) Subrecipients shall be responsible for providing mold training to their employees and Weatherization Subcontractors.

§6.413. Lead Safe Practices.

Subrecipients are required to document that its Weatherization staff as well as Subcontractors follow the Environmental Protection Agency's Renovation, Repair and Painting Program (RRP) Final Rule, 40 CFR Part 745 and HUD's Lead Based Housing Rule, 24 CFR Part 35, as applicable.

§6.414. Eligibility for Multifamily Dwelling Units.

(a) A Subrecipient may weatherize a building containing Rental Units if not less than 66% (50% for duplexes and four-unit buildings) of the Dwelling Units in the building are occupied by Low Income Households, or will become occupied by Low-income Households within 180 days under a Federal, State, or local government program for rehabilitating the building or making similar improvements to the building.

(b) In order to Weatherize large multifamily buildings containing twenty-five or more Dwelling Units or those with shared central heating (*i.e.,* boilers) and/or shared cooling plants (*i.e.,* cooling towers that use water as the coolant) regardless of the number of Dwelling Units, Subrecipients shall submit in writing a request for approval from the Department. When necessary, the Department will seek approval from DOE. Approvals from DOE must be received prior to the installation of any Weatherization measures in this type of structure.

(c) In order to weatherize Shelters, Subrecipients shall submit a written request for approval from the Department. Written approval from the Department must be received prior to the installation of any Weatherization measures.

(d) If roof repair is to be considered as part of repair cost under the Weatherization process, the expenses must be shared equally by all eligible Dwelling Units weatherized under the same roof. If multiple storied buildings are weatherized, eligible ground floor units must be allocated a portion of the roof cost as well as the eligible top floor units. All Weatherization measures installed in multifamily units must meet the standards set in 10 CFR §440.18(d)(9) and (15) and Appendix A-Standards for Weatherization Materials.

(e) WAP Subrecipients shall establish a multifamily master file for each multifamily project in addition to the individual unit requirements found in the record keeping requirement section of the contract. The multifamily master file must include, at a minimum, the forms listed in paragraphs (1) - (6) of this subsection: (Forms available on the Departments website.)

(1) Multifamily Pre-Project Checklist Form;

(2) Multifamily Post-Project Checklist Form;

(3) Permission to Perform an Assessment for Multifamily Project Form;

(4) Landlord Agreement Form;

(5) Landlord Financial Participation Form; and

(6) Significant Data Required in all Multifamily Projects.

(f) For DOE WAP, if a public housing, assisted multi-family or Low Income Housing Tax Credit (LIHTC) building is identified by the HUD and included on a list published by DOE, that building meets certain income eligibility and may meet other WAP requirements without the need for further evaluation or verification. A public housing, assisted housing, and LIHTC building that does not appear on the list using HUD records may still qualify for the WAP. Income eligibility can be made on an individual basis by the Subrecipient based on information supplied by property owners and the Households in accordance with subsection (a) of this section.

(g) For any Dwelling Unit that is weatherized using funding provided under DOE WAP, all Weatherization measures installed must be entered into an approved Energy Audit. Weatherization measures installed shall begin with repair items, then continue with those measures having the greatest SIR and proceed in descending order to the measures with the smallest SIR or until the maximum allowable per unit expenditures are achieved, and finishing with Health and Safety measures.

§6.415. Health and Safety and Unit Deferral.

(a) Health and Safety expenditures with DOE WAP may not exceed 20% of total expenditures for Materials, Labor, Program Support, and Health and Safety at the end of the contract term. Health and Safety expenditures with LIHEAP WAP may not exceed 30% of total expenditures for Materials, Labor, Program Support, and Health and Safety at the end of the Contract term.

(b) Subrecipients shall provide Weatherization services with the primary goal of energy efficiency. The Department considers establishing a healthy and safe home environment to be important to ensuring that energy savings result from Weatherization work.

(c) Subrecipients must test for high carbon monoxide ("CO") levels and bring CO levels to acceptable levels before Weatherization work can start. The Department has defined maximum acceptable CO readings as follows:

(1) if flame impingement exists in cook stove burners, must do clean and tune;

(2) 200 parts per million for vented combustion appliance;

(3) 200 parts per million for cook stove ovens;

(4) Primary Unvented Space Heater must be removed;

(5) if ambient CO level is 35 ppm, must shut off appliance, open a window and notify customer; and

(6) if ambient CO level is 70 ppm, open a window, notify customer and request customer exit the unit, must cease work, turn off gas and notify gas provider.

(d) A Dwelling Unit shall not be weatherized when there is a potentially harmful situation that may adversely affect the occupants or the Subrecipient's Weatherization crew and staff, or when a Dwelling Unit is found to have structural concerns that render the Dwelling Unit unable to benefit from Weatherization. The Subrecipient must declare their intent to defer Weatherization on an eligible unit on the assessment form. The assessment form should include the customer's name and address, dates of the assessment, and the date on which the customer was informed of the issue in writing. The written notice to the customer must include a clear description of the problem, conditions under which Weatherization could continue, the responsibility of all parties involved, and any rights or options the customer has. A copy of the notice must be given to the customer, and a signed copy placed in the customer application file. Only after the issue has been corrected to the satisfaction of the Subrecipient shall Weatherization work begin.

(e) If structural concerns or health and safety issues identified (which would be exacerbated by any Weatherization work performed) on an individual unit cannot be abated within program rules or within the allowable WAP limits, the Dwelling Unit exceeds the scope of this program.

§6.416. Whole House Assessment.

(a) Subrecipients must conduct a whole house assessment on all eligible units. Whole house assessments must be used to determine whether the Priority List or an Energy Audit is most appropriate for the unit. Whole house assessments must include but are not limited to the items described in paragraphs (1) - (15) of this subsection:

(1) Wall--Condition, type, orientation, and existing R-values;

(2) Windows--Condition, type material, glazing type, leakiness, and solar screens;

(3) Doors--Condition, type;

(4) Attic--Type, condition, existing R-values, and ventilation;

(5) Foundation--Condition, existing R-values, and floor height above ground level;

(6) Heating System--For all systems: unit type, fuel source (primary or secondary), thermostat, and output; for combustion systems only: vented or unvented efficiency, CO-levels, complete fuel gas analysis, gas leaks, and combustion venting;

(7) Cooling System--Unit type, condition, area cooled, size in BTU rating, Seasonal Energy Efficiency Rating (SEER) or Energy Efficiency Rating ("EER"), manufacture date, and thermostat;

(8) Duct System--Condition, existing insulation level, evaluation of registers, duct infiltration, return air register size, and condition of plenum joints;

(9) Water Heater--For all water heaters: condition, fuel type, energy factor, recovery efficiency, input and output ratings, size, existing insulation levels, existing pipe insulation; for combustion water heaters only: carbon monoxide levels, draft test, complete fuel gas analysis;

(10) Refrigerator--Condition, manufacturer, manufacture date and make, model, and consumption reading (minutes and meter reading); customer refusal must be documented;

(11) Lighting System--Quantity, watts, and estimated hours used per day;

(12) Water Savers--Number of showerheads, estimated gallons per minute and estimated minutes used per day;

(13) Health and Safety--For all units: smoke detectors, wiring, minimum air exchange, moisture problems, lead paint present, asbestos siding present, condition of chimney, plumbing problems, mold; for units with combustion appliances: unvented space heaters, carbon monoxide levels on all combustion appliances, carbon monoxide detectors;

(14) Air Infiltration--To be determined from Blower Door testing; areas requiring air sealing will be noted;

(15) Repairs--Measures needed to preserve or protect installed Weatherization measures may include lumber, shingles, flashing, siding, masonry supplies, minor window repair, gutters, downspouts, paint, stains, sealants, and underpinning.

(b) If using the Energy Audit, all allowable Weatherization measures needed must be entered. Measures will be performed in order of highest SIR to lowest depending on funds available. If using the Priority List, included Weatherization measures must be addressed in the order they appear on the list, or an explanation for excluding a measure must be provided.

§6.417. Blower Door Standards.

Subrecipients are required to use the blower door/duct blower data form adopted by the Department and available on the Department's website (http://www.tdhca.state.tx.us/community-affairs/wap/index.htm).

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 August 26, 2016.

TRD-201604552
Timothy K. Irvine
Executive Director
Texas Department of Housing and Community Affairs
Earliest possible date of adoption: October 9, 2016
For further information, please call: (512) 475-1762

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CHAPTER 7. HOMELESSNESS PROGRAMS

The Texas Department of Housing and Community Affairs (the "Department") proposes new 10 TAC Chapter 7, Homelessness Programs. The purpose of the proposed new Chapter 7 is to effectuate a reorganization of the rules that govern the homelessness programs so that the rules addressing homelessness that currently are provided for in Chapter 5 relating to the Community Affairs Programs will now be addressed in a new and separately proposed chapter.

FISCAL NOTE. Timothy K. Irvine, Executive Director, has determined that, for each year of the first five years the proposed new Chapter will be in effect, enforcing or administering the proposed new Chapter does not have any foreseeable additional costs or revenues for the state or local governments.

PUBLIC BENEFIT/COST NOTE. Mr. Irvine also has determined that, for each year of the first five years the new Chapter is in effect, the public benefit anticipated as a result of the new Chapter will be to provide clearer guidance to Subrecipients through more organized and direct rules. There are no anticipated additional new economic costs to individuals required to comply with the new Chapter as a result of this action.

ADVERSE IMPACT ON SMALL OR MICRO-BUSINESSES. The Department has determined that there will be no economic effect on small or micro-businesses.

REQUEST FOR PUBLIC COMMENT. The public comment period will be held September 9, 2016, to October 10, 2016, to receive input on the proposed Chapter. Written comments may be submitted to the Texas Department of Housing and Community Affairs, Attention: Brooke Boston, CA Rule Comments, P.O. Box 13941, Austin, Texas 78711-3941, or by email to the following address: *brooke.boston@tdhca.state.tx.us*. ALL COMMENTS MUST BE RECEIVED BY 5:00 P.M. AUSTIN LOCAL TIME ON OCTOBER 10, 2016. A copy of the proposed new chapter will be available on the Department's website at http://www.tdhca.state.tx.us/public-comment.htm under Items Open for Public Comment during the public comment period.

SUBCHAPTER A. GENERAL PROVISIONS

10 TAC §§7.1 - 7.14

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

The proposed new Chapter affects no other code, article, or statute.

§7.1. Purpose and Goals.

(a) The rules established herein for Chapter 7 "Homelessness Programs" Subchapter A "General Provisions" applies to all homelessness programs, unless otherwise noted. Additional program specific requirements are contained within each program subchapter.

(b) The homelessness programs administered by the Texas Department of Housing and Community Affairs ("the Department") support the Department's statutorily assigned mission to address the problem of homelessness among Texans.

(c) The Department accomplishes this mission by acting as a conduit for state and federal grant funds for homelessness programs. Ensuring program compliance with the state and federal laws that govern these programs is another important part of the Department's mission. Oversight and program mandates ensure state and federal resources are expended in an efficient and effective manner.

§7.2. Definitions.

(a) To ensure a clear understanding of the terminology used in the context of the Department's Homelessness programs, a list of terms and definitions has been compiled as a reference.

(b) The words and terms in this Chapter shall have the meanings described in this subsection unless the context clearly indicates otherwise.

(1) Affiliate--An entity related to an Applicant that controls by contract or by operation of law the Applicant or has the power to control the Applicant or a third entity that controls, or has the power to control both the Applicant and the entity. Examples include but are not limited to entities submitting under a common application, or instrumentalities of a unit of government. This term also includes any entity that is required to be reported as a component entity under Generally Accepted Accounting Standards, is required to be part of the same Single Audit as the Applicant, is reported on the same IRS Form 990, or is using the same federally approved indirect cost rate.

(2) At-risk of homelessness--As defined by 24 CFR §576.2.

(3) Break in Service--Situation in which a program participant had received homeless services or housing assistance, currently receives no homelessness services or housing assistance, and is in need of homelessness services or housing assistance.

(4) Child--Household member not exceeding eighteen (18) years of age.

(5) Code of Federal Regulations ("CFR")--The codification of the general and permanent rules and regulations of the federal government as adopted and published in the Federal Register.

(6) Concern--A policy, practice or procedure that has not yet resulted in a Finding but if not changed will or may result in Findings, Deficiencies, and/or disallowed costs.

(7) Continuum of Care ("CoC")--The Continuum of Care Program is a HUD funded program designed to assist sheltered and unsheltered homeless people by providing the housing and/or services needed to help individuals move into transitional and permanent housing, with the goal of long-term stability. HUD requires representatives of relevant organizations to form a CoC to serve a specific geographic area; the Department and the CoCs are required by HUD to coordinate relating to the ESG Program as set forth in 24 CFR §576.400. This does not include any funds given from the State to a specific CoC.

(8) Contract--The executed written agreement between the Department and a Subrecipient performing a program activity that describes performance requirements and responsibilities assigned by the document; for which the first day of the Contract term is the point at which programs funds may be considered by a Subrecipient for Expenditure, unless otherwise directed in writing by the Department.

(9) Contracted Funds--The gross amount of funds obligated by the Department to a Subrecipient as reflected in a Contract.

(10) Cost Reimbursement--A Contract sanction whereby reimbursement of costs incurred by the Subrecipient is made only after the Department has reviewed and approved backup documentation provided by the Subrecipient to support such costs.

(11) Declaration of Income Statement ("DIS")--A Department-approved form used only when it is not possible for an applicant to obtain third party or firsthand verification of income.

(12) Department of Housing and Urban Development ("HUD")--Federal department that provides funding for ESG.

(13) Elderly Person--

(A) For HHSP, a person who is 60 years of age or older; and

(B) For ESG, a person who is 62 years of age or older.

(14) Emergency Solutions Grants ("ESG")--A HUD-funded program which provides funds for services necessary to help persons that are at risk of homelessness or homeless quickly regain stability in permanent housing.

(15) Expenditure--An amount of money spent.

(16) Finding--A Subrecipient's material failure to comply with rules, regulations, the terms of the Contract or to provide services under each program to meet appropriate standards, goals, and other requirements established by the Department or funding source (including performance objectives). A Finding impacts the organization's ability to achieve the goals of the program and jeopardizes continued operations of the Subrecipient. Findings include the identification of an action or failure to act that results in disallowed costs.

(17) Homeless or Homeless Individual--An individual as defined by 42 U.S.C. §§11371 - 11378 and 24 CFR §576.2. For HHSP, a homeless individual may have right of occupancy because of a signed lease, but still qualify as homeless if his or her primary nighttime residence is an emergency shelter or place not meant for human habitation.

(18) Homeless Housing and Services Program ("HHSP")--The state-funded program established under §2306.2585 Tex. Gov't Code.

(19) Homeless Management Information System ("HMIS")--Information system designated by the CoC to comply with the HUD's data collection, management, and reporting standards and used to collect client-level data and data on the provision of housing and services to homeless individuals and families and persons at-risk of homelessness.

(20) HMIS-Comparable Database--Database established and operated by a victim service provider or legal service provider that is comparable to HMIS and collects client-level data over time (i.e., longitudinal data) and generates unduplicated aggregate reports based on the data.

(21) Household--Any individual or group of individuals who are living together.

(22) Low Income--Income in relation to Household size and that governs income eligibility for a program:

(A) For ESG, below 30% of the Median Family Income ("MFI") as defined by HUD's 30% Income Limits for All Areas for persons receiving prevention assistance or as amended by HUD; and

(B) For all other homelessness programs, below 30% of the MFI as defined by HUD for the ESG Program, although persons may be up to, but not exceed, 50% of ESG income limits, at recertification for rapid re-housing or homelessness prevention. Households in which any member is a recipient of SSI or a Means Tested Veterans Program are categorically income eligible.

(23) Land Use Restriction Agreement ("LURA")--An agreement, regardless of its title, between the Department and the shelter property owner which is a binding covenant upon the shelter property owner and successors in interest, that, when recorded, encumbers the property with respect to the requirements of the programs for which it receives funds.

(24) Means-Tested Veterans Program--A program whereby applicants receive payments under Sections 415, 521, 541, or 542 of title 38, United States, or under section 306 of the Veterans' and Survivors' Pension Improvement Act of 1978.

(25) Observation--A notable policy, practice or procedure observed though the course of monitoring

(26) Occupancy limits--three adults per bedroom, as defined by Tex. Prop Code §92.010. Exceptions to the occupancy limits are requirements by a state or federal fair housing law to allow a higher occupancy rate; or if an adult is seeking temporary sanctuary from family violence, as defined by Section 71.004, Family Code, for a period that does not exceed one month.

(27) Office of Management and Budget ("OMB")--Office within the Executive Office of the President of the United States that oversees the performance of federal agencies and administers the federal budget.

(28) OMB Circulars--Instructions and information issued by OMB to Federal agencies that set forth principles and standards for determining costs for federal awards and establish consistency in the management of grants for federal funds. Uniform cost principles and administrative requirements for local governments and for nonprofit organizations, as well as audit standards for governmental organizations and other organizations expending federal funds are set forth in 2 CFR Part 200, unless different provisions are required by statute or approved by OMB.

(29) Outreach--The method that attempts to identify clients who are in need of services, alerts these clients to service provisions and benefits, and helps them use the services that are available. Outreach is utilized to locate, contact and engage potential clients.

(30) Persons with Disabilities--Any individual who is:

(A) a handicapped individual as defined in 29 U.S.C. §701 or has a disability under 42 U.S.C. §12131-12134;

(B) disabled as defined in 42 U.S.C. 1382(a)(3)(A), 42 U.S.C. §423, or in 42 U.S.C. 15001; or

(C) receiving benefits under 38 U.S.C. Chapter 11 or 15.

(31) Private Nonprofit Organization--An organization described in §501(c) of the Internal Revenue Code (the "Code") of 1986 and which is exempt from taxation under subtitle A of the Code, has an accounting system and a voluntary board, and practices nondiscrimination in the provision of assistance. This does not include a governmental organization such as a public housing authority or a housing finance agency.

(32) Program Year--Contracts with funds from a specific federal allocation (ESG) or state biennium (HHSP).

(33) Public Organization--A unit of government, as established by the Legislature of the State of Texas. Includes, but may not be limited to, cities, counties, and councils of governments. For ESG, this does not include a governmental organization such as a public housing authority or a housing finance agency.

(34) Single Audit--The audit required by OMB, 2 CFR Part 200, Subpart F, or Tex. Gov't Code, Chapter 738, Uniform Grant and Contract Management, as reflected in an audit report.

(35) State--The State of Texas or the Department, as indicated by context.

(36) Subcontractor--A person or an organization with whom the Subrecipient contracts with to provide services.

(37) Subgrant--An award of financial assistance in the form of money made under a grant by a Subrecipient to an eligible Subgrantee. The term includes financial assistance when provided by contractual legal agreement, but does not include procurement purchases.

(38) Subgrantee--The legal entity to which a Subgrant is awarded and which is accountable to the Subrecipient for the use of the funds provided.

(39) Subrecipient--An organization that receives federal or states funds passed through the Department to operate the ESG and/or HHSP programs.

(40) Supplemental Security Income ("SSI")--A means tested program run by the Social Security Administration.

(41) Texas Administrative Code ("TAC")--A compilation of all state agency rules in Texas.

(42) Uniform Grant Management Standards ("UGMS")--The standardized set of financial management procedures and definitions established by Tex. Gov't Code Chapter 783 to promote the efficient use of public funds, by requiring consistency among grantor agencies in their dealings with grantees, and by ensuring accountability for the expenditure of public funds. State agencies are required to adhere to these standards when administering grants and other financial assistance agreements with cities, counties and other political subdivisions of the state. This includes all Public Organizations, Housing Authorities, and Housing Finance Agencies. In addition, Tex. Gov't Code Chapter 2105, subjects subrecipients of federal block grants (as defined therein) to the Uniform Grant and Contract Management Standards.

(43) Unit of General Local Government--A unit of government which has, among other responsibilities, the authority to assess and collect local taxes and to provide general governmental services.

(44) United States Code ("U.S.C.")--A consolidation and codification by subject matter of the general and permanent laws of the United States.

(45) United States Department of Veteran Affairs ("VA")--Federal department that serves America's Veterans and their families with medical care, benefits, social support, and lasting memorials promoting the health, welfare, and dignity of all Veterans in recognition of their service.

§7.3. Land Use Restriction Requirement.

(a) A Subrecipient that rehabilitates or convert a building(s) for use as a shelter will be required to enter into a land use restriction agreement from three to ten years depending on the type of renovation or conversion and value of the building. The minimum use periods established in 24 CFR §576.102(c) are applicable to both the ESG emergency shelter component and to HHSP.

(b) For HHSP only, §2306.185 Tex. Gov't Code requires certain multifamily developments to have a thirty-year land use restriction agreement. A Subrecipient that intends to expend funds that require the use of a LURA, must let the Department know at least 60 days prior to the end of the Contract.

§7.4. Subrecipient Contract.

(a) Subject to prior Board approval, the Department and a Subrecipient shall enter into and execute a Contract for the disbursement of program funds. The Department, acting by and through its Executive Director or his/her designee, may authorize, execute, and deliver authorized modifications and/or amendments to the Contract, as allowed by state and federal laws and rules.

(b) The governing body of the Subrecipient must pass a resolution authorizing its Executive Director or his/her designee to have signature authority to enter into Contracts, sign amendments, and review and approve reports. All Contract actions including extensions, amendments or revisions must be ratified by the governing body at the next regularly scheduled meeting. Minutes relating to this resolution must be on file at the Subrecipient level.

(c) Within 45 days following the conclusion of a Contract issued by the Department, the Subrecipient shall provide a final expenditure and final performance report regarding funds expended under the terms of the Contract.

(d) A performance statement and budget are attachments to the Contract between the Subrecipient and the Department. Execution of the Contract enables the Subrecipient to access funds through the Department's Community Affairs contract system.

(e) Amendments and Extensions to Contracts.

(1) Amendments and extension requests must be submitted in writing by the Subrecipient and except for amendments that only move funds within budget categories, amendments will not be granted if any of the following circumstances exist:

(A) if the award for the Contract was competitively awarded and the amendment would materially change the scope of the Contract performance;

(B) if the funds associated with the Contract will reach their federal expiration date within 45 days of the request;

(C) if the Subrecipient is delinquent in the submission of their Single Audit or their Single Audit Certification form required by §1.403 in Chapter 1 of this Part;

(D) if the Subrecipient owes the Department disallowed amounts in excess of $1,000 and a Department-approved repayment plan is not in place or has been violated;

(E) for amendments adding funds (not applicable to amendments for extending time), if the Department has cited the Subrecipient for violations within §7.14 of this Subchapter (related to Compliance Monitoring) and the corrective action period has expired without correction of the issue or a satisfactory plan for correction of the issue;

(F) the Contract has expired; or

(G) a member of the Subrecipient's board has been debarred and has not been removed.

(2) Within 30 calendar days of a Subrecipient's request for a Contract amendment or extension request the request will be processed or denied in writing. If denied, the applicable reason from this subsection (e) will be cited. The Subrecipient may appeal the decision to the Executive Director consistent with Chapter 1, §1.7, of this Title.

(f) For ESG:

(1) The Department reserves the right to deobligate funds and redistribute funds for failure to abide by terms of the Contract.

(2) The Department reserves the right to negotiate the final grant amounts and local match with Subrecipients.

§7.5. Performance and Expenditure Benchmarks.

(a) The Department may incorporate performance and expenditure benchmarks into each Contract.

(b) Performance and expenditure benchmarks will be based on budgets, timelines, and performance measures approved by the Department in writing before the start of the Contract period.

(c) Benchmarks may be adjusted for good cause by the Department. If Subrecipient does not concur with adjustments to benchmarks, they may Appeal this decision consistent with §1.7 of this Title, relating to Staff Appeals.

(d) Department staff will periodically review Subrecipients' progress in meeting benchmarks. If a Subrecipient is out of compliance with performance or expenditure benchmarks, the Department may deobligate all or a portion of any remaining funds under the Contract, in accordance with the notice provisions in the Contract.

§7.6. Subrecipient Reporting.

(a) Subrecipients must submit a monthly performance and expenditure report through the Community Affairs Contract System not later than the fifteenth (15th) day of each month following the reported month of the contract period. Reports are required even if a fund reimbursement or advance is not being requested.

(b) For monthly performance reports, the data to be reported will be indicated in the Contract. Clients that are assisted continuously as one Contract ends and a new Contract begins in the same program will count as new clients for the new Contract. However, the start of a new Contract does not require new eligibility determination or documentation for clients, except as required by federal rule for ESG.

(c) Subrecipient shall reconcile their Expenditures with their performance at least monthly before seeking a request for funds for the following month. If the Subrecipient is unable to reconcile on a month-to-month basis, the Subrecipient must provide at the request of the Department, a written explanation for the variance and take appropriate measures to reconcile the subsequent month. It is the responsibility of a Subrecipient to ensure that it has documented the compliant use of all funds provided prior to receipt of additional funds, or if this cannot be done to address the repayment of such funds.

(d) Within 45 days from the end of the Contract, the Subrecipient must provide a final expenditure and final performance report regarding all funds expended under the terms of the contract.

(e) Failure of a Subrecipient to provide a final expenditure and final performance report of funds expended under the terms of the contract may be sufficient reason for the Department to deny any future Contract to the Subrecipient until resolved to the satisfaction of the Department.

§7.7. Subrecipient Data Collection.

Subrecipients must ensure that data on all persons served and all activities assisted under ESG or HHSP is entered into the applicable HMIS or HMIS comparable database for domestic violence or legal service providers in order to integrate data from all homeless assistance and homelessness prevention projects in a COC. The data to be collected will be indicated in the Contract.

§7.8. Client Eligibility.

(a) For ESG, clients must satisfy the eligibility requirements as defined in 24 CFR Parts 91 and 576, by meeting the appropriate definition of homelessness, at-risk of homelessness in 24 CFR 576.2, including applicable income requirements. Subrecipients must document eligibility of the clients.

(b) For HHSP, clients must satisfy the eligibility requirements by meeting the appropriate definition of homelessness or at-risk of homelessness in this chapter including applicable income requirements. Subrecipients must document eligibility of the clients; however, in accordance with subsection (a) of §7.9 of this Subchapter, documentation of income for certain individuals is not required to be collected.

(c) If a client has a break in service, the Subrecipient must document eligibility before providing services. For HHSP, if the client is currently receiving homeless services or housing assistance through ESG, the Subrecipient would not need to document further their eligibility for HHSP.

(d) If Subrecipients provide medium-term rental assistance for a period greater than six months, prior to clients being assisted with the seventh month of rental assistance, the client must have applied for rental assistance benefits, such as Section 8 Housing Choice Voucher, HUD Section 811 Supportive Housing for Persons with Disabilities, HUD Section 811 Project Rental Assistance Demonstration, or HUD Section 202 Supportive Housing for the Elderly Program and been placed on one or more waiting lists, if waiting lists are open. If waiting lists are closed, the Subrecipient will check every six (6) months for opening of the lists for programs in the city (HHSP)or county (ESG).

§7.9. Income Determination.

(a) For ESG and HHSP, Subrecipients must use the income determination method outlined in 24 CFR §5.609, must use the list of income included in HUD Handbook 4350, and must exclude from income those items listed in HUD's Updated List of Federally Mandated Exclusions from Income, as may be amended from time to time. For HHSP, Households who were income eligible under a prior definition, retain that eligibility until recertification. For HHSP, there is no procedural requirement to verify income for persons living on the street (or other places not fit for human habitation), living in emergency shelter, entering transitional housing (housing that is limited to 24 months or less of occupancy), or starting rapid re-housing.

(b) If a federal or state requirement provides an updated definition of income or method for calculating income, the Department will provide written notice to Subrecipients about the implementation date for the new requirements.

(c) If proof of income is unobtainable, the applicant must complete and sign a DIS.

(d) For ESG recertification must be done in accordance with 24 CFR §576.401. For HHSP, recertification must be done for rapid re-housing and homelessness prevention the lesser of every twelve months or in accordance with the entity's written policies.

§7.10. Subrecipient Contact Information.

(a) In accordance with §1.22 of this Title (relating to Providing Contact Information to the Department), Subrecipients will notify the Department and provide contact information for key management staff (Executive Director, Chief Financial Officer, Program Director/Manager/Coordinator or any other person, regardless of title, generally performing such duties) new hires within 30 days of such occurrence.

(b) Subrecipients will notify the Department and provide contact information for subgrants or subcontracts, where clients must apply for services or for HMIS/HMIS-comparable databases, within 30 days of, subgrants or Subcontracts. Contact information for the organizations with which the Subrecipients partner, subgrant or subcontract must be provided to the Department, including: organization name, phone number, e-mail address, and service area for any program services provided.

(c) The Department will rely solely on the contact information supplied by the Subrecipient in the Department's web-based Community Affairs System. It is the Subrecipient's sole responsibility to ensure such information is current, accurate, and complete. Correspondence sent to the email or physical address shown in CA Contract System will be deemed delivered to the Subrecipient. Correspondence from the Department may be directly uploaded to the Subrecipient's CA contract

account using a secure electronic document attachment system. Once uploaded, notification of the attachment will be sent electronically to the email address listed in the CA contract system. The Department is not required to send a paper copy and if it does so it does as a voluntary and non-precedential courtesy only.

§7.11. Records Retention.

Record retention for rehabilitation/conversion/construction of emergency shelters or multifamily housing developments must be retained until the greater of ten (10) years after the date that the funds are first obligated for rehabilitation/conversion/construction, or the expiration of the LURA.

§7.12. Contract Closeout.

(a) When a Contract is terminated, or voluntarily relinquished, the procedures described in this subsection will be implemented. The terminology of a "terminated" Subrecipient below is intended to include the Subrecipient that is voluntarily terminating their Contract, but does not include Contracts naturally reaching the end of their Contract Term.

(1) The Department will issue a termination letter to the Subrecipient no less than 30 calendar days prior to terminating the Contract. The Department may determine to take one of the following actions: suspend funds immediately or allow a temporary transfer to another Subrecipient; or provide instructions to the Subrecipient to prepare a proposed budget and written plan of action that supports the closeout of the Contract. The plan must identify the name and current job titles of staff that will perform the closeout and an estimated dollar amount to be incurred. The plan must identify the CPA or firm which will perform the Single Audit. The Department will issue an official termination date to allow all parties to calculate deadlines which are based on such date.

(2) No later than 30 calendar days after the Contract is terminated, the Subrecipient will take a physical inventory of client files, including case management files.

(3) The terminated Subrecipient will have 30 calendar days from the date of the physical inventory to make available to the Department all current client files. Current and active case management files also must be inventoried.

(4) Within 60 calendar days following the Subrecipient due date for preparing and boxing client files, Department staff will retrieve the client files.

(5) The terminated Subrecipient will prepare and submit no later than 30 calendar days from the date the Department retrieves the client files, a final report containing a full accounting of all funds expended under the Contract.

(7) A final monthly expenditure report and a final monthly performance report for all remaining expenditures incurred during the closeout period must be received by the Department no later than 45 calendar days from the date the Department determines that the closeout of the program and the period of transition are complete.

(8) The Subrecipient will submit to the Department no later than 45 calendar days after the termination of the Contract, an inventory of the non-expendable personal property acquired in whole or in part with funds received under the Contract.

(9) The Department may require transfer of Equipment title to the Department or to any other entity receiving funds under the program in question. The Department will make arrangements to remove Equipment covered by this paragraph within 90 calendar days following termination of the Contract.

(10) A current year Single Audit must be performed for all entities that have exceeded the federal expenditure threshold under 2 CFR Part 200, Subpart F or the State expenditure threshold under UGMS, as applicable. The Department will allow a proportionate share of program funds to pay for accrued audit costs, when an audit is required, for a Single Audit that covers the date up to the closeout of the contract. To be reimbursed for a Single Audit, the terminated Subrecipient must have a binding contract with a CPA firm on or before the termination date of the Contract. The actual costs of the Single Audit and accrued audit costs including support documentation must be submitted to the Department no later than 45 calendar days from the date the Department determines the closeout is complete.

(11) Subrecipients shall submit within 45 calendar days after the date of the closeout process all financial, performance, and other applicable reports to the Department. The Department may approve extensions when requested by the Subrecipient. However, unless the Department authorizes an extension, the Subrecipient must abide by the 45 day requirement of submitting all referenced reports and documentation to the Department.

§7.13. Inclusive Marketing.

(a) The purpose of this section is to highlight certain policies and/or procedures that are required to have written documentation. Other items that are required for written standards are included in the federal or state rules.

(b) Participant selection criteria:

(1) Selection criteria will be applied in a manner consistent with all applicable laws, including the Texas and Federal Fair Housing Acts, program guidelines, and the Department's rules.

(2) If the local COC has adopted priority for certain Homeless subpopulations or a specific funding source has a statutory or regulatory preference, then those subpopulations may be given priority by the Subrecipient. Such priority must be listed in the participant selection criteria.

(3) Notifications on denial, non-renewal, or termination of Assistance must:

(A) State that a Person with a Disability may request a reasonable accommodation in relation to such notice.

(B) Include any appeal rights the participant may have in regards to such notice.

(C) Inform program participants in any denial, non-renewal or termination notice, include information on rights they may have under VAWA (for ESG only, in accordance with the Violence Against Women Reauthorization Act of 2013 ("VAWA") protections). Subrecipients may not deny admission on the basis that the applicant has been a victim of domestic violence, dating violence, sexual assault, or stalking.

(c) Other policies and procedures:

(1) Affirmative Fair Housing Marketing Plan. Subrecipients providing project-based rental assistance must have an Affirmative Fair Housing Marketing Plan created in accordance with HUD requirements to direct specific marketing and outreach to potential tenants who are considered "least likely" to know about or apply for housing based on an evaluation of market area data. Subrecipients must comply with HUD's Affirmative Fair Housing Marketing and the Age Discrimination Act of 1975.

(2) Language Access Plan. Subrecipients that interact with program participants or clients must create a Language Access Plan for Limited English Proficiency ("LEP") Requirements. Consistent with

Title VI and Executive Order 13166, Subrecipients are also required to take reasonable steps to ensure meaningful access to programs and activities for LEP persons.

(3) Affirmative Outreach. If it is unlikely that outreach will reach persons of any particular race, color, religion, sex, age, national origin, familial status, or disability who may qualify for those facilities and services, the Subrecipient must establish policies and procedures that target outreach to those persons. The Subrecipients must take appropriate steps to ensure effective communication with persons with disabilities including, but not limited to, adopting procedures that will make available to interested persons information concerning the location of assistance, services, and facilities that are accessible to persons with disabilities. Subrecipients must make known that use of the facilities, assistance, and services are available to all on a nondiscriminatory basis.

(4) Reasonable Accommodation. The Subrecipient must comply with state and federal fair housing and antidiscrimination laws. Subrecipients' policies and procedures must address reasonable accommodation, including, but not limited to, consideration of reasonable accommodations requested to complete the application process. See Chapter 1 Subchapter B for more information.

§7.14. Compliance Monitoring.

(a) Purpose and Overview

(1) This section provides the procedures that will be followed for monitoring for compliance with the programs in 10 TAC Chapter 7.

(2) Any entity administering any or all of the programs detailed in 10 TAC Chapter 7 is a Subrecipient. A Subrecipient may also administer other programs, including programs administered by other state or federal agencies and privately funded programs. If the Subrecipient has Contracts for other programs through the Department, including but not limited to the HOME Partnerships Program, the Neighborhood Stabilization Program, or the Texas Housing Trust Fund, the Department may, but is not required to and does not commit to, coordinate monitoring of those programs with monitoring of the programs under this Chapter.

(3) Any entity administering any or all of the programs provided for in subsection (a) of this section as part of a Memorandum of Understanding ("MOU"), contract, or other legal agreement with a Subrecipient is a Subgrantee.

(b) Frequency of Reviews, Notification and Information Collection.

(1) In general, the Subrecipient or Subgrantee will be scheduled for monitoring based on state or federal monitoring requirements and/or a risk assessment. Factors to be included in the risk assessment include but are not limited to: the number of Contracts administered by the Subrecipient or Subgrantee, the amount of funds awarded and expended, the length of time since the last monitoring, findings identified during previous monitoring, issues identified through the submission or lack of submission of a Single Audit, complaints received by the Department, and reports of fraud, waste and/or abuse. The risk assessment will also be used to determine which Subrecipients or Subgrantees will have an onsite review and which may have a desk review.

(2) The Department will provide the Subrecipient or Subgrantee with written notice of any upcoming onsite or desk monitoring review, and such notice will be given to the Subrecipient and Subgrantee by email to the Subrecipient's and Subgrantee's chief executive officer at the email address most recently provided to the Department by the Subrecipient or Subgrantee. In general, a 30 day notice will be provided. However, if a credible complaint of fraud or other egregious noncompliance is received the Department reserves the right to conduct unannounced monitoring visits. It is the responsibility of the Subrecipients to provide to the Department the current contact information for the organization and the Board in accordance with §7.10 of this chapter (relating to Subrecipient Contact Information) and §1.22 of this title (relating to Providing Contact Information to the Department).

(3) Upon request, Subrecipients or Subgrantees must make available to the Department all books and records that the Department determines are reasonably relevant to the scope of the Department's review. Typically, these records may include (but are not limited to):

(A) Minutes of the governing board and any committees thereof, together with all supporting materials;

(B) Copies of all internal operating procedures or other documents governing the Subrecipient's operations;

(C) The Subrecipient's Board approved operating budget and reports on execution of that budget;

(D) The Subrecipient's strategic plan or comparable document if applicable and any reports on the achievement of that plan;

(E) Correspondence to or from any independent auditor;

(F) Contracts with any third parties for goods or services and files documenting compliance with any applicable procurement and property disposition requirements;

(G) All general ledgers and other records of financial operations (including copies of checks and other supporting documents);

(H) Applicable client files with all required documentation;

(I) Applicable human resources records;

(J) Monitoring reports from other funding entities;

(K) Client files regarding complaints, appeals and termination of services; and

(L) Documentation to substantiate compliance with any other applicable state or federal requirements including, but not limited to, the Davis-Bacon Act, HUD requirements for environmental clearance, Lead Based Paint, the Personal Responsibility and Work Opportunity Act, HUD LEP requirements, and requirements imposed by Section 3 of the Housing and Urban Development Act of 1968.

(c) Post Monitoring Procedures.

(1) In general, within 30 calendar days of the last day of the monitoring visit, a written monitoring report will be prepared for the Subrecipient describing the monitoring assessment and any corrective actions, if applicable. The monitoring report will be emailed and sent through the U.S. Postal Service to the Board Chair and the Subrecipient's and Subgrantee Executive Director. Issues of concern over which there is uncertainty or ambiguity may be discussed by the Department with the staff of cognizant agencies overseeing federal funding. Certain types of suspected or observed improper conduct may trigger requirements to make reports to other oversight authorities, state and federal, including but not limited to the State Auditor's Office and applicable Inspectors General.

(2) Subrecipient Response. If there are any findings of noncompliance requiring corrective action, the Subrecipient will be provided 30 calendar days, from the date of the email, to respond which

may be extended for good cause. In order to receive an extension, the Subrecipient must submit a written request to the Chief of Compliance within the corrective action period, stating the basis for good cause that justifies the extension. The Department will approve or deny the extension request within five calendar days.

(3) Monitoring Close Out. Within 45 calendar days after the end of the corrective action period, a close out letter will be issued to the Subrecipient with notice to Subgrantees (if applicable). If the Subrecipient supplies evidence establishing continual compliance that negates the finding of noncompliance, the issue of noncompliance will be rescinded. If the Subrecipient's response satisfies all findings and concerns noted in the monitoring letter, the issue of noncompliance will be noted as corrected. In some circumstances, the Subrecipient may be unable to secure documentation to correct a finding. In those instances, if there are mitigating circumstances, the Department may note the finding is not corrected but close the issue with no further action required. If the Subrecipient's response does not correct all findings noted, the close out letter will identify the documentation that must be submitted to correct the issue.

(4) Options for Review. If, following the submission of corrective action documentation, Compliance staff continues to find the Subrecipient or Subgrantee in noncompliance, and the Subrecipient disagrees, the Subrecipient may request or initiate review of the matter using the following options, where applicable:

(A) If the issue is related to a program requirement or prohibition of a federal program, the Subrecipient may contact the applicable federal program officer for guidance or request that the Department contact applicable federal program officer for guidance without identifying the Subrecipient.

(B) If the issue is related to application of a provision of the Contract or a requirement of the Texas Administrative Code, the Subrecipient may request to submit an appeal to the Executive Director consistent with §1.7, Staff Appeals Process, in Chapter 1 of this Title.

(C) The Subrecipient may request Alternative Dispute Resolution ("ADR"). The Subrecipient may send a proposal to the Department's Dispute Resolution Coordinator to initiate ADR pursuant to §1.17 of this title.

(5) If the Subrecipients does not respond to a monitoring letter or fail to provide acceptable evidence of compliance, the matter will be handled through the procedures described in Chapter 2 of this Title, relating to Enforcement.

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

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Timothy K. Irvine
Executive Director
Texas Department of Housing and Community Affairs
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SUBCHAPTER B. HOMELESS HOUSING AND SERVICES PROGRAM (HHSP)

10 TAC §§7.1001 - 7.1005

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

The proposed new Chapter affects no other code, article, or statute.

§7.1001. Purpose and Use of Funds.

(a) In accordance with Tex. Gov't Code §2306.2585, HHSP provides funding to cities with populations in excess of 285,500 to develop programs to prevent and eliminate Homelessness.

(b) HHSP eligible activities are:

(1) Administrative costs associated with HHSP, including client tracking using HMIS or a HMIS-comparable database;

(2) Case management for households experiencing or at-risk of Homelessness to assess, arrange, coordinate and monitor the delivery of services;

(3) Construction/Conversion/Rehabilitation of buildings (including administrative facilities) to serve persons experiencing Homelessness or at-risk of Homelessness, or house persons experiencing homelessness;

(4) Essential services for Households experiencing or at-risk of Homelessness to find or maintain housing stability;

(5) Homelessness Prevention to provide financial assistance to individuals or families at risk of Homelessness;

(6) Homelessness Assistance to provide financial assistance provided to individuals or families experiencing Homelessness;

(7) Operation of emergency shelters or administrative facilities to serve persons experiencing or at-risk of Homelessness; and

(8) Other local programs to assists individuals or families experiencing Homelessness or at-risk of Homelessness if approved by the Department in writing in advance of the Expenditure.

§7.1002. Distribution of Funds and Formula.

(a) Pursuant to the authority of Tex. Gov't Code §2306.2585, HHSP is available to any municipality in Texas with a population of 285,500 or more. HHSP funds will be biennially awarded upon appropriation from the legislature and will be made available to any of those municipalities subject to the requirements of this rule and be distributed in accordance with the formula set forth in subsection (b) of this section (relating to Formula). The Department may redistribute formula-funded allocations among the eligible municipalities if a Subrecipient is unable to expend the funds within 120 days of the close of the biennium.

(b) Formula. Any funds made available for HHSP shall be distributed in accordance with a formula that is calculated each biennium that takes into account:

(1) population of the municipality, as determined by the most recent available 1 Year American Community Survey ("ACS") data;

(2) poverty, defined as the number of persons in the municipality's population with incomes at or below the poverty threshold, as determined by the most recent available 1 Year ACS data;

(3) veteran populations, defined as that percentage of the municipality's population composed of veterans, as determined by the most recent available 1 Year ACS data;

(4) population of Persons with Disabilities, defined as that percentage of the municipality's population composed of Persons with

Disabilities, as determined by the most recent available 1 Year ACS data; and

(5) population of Homeless persons, defined as that percentage of the municipality's population comprised of Homeless persons, as determined by the most recent publically available Point-In-Time Counts submitted to HUD by the CoCs in Texas.

(c) The factors enumerated shall be used to calculate distribution percentages for each municipal area based on the following formula:

(1) 20 percent weight for population;

(2) 25 percent weight for poverty populations;

(3) 25 percent weight for veteran populations;

(4) 5 percent weight for population of Persons with Disabilities; and

(5) 25 percent weight for the Homeless population.

§7.1003. General Homeless Housing and Services Program ("HHSP") Requirements.

(a) Each municipality or entity that had in effect as of January 1, 2012, a Contract with the Department to administer HHSP funds will remain a designated entity to receive HHSP funds in its municipality, whether that entity is the municipality itself or another entity. The Department may add to or change those entities at its discretion based on consideration of the factors enumerated in paragraphs (1) - (4) of this subsection. If the Department proposes to add or change any such entity(ies) it will publish notice thereof on its website at least twenty (20) days prior to such addition or change. If the proposal is to add an entity, the notice will include any proposed sharing of funding with other HHSP providers in the affected municipality:

(1) whether an entity to be removed and replaced was compliantly and efficiently administering its contract;

(2) the specific plans of any new entity to build facilities to provide shelter or services to homeless populations, and/or to provide any specific programs to serve the homeless;

(3) the capacity of any new entity to deliver its planned activities; and

(4) any public comment and comment by state or local elected officials.

(b) The final decision to add or change entities will be approved by the Department's Governing Board (the "Board").

(c) A municipality or entity receiving HHSP funds is subject to the Department's Previous Participation Rule, found in §1.302 of this title. In addition to the considerations of the Previous Participation Rule, a municipality or entity receiving HHSP funds may not:

(1) have failed to fully expend funds with respect to any previous HHSP award(s) except as approved by the Executive Director of the Department after review of unique circumstances and reported to the Board; or

(2) be in breach, after notice and a reasonable opportunity to cure, of any contract with the Department.

(d) A municipality or entity receiving HHSP funds (Subrecipient) must enter into a Contract with the Department governing the use of such funds. If the source of funds for HHSP is funding under another specific Department program, such as the Housing Trust Fund, as authorized by Tex. Gov't Code, §2306.2585(c), the Contract will incorporate any requirements applicable to such funding source.

§7.1004. Eligible Costs.

(a) Administrative costs includes staff costs related to staff performing management, reporting and accounting of HHSP activities, including costs associated with HMIS or an HMIS-comparable databases.

(b) Case management costs include staff salaries related to assessing, arranging, coordinating and monitoring the delivery of services related to obtaining or retaining housing, including, but not limited to, determining client eligibility, counseling, coordinating services and obtaining mainstream benefits, monitoring clients' progress, providing safety planning for persons under VAWA, developing a housing and service plan, and entry into HMIS or an HMIS-comparable database.

(c) Construction/Conversion and Rehabilitation costs include:

(1) Pre-Development such as: environmental review, site-control, survey, appraisal, architectural fees, and legal fees

(2) Development such as: land acquisition costs, site work including infrastructure for service utilities, walkways, curbs, gutters, construction to meet uniform building codes, construction to meet international energy conservation code, accessibility features to site and building, local rehabilitation standards, essential improvements, energy-related improvements, abatement of lead-based paint hazards, barrier removal/construction costs for accessibility features for persons with disabilities, non-luxury general property improvements, site improvements and utility connections, lot clearing and site preparations.

(3) Essential services costs are associated with finding maintaining stable housing, and include, but are not be limited to, out-patient medical services, child care, education services, legal services, mental health services, local transportation assistance, drug and alcohol rehabilitation, and job training.

(4) Homelessness Prevention costs include rental and utility assistance (including reasonable deposits), motel stay costs, and local transportation assistance. An individual or family at-risk of homelessness may receive Homelessness Prevention, Case Management, and Essential Services. Staff time entering information into HMIS or HMIS-comparable database is also an eligible Homelessness Prevention cost.

(5) Homelessness Assistance costs include costs associated with rapidly re-housing the individual or family with rental and utility assistance (including reasonable deposits) or motel stay costs, and local transportation assistance. An individual or family experiencing homelessness may receive Homelessness Assistance, Case Management, and Essential Services. Staff time entering information into HMIS or HMIS-comparable database is also an eligible Homelessness Assistance cost.

(6) Operation costs include rent, utilities, supplies and equipment purchases, food pantry supplies, and other related costs necessary to operate an emergency shelter or administrative offices serving individuals experiencing or at-risk of homelessness.

§7.1005. Shelter and Housing Standards.

(a) Minimum standards for emergency shelters. Any building for which HHSP funds are used for conversion, major rehabilitation, or other renovation, must meet state or local government safety and sanitation standards, as applicable, and the following minimum safety and sanitation standards. Any emergency shelter that receives assistance for shelter operations must also meet the following minimum safety and sanitation standards.

(1) Structure and materials. The shelter building must be structurally sound to protect residents from the elements and not pose

any threat to health and safety of the residents. Any renovation (including major rehabilitation and conversion) carried out with HHSP assistance must use Energy Star and WaterSense products and appliances.

(2) Access. The shelter must be accessible in accordance with Section 504 of the Rehabilitation Act (29 U.S.C. 794) and implementing regulations at 24 CFR Part 8; the Fair Housing Act (42 U.S.C. 3601 et seq.) as outlined in 10 TAC Chapter 1, Subchapter B, and implementing regulations at 24 CFR Part 100; and Title II of the Americans with Disabilities Act (42 U.S.C. 12131 et seq.) and 28 CFR Part 35; where applicable.

(3) Space and security. Except where the shelter is intended for day use only, the shelter must provide each program participant in the shelter with an acceptable place to sleep and adequate space and security for themselves and their belongings.

(4) Interior air quality. Each room or space within the shelter must have a natural or mechanical means of ventilation. The interior air must be free of pollutants at a level that might threaten or harm the health of residents.

(5) Water supply. The shelter's water supply must be free of contamination.

(6) Sanitary facilities. Each program participant in the shelter must have access to sanitary facilities that are in proper operating condition and are adequate for personal cleanliness and the disposal of human waste.

(7) Thermal environment. The shelter must have any necessary heating/cooling facilities in proper operating condition.

(8) Illumination and electricity. The shelter must have adequate natural or artificial illumination to permit normal indoor activities and support health and safety. There must be sufficient electrical sources to permit the safe use of electrical appliances in the shelter.

(9) Food preparation. Food preparation areas, if any, must contain suitable space and equipment to store, prepare, and serve food in a safe and sanitary manner.

(10) Sanitary conditions. The shelter must be maintained in a sanitary condition.

(11) Fire safety. There must be at least one working smoke detector in each occupied unit of the shelter. Where possible, smoke detectors must be located near sleeping areas. The fire alarm system must be designed for hearing-impaired residents. All public areas of the shelter must have at least one working smoke detector. There must also be a second means of exiting the building in the event of fire or other emergency.

(b) Minimum standards for housing for occupancy. HHSP funds cannot help a program participant remain in or move into housing that does not meet the minimum habitability standards below. HHSP funds may assist a program participant in returning the home to the minimum habitability standard in cases where the program participant is the responsible party for ensuring such conditions. In order to ensure continuity of housing, the Subrecipient may provide assistance to a program participant pending a completed housing inspection within 30 days of the assistance being provided. This allowance applies whether the program participant is the responsible party for ensuring such standards or another party is the responsible party. Should the housing not meet the minimum habitability standards 30 days after the initial assistance, no further assistance may be provided to maintain the program participant in that housing.

(1) Structure and materials. The structures must be structurally sound to protect residents from the elements and not pose any threat to the health and safety of the residents.

(2) Space and security. Each resident must be provided adequate space and security for themselves and their belongings. Each resident must be provided an acceptable place to sleep.

(3) Interior air quality. Each room or space must have a natural or mechanical means of ventilation. The interior air must be free of pollutants at a level that might threaten or harm the health of residents.

(4) Water supply. The water supply must be free from contamination.

(5) Sanitary facilities. Residents must have access to sufficient sanitary facilities that are in proper operating condition, are private, and are adequate for personal cleanliness and the disposal of human waste.

(6) Thermal environment. The housing must have any necessary heating/cooling facilities in proper operating condition.

(7) Illumination and electricity. The structure must have adequate natural or artificial illumination to permit normal indoor activities and support health and safety. There must be sufficient electrical sources to permit the safe use of electrical appliances in the structure.

(8) Food preparation. All food preparation areas must contain suitable space and equipment to store, prepare, and serve food in a safe and sanitary manner.

(9) Sanitary conditions. The housing must be maintained in a sanitary condition.

(10) Fire safety.

(A) There must be a second means of exiting the building in the event of fire or other emergency.

(B) Each unit must include at least one battery-operated or hard-wired smoke detector, in proper working condition, on each occupied level of the unit. Smoke detectors must be located, to the extent practicable, in a hallway adjacent to a bedroom. If the unit is occupied by hearing impaired persons, smoke detectors must have an alarm system designed for hearing-impaired persons in each bedroom occupied by a hearing-impaired person.

(C) The public areas of all housing must be equipped with a sufficient number, but not less than one for each area, of battery-operated or hard-wired smoke detectors. Public areas include, but are not limited to, laundry rooms, community rooms, day care centers, hallways, stairwells, and other common areas.

(c) Shelters and housing for occupancy. Lead-based paint remediation and disclosure. The Lead-Based Paint Poisoning Prevention Act (42 U.S.C. 4821-4846), the Residential Lead-Based Paint Hazard Reduction Act of 1992 (42 U.S.C. 4851-4856), and implementing regulations in 24 CFR Part 35, subparts A, B, H, J, K, M, and R apply to all shelters and all housing units occupied by program participants.

(d) Lead-based paint remediation and disclosure. The Lead-Based Paint Poisoning Prevention Act (42 U.S.C. 4821-4846), the Residential Lead-Based Paint Hazard Reduction Act of 1992 (42 U.S.C. 4851-4856), and implementing regulations in 24 CFR Part 35, subparts A, B, H, J, K, M, and R apply to all shelters and all housing units occupied by program participants.

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

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Timothy K. Irvine
Executive Director
Texas Department of Housing and Community Affairs
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For further information, please call: (512) 475-1762

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SUBCHAPTER C. EMERGENCY SOLUTIONS GRANT (ESG)

10 TAC §§7.2001 - 7.2006

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

The proposed new Chapter affects no other code, article, or statute.

§7.2001. Background.

(a) ESG funds are federal funds awarded to the State of Texas by HUD and administered by the Department.

(b) The regulations in this subchapter govern the administration of ESG funds and establish policies and procedures for use of ESG funds to meet the purposes contained in Title IV of the Stewart B. McKinney Homeless Assistance Act (42 U.S.C. §§11371 - 11378) (the "Act"), as amended by the Homeless Emergency Assistance and Rapid Transition to Housing Act ("HEARTH Act").

(c) ESG Subrecipients shall comply with the regulations applicable to the ESG Program as set forth in this subchapter and as set forth in 24 CFR Part 91 and 24 CFR Part 576 (the "Federal Regulations"). ESG Subrecipients must also follow all other applicable federal and state statutes and the regulations established in this chapter, as amended or supplemented.

(d) In the event that Congress, the Texas Legislature, or HUD add or change any statutory or regulatory requirements concerning the use or administration of these funds, ESG Subrecipients shall comply with such requirements at the time they become effective.

§7.2002. Purpose and Use of Funds.

(a) The purpose of ESG is to assist people in regaining stability in permanent housing quickly after experiencing a housing crisis and/or Homelessness.

(b) ESG eligible activities are:

(1) the rehabilitation or conversion of buildings for use as emergency shelter for the Homeless;

(2) the payment of certain expenses related to operating emergency shelters;

(3) essential services related to emergency shelters and street outreach for the Homeless;

(4) homelessness prevention and rapid re-housing assistance;

(5) HMIS activities, including HMIS-comparable database activities; and

(6) administrative costs.

(c) Subrecipients are prohibited from charging occupancy fees for emergency shelter supported by funds covered by this subchapter.

(d) The Department's Governing Board, Executive Director, or his/her designee may limit activities in a given funding cycle or by contract.

§7.2003. Availability, Distribution, and Redistribution of ESG Funds.

(a) The Department will post on its website the distribution plan for ESG funds.

(b) Redistribution/Reallocation of Additional Grant Funds and Unexpended Funds. The Department, as determined by the Board, will determine the most equitable and beneficial use of any additional grant year appropriation, unexpended or deobligated program funds. In determining the distribution of funds, the Department may consider program performance, expenditure rates of eligible applicants or Subrecipients, or other factors deemed appropriate by the Department.

§7.2004. Eligible Applicants.

(a) Eligible Subrecipients are Units of General Local Government; those Private Nonprofit Organization(s) that are secular or religious organizations as described in §501(c) of the Internal Revenue Code of 1986, are exempt from taxation under Subtitle A of the Code, have an accounting system and a voluntary board, and practice non-discrimination in the provision of assistance; and organizations as described in a Notice of Funding Availability or other Board-approved funding mechanism.

(b) The Department reserves the option to limit eligible Subrecipient entities in a given funding cycle.

(c) Subrecipients that subcontract or subgrant any portion of their award to another entity must, consistent with 2 CFR Part 200, monitor those subcontracts based on a risk assessment. Subrecipients must be prepared to provide documentation of the risk assessment performed and the policies and procedures used in monitoring those subcontracts.

§7.2005. Program Income.

(a) Program income is gross income received by the Subrecipient, its Affiliates, or Subgrantees directly generated by a grant supported activity, or earned only as a result of the grant agreement during the grant period. Program income received and expended during the contract period will count toward meeting the Subrecipients' matching requirements, provided the costs are eligible ESG costs that supplement the ESG program.

(b) Utility and security deposit refunds from vendors should be treated as program income.

(c) In accounting for program income, the Subrecipient must accurately reflect the receipt of such funds separate from the receipt of federal funds and Subrecipient funds.

(d) Program income received by the Subrecipient, its Affiliates, or its Subgrantees during the two (2) years following the end of the contract period must be returned to the Department. Program income must be returned to the Department within ten (10) working days of receipt.

(e) Program income received after the two (2) year period described in subsection (d) of this section has expired, can be retained.

§7.2006. Environmental Clearance.

All ESG activities require some level of environmental clearance. Subrecipients must obtain the correct level of environmental clearance prior to commencing associated choice-limiting activities. Activities for which the Subrecipient did not properly complete the Department's environmental review process before commencing a choice-limiting

activity are ineligible and funds will not be reimbursed or will be required to be repaid.

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

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Timothy K. Irvine
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Texas Department of Housing and Community Affairs
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CHAPTER 10. UNIFORM MULTIFAMILY RULES

SUBCHAPTER F. COMPLIANCE MONITORING

10 TAC §10.614

The Texas Department of Housing and Community Affairs (the "Department") proposes the repeal of 10 TAC Chapter 10, Uniform Multifamily Rules, Subchapter F, Compliance Monitoring, §10.614, concerning Utility Allowances. This repeal is being proposed concurrently with the proposal of new §10.614, concerning Utility Allowances which will improve compliance with new requirements related to the HOME program concerning utility allowances and guidance from Treasury for the Housing Tax Credit ("HTC") program.

FISCAL NOTE. Timothy K. Irvine, Executive Director, has determined that, for each year of the first five years the repeal is in effect, enforcing or administering the repeal does not have any foreseeable implications related to costs or revenues of the state or local governments.

PUBLIC BENEFIT/COST NOTE. Mr. Irvine also has determined that, for each year of the first five years the repeal is in effect, there will be no change in the public benefit anticipated as a result of the repeal. There will be no economic impact to any individuals required to comply with the repeal.

ADVERSE IMPACT ON SMALL OR MICRO-BUSINESSES. The Department has determined that there will be no economic effect on small or micro-businesses.

REQUEST FOR PUBLIC COMMENT. The public comment period will be held September 9, 2016, through October 10, 2016, to receive input on the proposed repeal. Written comments may be submitted to the Texas Department of Housing and Community Affairs, Stephanie Naquin, Rule Comments, P.O. Box 13941, Austin, Texas 78711-3941, or by fax to (512) 475-3359. ALL COMMENTS MUST BE RECEIVED BY 5:00 P.M. AUSTIN LOCAL TIME OCTOBER 10, 2016.

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

The proposed repeal affects no other code, article, or statute.

§10.614. Utility Allowances.

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

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10 TAC §10.614

The Texas Department of Housing and Community Affairs (the "Department") proposes new 10 TAC Chapter 10, Uniform Multifamily Rules, Subchapter F, Compliance Monitoring, §10.614, concerning Utility Allowances. This rule applies to all multifamily Department programs.

The HOME Final Rule, §24 CFR Part 92, was updated in August 2013 and the Department proposed a new rule to codify the requirements at the Board meeting of December 17, 2015. Upon conclusion of the public comment period, Treasury released final Treasury Regulation §1.42-10 Utility Allowance in the Federal Register on March 3, 2016, which impacted Housing Tax Credit requirements. The Department proposed a new rule to codify the requirements at the Board meeting of March 31, 2016. Upon conclusion of that public comment period, HUD released a HOMEfire that provided additional guidance related to the changes made in the August 2013 HOME Final Rule. The HOMEfire allows the Department to seek a waiver from HUD in the event that a household, in a HOME unit, has a Section 8 voucher for rental assistance to use the utility allowance established by the issuing housing authority. The Department is currently seeking comment on circumstances where a waiver might be appropriate.

In addition to the federally required changes to this rule, the Department has also identified the need to define a process for applicants seeking Department multifamily funds to follow when choosing to use an alternative method to calculate the utility allowance or when the application involves a Direct Loan (*e.g.,* HOME funds).

FISCAL NOTE. Timothy K. Irvine, Executive Director, has determined that, for each year of the first five years the new section is in effect, enforcing or administering the new section does not have any foreseeable implications related to costs or revenues of the state or local governments.

PUBLIC BENEFIT/COST NOTE. Mr. Irvine also has determined that, for each year of the first five years the new section is in effect, the public benefit anticipated as a result of the new section will be improved compliance with affordable housing program administered by the Department. There will not be any increased economic cost to any individuals required to comply with the new section that are not required by participating in a federal program.

ADVERSE IMPACT ON SMALL OR MICRO-BUSINESSES. The Department has determined that there will be no economic effect on small or micro-businesses.

REQUEST FOR PUBLIC COMMENT. The public comment period will be held September 9, 2016, through October 10, 2016,

to receive input on the proposed new section. Written comments may be submitted to the Texas Department of Housing and Community Affairs, Stephanie Naquin, Rule Comments, P.O. Box 13941, Austin, Texas 78711-3941, or by fax to (512) 475-3359. ALL COMMENTS MUST BE RECEIVED BY 5:00 P.M. Austin local time OCTOBER 10, 2016.

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

The proposed new section affects no other code, article, or statute.

§10.614. Utility Allowances.

(a) Purpose. The purpose of this section is to provide the guidelines for calculating a Utility Allowance under the Department's multifamily programs. The Department will cite noncompliance and/or not approve a Utility Allowance if it is not calculated in accordance with this section. Owners are required to comply with the provisions of this section, as well as, any existing federal or state program guidance.

(b) Definitions. The following words and terms, when used in this section, shall have the following meanings, unless the context clearly indicates otherwise. Other capitalized terms used in this section herein have the meaning assigned in Chapters 1, 2 and 10 of this part.

(1) Building Type--The HUD Office of Public and Indian Housing ("PIH") characterizes building and unit configurations for HUD programs. The Department will defer to the guidance provided by HUD found at: http://portal.hud.gov/hudportal/documents/huddoc?id=DOC_11608.pdf (or successor Uniform Resource Locator ("URL")) when making determinations regarding the appropriate building type(s) at a Development.

(2) Power to Choose--The Public Utility Commission of Texas database of retail electric providers in the areas of the state where the sale of electricity is open to retail competition http://www.powertochoose.org/ (or successor URL). In areas of the state where electric service is deregulated, the Department will verify the availability of residential service directly with the Utility Provider. If the Utility Provider is not listed as a provider of residential service in the Development's ZIP code for an area that is deregulated, the request will not be approved

(3) Component Charges--The actual cost associated with the billing of a residential utility. Each Utility Provider may publish specific utility service information in varying formats depending on the service area. Such costs include, but are not limited to:

(A) Rate(s)--The cost for the actual unit of measure for the utility (*e.g.,* cost per kilowatt hour for electricity);

(B) Fees--The cost associated with a residential utility that is incurred regardless of the amount of the utility the household consumes (*e.g.,* Customer Charge); and

(C) Taxes--Taxes for electricity and gas are regulated by the Texas Comptroller of Public Accounts and can be found http://comptroller.texas.gov/ (or successor URL). Local Utility Providers have control of the tax structure related to water, sewer and trash. To identify if taxes are imposed for these utilities, obtain documentation directly from the Utility Provider.

(4) Direct Loan--Funds provided through the HOME Program ("HOME"), Neighborhood Stabilization Program ("NSP"), National Housing Trust Fund ("NHTF"), Repayments from the Tax Credit Assistance Program ("TCAP RF"), or other program available through the Department or local political subdivision, for multifamily development that require a Utility Allowance. Direct Loans may also include deferred forgivable loans or other similar direct funding, regardless if it is required to be repaid. Housing Tax Credits, Tax Exempt Bonds and Project Based Vouchers are not Direct Loans.

(5) Renewable Source--Energy produced from energy property described in IRC §48 or IRC §45(d)(1) through (4), (6), (9), or (11). The manner in which a resident is billed is limited to the rate at which the local Utility Provider would have charged the residents for the utility if that entity had provided it to them, and as may be further limited by the Texas Utilities Code or by regulation.

(6) Submetered Utility--A utility purchased from or through a local Utility Provider by the building Owner where the resident is billed directly by Owner of the building or to a third party billing company and the utility is:

(A) Based on the residents' actual consumption of that utility and not an allocation method or Ratio Utility Billing System ("RUBS"); and

(B) The rate at which the utility is billed does not exceed the rate incurred by the building owner for that utility.

(7) Utility Allowance--An estimate of the expected monthly cost of any utility for which a resident is financially responsible, other than telephone, cable television, or internet.

(A) For HTC, TCAP, Exchange buildings, and SHTF include:

(i) Utilities paid by the resident directly to the Utility Provider;

(ii) Submetered Utilities; and

(iii) Renewable Source Utilities.

(B) For a Development with a Direct Loan, unless otherwise prescribed in the program' s Regulatory Agreement, include all utilities regardless of how they are paid.

(8) Utility Provider--The company that provides residential utility service (*e.g.,* electric, gas, water, wastewater, and/or trash) to the buildings.

(c) Methods. The following options are available to establish a Utility Allowance for all programs except Developments funded with Direct Loan funds, which are addressed in subsection (d) of this section.

(1) Rural Housing Services ("RHS") buildings or buildings with RHS assisted residents. The applicable Utility Allowance for the Development will be determined under the method prescribed by the RHS (or successor agency). No other utility method described in this section can be used by RHS buildings or buildings with RHS assisted residents.

(2) HUD-Regulated buildings layered with any Department program. If neither the building nor any resident in the building receives RHS rental assistance payments, and the rents and the Utility Allowances of the building are regulated by HUD (HUD-regulated building), the applicable Utility Allowance for all rent restricted Units in the building is the applicable HUD Utility Allowance. No other utility method described in this section can be used by HUD-regulated buildings. Unless further guidance is received from the U.S. Department of Treasury or the Internal Revenue Service ("IRS"), the Department considers Developments awarded a Direct Loan (*e.g.,* HOME) to be HUD-Regulated buildings.

(3) Other Buildings. For all other rent-restricted Units, Development Owners must use one of the methods described in subparagraphs (A) - (E) of this paragraph:

(A) Public Housing Authority ("PHA"). The Utility Allowance established by the applicable PHA for the Housing Choice Voucher Program. The Department will utilize the Texas Local Government Code, Chapter 392 to determine which PHA is the most applicable to the Development.

(i) If the PHA publishes different schedules based on Building Type, the Owner is responsible for implementing the correct schedule based on the Development's Building Type(s). Example 614(1): The applicable PHA publishes a separate Utility Allowance schedule for Apartments (5+ units), one for Duplex/Townhomes and another for Single Family Homes. The Development consists of 20 buildings, ten of which are Apartments (5+ units) and the other ten buildings are Duplexes. The Owner must use the correct schedule for each Building Type.

(ii) In the event the PHA publishes a Utility Allowance schedule specifically for energy efficient units, and the Owner desires to use such a schedule, the Owner must demonstrate that the building(s) meet the housing authority's specifications for energy efficiency once every five years.

(iii) If the applicable PHA allowance lists flat fees for any utility, those flat fees must be included in the calculation of the Utility Allowance if the resident is responsible for that utility.

(iv) If the individual components of a Utility Allowance are not in whole number format, the correct way to calculate the total allowance is to add each amount and then round the total up to the next whole dollar. Example 614(2): Electric cooking is $8.63, Electric Heating is $5.27, Other Electric is $24.39, Water and Sewer is $15. The Utility Allowance in this example is $54.00.

(v) If an Owner chooses to implement a methodology as described in subparagraph (B), (C), (D), or (E) of this paragraph, for Units occupied by Section 8 voucher holders, the Utility Allowance remains the applicable PHA Utility Allowance established by the PHA from which the household's voucher is received.

(vi) If the Development is located in an area that does not have a municipal, county, or regional housing authority that publishes a Utility Allowance schedule for the Housing Choice Voucher Program, Owners must select an alternative methodology, unless the building(s) is located in the published Housing Choice Voucher service area of:

(I) A Council of Government created under Texas Local Government Code, Chapter 303, that operates a Housing Choice Voucher Program; or,

(II) The Department' s Housing Choice Voucher Program.

(B) Written Local Estimate. The estimate must come from the local Utility Provider, be signed by the Utility Provider representative, and specifically include all Component Charges for providing the utility service.

(C) HUD Utility Schedule Model. The HUD Utility Schedule Model and related resources can be found at http://www.huduser.gov/portal/resources/utilallowance.html (or successor URL). Each item on the schedule must be displayed out two decimal places. The total allowance must be rounded up to the next whole dollar amount. The Component Charges used can be no older than those in effect 60 days prior to the beginning of the 90 day period described in subsection (f)(3) of this section related to Effective Dates.

(i) The allowance must be calculated using the MS Excel version available at http://www.huduser.org/portal/resources/utilmodel.html (or successor URL), as updated from time to time, with no changes or adjustments made other than entry of the required information needed to complete the model.

(ii) In the event that the PHA code for the local PHA to the Development is not listed in "Location" tab of the workbook, the Department will use the PHA code for the PHA that is closest in distance to the Development using online mapping tools (*e.g.,* MapQuest).

(iii) Green Discount. If the Owner elects any of the Green Discount options for a Development, documentation to evidence that the units and the buildings meet the Green Discount standard as prescribed in the model is required for the initial approval and every subsequent annual review. In the event the allowance is being calculated for an application of Department funding (*e.g.,* 9% Housing Tax Credits), upon request, the Department will provide both the Green Discount and the non-Green Discount results for application purposes; however, to utilize the Green Discount allowance for leasing activities, the Owner must evidence that the units and buildings have met the Green Discount elected when the request is submitted as required in subsection (l) of this section.

(iv) Do not take into consideration any costs (*e.g.,* penalty) or credits that a consumer would incur because of their actual usage. Example 614(3) The Electric Fact Label for ABC Electric Utility Provider provides a Credit Line of $40 per billing cycle that is applied to the bill when the usage is greater than 999 kWh and less that 2000 kWh. Example 614(4) A monthly minimum usage fee of $9.95 is applied when the usage is less than 1000 kWh in the billing cycle. When calculating the allowance, disregard these types costs or credits.

(D) Energy Consumption Model. The model must be calculated by a properly licensed mechanical engineer. The individual must not be related to the Owner within the meaning of §267(b) or §707(b) of the Code. The utility consumption estimate must, at minimum, take into consideration specific factors that include, but are not limited to, Unit size, building type and orientation, design and materials, mechanical systems, appliances, characteristics of building location, and available historical data. Component Charges used must be no older than in effect 60 days prior to the beginning of the 90 day period described in subsection (f)(3) of this section related to Effective Dates; and

(E) An allowance based upon an average of the actual use of similarly constructed and sized Units in the building using actual utility usage data and Component Charges, provided that the Development Owner has the written permission of the Department. This methodology is referred to as the "Actual Use Method." For a Development Owner to use the Actual Use Method they must:

(i) Provide a minimum sample size of usage data for at least five Continuously Occupied Units of each Unit Type or 20 percent of each Unit Type whichever is greater. If there are less than five Units of any Unit Type, data for 100 percent of the Unit Type must be provided;

(ii) Upload the information in subclause (I) - (IV) of this clause to the Development' s CMTS account no later than the beginning of the 90 day period after which the Owner intends to implement the allowance, reflecting data no older than 60 days prior to the 90 day implementation period described in described in subsection (f)(3) of this section related to Effective Dates.

(I) An Excel spreadsheet listing each Unit for which data was obtained to meet the minimum sample size requirement of a Unit Type, the number of bedrooms, bathrooms and square footage for each Unit, the household's move-in date, the utility usage (*e.g.,* actual kilowatt usage for electricity) for each month of the 12

month period for each Unit for which data was obtained, and the Component Charges in place at the time of the submission;

(II) All documentation obtained from the Utility Provider (or billing entity for the utility provider) and/or copies of actual utility bills gathered from the residents, including all usage data not needed to meet the minimum sample size requirement and any written correspondence from the utility provider;

(III) The rent roll showing occupancy as of the end of the month for the month in which the data was requested from the utility provider; and

(IV) Documentation of the current Utility Allowance used by the Development.

(iii) Upon receipt of the required information, the Department will determine if the Development Owner has provided the minimum information necessary to calculate an allowance using the Actual Use Method. If so, the Department shall calculate the Utility Allowance for each bedroom size using the guidelines described in subclause (I) - (V) of this clause;

(I) If data is obtained for more than the sample requirement for the Unit Type, all data will be used to calculate the allowance;

(II) If more than 12 months of data is provided for any Unit, only the data for the most current twelve 12 will be averaged;

(III) The allowance will be calculated by multiplying the average units of measure for the applicable utility (i.e., kilowatts over the last 12 months by the current rate) for all Unit Types within that bedroom size. For example, if sufficient data is supplied for 18 two bedroom/one bath Units, and 12 two bedroom/two bath Units, the data for all 30 Units will be averaged to calculate the allowance for all two bedroom Units;

(IV) The allowance will be rounded up to the next whole dollar amount. If allowances are calculated for different utilities, each utility's allowance will be rounded up to the next whole dollar amount and then added together for the total allowance; and

(V) If the data submitted indicates zero usage for any month, the data for that Unit will not be used to calculate the Utility Allowance.

(iv) The Department will complete its evaluation and calculation within forty-five (45) days of receipt of all the information requested in clause (ii) of this subparagraph;

(d) In accordance with 24 CFR §92.252, for a Direct Loan in which the Department is the funding source, the Utility Allowance will be established in the following manner:

(1) For Developments that, as a result of funding, must calculate the Utility Allowance under HUD Multifamily Notice H-2014-4, as revised from time to time, the applicable Utility Allowance for all rent restricted Units in the building is the applicable Utility Allowance calculated under that Notice. No other utility method described in this section can be used.

(2) Other Buildings. The Utility Allowance may be initiated by the Owner using the methodologies described in paragraph (3)(B),(C), (D), or (E) of subsection (c) related to Methods.

(3) If a request is not received by October 1st, the Department will calculate the Utility Allowance using the HUD Utility Schedule Model. For property specific data, the Department will use:

(A) The information submitted in the Annual Owner' s Compliance Report;

(B) Entrance Interview Questionnaires submitted with prior onsite reviews; or,

(C) The owner may be contacted and required to complete the Utility Allowance Questionnaire. In such case, a five day period will be provided to return the completed questionnaire.

(D) Utilities will be evaluated in the following manner:

(i) For regulated utilities, the Department will contact the Utility Provider directly and apply the Component Charges in effect no later than 60 days before the allowance will be effective.

(ii) For deregulated utilities:

(I) The Department will use the Power to Choose website and search available Utility Providers by ZIP code;

(II) The plan chosen will be the median cost per kWh based on average price per kWh for the average monthly use of 1000 kWh of all available plans; and

(III) The actual Component Charges from the plan chosen in effect no later than 60 days before the allowance will be effective will be entered into the Model.

(E) The Department will notify the Owner contact in CMTS of the new allowance and provide the backup for how the allowance was calculated. The owner will be provided a five day period to review the Department' s calculation and note any errors. Only errors related to the physical characteristics of the building(s) and utilities paid by the residents will be reconsidered; the utility plan and Utility Provider selected by the Department and Component Charges used in calculating the allowance will not be changed. During this five day period, the owner also has the opportunity to submit documentation and request use of any of the available Green Discounts.

(F) The allowance must be implemented for rent due in all program units thirty days after the Department notifies the Owner of the allowance.

(4) HTC Buildings in which there are units under a Direct Loan program are considered HUD- Regulated buildings and the applicable Utility Allowance for all rent restricted Units in the building is the Utility Allowance calculated under the Direct Loan program. No other utility method described in this section can be used by HUD-regulated buildings. If the Department is not the awarding jurisdiction, Owners are required to obtain the Utility Allowance established by the awarding jurisdiction, and to document all efforts to obtain such allowance to evidence due diligence in the event that the jurisdiction is nonresponsive.

(e) Acceptable Documentation. For the Methods where utility specific information is required to calculate the allowance (*e.g.,* base charges, cost per unit of measure, taxes) Owners should obtain documentation directly from the Utility Provider and/or Regulating State Agency. Any Component Charges related to the utility that are published by the Utility Provider and/or Regulating State Agency must be included. In the case where a utility is billed to the Owner of the building(s) and the Owner is billing residents through a third party billing company, the Component Charges published by the Utility Provider and not the third party billing company will be used.

(f) Changes in the Utility Allowance. An Owner may not change Utility Allowance methods, start or stop charging residents for a utility without prior written approval from the Department. Example 614(5): A Housing Tax Credit Development has been paying for water and sewer since the beginning of the Compliance Period. In year 8,

the Owner decides to require residents to pay for water and sewer. Prior written approval from the Department is required. Any such request must include the Utility Allowance Questionnaire found on the Department's website and supporting documentation.

(1) The Department will review all requests, with the exception of the methodology prescribed in paragraph (3)(E) of subsection (c) related to Methods, within 90 days of the receipt of the request.

(2) If the Owner fails to post the notice to the residents and simultaneously submit the request to the Department by the beginning of the 90 day period, the Department's approval or denial will be delayed for up to 90 days after Department notification. Example 614(6): The Owner has chosen to calculate the electric portion of the Utility Allowance using the written local estimate. The annual letter is dated July 5, 2014, and the notice to the residents was posted in the leasing office on July 5, 2014. However, the Owner failed to submit the request to the Department for review until September 15, 2014. Although the Notice to the Residents was dated the date of the letter from the utility provider, the Department was not provided the full 90 days for review. As a result, the allowance cannot be implemented by the owner until approved by the Department.

(3) Effective dates. If the Owner uses the methodologies as described in paragraph (3)(A) of subsection (c) related to Methods of this section, any changes to the allowance can be implemented immediately, but must be implemented for rent due at least 90 days after the change. For methodologies as described in paragraph (3)(B), (C), (D) and (E) of subsection (c) related to Methods, the allowance cannot be implemented until the estimate is submitted to the Department and is made available to the residents by posting in a common area of the leasing office at the Development. This action must be taken by the beginning of the 90 day period in which the Owner intends to implement the Utility Allowance. Nothing in this section prohibits an Owner from reducing a resident' s rent prior to the end of the 90 day period when the proposed allowance would result in a gross rent issue.
Figure: 10 TAC §10.614

(g) Requirements for Annual Review.

(1) RHS and HUD-Regulated Buildings. Owners must demonstrate that the utility allowance has been reviewed annually and in accordance with the RHS or HUD regulations.

(2) Buildings using the PHA Allowance. Owners are responsible for periodically determining if the applicable PHA released an updated schedule to ensure timely implementation. When the allowance changes or a new allowance is made available by the PHA, it can be implemented immediately, but must be implemented for rent due 90 days after the PHA releases an updated scheduled.

(3) Written Local Estimate, HUD Utility Model Schedule and Energy Consumption Model. Owners must update the allowance once a calendar year. The update and all back up documentation required by the method must be submitted to the Department no later than October 1st of each year. However, Owners are encouraged to submit prior to the deadline to ensure the Department has time to review. At the same time the request is submitted to the Department, the Owner must post, at the Development, the Utility Allowance estimate in a common area of the leasing office where such notice is unobstructed and visible in plain sight. The Department will review the request for compliance with all applicable requirements and reasonableness. If, in comparison to other approved Utility Allowances for properties of similar size, construction and population in the same geographic area, the allowance does not appear reasonable or appears understated, the Department may require additional support and/or deny the request.

(4) Actual Use Method. Owners must update the allowance once a calendar year. The update and all back up documentation required by the method must be submitted to the Department no later than August 1st of each year. However, Owners are encouraged to submit prior to the deadline to ensure the Department has time to review.

(h) For Owners participating in the Department' s Section 811 Project Rental Assistance ("PRA") Program, the Utility Allowance is the allowance established in accordance with this section related to the other multifamily program(s) at the Development. Example 614(7) ABC Apartments is an existing HTC Development now participating in the PRA Program. The residents pay for electricity and the Owner is using the PHA method to calculate the Utility Allowance for the HTC Program. The appropriate Utility Allowance for the PRA Program is the PHA method.

(i) Combining Methods. In general, Owners may combine any methodology described in this section for each utility service type paid directly by the resident and not by or through the Owner of the building (*e.g.,* electric, gas). For example, if residents are responsible for electricity and gas, an Owner may use the appropriate PHA allowance to determine the gas portion of the allowance and use the Actual Use Method to determine the electric portion of the allowance. RHS and certain HUD-Regulated buildings are not allowed to combine methodologies.

(j) The Owner shall maintain and make available for inspection by the resident all documentation, including, but not limited to, the data, underlying assumptions and methodology that was used to calculate the allowance. Records shall be made available at the resident manager's office during reasonable business hours or, if there is no resident manager, at the dwelling Unit of the resident at the convenience of both the Owner and resident.

(k) Utility Allowances for Applications.

(1) If the application includes RHS assisted buildings or tenants, the utility allowance is prescribed by the RHS program. No other method is allowed.

(2) If the application includes HUD-Regulated buildings for HUD programs other than a Direct Loan program the applicable Utility Allowance for all rent restricted Units in the building is the applicable HUD Utility Allowance. No other utility method is allowed.

(3) If the application includes a Direct Loan where the Department is the Participating Jurisdiction, the Department will establish the initial Utility Allowance in accordance with subsection (d)(3) of this section. In the event that the application has a Direct Loan from the Department and another Participating Jurisdiction, the Department will require the use of the allowance calculated by the Department.

(4) If the application includes a Direct Loan where the Department is the not the Participating Jurisdiction, Applicants are required to request in writing the Utility Allowance from the awarding jurisdiction. If the awarding jurisdiction does not respond or requests the Department to calculate the allowance, the Department will establish the initial Utility Allowance in accordance with subsection (d)(3) of this section.

(5) For all other applications, Applicants may calculate the utility allowance in accordance with paragraph (3)(A)(B),(C), (D), or (E) of subsection (c) related to Methods.

(A) Upon request, the Compliance Division will calculate or review an allowance within 21 days but no earlier than 90 days from when the application is due.

(B) Example 614(8) An application for a 9% HTC is due March 1, 2017. The applicant would like Department approval to use an alternative method by February 15, 2017. The request must be submitted to the Compliance Division no later than January 25, 2017, three weeks before February 15, 2017.

(C) Example 614(9) An Applicant intends to submit an applicant for a 4% HTC with Tax Exempt Bonds on August 11, 2017, and would like to use an alternative method. Because approval is needed prior to application submission, the request can be submitted no earlier than May 13, 2017, (90 days prior to August 11, 2017) and no later than July 21, 2017, (21 days prior to August 11, 2017).

(6) All Utility Allowance requests related to applications of funding must:

(A) Be submitted directly to ua application@tdhca.state.tx.us. Requests not submitted to this email address will not be recognized.

(B) Include the "Utility Allowance Questionnaire for Applications" along with all required back up based on the method.

(7) If the Applicant is successful in obtaining an award, the Utility Allowance may be calculated in accordance with subsection (d) of this section.

(l) If Owners want to utilize the HUD Utility Schedule Model, the Written Local Estimate or the Energy Consumption Model to establish the initial Utility Allowance for the Development, the Owner must submit Utility Allowance documentation for Department approval, at minimum, 90 days prior to the commencement of leasing activities. This subsection does not preclude an Owner from changing to one of these methods after commencement of leasing.

(m) The Department reserves the right to outsource to a third party the review and approval of all or any Utility Allowance requests to use the Energy Consumption Model or when review requires the use of expertise outside the resources of the Department. In accordance with Treasury Regulation §1.42-10(c) any costs associated with the review and approval shall be paid by the Owner.

(n) All requests described in this subsection must be complete and uploaded directly to the Development's CMTS account using the "Utility Allowance Documents" in the type field and "Utility Allowance" as the TDHCA Contact. The Department will not be able to approve requests that are incomplete and/or are not submitted correctly.

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 August 29, 2016.

TRD-201604546
Timothy K. Irvine
Executive Director
Texas Department of Housing and Community Affairs
Earliest possible date of adoption: October 9, 2016
For further information, please call: (512) 475-2330

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TITLE 16. ECONOMIC REGULATION

PART 1. RAILROAD COMMISSION OF TEXAS

CHAPTER 3. OIL AND GAS DIVISION

16 TAC §3.28

The Railroad Commission of Texas (Commission) proposes amendments to §3.28, relating to Potential and Deliverability of Gas Wells to be Ascertained and Reported. The amendments would adjust the methodology regarding deliverability testing requirements for gas wells to minimize the frequency of such tests, thereby reducing the administrative burden for those wells and associated costs to industry.

Specifically, the proposed amendments modify the requirements for conducting deliverability tests on gas wells and filing the test results with the Commission. Results of such tests are typically required to be filed semi-annually on Form G-10, Gas Well Status Report. The Commission proposes new subsection (d) to specify that an operator may elect not to perform or file a deliverability test for a well after the initial deliverability test has been filed, except in certain circumstances identified in new subsection (e). If the operator elects not to perform such a test, then the Commission would use the lessor of the previous deliverability test results or the maximum daily production from the previous 12 months to determine the deliverability of record, which is used in calculating well allowables in subsequent months.

Notwithstanding subsection (d), proposed new subsection (e) would require that an operator conduct a deliverability test in the following situations: at initial completion of the well; at recompletion of the well into a different field; at reclassification of an oil well to a gas well; when an inactive well is returned to production; when the well is completed in a regulatory field where the allocation formula is based in whole or in part on the downhole pressure of the well; when necessary to reinstate an allowable; or when required by Commission order, special field rule, or other Commission rule. For example, operators of wells authorized to surface commingle production pursuant to §§3.26 and 3.27 of this title (relating to Separating Devices, Tanks, and Surface Commingling of Oil, and Gas To Be Measured and Surface Commingling of Gas, respectively) will be required to conduct and report deliverability tests at the same frequency at which those tests are currently required by those rules or by the order authorizing the commingling.

The overall effect of the proposed amendments would be to require deliverability testing in specific instances, rather than as a general requirement. Based on the proposed revisions, the Commission anticipates receiving approximately 70% fewer Form G-10 filings.

Further, the Commission proposes to amend subsections (a) and (b) to modify the time frame in which tests shall be run to conform to the 90-day completion report deadline in §3.16 of this title (relating to Log and Completion or Plugging Report).

The Commission also proposes other non-substantive clarifications and updates.

Mr. Timothy A. Poe, Assistant Director for Administrative Compliance, Oil & Gas Division, has determined that for each year of the first five years the amendments will be in effect there will be fiscal implications to the Commission and to the regulated industry as a result of the amendments. There will be no fiscal effect on local government. Commission staff estimates that approximately 134,632 wells were required to provide deliverability test information in the past year. Of those, 39,728 (approximately 30%) fall into categories where deliverability testing would still be required under the proposed amendments.

The Commission will benefit from reduced postage costs due to reduced enforcement activities related to deliverability tests. Staff has determined that over a representative twelve-month period, approximately 21,750 notices were mailed to operators listing their wells in a given field that were due for deliverability testing; approximately 3,000 notices of delinquency were mailed to operators who had failed to submit G-10 tests; approximately 1,560 notifications were mailed to operators by certified mail advising that seal orders would be issued due to that delinquency; and approximately 280 seal orders were ultimately mailed. The overall annual postage cost for those mailings is approximately $15,625. Assuming a 70% reduction due to the decreased number of required tests, the amendments would result in an annual savings to the Commission of approximately $10,935. Therefore, staff estimates an overall reduction in costs over five years of $54,675, which exceeds the cost of implementing the proposed amendments.

Mr. Poe estimates that there would be a one-time cost of $23,125 associated with programming modifications to the Commission's data processing systems to implement the proposed amendments. These modifications will enable the Commission's systems to perform the necessary calculations to identify wells for which deliverability tests are still required and to track the source of the data in well deliverability records. For wells for which testing is not required, the modifications will enable the Commission's systems to record the appropriate deliverability to be used in calculating well allowables in subsequent months.

Mr. Poe has determined that for each year of the first five years the proposed amendments are in effect, the anticipated public benefit will be more efficient use of Commission resources due to reduced administrative costs and overhead associated with routine testing.

Mr. Poe has also determined that there is no economic cost for persons required to comply with the proposed amendments. Industry will, however, benefit from the modified testing and filing requirements. Commission records indicate that there are approximately 134,632 gas wells for which operators are currently required to perform deliverability testing. Of these wells, 39,728 would still require deliverability testing under the proposed amendments. The remaining 94,894 wells would no longer be required to undergo routine testing. Estimated costs to perform a deliverability test range from $400 to $450 per test for low pressure wells, and $1,100 to $1,450 for high pressure wells. The majority of wells tested are low pressure wells. Using the conservative figure of $400 per test and assuming that each well is currently required to be tested only annually, operators could see a potential benefit in excess of $37,957,600 in annual cost savings.

The Commission has determined that the proposed amendments to §3.28 will not have an adverse economic effect on small businesses or micro-businesses. As noted above, there is no anticipated additional cost for any person required to comply with the proposed amendments. Therefore, the Commission has not prepared the economic impact statement or the regulatory flexibility analysis pursuant to Texas Government Code §2006.002.

The Commission has also determined that the proposed amendments will not affect a local economy. Therefore, the Commission has not prepared a local employment impact statement pursuant to Texas Government Code §2001.022.

The Commission has determined that the amendments do not meet the statutory definition of a major environmental rule as set forth in Texas Government Code, §2001.0225(a); therefore, a regulatory analysis conducted pursuant to that section is not required.

Comments on the proposed amendments may be submitted to Rules Coordinator, Office of General Counsel, Railroad Commission of Texas, P.O. Box 12967, Austin, Texas 78711-2967; online at www.rrc.texas.gov/legal/rules/comment-form-for-proposed-rulemakings; or by electronic mail to rulescoordinator@rrc.texas.gov. The Commission will accept comments until noon (12:00 p.m.) on Monday, October 10, 2016, which is 31 days after publication in the *Texas Register.* Comments should refer to O&G Docket No. 20-0301391. The Commission finds that this comment period is reasonable because the proposal and an online comment form will be available on the Commission's website more than two weeks prior to *Texas Register* publication of the proposal, giving interested persons additional time to review, analyze, draft, and submit comments. The Commission cannot guarantee that comments submitted after the deadline will be considered. For further information, call Joe Stasulli, Well Compliance Unit Manager, Oil & Gas Division, at (512) 463-3905. The status of Commission rulemakings in progress is available at www.rrc.texas.gov/legal/rules/proposed-rules.

The Commission proposes these rules under Texas Natural Resources Code §§81.051 and 81.052, which provide the Commission with jurisdiction over all persons owning or engaged in drilling or operating oil or gas wells in Texas and the authority to adopt all necessary rules for governing and regulating persons and their operations under Commission jurisdiction; Texas Natural Resources Code §§85.042, 85.202, 86.041 and 86.042, which require the Commission to adopt rules to control waste of oil and gas; and Texas Natural Resources Code §85.053, which authorizes the Commission to adopt rules relating to the allocation of production allowables.

Texas Natural Resources Code, §§81.051, 81.052, 85.042, 85.053, 85.202, 86.041, and 86.042 are affected by the proposed amendments.

Statutory authority: Texas Natural Resources Code §§81.051, 81.052, 85.042, 85.053, 85.202, 86.041, and 86.042.

Cross-reference to statute: Texas Natural Resources Code, Chapters 81, 85, and 86.

§3.28. Potential and Deliverability of Gas Wells to be [~~To Be~~] Ascertained and Reported.

(a) The information necessary to determine the absolute daily open flow potential of each producing associated or nonassociated gas well shall be ascertained, and a report shall be filed as required with [~~on~~] the [~~appropriate~~] Commission [~~form in the appropriate Commission office~~] within 90 [~~30~~] days of completion of the well. The test shall be performed in accordance with the Commission's [~~commission's~~] publication, Back Pressure Test for Natural Gas Wells, State of Texas, or other test procedure approved in advance by the Commission and shall be reported on the Commission's prescribed form. An operator[~~, at his option,~~] may determine absolute open flow potential from a stabilized one-point test. For a one-point test, the well shall be flowed on a single choke setting until a stabilized flow is achieved, but not less than 72 hours. The shut-in and flowing bottom hole pressures shall be calculated in the manner prescribed for a four-point test. The Commission may authorize a one-point test of shorter duration for a well which is not connected to a sales line, but a test which is in compliance with

this section must be conducted and reported after the well is connected before an allowable will be assigned to the well. Back-dating of allowables will be performed in accordance with §3.31 of this title (relating to Gas Reservoirs and Gas Well Allowable).

(b) After conducting the test required by subsection (a) of this section each operator of a gas well shall conduct an initial deliverability test and report the test results on the Commission's prescribed form not later than 90 [~~ten~~] days after completion of the well [~~the start of production for one or more legal purposes and shall report such initial deliverability test on the prescribed form~~]. If a 72-hour one-point back pressure test on a well connected to a sales line was conducted as provided in subsection (a) of this section, the same test may be used to determine initial deliverability, provided the test was conducted in accordance with subsection (c) of this section.

(1) After the initial deliverability test has been conducted, the following schedule for well testing applies: [~~:~~]

(A) Nonassociated gas wells shall be tested semiannually.

(B) Associated [~~49(b)~~] gas wells described in §3.49(b) of this title (relating to Gas-Oil Ratio) shall be tested annually.

(C) Wells with current reported deliverability of 100 Mcf a day or less are not required to test as long as deliverability and production remain at or below 100 Mcf a day but are required to file Form G-10 according to the instructions on the form.

(D) Wells with a deliverability greater than 100 Mcf a day and less than or equal to 250 Mcf a day in fields without special field rules are not required to be tested as long as deliverability and production remain equal to or less than 250 Mcf a day. [~~Wells operating under special field rules which conflict with this subsection shall test in accordance with the special field rules.~~]

(2) Notwithstanding the above provisions on frequency of testing, gas wells commingling liquid hydrocarbons before metering must comply with the testing provisions applicable to such wells.

(3) All deliverability tests shall be conducted in accordance with subsection (c) of this section and the instructions printed on the Form G-10. The results of each test shall be attested to by the operator or its [~~his~~] appointed agent. The first purchaser or its representative upon request to the operator shall have the right to witness such tests. Gas meter charts, printouts, or other documents showing the actual measurement of the gas produced or other data required to be recorded during any deliverability test conducted under this subsection shall be preserved as required by §3.1 of this title (relating to Organization Report; Retention of Records; Notice Requirements) [~~(Statewide Rule 1)~~].

(4) In the event that the first purchaser and the operator cannot agree upon the validity of the test results, then either party may request a retest of the well. The first purchaser upon request to the operator shall have the right to witness the retest. If either party requests a representative from the Commission to witness a retest of the well, the results of a Commission-witnessed test shall be conclusive for the purposes of this section until the next regularly scheduled test of the well. In the event a retest is witnessed by the Commission, the retest shall be signed by the representative of the Commission.

(5) In the event that downhole remedial work or other substantial production enhancement work is performed, or if a pumping unit, compressor, or other equipment is installed to increase deliverability of a well subject to the Commission-witnessed testing procedure described in this subsection, a new test may be requested and shall be performed according to the procedure outlined in this subsection.

(c) Unless applicable special field rules provide otherwise or the director of the oil and gas division or the director's delegate authorizes an alternate procedure due to a well's producing characteristics, deliverability tests shall be performed as follows. Deliverability tests shall be scheduled by the producer within the testing period designated by the [~~Railroad~~] Commission, and only the recorded data specified by the Form G-10 is required to be reported. All deliverability tests shall be performed by producing the subject well at stabilized rates for a minimum time period of 72 hours. A deliverability test shall be conducted under normal and usual operating conditions using the normal and usual operating equipment in place on the well being tested, and the well shall be produced against the normal and usual line pressure prevailing in the line into which the well produces. The average daily producing rate for each 24-hour period, the wellhead pressure before the commencement of the 72-hour test, and the flowing wellhead pressure at the beginning of each 24-hour period shall be recorded. In addition, a 24-hour shut-in wellhead pressure shall be determined either within the six-month period prior to the commencement of the 72-hour deliverability test or immediately after the completion of the deliverability test. The shut-in wellhead pressure that was determined and the date on which the 24-hour test was commenced shall be recorded on Form G-10. Exceptions and extensions to the timing requirements for deliverability tests and shut-in wellhead pressure tests may be granted by the Commission for good cause. The flow rate during each day of the first 48 hours of the test must be as close as possible to the flow rate during the final 24 hours of the test, but must equal at least 75% of such flow rate. The deliverability of the well during the last 24 hours of the flow test shall be used for allowable and allocation purposes. If pipeline conditions exist such that a producer believes a representative deliverability test cannot be performed, the producer with pipeline notification may request in writing that the Commission [~~commission~~] use either of the following as the deliverability of record [~~a representative deliverability~~]:

(1) the deliverability test performed during the previous testing period; or

(2) the maximum daily production from any of the 12 months prior to the due date of the test as determined by dividing the highest monthly production by the number of days in that month.

(d) After the initial deliverability test, an operator may elect not to perform and/or file a subsequent deliverability test for a well. In those cases, the Commission shall use the lesser of the following as the deliverability of record for the purpose of this section:

(1) the results of the most recent deliverability test on file with the Commission; or

(2) the maximum daily production from any of the 12 months prior to the due date of the test as determined by dividing the highest monthly production by the number of days in that month.

(e) Notwithstanding subsection (d) of this section, a deliverability test must be performed on a well in accordance with this section:

(1) at initial completion of the well;

(2) at recompletion of the well into a different regulatory field;

(3) at reclassification of the well from oil to gas;

(4) when the well is an inactive well as defined in §3.15 of this title (relating to Surface Equipment Removal Requirements and Inactive Wells) and the operator resumes production from the well;

(5) when the well is completed in a regulatory field where the allocation formula is based in whole or in part on the downhole pressure of the well, and that allocation formula is not suspended;

(6) when necessary to reinstate an allowable; or

(7) when required by Commission order, special field rule, or other Commission rule.

(f) [~~(d)~~] If the deliverability of a well changes after a test is reported to the Commission, the deliverability of record for a well will be decreased upon receipt of a written request from the operator to reduce the deliverability of record to a specified amount. If the deliverability of a well increases, a retest must be conducted in the manner specified in this section and must be reported on Form G-10 before the deliverability of record will be increased.

(g) [~~(e)~~] First purchasers with packages of gas dedicated entirely to a downstream purchaser shall coordinate testing with and provide test results to that downstream purchaser if requested by the downstream purchaser. In these cases, the downstream purchaser upon request to the operator shall have the right to witness all deliverability tests and retests.

(h) [~~(f)~~] Tests of wells connected to a pipeline shall be made in a manner that no gas is flared, vented, or otherwise wastefully used.

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 August 24, 2016.

TRD-201604360
Haley Cochran
Rules Attorney, Office of General Counsel
Railroad Commission of Texas
Earliest possible date of adoption: October 9, 2016
For further information, please call: (512) 475-1295

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TITLE 22. EXAMINING BOARDS

PART 8. TEXAS APPRAISER LICENSING AND CERTIFICATION BOARD

CHAPTER 153. RULES RELATING TO PROVISIONS OF THE TEXAS APPRAISER LICENSING AND CERTIFICATION ACT

22 TAC §153.15

The Texas Appraiser Licensing and Certification Board (TALCB or Board) proposes amendments to §153.15, Experience Required for Licensing. The proposed amendments clarify the criteria required for awarding experience credit for applicants and license holders based on a revised interpretation of the Appraisal Subcommittee (ASC). The proposed amendments also remove redundant language and reorganize this section to improve readability.

Kristen Worman, General Counsel, has determined that for the first five-year period the proposed amendments are in effect, there will be no fiscal implications for the state or for units of local government as a result of enforcing or administering the proposed amendments. There is no anticipated significant impact on small businesses, micro-businesses or local or state employment as a result of implementing the proposed amendments. There is no significant anticipated economic cost to persons who are required to comply with the proposed amendments.

Ms. Worman also has determined that for each year of the first five years the sections as proposed are in effect the public benefits anticipated as a result of enforcing the section as proposed will be clarity for applicants and license holders and a requirement that is easier to understand and consistent with state and federal law.

Comments on the proposal may be submitted to Kristen Worman, General Counsel, Texas Appraiser Licensing and Certification Board, P.O. Box 12188, Austin, Texas 78711-2188 or emailed to general.counsel@talcb.texas.gov. The deadline for comments is 30 days after publication in the *Texas Register.*

The amendments are proposed under Texas Occupations Code §§1103.151 - 1103.152, which authorize TALCB to: adopt rules relating to certificates and licenses and prescribe qualifications for appraisers that are consistent with the qualifications established by the Appraiser Qualifications Board (AQB).

The statute affected by these amendments is Texas Occupations Code, Chapter 1103. No other statute, code or article is affected by the proposed amendments.

§153.15. Experience Required for Licensing.

(a) An applicant for a certified general real estate appraiser license must provide evidence satisfactory to the Board that the applicant possesses the equivalent of 3,000 hours of real estate appraisal experience over a minimum of 30 months. At least 1,500 hours of experience must be in non-residential real estate appraisal work. [~~Hours may be treated as cumulative in order to achieve the necessary hours of appraisal experience.~~]

(b) An applicant for a certified residential real estate appraiser license must provide evidence satisfactory to the Board that the applicant possesses the equivalent of 2,500 hours of real estate appraisal experience over a minimum of 24 months. [~~Hours may be treated as cumulative in order to achieve the necessary hours of appraisal experience.~~]

(c) An applicant for a state real estate appraiser license must provide evidence satisfactory to the Board that the applicant possesses at least 2,000 hours of real estate appraisal experience over a minimum of twelve months.

(d) Experience by endorsement: An applicant who is currently licensed and in good standing in a state that has not been disapproved by the ASC is deemed to satisfy the experience requirements for the same level of license in Texas. The applicant must provide appropriate documentation as required by the Board.

(e) The Board awards experience credit in accordance with current criteria established by the AQB and in accordance with the provisions of the Act specifically relating to experience requirements. An hour of experience means 60 minutes expended in one or more of the acceptable appraisal experience areas. Calculation of the hours of experience is based solely on actual hours of experience. Hours may be treated as cumulative in order to achieve the necessary hours of appraisal experience. Any one or any combination of the following categories may be acceptable for satisfying the applicable experience requirement. Experience credit may be awarded for:

(1) An [~~Fee or staff~~] appraisal or appraisal analysis when [~~it is~~] performed in accordance with Standards 1 and 2 and other provisions of the USPAP edition in effect at the time of the appraisal or appraisal analysis.

(2) Mass appraisal, including ad [~~Ad~~] valorem tax appraisal that:

(A) conforms to USPAP Standard 6; and

(B) demonstrates proficiency in appraisal principles, techniques, or skills used by appraisers practicing under USPAP Standard 1.

[~~(3) Condemnation appraisal.~~]

(3) [~~(4)~~] Appraisal [~~Technical~~] review [~~appraisal to the extent~~] that: [~~it~~]

(A) conforms to USPAP Standard 3; and

(B) demonstrates proficiency in appraisal principles, techniques, or skills used by appraisers practicing under USPAP Standard 1.

[~~(5) Appraisal analysis. A market analysis typically performed by a real estate broker or salesperson may be awarded experience credit when the analysis is prepared in conformity with USPAP Standards 1 and 2.~~]

(4) [~~(6)~~] Appraisal [~~Real property appraisal~~] consulting services, including market analysis, cash flow and/or investment analysis, highest and best use analysis, and feasibility analysis when it demonstrates proficiency in appraisal principles, techniques, or skills used by appraisers practicing under USPAP Standard 1 and performed in accordance with USPAP Standards 4 and 5.

(f) Experience credit may not be awarded for teaching appraisal courses.

(g) Recency of Experience.

(1) The Appraisal Experience Log submitted by an applicant must include a minimum of 10 appraisal reports representing at least 10 percent of the hours and property type of experience required for each license category and for which an applicant seeks experience credit that have been performed within 5 years before the date an application is accepted for filing by the Board.

(2) This requirement does not eliminate an applicant's responsibility to comply with the 5-year records retention requirement in USPAP.

(h) Experience credit for first-time applicants. Each applicant must submit a Board-approved Appraisal Experience Log and Appraisal Experience Affidavit listing each appraisal assignment or other work for which the applicant is seeking experience credit. The Board may grant experience credit for work listed on an applicant's Appraisal Experience Log that:

(1) complies with the USPAP edition in effect at the time of the appraisal;

(2) is verifiable and supported by:

(A) work files in which the applicant is identified as participating in the appraisal process; or

(B) appraisal reports that:

(i) name the applicant in the certification as providing significant real property appraisal assistance; or

(ii) the applicant has signed;

(3) was performed when the applicant had legal authority to do so; and

(4) complies with the acceptable categories of experience established by the AQB and stated in subsection (e) of this section.

(i) Experience credit for current licensed residential or certified residential license holders who seek to upgrade their license.

(1) Applicants who currently hold a licensed residential or certified residential appraiser license issued by the Board and want to upgrade this license must:

(A) submit an application on a Board-approved form;

(B) submit a Board-approved Appraisal Experience Log and Appraisal Experience Affidavit listing each appraisal assignment or other work for which the applicant is seeking experience credit for the full amount of experience hours required for the license sought;

(C) pay the appropriate application fee; and

(D) satisfy any other requirement for the license sought, including but not limited to:

(i) the incremental number of experience hours required;

(ii) the hours of experience required for each property type;

(iii) the minimum length of time over which the experience is claimed; and

(iv) the recency requirement in this section.

(2) Review of experience logs.

(A) An applicant who seeks to upgrade a current license issued by the Board must produce experience logs to document 100 percent of the experience hours required for the license sought.

(B) Upon review of an applicant's experience logs, the Board may, at its sole discretion, grant experience credit for the hours shown on the applicant's logs even if some work files have been destroyed because the 5-year records retention period in USPAP has passed.

(j) The Board may, at its sole discretion, accept evidence other than an applicant's Appraisal Experience Log and Appraisal Experience Affidavit to demonstrate experience claimed by an applicant.

(k) The Board must verify the experience claimed by each applicant generally complies with USPAP.

(1) Verification may be obtained by:

(A) requesting copies of appraisals and all supporting documentation, including the work files; and

(B) engaging in other investigative research determined to be appropriate by the Board.

(2) If the Board requests documentation from an applicant to verify experience claimed by an applicant, the applicant has 60 days to provide the requested documentation to the Board.

(3) Failure to comply with a request for documentation to verify experience, or submission of experience that is found not to comply with the requirements for experience credit, is a violation of these rules and may result in denial of a license application, and any disciplinary action up to and including revocation.

[~~(g) Experience claimed by an applicant must be submitted on an Appraisal Experience Log with an accompanying Appraisal Experience Affidavit.~~]

[~~(1) In exceptional situations, the Board, at its discretion, may accept other evidence of experience claimed by the applicant.~~]

[~~(2) If the Board determines just cause exists for requiring further information, the Board may obtain additional information by:~~]

[~~(A) requiring the applicant to complete a form, approved by the Board, that includes detailed listings of appraisal experience showing, for each appraisal claimed by the applicant, the city or county where the appraisal was performed, the type and description of the building or property appraised, the approaches to value utilized in the appraisal, the actual number of hours expended on the appraisal, name of client, and other information determined to be appropriate by the Board; or~~]

[~~(B) engaging in other investigative research determined to be appropriate by the Board.~~]

[~~(3) The Board will require verification of acceptable experience of all applicants. Applicants have 60 days to provide all documentation requested by the Board. The verification may be obtained by:~~]

[~~(A) requiring the applicant to complete a form, approved by the Board, that includes detailed listings of appraisal experience showing, for each appraisal claimed by the applicant, the city or county where the appraisal was performed, the type and description of the building or property appraised, the approaches to value utilized in the appraisal, the actual number of hours expended on the appraisal, name of client, and other information determined to be appropriate by the Board;~~]

[~~(B) requesting copies of appraisals and all supporting documentation, including the workfiles; and~~]

[~~(C) engaging in other investigative research determined to be appropriate by the Board.~~]

[~~(4) Failure to comply with a request for verification of experience, or submission of experience that is found not to comply with the requirements for experience credit, is a violation of these rules and may result in denial of a license application, and any disciplinary action up to and including revocation.~~]

[~~(h) An applicant may be granted experience credit only for real property appraisals that:~~]

[~~(1) comply with the USPAP edition in effect at the time of the appraisal;~~]

[~~(2) are verifiable and supported by workfiles in which the applicant is identified as participating in the appraisal process;~~]

[~~(3) were performed when the applicant had legal authority; and~~]

[~~(4) comply with the acceptable categories of experience as per the AQB experience criteria and stated in subsection (e) of this section.~~]

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

Filed with the Office of the Secretary of State on August 23, 2016.

TRD-201604339
Kristen Worman
General Counsel
Texas Appraiser Licensing and Certification Board
Earliest possible date of adoption: October 9, 2016
For further information, please call: (512) 936-3652

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CHAPTER 159. RULES RELATING TO THE PROVISIONS OF THE TEXAS APPRAISAL MANAGEMENT COMPANY REGISTRATION AND REGULATION ACT

22 TAC §159.52

The Texas Appraiser Licensing and Certification Board (TALCB or Board) proposes amendments to §159.52, Fees. The proposed amendments reduce the renewal fee for appraisal management companies by $300 per two-year license renewal period and reduce the fee to add or remove an appraiser from an AMC panel from $10 to $5. The Board proposes these AMC fee reductions as part of its budget for fiscal year 2017.

Kristen Worman, General Counsel, has determined that for the first five-year period the proposed amendments are in effect, there will be no fiscal implications for the state or for units of local government as a result of enforcing or administering the proposed amendments. There is no anticipated significant impact on small businesses, micro-businesses or local or state employment as a result of implementing the proposed amendments. There is no significant anticipated economic cost to persons who are required to comply with the proposed amendments.

Ms. Worman also has determined that for each year of the first five years the sections as proposed are in effect the public benefits anticipated as a result of enforcing the section as proposed will be lower fees for license holders.

Comments on the proposal may be submitted to Kristen Worman, General Counsel, Texas Appraiser Licensing and Certification Board, P.O. Box 12188, Austin, Texas 78711-2188 or emailed to general.counsel@talcb.texas.gov. The deadline for comments is 30 days after publication in the *Texas Register.*

The amendments are proposed under Texas Occupations Code, §1104.051, which authorizes the TALCB to adopt rules necessary to administer the provisions of Chapter 1104, Texas Occupations Code.

The statute affected by these amendments is Texas Occupations Code, Chapter 1104. No other statute, code or article is affected by the proposed amendments.

§159.52. Fees.

(a) The Board will charge and the Commissioner will collect the following fees:

(1) a fee of $3,300 for an application for a two-year registration;

(2) a fee of $3,000 [~~$3,300~~] for a timely renewal of a two-year registration;

(3) a fee equal to 1-1/2 times the timely renewal fee for the late renewal of a registration within 90 days of expiration; a fee equal to two times the timely renewal fee for the late renewal of a registration more than 90 days but less than six months after expiration;

(4) the national registry fee in the amount charged by the Appraisal Subcommittee for the AMC registry;

(5) a fee of $10 for each appraiser on a panel at the time of renewal of a registration;

(6) a fee of $5 [~~$10~~] to add an appraiser to a panel in the Board's records;

(7) a fee of $5 [~~$10~~] for the termination of an appraiser from a panel;

(8) a fee of $25 to request a registration be placed on inactive status;

(9) a fee of $50 to return to active status;

(10) a fee of $40 for preparing a certificate of licensure history or active licensure;

(11) a fee for a returned check equal to that charged for a returned check by the Texas Real Estate Commission;

(12) a fee of $20 for filing any request to change an owner, primary contact, appraiser contact, registered business name or place of business;

(13) a fee of $50 for evaluation of an owner or primary contact's background history not submitted with an original application or renewal;

(14) a fee of $20 for filing any application, renewal, change request, or other record on paper when the person may otherwise file electronically by accessing the Board's website and entering the required information online; and

(15) any fee required by the Department of Information Resources for establishing and maintaining online applications.

(b) Fees must be submitted in U.S. funds payable to the order of the Texas Appraiser Licensing and Certification Board. Fees are not refundable once an application has been accepted for filing. Persons who have submitted a check which has been returned, and who have not made good on that check within 30 days, for whatever reason, must submit all future fees in the form of a cashier's check or money order.

(c) AMCs registered with the Board must pay any annual registry fee as required under federal law. All registry fees collected by the Board will be deposited in the Texas Treasury Safekeeping Trust Company to the credit of the appraiser registry fund. The Board will send the fees to the Appraisal Subcommittee as required by federal law.

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 August 23, 2016.

TRD-201604332
Kristen Worman
General Counsel
Texas Appraiser Licensing and Certification Board
Earliest possible date of adoption: October 9, 2016
For further information, please call: (512) 936-3652

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22 TAC §159.161

The Texas Appraiser Licensing and Certification Board (TALCB or Board) proposes amendments to §159.161, Appraiser Panel. As recommended by the Appraisal Management Company (AMC) Advisory Committee, the proposed amendments allow the Board to remove an appraiser from an AMC's panel without any charge to the AMC if the Board suspends or revokes the appraiser's license. The proposed amendments also clarify when an appraiser will be removed from an AMCs panel after the appraiser's license expires.

Kristen Worman, General Counsel, has determined that for the first five-year period the proposed amendments are in effect, there will be no fiscal implications for the state or for units of local government as a result of enforcing or administering the proposed amendments. There is no anticipated significant impact on small businesses, micro-businesses or local or state employment as a result of implementing the proposed amendments. There is no significant anticipated economic cost to persons who are required to comply with the proposed amendments.

Ms. Worman also has determined that for each year of the first five years the sections as proposed are in effect the public benefits anticipated as a result of enforcing the section as proposed will be clarity for license holders.

Comments on the proposal may be submitted to Kristen Worman, General Counsel, Texas Appraiser Licensing and Certification Board, P.O. Box 12188, Austin, Texas 78711-2188 or emailed to general.counsel@talcb.texas.gov. The deadline for comments is 30 days after publication in the *Texas Register.*

The amendments are proposed under Texas Occupations Code, §1104.051, which authorizes the TALCB to adopt rules necessary to administer the provisions of Chapter 1104, Texas Occupations Code.

The statute affected by these amendments is Texas Occupations Code, Chapter 1104. No other statute, code or article is affected by the proposed amendments.

§159.161. Appraiser Panel.

(a) If an appraiser is not employed by the AMC or already a member of the AMC's panel, an AMC must add the appraiser to the AMC's panel no later than the date on which the AMC makes an assignment to the appraiser.

(b) To add an appraiser to a panel, the AMC must:

(1) initiate the appropriate two-party transaction through the Board's online panel management system, including payment of any required fee(s); or

(2) submit a notice on a form approved by the Board for this purpose, including the signatures of the appraiser and the AMC's primary contact, and the appropriate fee(s).

(c) An appraiser or an AMC may terminate the appraiser's membership on a panel by:

(1) submitting a termination notice electronically through the Board's online panel management system, including payment of any required fee; or

(2) submitting a notice on a form approved by the Board for this purpose and the appropriate fee(s).

(d) If an appraiser terminates his or her membership on a panel, the appraiser must immediately notify the AMC of the termination. If an AMC terminates an appraiser's membership on a panel, the AMC must immediately notify the appraiser of the termination.

(e) If an appraiser's license [~~expires or~~] is suspended or revoked, the Board will remove the appraiser from any panels on which the appraiser is listed with no fee charged to the AMC or [~~to~~] the appraiser.

(f) If an appraiser's license expires, the Board will:

(1) change the appraiser's license status the month following expiration of the license; and

(2) remove the appraiser from any panels on which the appraiser is listed with no fee charged to the AMC or the appraiser once the license can no longer be renewed.

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 August 23, 2016.

TRD-201604333
Kristen Worman
General Counsel
Texas Appraiser Licensing and Certification Board
Earliest possible date of adoption: October 9, 2016
For further information, please call: (512) 936-3652

22 TAC §159.201

The Texas Appraiser Licensing and Certification Board (TALCB or Board) proposes amendments to §159.201, concerning Guidelines for Revocation, Suspension, or Denial of a License. As recommended by the Working Group for AQB Criminal History Check Criteria and the Appraisal Management Company (AMC) Advisory Committee, the proposed amendments allow an AMC to conduct additional criminal history checks beyond those required by the Board, so long as an AMC does not require an appraiser to pay for or reimburse an AMC for the additional criminal history checks.

The Legislature delegated authority to the Board to adopt rules requiring fingerprint-based criminal history checks. The Board appointed the Working Group in November 2015 to consider whether to implement fingerprint-based criminal history checks for appraisers to comply with criteria adopted by the Appraiser Qualifications Board (AQB). The Working Group recommends implementing fingerprint-based criminal history checks for applicants and current license holders. The Working Group and the AMC Advisory Committee recognize that AMCs may have a business need to conduct additional criminal history checks beyond those recommended by the Working Group and, if adopted, required by the Board. The proposed amendments would allow AMCs to conduct additional criminal history checks, so long as an AMC does not require an appraiser to pay for or reimburse an AMC for the additional criminal history checks.

Kristen Worman, General Counsel, has determined that for the first five-year period the proposed amendments are in effect, there will be no fiscal implications for the state or for units of local government as a result of enforcing or administering the proposed amendments. There is no anticipated significant impact on small businesses, micro-businesses or local or state employment as a result of implementing the proposed amendments. There is no significant anticipated economic cost to persons who are required to comply with the proposed amendments.

Ms. Worman also has determined that for each year of the first five years the sections as proposed are in effect the public benefits anticipated as a result of enforcing the section as proposed will be clarity for license holders.

Comments on the proposal may be submitted to Kristen Worman, General Counsel, Texas Appraiser Licensing and Certification Board, P.O. Box 12188, Austin, TX 78711-2188 or emailed to *general.counsel@talcb.texas.gov.* The deadline for comments is 30 days after publication in the *Texas Register.*

The amendments are proposed under Texas Occupations Code, §1104.051, which authorizes the TALCB to adopt rules necessary to administer the provisions of Chapter 1104, Texas Occupations Code.

The statute affected by these amendments is Texas Occupations Code, Chapter 1104. No other statute, code or article is affected by the proposed amendments.

§159.201. Guidelines for Revocation, Suspension, or Denial of a License.

(a) The Board may suspend or revoke a license issued under provisions of the AMC Act, or deny issuing a license to an applicant, any time it is determined that the person applying for or holding the license or the AMC's primary contact:

(1) disregards or violates a provision of the AMC Act or Board rules;

(2) is convicted of a felony;

(3) fails to notify the Board not later than the 30th day after the date of the final conviction if the person, in a court of this or another state or in a federal court, has been convicted of or entered a plea of guilty or nolo contendere to a felony or a criminal offense involving fraud or moral turpitude;

(4) fails to notify the Board not later than the 30th day after the date of incarceration if the person, in this or another state, has been incarcerated for a criminal offense involving fraud or moral turpitude;

(5) fails to notify the Board not later than the 30th day after the date disciplinary action becomes final against the person with regard to any occupational license the person holds in Texas or any other jurisdiction;

(6) fails to comply with the USPAP edition in effect at the time of the appraisal or appraisal practice;

(7) acts or holds any person out as a registered AMC under the AMC Act or another state's act when not so licensed or certified;

(8) accepts payment for appraisal management services but fails to deliver the agreed service in the agreed upon manner;

(9) refuses to refund payment received for appraisal management services when he or she has failed to deliver the appraiser service in the agreed upon manner;

(10) accepts payment for services contingent upon a minimum, maximum, or pre-agreed value estimate;

(11) offers to perform appraisal management services or agrees to perform such services when employment to perform such services is contingent upon a minimum, maximum, or pre-agreed value estimate;

(12) makes a material misrepresentation or omission of material fact;

(13) has had a registration as an AMC revoked, suspended, or otherwise acted against by any other jurisdiction for an act which is an offense under Texas law;

(14) procures a registration pursuant to the AMC Act by making false, misleading, or fraudulent representation;

(15) has had a final civil judgment entered against him or her on any one of the following grounds:

(A) fraud;

(B) intentional or knowing misrepresentation; or

(C) grossly negligent misrepresentation in the making of real estate appraiser services;

(16) fails to make good on a payment issued to the Board within 30 days after the Board has mailed a request for payment by certified mail to the license holder's primary contact as reflected in the Board's records;

(17) knowingly or willfully engages in false or misleading conduct or advertising with respect to client solicitation;

(18) uses any title, designation, initial or other insignia or identification that would mislead the public as to that person's credentials, qualifications, competency, or ability to provide appraisal management services;

(19) requires an appraiser to pay for or reimburse the AMC for a criminal history check;

(20) fails to comply with a final order of the Board; or

(21) [~~(20)~~] fails to answer all inquiries concerning matters under the jurisdiction of the Board within 20 days of notice to said person's or primary contact's address of record, or within the time period allowed if granted a written extension by the Board.

(b) The Board has discretion in determining the appropriate penalty for any violation under subsection (a) of this section.

(c) The Board may probate a penalty or sanction, and may impose conditions of the probation, including, but not limited to:

(1) the type and scope of appraisal management practice;

(2) requirements for additional education by the AMC's controlling persons;

(3) monetary administrative penalties; and

(4) requirements for reporting appraisal management activity to the Board.

(d) A person applying for reinstatement after revocation or surrender of a registration must comply with all requirements that would apply if the registration had instead expired.

(e) The provisions of this section do not relieve a person from civil liability or from criminal prosecution under the AMC Act or under the laws of this State.

(f) The Board may not investigate under this section a complaint submitted either more than two years after the date of discovery or more than two years after the completion of any litigation involving the incident, whichever event occurs later, involving the AMC that is the subject of the complaint.

(g) Except as provided by Texas Government Code §402.031(b) and Texas Penal Code §32.32(d), there will be no undercover or covert investigations conducted by authority of the AMC Act.

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

Filed with the Office of the Secretary of State on August 23, 2016.

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Kristen Worman
General Counsel
Texas Appraiser Licensing and Certification Board
Earliest possible date of adoption: October 9, 2016
For further information, please call: (512) 936-3652

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PART 16. TEXAS BOARD OF PHYSICAL THERAPY EXAMINERS

CHAPTER 323. POWERS AND DUTIES OF THE BOARD

22 TAC §323.4

The Texas Board of Physical Therapy Examiners proposes the addition of §323.4. Request for Proposals for Outsourced Services under Chapter 323. Powers and Duties of the Board.

The new rule is proposed to allow the Board to develop a process for outsourcing services through a request for proposal (RFP) method to ensure fairness and transparency.

John P. Maline, Executive Director, has determined that for the first five-year period this new rule is in effect there will be no additional costs to state or local governments as a result of enforcing or administering this amendment, and that there will be a positive effect on public safety through an open and transparent bid process.

Mr. Maline has determined that there will be no costs or adverse economic effects to small or micro businesses, therefore an economic impact statement or regulatory flexibility analysis is not required for the proposal. There are no anticipated costs to individuals who are required to comply with the rule as proposed.

Comments on the proposed new rule may be submitted to Karen Gordon, PT Coordinator, Texas Board of Physical Therapy Examiners, 333 Guadalupe, Suite 2-510, Austin, Texas 78701; email: karen@ptot.texas.gov. Comments must be received no later than 30 days from the date this proposal is published in the *Texas Register.*

The new rule is proposed under the Physical Therapy Practice Act, Title 3, Subtitle H, Chapter 453, Texas Occupations Code, which provides the Texas Board of Physical Therapy Examiners with the authority to adopt rules consistent with this Act to carry out its duties in administering this Act.

Title 3, Subtitle H, Chapter 453, Texas Occupations Code is affected by this proposal.

§323.4. Request for Proposals for Outsourced Services.

(a) The board shall conduct a request for proposals (RFP) and bid process for all outsourced services, including the issuance of agreements or memorandums of understanding with other entities, no less than once every four years beginning September 1, 2017. The board may also request RFPs at any time by an action of the board.

(b) The board shall develop specific guidelines for each RFP and shall review the RFP as part of the biennual review.

(c) The board shall review all outsourced services on a biennual basis.

(d) An entity entering into an agreement with the board shall provide access to financial information as required by the RFP.

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 August 26, 2016.

TRD-201604532

John P. Maline
Executive Director
Texas Board of Physical Therapy Examiners
Earliest possible date of adoption: October 9, 2016
For further information, please call: (512) 305-6900

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CHAPTER 329. LICENSING PROCEDURE

22 TAC §329.2

The Texas Board of Physical Therapy Examiners proposes an amendment to §329.2. Licensure by Examination relating to (b) Re-examination and (d) Exam Accommodations.

The amendments are proposed to allow for the implementation of the Alternate Approval Process through the Federation of State Boards of Physical Therapy (Federation) for candidate eligibility for the National Physical Therapy Examination (exam). The procedures for applying for re-examination if a candidate fails the exam and for applying for accommodations for taking the exam will be included in the Federation's requirements for eligibility and will be processed by the Federation.

John P. Maline, Executive Director, has determined that for the first five-year period these amendments are in effect there will be no additional costs to state or local governments as a result of enforcing or administering these amendments; that there will be a decreased workload for staff by eliminating re-examination and accommodation procedures; and that there will be no adverse effect on public safety.

Mr. Maline has determined that there will be no costs or adverse economic effects to small or micro businesses, therefore an economic impact statement or regulatory flexibility analysis is not required for the amendment. There are no anticipated costs to individuals who are required to comply with the rule as proposed.

Comments on the proposed amendments may be submitted to Karen Gordon, PT Coordinator, Texas Board of Physical Therapy Examiners, 333 Guadalupe, Suite 2-510, Austin, Texas 78701; email: karen@ptot.texas.gov. Comments must be received no later than 30 days from the date this proposed amendment is published in the *Texas Register.*

The amendments are proposed under the Physical Therapy Practice Act, Title 3, Subtitle H, Chapter 453, Texas Occupations Code, which provides the Texas Board of Physical Therapy Examiners with the authority to adopt rules consistent with this Act to carry out its duties in administering this Act.

Title 3, Subtitle H, Chapter 453, Texas Occupations Code is affected by these amendments.

§329.2. Licensure by Examination.

(a) Requirements. An applicant applying for licensure by examination must:

(1) meet the requirements as stated in §329.1 of this title (relating to General Licensure Requirements and Procedures);

(2) register to take the National Physical Therapy Exam (NPTE) and select Texas as the jurisdiction for which the applicant will be testing in order to [~~national exam through this state, and~~] have the first score report sent to this state; and

(3) pass the NPTE [~~National Physical Therapy Exam (NPTE)~~] for physical therapists or physical therapist assistants with the score approved [~~set~~] by the board. Score reports must be sent directly to the board by the authorized score reporting service.

(b) Re-examination.

(1) An applicant who fails the exam is eligible to take the examination again if all eligibility requirements as set in policy by the Federation of State Boards of Physical Therapy (FSBPT) are met. [~~after submitting a re-exam application and fee.~~]

(2) An applicant can take the exam a maximum of six (6) times.

(3) An applicant who receives two (2) very low scores on the exam (scale scores 400 or below) will not be eligible to test again.

(4) An applicant who has taken the exam six (6) times or received two (2) very low scores may appeal for one (1) additional attempt through the Board for reasons as set in policy by the FSBPT. [~~Federation of State Boards of Physical Therapy (FSBPT).~~]

(5) An applicant can take the exam for PTs six (6) times and also take the exam for PTAs six (6) times if otherwise eligible to do so.

(c) Failure of PT exam. An applicant who fails the physical therapy examination may apply for licensure as a PTA and take the physical therapist assistant examination if he meets all other requirements for licensure.

(d) Exam Accommodations.

(1) Reasonable testing accommodations for an exam candidate with a disability or challenge that is covered by the Americans with Disabilities Act will be provided for candidates who submit the appropriate documentation through the FSBPT.

(2) Accommodations must be requested at the time of registration for the NPTE.[~~The board will provide reasonable accommodations for the national exam. An individual requesting special accommodations must submit the request to the board at least 30 days prior to the deadline for registering for the licensing examination. The board will process the accommodation request once all of the required information and documentation is received. The request includes the following forms:~~]

[~~(1) A completed Accommodations Request Form;~~]

[~~(2) A Professional Documentation of Disability Form, completed by a diagnostician meeting the board's requirements, which includes documentation of tests and measures used to diagnose the disability, and the results of those tests and measures;~~]

[~~(3) A completed Consent to Release Information Form; and~~]

[~~(4) The Academic Program Verification Form completed by the director of the academic program attended, if accommodations were granted by the PT or PTA program.~~]

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

Filed with the Office of the Secretary of State on August 26, 2016.

TRD-201604533
John P. Maline
Executive Director
Texas Board of Physical Therapy Examiners
Earliest possible date of adoption: October 9, 2016
For further information, please call: (512) 305-6900

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PART 24. TEXAS BOARD OF VETERINARY MEDICAL EXAMINERS

CHAPTER 573. RULES OF PROFESSIONAL CONDUCT

SUBCHAPTER G. OTHER PROVISIONS

22 TAC §573.80

The Texas Board of Veterinary Medical Examiners (Board) proposes amendments to §573.80, concerning Definitions.

The purpose of the amendment is to remove the definition of "designated caretaker." The Third Court of Appeals upheld a district court's determination that the definition was invalid.

Nicole Oria, Executive Director, has determined that for each year of the first five years that the rule is in effect, the fiscal implications for state government will be the Board's cost of administrative litigation in cases where the respondent claims exemption from the Board's jurisdiction under the designated caretaker provision in Texas Occupations Code §801.004. Ms. Oria does not anticipate any impact on revenue to local government. Ms. Oria has also determined that there will be no increase or reduction in costs to either state or local government as a result of enforcing or administering the rule as proposed. Ms. Oria has further determined that the amendment to the rule will have no impact on local employment.

Ms. Oria has determined that for each year of the first five years the rule is in effect, the anticipated public benefit will be that the Board's rule reflects the final judicial determination on the validity of the rule.

Ms. Oria has determined that for the first five-year period the proposed rule is in effect, there will be no costs to persons or small businesses who are required to comply with the rule. There is no adverse impact expected for small or micro businesses, and no anticipated difference in cost of compliance between small and large businesses.

The Texas Board of Veterinary Medical Examiners invites comments on the proposed amendments to the rule from any member of the public. A written statement should be mailed or delivered to Loris Jones, Texas Board of Veterinary Medical Examiners, 333 Guadalupe, Ste. 3-810, Austin, Texas 78701-3942, by facsimile (FAX) to (512) 305-7574, or by e-mail to *vet.board@veterinary.texas.gov.* Comments will be accepted for 30 days following publication in the *Texas Register.*

The amendments are proposed under the authority of the Veterinary Licensing Act, Texas Occupations Code, §801.151(a), which states that the Board may adopt rules necessary to administer the chapter.

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

§573.80. Definitions.

The following words and terms, when used in the Veterinary Licensing Act (Chapter 801, Texas Occupations Code) or the Rules of the Board (Texas Administrative Code, Title 22, Part 24, Chapters 571, 573, 575, and 577) shall have the following meanings, unless the context clearly indicates otherwise:

(1) (No change.)

[~~(2) Designated caretaker--a person to whom the owner of an animal has given specific authority to care for the animal and who has not been designated, by using the pretext of being a designated caretaker, to circumvent the Veterinary Licensing Act (Chapter 801, Texas Occupations Code) by engaging in any aspect of the practice of veterinary medicine (including alternate therapies). A designated caretaker who treats an animal for a condition that the animal was known or suspected of having prior to the person being named a designated caretaker, is presumed to be attempting to circumvent the Veterinary Licensing Act unless the designated caretaker is following the instruction of a veterinarian and is under the appropriate level of supervision per board rules. In this situation, the designated caretaker may present evidence to rebut the presumption.~~]

(2) [~~(3~~] Food production animals--any mammalians, poultry, fowl, fish or other animals that are raised primarily for human food consumption.

(3) [4] Biologic--any serum, vaccine, antitoxin, or antigen used in the prevention or treatment of disease.

(4) [~~5~~] Pregnancy testing--the diagnosis of the physical condition of pregnancy by any method other than the gross visual observation of the animal.

(5) [~~6~~] Invasive dentistry or invasive dental procedures--exposing of the dental pulp, or performing extractions.

(6) [~~7~~] Consultation--the act of rendering professional advice (diagnosis and prognosis) about a specific veterinary medical case, but does not include treatment or surgery.

(7) [~~8~~] General Supervision--a veterinarian required to generally supervise a non-veterinarian must be readily available to communicate with the person under supervision.

(8) [~~9~~] Direct Supervision--a licensee required to directly supervise a person must be physically present on the same premises as the person under supervision.

(9) [~~10~~] Immediate Supervision--a licensee required to immediately supervise a person must be within audible and visual range of both the animal patient and the person under supervision.

(10) [~~11~~] Official Health Documents--any certificate attesting to the health, vaccination status, physical condition and/or soundness of an animal.

(11) [~~12~~] Specialist--a veterinarian that is a Board Certified Diplomate of a specialty organization recognized by the American Veterinary Medical Association.

(12) [~~13~~] Non-veterinarian employee--an individual paid directly by a veterinarian for work involving the practice of veterinary medicine, as defined in the Veterinary Licensing Act, Texas Occupations Code, §801.002(5), regardless of the defined status of the employment relationship between the individual and the veterinarian under Internal Revenue Service regulations.

(13) [~~14~~] Herd--a group of animals of the same species, managed as a group and confined to a specific geographic location. A herd may not include dogs, cats, any animal in individual training, or any animal that competes as an individual.

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 August 24, 2016.

TRD-201604355

Loris Jones
Executive Assistant
Texas Board of Veterinary Medical Examiners
Earliest possible date of adoption: October 9, 2016
For further information, please call: (512) 305-7563

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CHAPTER 577. GENERAL ADMINISTRATIVE DUTIES

SUBCHAPTER A. BOARD MEMBERS AND MEETINGS--DUTIES

22 TAC §577.5

The Texas Board of Veterinary Medical Examiners (Board) proposes amendments to §577.5, concerning Advisory Committees.

The purpose of the amendment is to comply with Texas Occupations Code §801.163, which requires the Board to adopt rules regarding training requirements for advisory committee members, if training is deemed necessary.

Nicole Oria, Executive Director, has determined that for each year of the first five years that the rule is in effect, there will be no fiscal implications for state government. Ms. Oria does not anticipate any impact on revenue to local government. Ms. Oria has also determined that there will be no increase or reduction in costs to either state or local government as a result of enforcing or administering the rule as proposed. Ms. Oria has further determined that the amendments to the rule will have no impact on local employment.

Ms. Oria has determined that for each year of the first five years the rule is in effect, the anticipated public benefit will be that the Board's rule complies with §801.163.

Ms. Oria has determined that for the first five-year period the proposed rule is in effect, there will be no costs to persons or small businesses who are required to comply with the rule. There is no adverse impact expected for small or micro businesses, and no anticipated difference in cost of compliance between small and large businesses.

The Texas Board of Veterinary Medical Examiners invites comments on the proposed amendments to the rule from any member of the public. A written statement should be mailed or delivered to Loris Jones, Texas Board of Veterinary Medical Examiners, 333 Guadalupe, Ste. 3-810, Austin, Texas 78701-3942, by facsimile (FAX) to (512) 305-7574, or by e-mail to *vet.board@veterinary.texas.gov.* Comments will be accepted for 30 days following publication in the *Texas Register.*

The amendments are proposed under the authority of the Veterinary Licensing Act, Texas Occupations Code, §801.163, which requires the Board to adopt rules regarding advisory committees.

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

§577.5. Advisory Committees.

(a) (No change.)

(b) The president will determine the composition of the advisory committee, and determine the necessary qualifications of advisory committee members, to ensure that the advisory committee is made up of members with experience or backgrounds necessary to represent stakeholder viewpoints on the issue before the advisory committee. The president will also determine any training requirements for advisory committee members, if necessary.

(c) - (l) (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 August 24, 2016.

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Loris Jones
Executive Assistant
Texas Board of Veterinary Medical Examiners
Earliest possible date of adoption: October 9, 2016
For further information, please call: (512) 305-7563

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SUBCHAPTER B. STAFF

22 TAC §577.15

The Texas Board of Veterinary Medical Examiners (Board) proposes amendments to §577.15, concerning the Fee Schedule.

The Board proposes the amendments to §577.15 to include a slight increase to reflect Legislative appropriations for fiscal year 2017.

Nicole Oria, Executive Director, has determined that for each year of the first five years that the rule is in effect, the fiscal implications for state government are no more than the changes in the fee increase listed in the rule. Ms. Oria does not anticipate any impact on revenue to local government. Ms. Oria has also determined that there will be no increase or reduction in costs to either state or local government as a result of enforcing or administering the rule as proposed. Ms. Oria has further determined that the amendment to the rule will have no impact on local employment.

Ms. Oria has determined that for each year of the first five years the rule is in effect, the anticipated public benefit will be to ensure that the Board is collecting the fees necessary to maintain operations.

Ms. Oria has determined that for the first five-year period the proposed rule is in effect, costs to persons or small businesses who are required to comply with the rule are no more than the fee increase listed in the rule. There is no adverse impact expected for small or micro businesses, and no anticipated difference in cost of compliance between small and large businesses.

If adopted, the amendments will become effective January 1, 2017.

The Texas Board of Veterinary Medical Examiners invites comments on the proposed amendments to the rule from any member of the public. A written statement should be mailed or delivered to Loris Jones, Texas Board of Veterinary Medical Examiners, 333 Guadalupe, Ste. 3-810, Austin, Texas 78701-3942, by facsimile (FAX) to (512) 305-7574, or by e-mail to *vet.board@veterinary.texas.gov.* Comments will be accepted for 30 days following publication in the *Texas Register.*

The amendments are proposed under the authority of the Veterinary Licensing Act, Texas Occupations Code, §801.151(a), which states that the Board may adopt rules necessary to administer the chapter; §801.154(a), which states that the board by

rule shall set fees in amounts that are reasonable and necessary so that the fees, in the aggregate, cover the costs of administering this chapter; and Texas Health and Safety Code, §467.004, which authorizes a licensing authority to add a surcharge to its license or license renewal fee to fund an approved peer assistance program.

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

§577.15. Fee Schedule.

The Texas Board of Veterinary Medical Examiners has established the following fixed fees as reasonable and necessary for the administration of its functions. Other variable fees exist, including but not limited to costs as described in §575.10 of this title (relating to Costs of Administrative Hearings), and are not included in this schedule.

Figure: 22 TAC §577.15

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

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22 TAC §577.18

The Texas Board of Veterinary Medical Examiners (Board) proposes repealing and replacing §577.18, concerning Historically Underutilized Businesses. The proposed new section and its proposed repeal are published concurrently in this issue of the *Texas Register.*

The rule references the Texas Building and Procurement Commission, an agency that has become inactive since the rule was last amended, and references rule sections that are no longer correct. In conjunction with this repeal, the Board proposes new §577.18 to replace the repealed language.

Nicole Oria, Executive Director, has determined that for each year of the first five years that the repeal is in effect, there are no fiscal implications for state government. Ms. Oria does not anticipate any impact on revenue to local government. Ms. Oria has also determined that there will be no increase or reduction in costs to either state or local government as a result of enforcing or administering the repeal as proposed. Ms. Oria has further determined that the repeal will have no impact on local employment.

Ms. Oria has determined that for each year of the first five years the repeal is in effect, the anticipated public benefit will be to ensure that the Board's rule contains the correct citations.

Ms. Oria has determined that for the first five-year period the proposed repeal is in effect, there will be no increase in costs to persons or small businesses who are required to comply with the rule. There is no adverse impact expected for small or micro businesses, and no anticipated difference in cost of compliance between small and large businesses.

The Texas Board of Veterinary Medical Examiners invites comments on the proposed repeal from any member of the public. A written statement should be mailed or delivered to Loris Jones, Texas Board of Veterinary Medical Examiners, 333 Guadalupe, Ste. 3-810, Austin, Texas 78701-3942, by facsimile (FAX) to (512) 305-7574, or by e-mail to *vet.board@veterinary.texas.gov.* Comments will be accepted for 30 days following publication in the *Texas Register.*

The repeal is proposed under the authority of Texas Government Code §2161.003, which requires the agency to adopt rules relating to historically underutilized businesses, and Texas Occupations Code, §801.151(a), which states that the Board may adopt rules necessary to administer the chapter.

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

§577.18. Historically Underutilized Businesses.

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

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Loris Jones
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For further information, please call: (512) 305-7563

22 TAC §577.18

The Texas Board of Veterinary Medical Examiners (Board) proposes repealing and replacing §577.18, concerning Historically Underutilized Businesses. The proposed new section and its proposed repeal are published concurrently in this issue of the *Texas Register.*

Texas Government Code requires a state agency to adopt rules regarding the use of historically underutilized businesses. The current rule references an agency that has become inactive since the rule was last amended, and references rule sections that are no longer correct. Proposed new §577.18 references the Comptroller of Public Account's rules regarding historically underutilized businesses.

Nicole Oria, Executive Director, has determined that for each year of the first five years that the new rule is in effect, there are no fiscal implications for state government. Ms. Oria does not anticipate any impact on revenue to local government. Ms. Oria has also determined that there will be no increase or reduction in costs to either state or local government as a result of enforcing or administering the new rule as proposed. Ms. Oria has further determined that the new rule will have no impact on local employment.

Ms. Oria has determined that for each year of the first five years the new rule is in effect, the anticipated public benefit will be to ensure that the Board's rule contains the correct citations.

Ms. Oria has determined that for the first five-year period the proposed new rule is in effect, there will be no increase in costs to persons or small businesses who are required to comply with the rule. There is no adverse impact expected for small or micro businesses, and no anticipated difference in cost of compliance between small and large businesses.

The Texas Board of Veterinary Medical Examiners invites comments on the proposed new rule from any member of the public. A written statement should be mailed or delivered to Loris Jones,

Texas Board of Veterinary Medical Examiners, 333 Guadalupe, Ste. 3-810, Austin, Texas 78701-3942, by facsimile (FAX) to (512) 305-7574, or by e-mail to *vet.board@veterinary.texas.gov.* Comments will be accepted for 30 days following publication in the *Texas Register.*

The new rule is proposed under the authority of Texas Government Code §2161.003, which requires the agency to adopt rules relating to historically underutilized businesses, and Texas Occupations Code, §801.151(a), which states that the Board may adopt rules necessary to administer the chapter.

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

§577.18. Historically Underutilized Businesses.

In accordance with Texas Government Code §2161.003, the Board adopts by reference the rules of the Comptroller of Public Accounts in 34 TAC Part 1, Chapter 20, Subchapter B (relating to the Historically Underutilized Business Program).

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

Filed with the Office of the Secretary of State on August 24, 2016.

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Executive Assistant
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For further information, please call: (512) 305-7563

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TITLE 28. INSURANCE

PART 1. TEXAS DEPARTMENT OF INSURANCE

CHAPTER 5. PROPERTY AND CASUALTY INSURANCE

SUBCHAPTER E. TEXAS WINDSTORM INSURANCE ASSOCIATION

The Texas Department of Insurance proposes new 28 TAC §5.4023 and §§5.4029 - 5.4041, relating to the Texas Windstorm Insurance Association (association). The proposed rules implement Insurance Code §2210.578, enacted under HB 3, 82nd Legislature, 1st Called Session (2011). The proposed rules prescribe claim settlement guidelines that the association must use in settling certain claims. The guidelines are based on the recommendations of a panel of experts, appointed under Insurance Code §2210.578 and charged with developing methods or models for determining the extent to which a loss may be or was incurred as a result of wind, waves, tidal surges, or rising waters not caused by waves or surges.

In addition, to allow room for the new proposed sections in 28 TAC Chapter 5, Division 1, the department also proposes repealing 28 TAC Chapter 5, Division 2, which contains §5.4016. The text of §5.4016 is proposed as new §5.4023, with changes conforming it to current department style and revisions of the Insurance Code enacted after §5.4016 was adopted.

To give the association time to research and comment on the costs of implementing the proposed rules, the department is providing an extended comment period for this proposal, and public comments will be accepted until October 31, 2016.

EXPLANATION. The association is the residual insurer of last resort for windstorm and hail insurance coverage in the seacoast territory for those who are unable to obtain wind and hail insurance in the private market. The commissioner of insurance designates the catastrophe area eligible for coverage through the association under Insurance Code §2210.005, and it currently includes the 14 first-tier coastal counties and parts of Harris County. The association is similar to other insurers in that it sells policies, collects premiums, and pays claims. The association's largest risk exposure is to catastrophic losses from hurricanes.

Insurance Code §2210.578 requires the commissioner to appoint a panel of experts to advise the association on the extent to which a loss to insurable property was incurred as a result of wind, waves, tidal surges, or rising waters not caused by waves or surges. Because association policies cover direct physical loss caused by wind and exclude loss caused by rising water in its various forms, the distinction is important for determining the association's liability for a claim. Members of the panel must recommend to the commissioner methods or models for determining the extent to which a loss may be or was incurred as a result of wind, waves, tidal surges, or rising waters not caused by waves or surges for geographic areas or regions designated by the commissioner. After considering the panel's recommendations, the commissioner must publish guidelines that the association must use to settle claims.

The commissioner appointed a panel of experts who, as §2210.578(b) requires, have professional expertise in and are knowledgeable concerning the geography and meteorology of the Texas seacoast territory, as well as the scientific basis for determining the extent to which damage to property is caused by wind, waves, tidal surges, or rising waters not caused by waves or surges. The panel consists of five members, all appointed in August 2013. The members are:

--Exponent, Inc., an engineering consulting firm, represented by James R. "Bob" Bailey, Ph.D., P.E., F. ASCE;

--Texas Tech University, represented by Douglas A. Smith, Ph.D., P.E., F. SEI, F. ASCE;

--Forte & Tablada, Inc., an engineering consulting firm, represented by Samuel Amoroso, Ph.D., P.E., S.E., M. ASCE;

--William "Bill" Coulbourne, P.E., M. ASCE; and

--Andrew Kennedy, Ph.D., M. ASCE.

Members of the panel have published peer-reviewed papers on topics in wind engineering, and wave and surge measurement and prediction; written articles for the American Society of Civil Engineers (ASCE) Press; and served on the ASCE Wind Load Task committee and the ASCE Flood Resistant Design and Construction committee, which develop engineering standards. All panel members have worked on the Texas coast, whether investigating storm damage, conducting vulnerability assessments, or measuring waves and storm surge. Panel member biographies are at tdi.texas.gov/webcast/documents/twiapanelbios.pdf. Panel member curricula vitae are in Appendix B of the expert panel's final report at tdi.texas.gov/reports/pc/documents/epfinalrpt.pdf.

The panel developed a methodology and the steps necessary to implement the methodology, submitted the methodology for peer review, and adjusted the methodology based on the peer review. The panel also held nine public meetings in Austin and Corpus Christi to update the public on its progress. The expert panel submitted its final report on April 18, 2016. Audio and slides from the public meetings are at tdi.texas.gov/commercial/pctwia.html#expert. The panel's final report, containing its recommended methodology, is on the department's website at tdi.texas.gov/reports/pc/documents/epfinalrpt.pdf.

The panel recommended that its methodology be applied only to residential slab claims in which nothing but the foundation or a portion of the foundation of a residential structure remains after a storm. When all or a sufficient part of the structure above the foundation remains, the panel expects that an adjuster or engineer can find enough evidence to attribute damage to either wind or water with greater accuracy than the panel's methodology would provide.

The panel's recommended methodology would estimate the percentage of damage each component of a structure sustained due to wind before the structure was likely destroyed by waves or surges. These estimations are probabilistic; they represent the average damage expected for a given structure and do not necessarily reflect what happened to the structure. However, the methodology would require that the percentage of damage estimates be checked against observations.

The panel's recommended methodology contains five components, or modules: the property database, the hazard module, the damage estimation module, the economic loss module, and the report generation module.

Property Database

The property database would consist of information on certain characteristics of each association-insured structure to which the methodology might be applied. For example, this information includes the age of the structure, the type of roof covering, and the height of the structure's lowest horizontal structural member. The property database would also include high-resolution aerial and ground photographs of each structure, providing further information on characteristics of the structure.

Information from the database, along with data on a particular storm from the hazard module, would be used in the damage estimation module to calculate the probable extent of wind damage to a given structure. High-resolution aerial photographs also provide information on the terrain surrounding a structure, which is key to assessing its wind exposure. The damage estimation module assumes the worst exposure category in all wind directions for a structure. As an enhancement to the proposed methodology, the expert panel recommends the association consider determining the structure's wind exposure for eight direction sectors for input into the damage estimation module.

The proposed rules state that the association may input wind exposure for eight direction sectors into the damage estimation module. The association would need to populate the property database in advance of a storm and keep it up to date. The proposed rules adopt the expert panel's recommendations for the property database.

Hazard Module

The hazard module would provide data on wind, waves, and storm surges to which a given structure was exposed for the duration of a storm. To calculate the probable extent of wind damage to a given structure, the damage estimation module would use:

--wind speed and direction time histories

--wave and surge time histories, and

--information from the property database.

Because taking measurements at every structure would be cost prohibitive or technically infeasible, the hazard module requires taking sufficiently detailed measurements during a storm to enable the use of models to project site-specific data.

In developing the hazard module, the expert panel investigated existing systems for modeling wind fields during a storm. For the purpose of the recommended methodology, a wind field model or models must provide site-specific wind speed and direction time histories and provide a wind field that can be used in a wave and surge model to generate site-specific wave and surge time histories. The wave and surge model requires input from the wind field model so that the histories from each model will be spatially and temporally correlated. The recommended methodology also requires that wind field models have a minimum amount of error at each specific site, where error is defined as the difference between model estimates and the observed wind speeds and directions measured during a storm.

The expert panel investigated three classes of wind field models by comparing each model's output wind speeds, predicted with data from Hurricane Ike, with observed wind speeds from Hurricane Ike. The expert panel recommended that an observational model or models be used in the hazard module to generate wind speed and direction time histories and wave and surge time histories. The proposed rules require that the association use one or more observational models for this purpose. The proposed rules also require the association to gather the data to be used in the model or models as the expert panel recommended.

As discussed above, the expert panel recommended inputting the wind field model into the wave and surge model. In addition, the wave and surge model requires measurements of waves and water levels during a storm and measurements of high-water marks taken after the storm. The wave and surge model uses these inputs to generate wave and surge time histories at a given structure. The expert panel recommended that the association contract with firms or government agencies to gather data during and after a storm and to develop a wave and surge model. The proposed rules require that the wave and surge model contain the technical features the expert panel recommended and require the association to obtain the recommended data.

Damage Estimation Module

The damage estimation module would use wind speed and direction time histories and wave and surge time histories, along with information on the characteristics of a given structure. These inputs would be used to estimate the percentage of each component in the structure damaged by wind before the point in time at which waves or surges likely destroyed the structure. The expert panel recommended that these percentages, after having been validated with post-storm observations, be used to compute the total loss due to wind that occurred during a storm. The proposed rules require that the association use the damage estimation module, defined as Section 6 and Appendix A of the expert panel's report and incorporated into the rules by reference.

The damage estimation module requires two independent determinations of probability: the probability that waves or surges

destroyed the structure and the probability that wind destroyed it. For both hazards, the probability will vary throughout the time history.

The expert panel recommended that the association determine the probability that waves or surges destroyed a structure using an engineering methodology introduced in a paper in the *Journal of Waterway, Port, Coastal, and Ocean Engineering,* a peer-reviewed journal published by the ASCE. The proposed rules cite Tomiczek, T., Kennedy, A., and Rogers, S. (2014), *Collapse Limit State Fragilities of Wood-Framed Residences From Storm Surge and Waves During Hurricane Ike,* J. Waterway, Port, Coastal, and Ocean Eng. ASCE, 140(1), 43-55, *available at* dx.doi: 10.1061/(ASCE)WW.1943-5460.0000212. The paper is available through the association at *compliance@twia.org*.

The probability that wind destroyed a structure would be determined from the maximum of the probabilities of failure for three key components of the structure. The expert panel investigated different techniques for estimating component failure probabilities, including the First-Order, Second-Moment, Mean Value (FOSM-MV) reliability analysis; the Rackwitz-Fiessler procedure; and the Monte Carlo simulation. The panel chose to use the FOSM-MV reliability analysis to demonstrate the calculation of failure probabilities in its report, but all three techniques can be used effectively in the damage estimation module. Appendix C of the expert panel's report discusses the strengths and weaknesses of the different techniques.

In the damage estimation module, the independent probabilities of destruction by waves and surges and destruction by wind are used in an equation with the percentage of a given component that was damaged by wind before the structure was likely destroyed by waves or surges. The equation creates a probability-weighted average of the expected wind damage to the component before waves and surges likely destroyed the structure, and the damage that would have occurred if wind destroyed the structure. The equation is calculated for every component. Pages 6-3 and 6-4 of the expert panel's report show examples of how the equation would function with different damage levels and collapse probabilities.

The damage estimation module uses the probability that a component of a structure will fail as a proxy for the expected amount of damage to the component. This is because damage is estimated probabilistically as the average damage expected for a structure with given characteristics. The average damage expected can be used when there are a large number of properties being considered. From Page 6-8 of the expert panel's report:

"As an example, consider roof panel damage in one corner zone of a roof. Only one piece of plywood may occupy this location due to the relative sizes of plywood sheets and of roof corner zones for typical residences. For a single property, only two outcomes are possible: damage or no damage. If the Damage Estimation Module estimates that the probability of damage to the roof decking in this location is 10 percent, then it is reasonable to conclude that a single property would not experience damage to roof decking in this roof area. However, if 100 properties are under consideration, and the Damage Estimation Module estimates that the probability of damage to the roof decking in this location is 9 percent, then it is reasonable to conclude that 9 of 100 properties experience damage to roof decking in this area, and the average damage rate for these 100 properties is 9 percent. That is, 9 of 100 properties would experience total damage, and the other 91 would experience no damage.

"This example demonstrates a fundamental characteristic of the Damage Estimation Module: the most likely result and the average result are not the same. The Damage Estimation Module produces the average result, and because of this characteristic, the assumption that probability of failure can be considered as a proxy for damage rate is acceptable. The total damage ratio for a component over the entire building is the sum of the areas, weighted by their individual failure probabilities.

"For illustration, consider the following simple hypothetical scenario. One portion of a building roof covers 10 percent of the roof area, and the probability of failure for this area of roof is 50 percent. If the probabilities of failure in all the other portions of the roof are zero, then the total damage ratio for the roof is five percent."

In addition to the probabilistic approach, the damage estimation module contains an observational approach (not to be confused with the observational models developed as part of the hazard module). The proposed rules require the association to use this observational approach, the purpose of which is to check the results from the probabilistic approach. The proposed rules give the association discretion to use certain observations.

Economic Loss Module

The economic loss module contains the expert panel's recommendation that adjusters use the component damage estimates from the damage estimation module to determine the scope of work and associated costs for each component. The panel's expertise covers damage to structures, not to contents. Therefore, the panel also recommended that adjusters or other professionals estimate losses to contents. The proposed rules implement these recommendations.

Report Generation Module

The report generation module requires:

--pre-storm and post-storm site-specific information

--wind and wave and surge hazard information and building vulnerability, and

--damage information (the results of the damage estimation module).

The association would combine this information in a report sent to the policyholder. The policyholder can then supplement any building, damage, or hazard magnitude information used as inputs to the model.

Insurance Code §2210.573(b) allows the association to ask a claimant for additional information not later than the 30th day after the claim is filed. Proposed §5.4040(a) uses the same time frame to require the association to ask the policyholder for information that may be used to verify or correct model inputs, thus tying the two actions to the same deadline.

Insurance Code §2210.573(d) requires the association to accept or deny a claim not later than the 60th day after the claim is filed. Proposed §5.4040(b) requires the association at the same time to provide the policyholder with a complete residential slab claim report and a summary of the results, again tying a new requirement to an existing deadline.

The expert panel's report recommends that the association give the residential slab claim report to the policyholder after running the model. The rule departs from this timing so that the communications between the policyholder and the association can be combined with the claim-processing correspondence in In-

surance Code §2210.573. Incorporating the new requirements into the claim-settling process is less burdensome for the association and policyholders than creating a new set of deadlines.

Validation of Recommended Methodology

The expert panel validated its recommended methodology by using the damage estimation module to predict damage for past hurricanes using data from those hurricanes, and then comparing the predictions with residential claims resulting from the hurricanes. The panel compared predictions for Hurricanes Charley (2004), Ivan (2004), Katrina (2005), Rita (2005), and Ike (2008) with residential windstorm claims drawn from insurer bulk claims data, individual claim reports, open literature, and existing catastrophe loss models.

Qualitative analysis confirmed the damage estimation module is reasonable in terms of overall approach, with its predictions comparing favorably with qualitative observations from post-storm damage photographs. Quantitative analysis showed that the module's predictions generally compared favorably with data interpreted from claim files, with the module providing reasonable estimates of the magnitudes and trends of damage when compared to observations of actual damage. Detailed discussion of the validation, including data and limitations, is in the expert panel's report at tdi.texas.gov/reports/pc/documents/epfinalrpt.pdf. The panel recommends continual validation of the recommended methodology by a performance review after each time it is used.

The damage estimation module was also reviewed (independently of the expert panel) by employees of Exponent, Inc., which is an ISO 9001-certified firm, to verify the reliability of the calculations underlying the module's predictions, which were based on the FOSM-MV reliability analysis.

Peer Review of Recommended Methodology

The department contracted with five reviewers from industry and academia to each conduct an independent peer review of the expert panel's report. Each reviewer looked for compliance with accepted standards of professional and technical practices, and each provided a final report of his findings to the department. The expert panel reviewed each peer-review report and, where necessary, modified its final report on the basis of the peer review suggestions or comments.

The most significant modification the panel made in response to peer-review comments was to change the equation used to calculate the percentage of damage each component sustained. The panel made the change to take into account situations in which the probability of both destruction due to wave and surge and destruction due to wind was low. Also, in response to peer reviewer comments, the expert panel added a sensitivity analysis of failure probability calculation techniques, comparing roof cover damage results obtained using the FOSM-MV technique with results obtained using the Monte Carlo simulation for different wind speeds and structure characteristics. The panel concluded that the limitations of the FOSM-MV, which a reviewer had also mentioned, have "little practical significance for the methodology as currently proposed." The sensitivity analysis is in Appendix C of the expert panel's report.

The panel's final report, containing its recommended methodology, is on the department's website at tdi.texas.gov/reports/pc/documents/epfinalrpt.pdf. The peer reviews are also on the department's website at tdi.texas.gov/commercial/pctwia.html#expert.

Section by Section Summary

Section 5.4023. Section 5.4023, relating to reinsurance, consists of rule text currently in 28 TAC §5.4016, which is proposed for repeal in this proposal. Proposed §5.4023 will be included in the association plan of operation, required by Insurance Code §2210.152(a)(2)(C). The proposed text in §5.4023 is substantially the same as the text in current §5.4016. Nonsubstantive changes update Insurance Code citations to reflect the recodification of the Insurance Code and update the text for consistency with current department rule drafting style. The single substantive change from the current text is the removal of a requirement for notice and hearing before the commissioner issues an order approving or disapproving an excess reinsurer or the amount of payment for the excess reinsurance. This change to the current text, in proposed §5.4023(d)(2) and (g)(2), reflects that notice and a hearing are no longer required before the commissioner issues an order under Insurance Code §2210.008, which is the recodification of 2005 Texas Insurance Code Article 21.49 §5A. In HB 4409, 81st Legislature, Regular Session, 2009, the legislature removed the notice and hearing requirement from §2210.008. This change to the current text reflects that statutory change.

Section 5.4029. Applicability. Section 5.4029 identifies the geographic areas where the claim settlement guidelines will apply and how the association will determine if a storm is an "applicable storm" requiring it to use the guidelines. Proposed §5.4029(b) requires the association to use the rules to settle residential slab claims resulting from an organized weather system that:

(1) has a defined surface circulation and maximum sustained winds of not less than 39 miles per hour;

(2) the National Hurricane Center of the United States National Weather Service names as a tropical storm or a hurricane; and

(3) the association expects will result in more than 500 residential slab claims.

Paragraphs (1) and (2) in proposed §5.4029(b) constitute the definition of "named storm" in the National Flood Insurance Act. Under proposed §5.4029(c), the association must make the initial determination of the number of anticipated residential slab claims when the organized weather system is in the Gulf of Mexico or within the boundaries of longitude 80 degrees west and latitude 20 degrees north, and a final determination no later than 24 hours before expected landfall. While a longer period between the final determination and expected landfall would allow more time to deploy instruments, tropical storms and hurricanes can intensify, dissipate, or shift direction rapidly. A final determination at 24 hours before expected landfall allows greater accuracy as to the anticipated number of residential slab claims.

The proposed rules require the association to use the wind damage evaluation based on the anticipated number of residential slab claims, regardless of the actual number the association ultimately receives. The association will not know the final, actual, number of residential slab claims until after a storm. While the vast majority of residential slab claims would likely be made shortly after the storm, policyholders have until the first anniversary of the date of loss to file claims. Requiring the wind damage evaluation based on the anticipated number of residential slab claims provides clear guidance immediately after a storm as to what claim-settling procedures the association must use.

Proposed §5.4029(e) recognizes that the association may contract with appropriate private or governmental entities to obtain any of the data or services required in this division.

Section 5.4030. Definitions Applicable to §§5.4029 - 5.4041. Section 5.4030 defines the terms "applicable storm," "catastrophe area," "damage estimation module," "expert panel," "hazard module," and "residential slab claim."

Section 5.4031. Wind Damage Evaluation. Section 5.4031 requires the association to develop a comprehensive wind damage evaluation system that uses both an observational approach and a probabilistic methodology, as recommended by the expert panel, to determine residential slab claim wind damage. The system includes a property database, and modules for hazards, damage estimation, economic loss, and report generation.

Section 5.4032. Property Database. Section 5.4032 requires the association to gather and regularly update specific information about storm-related building features for each property in the geographic area described in §5.4029(a). Section 5.4032 also requires the association to gather high-resolution aerial and ground photographs of each property in the area to be used after an applicable storm.

Section 5.4033. Hazard Module. Section 5.4033 describes the overarching goal of the hazard module: to obtain synchronous, site-specific wind speed and direction time histories along with storm surge and wave time histories. Reaching this goal requires one or more wind field models and a storm surge and wave model. The association must also develop plans and capabilities to obtain good quality wave, surge, and wind field data and, to the extent possible, to do so working in concert with federal agencies and other organizations.

Section 5.4034. Hazard Module - Wind Measurements. To ensure pre-event wind measurements are sufficient, §5.4034(a) requires the association to ensure the placement of measurement platforms before an applicable storm reaches a catastrophe area. The measurements must be capable of generating gust wind speed and direction time histories during an applicable storm. Section 5.4034(b) - (e) lists the expert panel's recommendations for deploying measurement devices.

Section 5.4035. Hazard Module - Wind Field Model. Section 5.4035 mandates that the association develop one or more observational models for constructing a wind field following specific model requirements from the expert panel's report. Under §5.4035(c), the association must take steps to minimize errors between model estimates and observed wind speeds and directions.

Section 5.4036. Hazard Module - Storm Surge and Wave Measurements. Section 5.4036 requires the association to obtain physical measurements of surge, waves, and high-water marks during and after an applicable storm. The section requires the association to take the appropriate steps to obtain the measurements before each hurricane season.

Section 5.4037. Hazard Module - Storm Surge and Wave Model. Section 5.4037 lists the expert panel's recommended specifications for a storm surge and wave model. The section requires the association, before an applicable storm, to take steps to obtain rapid, post-event high-resolution surge and wave modeling.

Section 5.4038. Use of Damage Estimation Module. Section 5.4038 describes how the association must use the damage estimation module that the expert panel recommended to determine the total damage to a structure attributable to wind. The section describes the required inputs to the module and lists the estimations the association must make using the calculations in Section 6 and Appendix A of the expert panel's report. Section 5.4041 incorporates Section 6 and Appendix A by reference. Because the damage estimation module consists of both a probabilistic approach and an observational approach, this section also gives the association discretion as to which of the listed observations it will use as part of the observational approach.

Finally, §5.4038 lists two actions that, according to the expert panel's recommendations, could improve the damage estimation module but are not necessary for it to work. Therefore, §5.4038(d) states that the association may input representations of the wind exposure category applicable to the structure from each of the eight different directions surrounding the structure. Similarly, §5.4038(e) states that the association may also incorporate other methods for computing probabilities of component and system failure other than the method used in the damage estimation module.

Section 5.4039. Economic Loss Determination. Section 5.4039 implements a recommendation from the expert panel report that the association develop an economic loss module that translates physical damage estimates into monetary losses. Section 5.4039(b) requires the association to use wind damage estimates obtained through the damage estimation module to determine the appropriate scope of work and associated costs for each component likely damaged by wind. Section 5.4039(c) states that to make estimates concerning contents, adjusters must use their own knowledge and experience, as well as any information about the particular property in the association's files, from the policyholder, and other sources.

Section 5.4040. Report Generation Module. Section 5.4040 requires the association to send the policyholder a request for information that may be used to update the association's property database before the wind damage evaluation method is used. The request for information must also give the policyholder an opportunity to provide any information on wind speed and direction, and surge and waves at the policyholder's structure during the applicable storm and any information on damage to the structure. The association must also make claim settlement reports generated by the wind damage evaluation method available to insureds within specified time periods.

Section 5.4041. Incorporation by Reference. Section 5.4041 incorporates the damage estimation module, found in the expert panel's report and available at tdi.texas.gov/reports/pc/documents/epfinalrpt.pdf, by reference into the proposed rules.

Repeal of Section 5.4016. Insurance Code §2210.152(a)(2)(C) requires the association to include in the plan of operation procedures for accepting and ceding reinsurance. Insurance Code §2210.152(c), enacted by HB 3, requires TWIA to use the claim settlement guidelines published by the commissioner under Section 2210.578(f) as part of the association's plan of operation. Division 2, Reinsurance, consists of §5.4016. Repealing the division and §5.4016 allows the department to include proposed §5.4023 in Division 1. The repeal also permits placement of additional rules relating to the association's plan of operation in the division, including the proposed claim settlement guidelines, §§5.4029 - 5.4041.

FISCAL NOTE AND LOCAL EMPLOYMENTS IMPACT STATEMENT. Marianne Baker, manager, Property and Casualty Lines Office, has determined that for each year of the first five years the proposed amended and new sections will be in effect, there will

be minimal fiscal impact to state and local governments as a result of enforcement or administration of this proposal. Ms. Baker does not anticipate any measurable effect on local employment or the local economy as a result of enforcement or administration of this proposal. Some local governments are association policyholders. A local government would experience a positive economic effect if the guidelines established by the rule facilitate the settlement of residential slab claims under the association's windstorm and hail insurance policies.

PUBLIC BENEFIT AND COST NOTE. Ms. Baker has also determined that for each year of the first five years the proposed sections are in effect, there will be public benefits resulting from the proposal and costs to the association, which is required to comply with the proposal.

A. Anticipated Public Benefits.

The department anticipates that a primary public benefit resulting from the proposal will be the implementation of Insurance Code §2210.578. The association, its policyholders, and members will benefit because residential slab claims will be determined more consistently on a claim-by-claim basis, and policyholders will be informed of the manner in which slab claims will be adjusted. Administering and enforcing the proposed rules will have the public benefit of increasing public understanding of how residential slab claims will be adjusted.

B. Estimated Costs to Comply with This Proposal.

The association will incur costs to comply with this proposal. Initial costs will be the costs of setting up the comprehensive wind damage evaluation system based on the expert panel's recommended methodology. Long-term costs will be incurred in post-event modeling, data collection, and operation of the system.

The department received cost information and estimates from the expert panel and from the association. The expert panel's methodology includes numerous complex and interrelated activities that are difficult to price without seeking bids. The estimates are based on the best information reasonably obtainable within the available time frame, but are nonetheless rough approximations. The actual costs for services and information will depend on how quickly they are needed and which provider the association works with. Costs related to a specific storm may vary significantly based on the magnitude and location of the storm, and the number of claims. Other factors include how the association chooses to acquire devices and any variation in the cost of instruments.

To give the association additional time to research and comment on the costs of implementing the proposed rules, the comment period for this proposal lasts from the date of publication in the *Texas Register* to October 31, 2016.

(1) Obtaining pre-event high resolution aerial and ground photography.

The association must acquire pre-event high resolution aerial photographs of potentially affected properties to define structure characteristics and terrain. The association currently has a provider of these services under contract. The association will also need pre-event ground level photographs and video synced to latitudinal and longitudinal coordinates. The expert panel estimates that this function will cost $200,000 per city. The association states the cost of obtaining and structuring all required data for property characteristics will be $100 per property, or a total of $3.5 million for 35,000 potential slab properties.

(2) Collecting high-quality real-time storm surge and wave and wind field data.

To collect wave and surge data, the association will need to purchase or rent dedicated collection instruments and deploy these instruments at locations prepared and surveyed for elevation well in advance of a storm. If the association decides to purchase the instruments, the purchase and deployment will be required one time; thereafter, some annual maintenance will be necessary. The expert panel estimates that the one-time purchase cost would be approximately $100,000; the association could possibly reduce this cost by purchasing large numbers of inexpensive instruments. The panel estimates that annual maintenance would be approximately $10,000 - $15,000. If the association decides to rent the instruments, the panel estimates that the cost would be approximately $50,000 per applicable storm.

Wind field data collection requires deploying mobile instruments to obtain wind speed and direction data to be provided to hurricane wind field modelers. Many state universities provide these services. The exact costs depend on the number of instrument platforms required, deployment costs, and the extent of the analysis to be performed by the hurricane wind field modeler. The expert panel estimates the instrument and platform construction costs would be approximately $12,000 per platform; the association will need 40 to 60 platforms, for a total cost of $480,000 - $720,000. The association estimates the cost would be $300,000 - $600,000.

(3) Collecting high-quality post-event LIDAR imagery.

The association will need to rapidly collect and process post-event light detection and ranging (LIDAR) imagery. There are many private sector and governmental providers that can perform these services. The expert panel estimates the annual cost of these services would be $50,000 - $100,000, plus a smaller annual maintenance and administration cost. The association estimates the cost would be $100 - $500 per square mile, or $36,700 - $183,500 for the entire Texas coast.

(4) Modeling storm surge and wave and wind fields.

Storm surge and wave modeling has three components:

(1) grid and model setup;

(2) annual maintenance and testing in concert with wind providers; and

(3) modeling in the event of a storm.

The grid and model setup requires preparing grids appropriate for the association, setting up and testing the model of the grids, and integrating the model with the association for data exchange. The expert panel estimates the cost of grid and model setup would be $75,000 - $100,000.

In the expert panel's estimation, the annual maintenance, testing, and upgrades to the model would cost approximately $25,000 - $50,000. The panel estimates that storm modeling, which requires rapid grid updates, multiple model runs over several months, transmission of results to the association, and validation of accuracy, would cost approximately $100,000 - $200,000 per event. The panel estimates that the total cost for surge and wave modeling would be $200,000 - $400,000.

The expert panel estimates that the cost of a synoptic wind field model required for surge and wave modeling would be approximately $50,000, and hurricane wind field modeling needed for wind damage prediction would cost approximately $18,000. The

panel estimates that the total cost of wind field modeling would be approximately $68,000.

The expert panel estimates the total cost for both surge and wave and wind field modeling is approximately $268,000 - $468,000. The association estimates the cost for both would be $300,000 - $600,000.

(5) Damage estimation module.

The paper by Tomiczek, T., Kennedy, A., and Rogers, S., *Collapse Limit State Fragilities of Wood-Framed Residences From Storm Surge and Waves During Hurricane Ike,* Journal of Waterway, Port, Coastal, and Ocean Engineering (ASCE) (2014), 140(1), 43-55, *available at* dx.doi: 10.1061/(ASCE)WW.1943-5460.0000212, will cost between $30 and $1,000 for the association to access and make available to anyone. Each individual download of the paper from the ASCE library costs $30; unlimited downloads are available for $1,000. Therefore, the cost of this portion of the damage estimation module depends on how many requests for the paper the association receives.

Taking the data from the property database and hazard module and using it to calculate the probabilities of component damage and slabbing due to surge in the damage estimation module will involve software integration and application development. The expert panel estimates that the cost of the remainder of the damage estimation module would be approximately $500,000.

(6) Report generation module.

The association estimates that there will be costs associated with combining the information produced from the other modules into a readable and usable format. The association did not provide a specific estimate. The cost will depend on the number of slab claims, and thus the number of reports. In addition to the costs of paper and postage, approximately $1.00, the department estimates that the association will spend between 30 minutes and two hours preparing each report. Depending on the level of employee, the department estimates a cost between $15 and $50 per report. Costs will also depend on whether the software development completed for the damage estimation module makes the relevant data easily accessible for the report generation module as well.

(7) Summary.

The expert panel estimates that the initial implementation would cost the association approximately $925,000 - $1.34 million, with approximately $35,000 - $65,000 in annual costs, and approximately $150,000 - $250,000 in costs per storm. The initial costs would be lower if the association decides to rent instead of purchase wave and surge data collection instruments. The association estimates that the initial implementation would be $6 - $30 million.

ECONOMIC IMPACT STATEMENT AND REGULATORY FLEXIBILITY ANALYSIS FOR SMALL AND MICRO BUSINESSES. As required by Government Code §2006.002(c), the department has determined that neither the proposal nor the proposed repeal will have adverse economic effects on small or micro businesses because the proposed rules and repeal do not apply to any small or micro businesses. Instead, they relate to the association and residential homeowners covered under its windstorm and hail policies. Therefore, in accordance with Government Code §2006.002(c), the department has determined that a regulatory flexibility analysis is not required.

TAKINGS IMPACT ASSESSMENT. The department has determined that no private real property interests are affected by this proposal or proposed repeal and that they do not restrict or limit an owner's right to property that would otherwise exist in the absence of government action and, therefore, do not constitute a taking or require a takings impact assessment under Government Code §2007.043.

REQUEST FOR PUBLIC COMMENT. The department invites public comment on the proposal and proposed repeal. Submit your written comments no later than 5:00 p.m., Central Time, on October 31, 2016. Send written comments by mail to the Office of the Chief Clerk, Mail Code 113-2A, Texas Department of Insurance, P.O. Box 149104, Austin, Texas 78714-9104; or by email to *chiefclerk@tdi.texas.gov.* You must submit an additional copy of the comments by mail to Marianne Baker, Property and Casualty Lines Office, 104-PC, Texas Department of Insurance, P.O. Box 149104, Austin, Texas 78714-9104; or by email to *marianne.baker@tdi.texas.gov.*

The commissioner will consider the repeal of Division 2 and §5.4016, and the adoption of new §5.4023, and §§5.4029 - 5.4041 in a public hearing under Docket Number 2789, scheduled for 9:30 a.m., Central Time, on October 28, 2016, in Room 100 of the William P. Hobby, Jr. State Office Building, 333 Guadalupe Street, Austin, Texas. Written comments and public testimony presented at the hearing will be considered.

DIVISION 1. PLAN OF OPERATION

28 TAC §§5.4023, 5.4029 - 5.4041

STATUTORY AUTHORITY. The department proposes new 28 TAC §5.4023 and §§5.4029 - 5.4041 under Insurance Code §§36.001, 2210.008(b), 2210.152, 2210.505(c), 2210.578, and 2210.580.

Section 36.001 provides that the commissioner may adopt any rules necessary and appropriate to implement the powers and duties of the department under the Insurance Code and other laws of the state.

Section 2210.008(b) authorizes the commissioner to adopt reasonable and necessary rules to implement Chapter 2210.

Section 2210.152(c) provides that the association's plan of operation must require it to use the claim settlement guidelines published by the commissioner under section 2210.578(f) in evaluating the extent to which a loss to insured property is incurred as a result of wind, waves, tidal surges, or rising waters not caused by waves or surges.

Section 2210.505(c) authorizes the commissioner to adopt rules as necessary to implement the section, relating to reinsured excess limits.

Section 2210.578(f) provides that after consideration of the recommendations made by the expert panel, the commissioner must publish guidelines that the association will use to settle claims.

Section 2210.580 authorizes the commissioner to adopt rules regarding the provisions of Subchapter L 1.

CROSS-REFERENCE TO STATUTE. The proposed sections implement Insurance Code §§2210.152, 2210.505, 2210.572 - 2210.575, and 2210.578.

§5.4023. Per Risk Reinsured Excess Coverage

(a) Purpose. Under Insurance Code §2210.505, the Texas Windstorm Insurance Association may issue a policy of windstorm

and hail insurance that includes coverage for an amount in excess of the maximum limit of liability approved by the commissioner.

(b) Definitions. The following words and terms when used in this section have the following meanings unless the context clearly indicates otherwise.

(1) Available reinsurance capacity--Amount of reinsurance purchased by the association pursuant to the excess per risk reinsurance contract to provide reinsured excess coverage to association policyholders as provided in Texas Insurance Code §2210.505.

(2) Excess per risk reinsurance contract--An agreement entered into by the association with an approved reinsurer to provide coverage to association policyholders for an amount in excess of the liability limits approved by the commissioner.

(3) Reinsured excess coverage--Coverage provided under a windstorm and hail insurance policy issued by the association through a reinsurance agreement with an approved reinsurer for amounts of insurance that are in excess of the maximum limits of liability available to the individual risk from the association.

(4) Reinsured excess coverage program--The program operated by the association to provide reinsured excess coverage, the excess per risk reinsurance contract or contracts entered into between the association and the commissioner-approved reinsurer or reinsurers, this section, and any orders issued, including the collection of premium, issuance of coverage under the windstorm and hail insurance policy, and the processing and payment of claims for the reinsured excess coverage.

(c) Administration.

(1) The association must administer the reinsured excess coverage program on behalf of each policyholder of a windstorm and hail insurance policy to which reinsurance is provided by an approved reinsurer.

(2) The association must distribute the available reinsurance capacity for the reinsured excess coverage in a fair and reasonable manner to risks qualifying under the association's reinsured excess coverage program.

(3) The association must annually review the reinsured excess coverage program, including the rates, reinsurers, excess per risk reinsurance contracts, use of available reinsurance capacity, the association's costs to administer the reinsured excess coverage program, and the rules in this section, and must provide an annual summary of the review to the commissioner.

(d) Approval of reinsurer. Before the association may provide reinsurance coverage on an individual risk that is in excess of the maximum limits of liability approved by the commissioner, the association must first obtain from a reinsurer approved by the commissioner reinsurance for the full amount of policy exposure above the limits approved by the commissioner for any given type of risk. The approval of the reinsurer must be in accordance with this subsection.

(1) The association must submit a petition to the commissioner requesting approval of the reinsurer before any excess per risk reinsurance contract or renewal of such contract becomes effective. The petition must include the name of the proposed reinsurer or reinsurers; the reinsurance proposal; the draft excess per risk reinsurance contract; information on the financial health of the proposed reinsurer or reinsurers and any other information related to the reasons for the association's selection of reinsurer or reinsurers; estimated costs for the reinsurance; the proposed cost to the association to administer the reinsured excess coverage program; estimated total premium for the reinsurance; the method of making the reinsurance capacity available to policyholders; and any other information the association or the commissioner deems necessary to enable the commissioner to determine whether to approve or disapprove the proposed reinsurer or reinsurers.

(2) The commissioner must issue an order approving or disapproving the proposed reinsurer. The order must be issued no later than December 31 of each year preceding the calendar year in which the reinsured excess coverage program is operated except for the first year the program is operated when the order must be issued following the adoption of this section.

(3) An excess per risk reinsurance contract may not become effective until the commissioner has issued an order approving the reinsurer. The excess per risk reinsurance contract does not require approval by the commissioner.

(4) The association must submit written notice of any amendments to any existing excess per risk reinsurance contract to the commissioner at least 30 days prior to the effective date of the proposed amendments. The notice must include an explanation of the reason for the amendments and a copy of the draft amendments. The reinsurer under the amended contract must be deemed approved by the commissioner unless within 30 days following the submission of the written notice the commissioner enters an order disapproving the reinsurer. Amendments to the contract do not require approval by the commissioner.

(e) Coverage. The association may issue a policy of windstorm and hail insurance that includes coverage that is in excess of a liability limit approved by the commissioner. Any such policy must be issued in accordance with this subsection.

(1) Excess liability limits. The amount of reinsurance excess coverage available to an individual risk must be determined in accordance with the reinsured excess coverage program.

(2) Policy provisions.

(A) The total limit of liability must be the limit of liability insured by the association and the amount of reinsured excess coverage provided on the individual risk under the reinsured excess coverage program.

(B) All terms and conditions of the windstorm and hail insurance policy issued by the association must apply to the reinsured excess coverage provided under the windstorm and hail insurance policy.

(C) The amount of reinsured excess coverage must be shown separately on the declarations page of the policy.

(3) Types of risks.

(A) The association may provide reinsured excess coverage for dwelling structures only, commercial structures only, or for both dwelling structures and commercial structures.

(B) Reinsured excess coverage may be provided on either buildings or contents, or on building and contents. If reinsured excess coverage is provided on building and contents, building structures must be insured for 100 percent replacement cost, up to the total maximum limit of liability available for the risk and the available reinsured excess coverage amount provided under the reinsured excess coverage program before reinsured excess coverage may be applied to contents.

(f) Premium.

(1) Premium computation. The total premium charged by the association for the reinsured excess coverage provided on a windstorm and hail insurance policy issued by the association must be the total of:

(A) the amount of the excess per risk reinsurance premium charged to the association by the reinsurer for the reinsured excess coverage provided on any given risk; and

(B) the payment to the association that is approved by the commissioner.

(2) Display of premium. The total premium charged by the association for the reinsured excess coverage provided in a windstorm and hail insurance policy issued by the association must be shown separately on the declarations page of the policy.

(g) The premium charged by the association for the excess coverage must be equal to the amount of the reinsurance premium charged to the association by the reinsurer plus any payment to the Association that is approved by the commissioner.

(1) The payment to the Association that may be proposed by the association for approval by the commissioner may include the amount of the direct and indirect costs identified by the association to administer the reinsured excess coverage program and may include costs for claims, underwriting, accounting, technical and administrative support, computer equipment, agent commissions, taxes, and any other administrative costs approved by the commissioner.

(2) The commissioner will issue an order approving or disapproving the proposed payment to the association. The commissioner may take action in the order issued under subsection (d)(2) of this section.

§5.4029. Applicability of 28 TAC §§5.4029- 5.4041.

(a) This section and §§5.4030 - 5.4041 of this title prescribe guidelines that the Texas Windstorm Insurance Association must use to prepare for and settle residential slab claims in Zones V, VE, and V1-V30, as defined by the National Flood Insurance Program.

(b) This section and §§5.4030 - 5.4041 of this title apply only to residential slab claims resulting from an organized weather system that:

(1) has a defined surface circulation and maximum sustained winds of not less than 39 miles per hour;

(2) the National Hurricane Center of the United States National Weather Service names as a tropical storm or a hurricane; and

(3) that the association expects will result in more than 500 residential slab claims.

(c) The association must make an initial determination as to the expected number of claims when the organized weather system is in the Gulf of Mexico or within the boundaries of longitude 80 degrees west and latitude 20 degrees north.

(d) The association must make a final determination as to the expected number of claims no later than 24 hours before expected landfall.

(e) The association may contract with appropriate private or governmental entities to obtain any of the data or services required in this division.

§5.4030. Definitions Applicable to §§5.4029 - 5.4041.

The following definitions apply to §§5.4029 - 5.4041:

(1) Applicable storm--An event described in §5.4029(b) of this title.

(2) Catastrophe area--A municipality, a part of a municipality, a county, or a part of a county designated by the commissioner of insurance under Insurance Code §2210.005.

(3) Damage estimation module--The module incorporated by reference in §5.4041 of this title.

(4) Expert panel--The panel created under Insurance Code §2210.578.

(5) Hazard module--The component of the wind damage evaluation in which the association gathers data from an applicable storm and uses that data to generate wind speed time histories and surge and wave time histories.

(6) Residential slab claim--A first-party claim on a residential structure of which nothing more remains than foundation elements such as pilings, floor framing members, or concrete slab, and there is insufficient evidence to enable the association to determine the extent to which the loss occurred as a result of wind, waves, tidal surges, or rising waters not caused by waves or surges.

§5.4031. Wind Damage Evaluation.

To estimate the extent to which damage to structures that are the subject of residential slab claims has been caused by wind, waves, tidal surges, or rising waters not caused by waves or surges, the association must employ both a probabilistic approach and an observational approach as described in §§5.4032 - 5.4040 of this title. The association must use:

(1) a property database, described in §5.4032;

(2) a hazard module, described in §§5.4033 - 5.4037;

(3) a damage estimation module, described in §5.4038;

(4) an economic loss module, described in §5.4039; and

(5) a report generation module, described in §5.4040.

§5.4032. Property Database.

To ensure the accuracy of information related to residential slab claims, the association must:

(1) gather and, not less frequently than once every year, update applicable pre-event data on insured structures located in the area described in §5.4029(a) of this title. The pre-event data consists of characteristics-specified in the damage estimation module-pertinent to the performance of each insured structure during an applicable storm; and

(2) acquire pre-event high-resolution aerial and on-ground photographs of structures located in the area described in §5.4029(a) of this title to define building characteristics and terrain.

§5.4033. Hazard Module.

(a) The hazard module must generate synchronous, site-specific wind speed and direction time histories and storm surge and wave time histories.

(b) The hazard module must include one or more wind field models and a storm surge and wave model.

(c) The association must develop plans and capabilities to obtain reliable surge, wave, and wind field data, which is necessary to implement the hazard module. To the extent possible, this task should be performed in collaboration with federal agencies and other organizations.

§5.4034. Hazard Module - Wind Measurements.

(a) Before an applicable storm, the association must take steps to ensure the deployment of mobile measurement platforms and fixed surface-level devices that:

(1) provide real-time wind speed and direction measurements during the applicable storm; and

(2) can be used both for forecasting and producing post-event wind field hindcasts.

(b) Wind measurements must be capable of generating gust wind speed and wind-direction time histories during an applicable storm.

(c) The association must deploy at least 40 to 60 mobile wind measurement platforms in two layers, with the first layer in close proximity to the coastline and the second layer approximately 20 miles inland. The mobile wind measurement platforms must be deployed as follows:

(1) three to five miles apart in the eyewall region of the storm;

(2) up to 10 miles apart in the outer regions of the storm;

(3) with a wind speed and direction sampling frequency of 10 hertz or higher; and

(4) a temperature, barometric pressure, and relative humidity sampling frequency of 1 hertz or higher.

(d) The association must deploy sufficient mobile wind measurement platforms along the coast in front of a land-falling storm to ensure that a high-resolution wind field with small errors-no more than 2 percent of the maximum sustained wind measured in a 30-minute period-can be developed for use in wind damage prediction.

(e) Wherever reasonable, the mobile wind measurement platforms must be co-located with surge and wave gauges.

§5.4035. Hazard Module - Wind Field Model.

(a) The association must develop one or more observational models for constructing a wind field to obtain:

(1) site-specific wind speed and direction time histories that are used for wind damage prediction; and

(2) a wind field that can be used as input for a surge and wave model that outputs time histories for surge and wave damage prediction.

(b) The association must take steps to minimize errors between model estimates and the observed wind speeds and directions measured during an applicable storm.

§5.4036. Hazard Module - Storm Surge and Wave Measurements.

(a) The association must obtain physical measurements of surge, waves, and high-water marks during and after an applicable storm. Physical measurements of surge, wave, and high-water marks include:

(1) water-level time series during the applicable storm from the National Oceanic and Atmospheric Administration and other permanent tide gauges;

(2) post-event high-water marks;

(3) surge and wave heights from rapidly deployed surge and wave gauges deployed at sites with the potential to be significantly damaged by surge and waves; and

(4) other indications of surge and wave magnitudes, such as elevations of surge and wave damage on buildings.

(b) Before an applicable storm, the association must take steps to ensure that as soon as possible after an applicable storm, the association can acquire and process high-resolution aerial photographs and light detection and ranging (LIDAR) measurements.

(c) Where data is not available from federal or state agencies, the association must take steps to acquire physical measurements of surge, wave, and high-water marks. Any contracts must be in place before each hurricane season.

§5.4037. Hazard Module - Storm Surge and Wave Model.

(a) Before an applicable storm, the association must take steps so that it will be able to obtain rapid, post-event high-resolution surge and wave modeling to provide surge and wave time histories.

(b) The surge and wave hazard module must directly incorporate both numerical modeling and the high-resolution aerial photographs and LIDAR measurements required under §5.4036(a) and (b) of this title.

(c) The technical features of the storm surge and wave model must include:

(1) a domain of surge and wave modeling that extends from at least Pensacola, Florida to the Mexican coast at latitude 23 degrees north, and at minimum, 500 km offshore of Texas;

(2) for Texas and parts of Louisiana west of longitude 93.5 degrees west, sufficiently high resolution nearshore and overland to show dunes and other significant features impeding flow, such as a grid with 50 meter or finer resolution (resolution may be coarser offshore and in other locations), with models run on the same grid, if possible, to avoid interpolation errors;

(3) the same wind field used to compute wind damage, which must be a best available reanalysis wind field that incorporates measurements made during the applicable storm;

(4) a drag coefficient that features a high wind cutoff that is defensible from observations or the scientific literature;

(5) wave computations that use a third-generation unsteady spectral wave model that has been tested closely against data from Hurricane Ike and other storms in Texas;

(6) wave computations that include feedback from velocities and water levels generated by the surge model;

(7) wave breaking dissipation that is spectrally based and does not use a simple depth-limited cutoff;

(8) a shallow water model (either depth-averaged or multi-level) that includes convective processes and bottom friction that varies with substrate or vegetation;

(9) tides as an integral part of the model;

(10) the ability to produce initial estimates within 48 hours of landfall;

(11) the ability to readily incorporate new LIDAR topographical data into the grid, and wind data into the surge and wave model as it becomes available post-event, to rapidly produce improved surge and wave model simulations;

(12) the ability to quickly produce estimates of waves and surge as additional data becomes available, and pass these estimates to the association for use in the damage estimation module;

(13) the ability to compare model estimates with measured wave and water level data as it becomes available; and

(14) the ability to produce error estimates for each applicable storm.

(d) The association must ensure that errors are minimized between model estimates and the observed storm surge and wave heights measured during an applicable storm.

§5.4038. Use of Damage Estimation Module.

(a) The association must use the damage estimation module to estimate damage to components of a structure that is the subject of a residential slab claim. The association must use the following inputs:

(1) outputs from the wind field and surge and wave models described in §5.4035 and §5.4037, respectively, of this title; and

(2) property database information.

(b) The association must determine the total damage to a structure attributable to wind by:

(1) estimating the time history of wind damage to components and systems according to the damage estimation module, without considering the effects of storm surge and waves;

(2) estimating the probability of collapse due to surge and waves (P_{surge}) using Variant 5 of the methodology in Tomiczek, T., Kennedy, A., and Rogers, S., Collapse Limit State Fragilities of Wood-Framed Residences From Storm Surge and Waves During Hurricane Ike, Journal of Waterway, Port, Coastal, and Ocean Engineering (ASCE), (2014) 140(1), 43-55, dx.doi: 10.1061/(ASCE)WW.1943-5460.0000212;

(3) estimating the probability that wind caused the collapse of the structure (P_{wind}) by determining the maximum of the probabilities of failure for wall studs in bending, the connections of the wall studs to the wall plates, and the shear walls using the damage estimation module;

(4) calculating the time of surge slabbing (t_{surge}), which is the earlier of the time at which:

(A) the probability of surge and wave collapse (P_{surge}) reaches its maximum; or

(B) the probability of surge and wave collapse first reaches 50 percent;

(5) calculating the wind damage to each building component at the time of surge slabbing (D_{t_surge}) using the damage estimation module; and

(6) calculating wind damage each building component sustained during the applicable storm ($D_{total_component}$) using the formula: Figure: 28 TAC §5.4038(b)(6)

(c) The association must also use an observational approach, as described in Section 6 of the expert panel's report, along with the probabilistic approach described in §§5.4032 - 5.4040. In using an observational approach, the association must consider the following:

(1) modeled or observed surge and wave heights;

(2) peak wind speed;

(3) post-event photographs referenced in §5.4036(b) of this title; and

(4) observed damage to surviving structures.

(d) The association may input representations of the wind exposure category for eight direction sectors.

(e) The association may also incorporate other methods for computing probabilities of component and system failure due to wind such as the Monte Carlo simulation or the Rackwitz-Fiessler method.

§5.4039. Economic Loss Module.

(a) The association must adjust residential slab claims using the damage estimates obtained as described in §5.4038 of this title.

(b) The association must use the wind damage estimates obtained as described in §5.4038 of this title to determine the scope of work and associated costs for each component that was likely damaged by wind.

(c) The damage estimation module does not generate estimates on damage to contents; association adjusters must determine the amount to pay for contents by taking into consideration:

(1) the adjuster's knowledge and experience; and

(2) information about the particular property from the property database, the policyholder, and other sources, including applicable information from the damage estimation module.

§5.4040. Report Generation Module.

(a) Not later than 30 days after a policyholder files a residential slab claim, the association must:

(1) notify the policyholder that the association will use the wind damage evaluation method; and

(2) send the policyholder a request for any information the policyholder has on:

(A) wind speed and direction, and surge and waves, at the site of the structure for the duration of the applicable storm;

(B) damage to the structure during the applicable storm; and

(C) new information on the characteristics of the structure. When it sends the request for information, the association must also send the policyholder a copy of the association's current data in the property database on the structure's characteristics.

(b) If the association sends a letter under Insurance Code §2210.573(b), the letter can include the request required under subsection (a)(2) of this section.

(c) At the same time that the association provides the information required in Insurance Code §2210.573(d), the association must also provide to the policyholder a complete residential slab claim report and a summary of the results of the wind damage evaluation. A complete residential slab claim report contains the percentage of damage to each component of the structure, as determined in the damage estimation module, and all the information that the association used in making that determination, including the following:

(1) information on the characteristics of the structure;

(2) wind and wave and surge time histories; and

(3) all information used in the observational approach.

(d) An extension under Insurance Code §2210.573(d) also applies to the deadlines in this section.

§5.4041. Incorporation by Reference.

This rule incorporates by reference the expert panel's damage estimation module (Section 6 and Appendix A), which is part of the expert panel's report, James R. Bailey, Samuel D. Amoroso, William Coulbourne, Andrew Kennedy, & Douglas A. Smith, A Proposed Methodology for Estimating Wind Damage to Residential Slab-Only Claims Resulting from a Hurricane Impacting the Texas Coastline, Section 6, Appendix A, April 18, 2016, available at tdi.texas.gov/reports/pc/documents/epfinalrpt.pdf.

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 August 25, 2016.

TRD-201604433

Norma Garcia
General Counsel
Texas Department of Insurance
Earliest possible date of adoption: October 9, 2016
For further information, please call: (512) 676-6584

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DIVISION 2. REINSURANCE

28 TAC §5.4016

STATUTORY AUTHORITY. The department proposes repealing 28 TAC §5.4016 under Insurance Code §§36.001, 2210.008(b), and 2210.505(c).

Section 36.001 provides that the commissioner may adopt any rules necessary and appropriate to implement the powers and duties of the department under the Insurance Code and other laws of the state.

Section 2210.008(b) authorizes the commissioner to adopt reasonable and necessary rules to implement Chapter 2210.

Section 2210.505(c) authorizes the commissioner to adopt rules as necessary to implement the section, relating to reinsured excess limits.

CROSS-REFERENCE TO STATUTE. The proposed repeal implements Insurance Code §2210.152 and §2210.505.

§5.4016. Per Risk Reinsured Excess Coverage.

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

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

TRD-201604434
Norma Garcia
General Counsel
Texas Department of Insurance
Earliest possible date of adoption: October 9, 2016
For further information, please call: (512) 676-6584

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TITLE 30. ENVIRONMENTAL QUALITY

PART 1. TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

CHAPTER 122. FEDERAL OPERATING PERMITS PROGRAM

The Texas Commission on Environmental Quality (TCEQ, agency, or commission) proposes amendments to §§122.10, 122.12, 122.120, 122.122, 122.130, 122.132, 122.142, 122.145, and 122.148. The commission also proposes the repeal of §§122.420, 122.422, 122.424, 122.426, and 122.428.

If adopted, the changes proposed in this rulemaking will be submitted to the United States Environmental Protection Agency (EPA) as revisions to the Texas Federal Operating Permits (FOP) Program. In addition, the revisions to §122.122 will be submitted to the EPA as a revision to the State Implementation Plan.

Background and Summary of the Factual Basis for the Proposed Rules

TCEQ is the permitting authority responsible for implementing the FOP Program (also referred to as the Title V Permits Program) in Texas. Chapter 122 contains the framework and criteria that identify which sources are required to obtain a federal operating permit, identify the applicable requirements to be included in the permit, and establish other details about applying for and complying with a federal operating permit. In recent years there have been significant changes to several major federal regulatory initiatives as a result of court actions and new EPA rulemaking. Revisions to Chapter 122 are necessary in order to reflect up-to-date requirements associated with these federal regulations as they relate to the FOP Program.

The purpose of a federal operating permit is to improve compliance with air pollution laws and regulations by recording in one document all the air pollution control requirements that apply to a source. This gives regulators, site owners or operators, and members of the public a clear picture of what the facility is required to do to meet regulatory standards. A federal operating permit also requires the source to make regular reports on how it is meeting its emission control requirements and maintaining compliance with applicable regulations.

The federal initiatives or regulations addressed in this rulemaking include the Clean Air Interstate Rule (CAIR), the Cross-State Air Pollution Rule (CSAPR), and the permitting of greenhouse gases (GHGs) under Prevention of Significant Deterioration (PSD) and under the FOP Program. More specifically, the changes in this rulemaking are intended to address the vacatur of CAIR; the replacement of CAIR with CSAPR; and the 2014 Supreme Court decision which partially struck down certain requirements for the permitting of GHGs.

CAIR and CSAPR

CAIR was a regulation developed by the EPA to address interstate transport of emissions by reducing power plant emissions that the EPA determined were contributing to ozone or fine particle pollution in downwind states. In December 2008, the United States Court of Appeals for the District of Columbia Circuit (DC Circuit) found that CAIR did not meet the requirements of the Federal Clean Air Act (FCAA). The DC Circuit struck down CAIR, but left existing CAIR programs in place temporarily while directing EPA to replace them with a new rule consistent with the FCAA. In response, the EPA developed CSAPR, which effectively replaced CAIR when promulgated on August 8, 2011. However, in August 2012, the DC Circuit also vacated CSAPR. In April 2014, the Supreme Court overturned the DC Circuit's 2012 ruling and reinstated CSAPR. Because federal regulations specify that CSAPR is an applicable requirement under the FOP Program, it is necessary to revise Chapter 122 to add CSAPR to the definition of "Applicable requirement." This would ensure that TCEQ's FOP Program rules and operating permits issued by TCEQ are consistent with current federal requirements, and ensure that TCEQ maintains overall FOP Program approval.

GHG Permitting under the FOP Program

In March 2014, the TCEQ adopted rules in 30 TAC Chapters 116 and 122 to provide for the permitting of GHGs, as directed by House Bill (HB) 788 (83rd Texas Legislature, 2013). However, in June 2014, the Supreme Court struck down portions of the EPA's regulations relating to permitting of GHGs. The Supreme Court ruled that the EPA could not require permitting of GHG emissions under the PSD or Title V (FOP) program based on emissions of GHGs alone. However, the court also ruled that if a project triggered PSD review as the result of emissions of non-GHG crite-

ria pollutants, the permit review could include consideration and appropriate limitations on GHG emissions. A source which becomes subject to PSD review for a particular pollutant due to emissions of a different regulated new source review pollutant, is informally known as an "anyway source."

As a result of the Supreme Court ruling, the 2014 revisions to Chapter 122 which established the applicability of federal operating permit requirements for major sources of GHG are no longer applicable. These GHG-related requirements need to be deleted from Chapter 122 to avoid unnecessary confusion, maintain consistency with current federal requirements, and to ensure that TCEQ maintains FOP Program approval. In addition, HB 788 and corresponding Texas Health and Safety Code, §382.05102(e) require that the commission repeal rules requiring the permitting of GHG emissions, if emissions of GHGs are no longer required to be authorized under federal law. The proposed revisions are consistent with that statutory requirement.

Note that the proposed revisions to Chapter 122 relate to the relevance of GHG emissions at the site when determining the applicability of federal operating permit requirements. The proposed revisions are intended to ensure that emissions of GHGs alone do not cause a site to become subject to federal operating permit requirements. However, this does not necessarily mean that a federal operating permit will never contain terms and conditions which relate to emissions of GHGs. In situations where a project has triggered PSD review due to emissions of criteria pollutants, the permitting authority may still establish GHG-related requirements, and all terms and conditions of a PSD permit (including any limitations or conditions relating to emissions of GHGs) are still considered applicable requirements under the FOP Program.

Other Changes

The commission has also proposed other minor amendments to Chapter 122 to correct outdated or inaccurate references to other commission rules and federal statutes, and to correct various grammatical and style errors.

Section by Section Discussion

§122.10, General Definitions

The commission proposes to revise the definition of "Air pollutant" at §122.10(1). The proposed change would remove the portion of this definition at §122.10(1)(G) which covers GHGs. The effect of the proposed change would be that GHGs would no longer be considered an air pollutant for purposes of determining the applicability of Chapter 122 federal operating permit requirements.

The commission proposes to revise the definition of "Applicable requirement" at §122.10(2)(I)(iii). The proposed change to §122.10(2)(I)(iii) would remove the reference to the federal CAIR program as an applicable standard or requirement, and replace it with a reference to the federal CSAPR regulation.

The commission proposes to delete the definition of "Carbon dioxide equivalent (CO_2 e) emissions" under §122.10(3). This definition is no longer relevant to the applicability of Chapter 122 because the proposed rule changes would remove consideration of GHG emissions as a factor when determining applicability of federal operating permit requirements. The commission also proposes to renumber existing definitions §122.10(4) - (30) to maintain correct sequencing after the deletion of existing §122.10(3).

The commission proposes to revise the definition of "Major source" under existing §122.10(14), to remove language in §122.10(14)(C) and (H) which specifies the threshold quantities of GHG emissions which trigger the requirement to obtain a federal operating permit. In addition, to maintain consistency with federal regulations pertaining to federal operating permit requirements, the commission proposes a revision to the list of source categories which are required to include fugitive emissions when determining if a facility is a major source. The revision to existing §122.10(14)(C)(xx) would clarify that certain ethanol production facilities which produce ethanol by natural fermentation are excluded from the source category of chemical process plants. The EPA adopted this change to the corresponding 40 Code of Federal Regulations (CFR) Parts 70 and 71 on May 1, 2007 (72 FR 24060). The definition of "Major source" is also proposed to be renumbered as §122.10(13).

§122.12, Acid Rain and Clean Air Interstate Rule Definitions

The commission proposes to delete the definition of "Clean Air Interstate Rule permit" at §122.12(3). This definition is no longer necessary, as TCEQ will no longer be issuing CAIR permits under this chapter. The commission proposes to renumber existing definition §122.12(4) to account for the deletion of §122.12(3).

§122.120, Applicability

The commission proposes to delete §122.120(a)(5) and (6), which contain language relating to the applicability of Chapter 122 to units covered by CAIR. This language is no longer necessary as CAIR is no longer effective. The commission has not proposed to add any references to CSAPR in this applicability language because the requirement to obtain a federal operating permit is not based directly or solely on the CSAPR status of the site.

§122.122, Potential to Emit

The commission proposes a minor grammatical correction to §122.122(a).The commission also proposes to delete language in §122.122(e)(3) which provides for the certified registration of GHG emissions. This language is no longer necessary because a site's GHG emissions would no longer be a sole determining factor for the applicability of federal operating permit requirements, so there would be no need for a site to use this method of limiting potential to emit for GHGs. The commission also proposes a minor grammatical correction to §122.122(a).

§122.130, Initial Application Due Dates

The commission proposes to delete language in §122.130(b)(3) relating to the deadline for the owner or operator of a site to submit a permit application as a result of rulemaking which adds GHG sources to the FOP Program. This language is no longer necessary because emissions of GHGs alone will no longer trigger the requirement for an owner or operator to apply for a federal operating permit.

§122.132, Application and Required Information for Initial Permit Issuance, Reopening, Renewal, or General Operating Permits

The commission proposes to delete §122.132(d) and (e)(7), which contain language relating to an outdated phased permitting option which was repealed in 2003. The commission also proposes to revise existing §122.132(e)(3) to remove a phrase referencing the repealed phased permitting option. The commission proposes to re-letter or renumber the remaining subsections and paragraphs in the section as needed to reflect the proposed deletions and maintain sequential order.

§122.142, Permit Content Requirements

The commission proposes to delete language from §122.142(b)(2)(B) and (d) that relates to the phased permitting option repealed in 2003. The commission also proposes to revise existing §122.142(e)(1) and (2) by updating cross-references to certain rules in §122.132(e) (which are proposed to be re-lettered as §122.132(d)). In addition, the commission proposes to re-letter current §122.142(e) - (i) as necessary to reflect the proposed deletion of §122.142(d).

§122.145, Reporting Terms and Conditions

The commission proposes to revise §122.145(2)(D) to replace outdated references to 30 TAC §101.6 and §101.7. The current corresponding references are 30 TAC §101.201, Emissions Event Reporting and Recordkeeping Requirements, and 30 TAC §101.211, Scheduled Maintenance, Startup, and Shutdown Reporting and Recordkeeping Requirements, respectively.

§122.148, Permit Shield

The commission proposes to revise §122.148(b) by updating cross-references to rule subsections and paragraphs within proposed §122.132(d) which have been proposed to be re-lettered or renumbered as a result of proposed revisions to that section.

Subchapter E, Acid Rain Permits and Clean Air Interstate Rule

Division 2, Clean Air Interstate Rule

The commission proposes to repeal §§122.420, 122.422, 122.424, 122.426, and 122.428, which contain various requirements relating to applications for and contents of CAIR permits. As CAIR is no longer in effect, it is no longer necessary for Chapter 122 to maintain these requirements.

Fiscal Note: Costs to State and Local Government

Jeffrey Horvath, Analyst in the Chief Financial Officer's Division, determined that for the first five-year period the proposed rules are in effect, no significant fiscal implications are anticipated for the agency or for other units of state or local government as a result of administration or enforcement of the proposed rules.

The proposed rules would: 1) remove requirements associated with CAIR, an emission trading rule that has been vacated by federal courts and replaced with CSAPR; 2) add CSAPR as a new applicable requirement to Chapter 122; and 3) remove references to GHG permitting as a 2014 Supreme Court case overturned the EPA's regulations requiring a federal operating permit solely for GHG emissions. Other minor changes would correct outdated cross-references and grammatical errors. The proposed changes are intended to ensure that the Texas FOP Program is consistent with current federal requirements.

Any local governmental entity owning or operating a power plant (electric generating unit or EGU) subject to CSAPR will be affected by the proposed rules. These power plant facilities will be required to revise their federal operating permits to include the monitoring, recordkeeping, reporting, and testing requirements associated with the federal CSAPR regulations. Affected sites will incur a cost to prepare permit applications to incorporate the applicable CSAPR requirements. This cost is expected to vary widely for different facilities and is difficult to estimate. The cost of the operating permit revision is not expected to be significant relative to the daily, routine operating cost of an affected power plant. It is roughly estimated that it may cost $5,000 for each affected facility to prepare a permit application to reflect the applicable requirements of CSAPR. Agency staff estimates that 20 to 30 facilities owned or operated by local governments may be affected. Total statewide costs for 20 to 30 affected sites may be $100,000 to $150,000.

The proposed rules are not expected to have significant fiscal implications for the agency. The proposed rules will not affect or change any fees collected by TCEQ. Applicants do not pay fees for permit applications or revisions under the FOP Program. Holders of federal operating permits are already required to pay an annual emissions fee, but the proposed changes will not affect that fee. Federal operating permit revisions submitted to TCEQ as a result of CSAPR are not anticipated to significantly affect agency workload.

Public Benefits and Costs

Mr. Horvath also determined that for each year of the first five years the proposed rules are in effect, the public benefit anticipated from the changes seen in the proposed rules will be compliance with the current federal requirements for CSAPR, CAIR, and GHG permitting. The proposed rules are anticipated to result in greater consistency between Texas' FOP Program rules and the corresponding federal requirements as well as clarify federal operating permit requirements for permit applicants and the public. The proposed changes will also ensure that TCEQ will maintain EPA delegation for implementing the FOP Program in Texas.

The proposed rules are not anticipated to result in significant fiscal implications for businesses or individuals.

The proposed rulemaking would add a reference to CSAPR as an applicable requirement for sources covered by the Texas FOP Program. CSAPR is a federal regulation which requires substantial emission reductions from power plants (EGUs), and has considerable economic impacts. However, CSAPR applies independently of Chapter 122 federal operating permit requirements. Sources will have to comply with the federally-imposed CSAPR regulations regardless of the proposed Chapter 122 rule changes. Therefore, this fiscal note assumes that costs for the federal CSAPR program are separate from and do not result from these proposed rules.

The proposed rules will ensure that Chapter 122 maintains consistency with federal regulations and that the regulated community is aware of current applicable requirements. Sources affected by CSAPR will be required to revise their federal operating permits to reflect the additional requirements.

Power plants subject to the federal CSAPR regulation will be required to incorporate the monitoring, recordkeeping, reporting, and testing requirements of CSAPR within their Texas federal operating permit. This will require owners or operators of those facilities to submit an application to revise their federal operating permit to provide the information associated with the CSAPR requirements applicable to their site. No fees are required for the permit revisions. The proposed changes to Chapter 122 are estimated to affect 120 to 140 power generating sites in Texas.

Because each facility is unique, actual permitting costs are highly variable and difficult to forecast with any precision. The cost of the operating permit revisions is not expected to be significant relative to the daily, routine operating cost of an affected power plant. It is roughly estimated that it may cost $5,000 for each affected facility to prepare a permit application to reflect the applicable requirements of CSAPR. Statewide costs for 120 to 140 affected sites may be $600,000 to $700,000.

The proposed removal of CAIR and GHG permitting requirements from the definition of "Applicable requirement" is also to ensure that Chapter 122 is consistent with current federal requirements and regulations. Since these regulations are already effectively neutralized by court actions and EPA guidance, and since the GHG permitting aspect of the TCEQ's FOP Program was never approved by the EPA, the removal of these regulations from the Chapter 122 definition of "Applicable requirement" will not have a fiscal impact on regulated facilities.

Small Business and Micro-Business Assessment

No adverse fiscal implications are anticipated for small or micro-businesses due to the implementation or administration of the proposed rules for the first five-year period the proposed rules are in effect. The proposed rules apply to major industrial sources (power plants) and would not affect small or micro-businesses.

Small Business Regulatory Flexibility Analysis

The commission reviewed this proposed rulemaking and determined that a small business regulatory flexibility analysis is not required because the proposed rules do not adversely affect a small or micro-business in a material way for the first five years the proposed rules are in effect and are intended to enhance the public health, safety, environmental and economic welfare of the state.

Local Employment Impact Statement

The commission reviewed this proposed rulemaking and determined that a local employment impact statement is not required because the proposed rules do not adversely affect a local economy in a material way for the first five years that the proposed rules are in effect.

Draft Regulatory Impact Analysis Determination

The commission reviewed the proposed rulemaking in light of the regulatory impact analysis requirements of the Texas Government Code, §2001.0225, and determined that the proposed rulemaking does not meet the definition of a "Major environmental rule" as defined in that statute, and in addition, if it did meet the definition, would not be subject to the requirements to prepare a Regulatory Impact Analysis.

A "Major environmental rule" means a rule, the specific intent of which is to protect the environment or reduce risks to human health from environmental exposure, and that may adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. The specific intent of the proposed revisions to Chapter 122 is to reflect current applicable requirements associated with federal rulemakings and court decisions as they relate to the FOP Program.

Due to significant changes to several major federal regulations as a result of court actions and EPA rulemaking, revisions to Chapter 122 are necessary in order to reflect up-to-date permitting requirements associated with these new or revised federal regulations. The federal regulations addressed in this rulemaking are CAIR, CSAPR, and GHG permitting. All of these regulations, and the overall FOP Program, were developed by the EPA to implement or satisfy provisions of the FCAA.

The proposed rulemaking would revise Chapter 122 to: 1) remove requirements associated with CAIR; which was an emission trading rule that has been vacated by federal courts and replaced with CSAPR; 2) add CSAPR as a new applicable requirement to Chapter 122; and 3) remove references to GHG permitting under Chapter 122, as a 2014 Supreme Court case overturned EPA's regulations requiring a federal operating permit for GHG emissions. Other minor changes to Chapter 122 would correct outdated cross-references and grammatical errors. The proposed rule changes are intended to ensure that the Texas FOP Program is consistent with current federal requirements.

Because the rules place no involuntary requirements on the regulated community, the rules will not adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. Also, none of the amendments place additional financial burdens on the regulated community beyond what is already required by federal regulations relating to the implementation of CSAPR and the FOP Program.

In addition, a regulatory impact analysis is not required because the rules do not meet any of the four applicability criteria for requiring a regulatory analysis of a "Major environmental rule" as defined in the Texas Government Code. Texas Government Code, §2001.0225, applies only to a major environmental rule the result of which is to: 1) exceed a standard set by federal law, unless the rule is specifically required by state law; 2) exceed an express requirement of state law, unless the rule is specifically required by federal law; 3) exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program; or 4) adopt a rule solely under the general powers of the agency instead of under a specific state law. This rulemaking does not exceed a standard set by federal law. In addition, this rulemaking does not exceed an express requirement of state law and is not adopted solely under the general powers of the agency but is specifically authorized by the provisions cited in the Statutory Authority section of this preamble. Finally, this rulemaking does not exceed a requirement of a delegation agreement or contract to implement a state or federal program.

Written comments on the Draft Regulatory Impact Analysis Determination may be submitted to the contact person at the address listed under the Submittal of Comments section of this preamble.

Takings Impact Assessment

The commission evaluated the proposed rules and performed an analysis of whether the proposed rules constitute a taking under Texas Government Code, Chapter 2007. The commission's assessment indicates Texas Government Code, Chapter 2007 does not apply.

Under Texas Government Code, §2007.002(5), taking means: "(A) a governmental action that affects private real property, in whole or in part or temporarily or permanently, in a manner that requires the governmental entity to compensate the private real property owner as provided by the Fifth and Fourteenth Amendments to the United States Constitution or Section 17 or 19, Article I, Texas Constitution; or (B) a governmental action that: (i) affects an owner's private real property that is the subject of the governmental action, in whole or in part or temporarily or permanently, in a manner that restricts or limits the owner's right to the property that would otherwise exist in the absence of the governmental action; and (ii) is the producing cause of a reduction of at least 25 percent in the market value of the affected private real property, determined by comparing the market value of the property as if the governmental action is not in effect and the market

value of the property determined as if the governmental action is in effect."

The specific purpose of the proposed rulemaking is to revise Chapter 122 in order to reflect up-to-date requirements associated with these federal regulations as they relate to the FOP Program. This would include removing requirements associated with CAIR; adding CSAPR as a new applicable requirement to Chapter 122; removing references to GHG permitting under Chapter 122; and correcting outdated cross-references and grammatical errors. The proposed rule changes are intended to ensure that the Texas FOP Program is consistent with current federal requirements.

Promulgation and enforcement of the proposed rules would not be a statutory or a constitutional taking of private real property. These rules are not burdensome, restrictive, or limiting of rights to private real property because the proposed rules do not affect a landowner's rights in private real property. These rules do not burden, restrict, or limit the owner's right to property, nor does it reduce the value of any private real property by 25% or more beyond that which would otherwise exist in the absence of the regulations. Therefore, the proposed rules would not constitute a taking under Texas Government Code, Chapter 2007.

Consistency with the Coastal Management Program

The commission reviewed the proposed rulemaking and found that the proposal is subject to the Texas Coastal Management Program (CMP) in accordance with the Coastal Coordination Act, Texas Natural Resources Code, §§33.201 *et seq.,* and therefore must be consistent with all applicable CMP goals and policies. The commission conducted a consistency determination for the proposed rules in accordance with Coastal Coordination Act Implementation Rules, 31 TAC §505.22 and found the proposed rulemaking is consistent with the applicable CMP goals and policies. The CMP goal applicable to this rulemaking is the goal to protect, preserve, and enhance the diversity, quality, quantity, functions, and values of coastal natural resource areas (31 TAC §501.12(1)). The proposed rulemaking updates rules governing the TCEQ's FOP Program to reflect recent developments in federal regulations and programs such as CAIR, CSAPR, and GHG permitting. The CMP policy applicable to this rulemaking is the policy that commission rules comply with federal regulations in 40 CFR, to protect and enhance air quality in the coastal areas (31 TAC §501.32). This rulemaking complies with 40 CFR Part 51, Requirements for Preparation, Adoption, and Submittal of Implementation Plans. Therefore, in accordance with 31 TAC §505.22(e), the commission affirms that this rulemaking is consistent with CMP goals and policies.

Promulgation and enforcement of these rules will not violate or exceed any standards identified in the applicable CMP goals and policies because the proposed rules are consistent with these CMP goals and policies, and because these rules do not create or have a direct or significant adverse effect on any coastal natural resource areas.

Written comments on the consistency of this rulemaking may be submitted to the contact person at the address listed under the Submittal of Comments section of this preamble.

Effect on Sites Subject to the Federal Operating Permits Program

The proposed rule changes will update the applicability provisions of Chapter 122 to clarify that owners or operators of sites subject to the FOP Program will not be required to obtain federal operating permits as a result of GHG emissions, and that CAIR is no longer an applicable requirement for purposes of the FOP Program. Since the EPA has determined that CSAPR is an applicable requirement under the FOP Program, owners or operators of sites subject to CSAPR will need to revise their federal operating permits to incorporate the applicable CSAPR requirements.

Announcement of Hearing

The commission will hold a public hearing on this proposal in Austin on October 4, 2016, at 10:00 a.m., in Building E, Room 201S, at the commission's central office located at 12100 Park 35 Circle. The hearing is structured for the receipt of oral or written comments by interested persons. Individuals may present oral statements when called upon in order of registration. Open discussion will not be permitted during the hearing; however, commission staff members will be available to discuss the proposal 30 minutes prior to the hearing.

Persons who have special communication or other accommodation needs who are planning to attend the hearing should contact Sandy Wong, Office of Legal Services at (512) 239-1802 or 1-800-RELAY-TX (TDD). Requests should be made as far in advance as possible.

Submittal of Comments

Written comments may be submitted to Ms. Kris Hogan, MC 205, Office of Legal Services, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087, or faxed to (512) 239-4808. Electronic comments may be submitted at: *http://www1.tceq.texas.gov/rules/ecomments/.* File size restrictions may apply to comments being submitted via the eComments system. All comments should reference Rule Project Number 2016-012-122-AI. The comment period closes on October 10, 2016. Copies of the proposed rulemaking can be obtained from the commission's website at *http://www.tceq.texas.gov/rules/propose_adopt.html.* For further information, please contact Michael Wilhoit, TCEQ Air Permits Division, Operational Support Section, (512) 239-1222.

SUBCHAPTER A. DEFINITIONS

30 TAC §122.10, §122.12

Statutory Authority

The amendments are proposed under Texas Water Code (TWC), §5.102, concerning General Powers, which provides the commission with the general powers to carry out its duties under the TWC; TWC, §5.103, concerning Rules, which authorizes the commission to adopt any rules necessary to carry out the powers and duties under the provisions of the TWC and other laws of this state; and TWC, §5.105, concerning General Policy, which authorizes the commission by rule to establish and approve all general policy of the commission. The amendments are also proposed under Texas Health and Safety Code (THSC), Texas Clean Air Act (TCAA), §382.017, concerning Rules, which authorizes the commission to adopt rules consistent with the policy and purposes of the THSC; THSC, §382.011, concerning General Powers and Duties, which authorizes the commission to establish the level of quality to be maintained in the state's air and to control the quality of the state's air; THSC, §382.051, concerning Permitting Authority of Commission; Rules, which authorizes the commission to issue permits to operate a federal source and adopt rules as necessary to comply with changes in federal law or regulations applicable to permits issued under the TCAA; THSC, §382.0515, concerning Application for

Permit, which specifies permit application requirements; THSC, §382.054, concerning Federal Operating Permit, which requires sources to obtain a federal operating permit; THSC, §382.0541, concerning Administration and Enforcement of Federal Operating Permit, which authorizes the commission to administer and enforce federal operating permits; THSC, §382.0543, concerning Review and Renewal of Federal Operating Permit, which authorizes the commission to review and renew federal operating permits; and THSC, §382.05102, which relates to the permitting authority of the commission for greenhouse gas emissions. Additional relevant sections are Texas Government Code, §2001.006, which authorizes state agencies to adopt rules or take other administrative action that the agency deems necessary to implement legislation; and Texas Government Code, §2001.142, which provides a time period for presumed notification by a state agency. The amendments are also proposed under Federal Clean Air Act (FCAA), 42 United States Code (USC), §§7661- 7661e, which requires states to develop and submit permit programs to the United States Environmental Protection Agency that implement the requirements of the Title V Permits Program.

The proposed amendments implement TWC, §§5.102, 5.103, and 5.105; THSC, §§382.011, 382.017, 382.051, 382.05102, 382.0515, 382.0518, 382.054, 382.0541, and 382.0543; Texas Government Code, §2001.006 and §2001.142; and FCAA, 42 USC, §§7661 - 7661e.

§122.10. General Definitions.

The definitions in the Texas Clean Air Act, Chapter 101 of this title (relating to General Air Quality Rules), and Chapter 3 of this title (relating to Definitions) apply to this chapter. In addition, the following words and terms, when used in this chapter, have the following meanings, unless the context clearly indicates otherwise.

(1) Air pollutant--Any of the following regulated air pollutants:

(A) nitrogen oxides;

(B) volatile organic compounds;

(C) any pollutant for which a national ambient air quality standard has been promulgated;

(D) any pollutant that is subject to any standard promulgated under Federal Clean Air Act (FCAA), §111 (Standards of Performance for New Stationary Sources);

(E) unless otherwise specified by the United States Environmental Protection Agency (EPA) by rule, any Class I or II substance subject to a standard promulgated under or established by FCAA, Title VI (Stratospheric Ozone Protection); or

(F) any pollutant subject to a standard promulgated under FCAA, §112 (Hazardous Air Pollutants) or other requirements established under FCAA, §112, including §112(g), (j), and (r), including any of the following:

(i) any pollutant subject to requirements under FCAA, §112(j). If the EPA fails to promulgate a standard by the date established under FCAA, §112(e), any pollutant for which a subject site would be major shall be considered to be regulated on the date 18 months after the applicable date established under FCAA, §112(e); and

(ii) any pollutant for which the requirements of FCAA, §112(g)(2) have been met, but only with respect to the individual site subject to FCAA, §112(g)(2) requirement. [~~; or~~]

[~~(G) Greenhouse gases (GHGs)--as defined in §101.1 of this title (relating to Definitions).~~]

(2) Applicable requirement--All of the following requirements, including requirements that have been promulgated or approved by the United States Environmental Protection Agency (EPA) through rulemaking at the time of issuance but have future-effective compliance dates:

(A) all of the requirements of Chapter 111 of this title (relating to Control of Air Pollution from [~~From~~] Visible Emissions and Particulate Matter) as they apply to the emission units at a site;

(B) all of the requirements of Chapter 112 of this title (relating to Control of Air Pollution from Sulfur Compounds) as they apply to the emission units at a site;

(C) all of the requirements of Chapter 113 of this title (relating to Standards of Performance for Hazardous Air Pollutants and for Designated Facilities and Pollutants), as they apply to the emission units at a site;

(D) all of the requirements of Chapter 115 of this title (relating to Control of Air Pollution from Volatile Organic Compounds) as they apply to the emission units at a site;

(E) all of the requirements of Chapter 117 of this title (relating to Control of Air Pollution from [~~From~~] Nitrogen Compounds) as they apply to the emission units at a site;

(F) the following requirements of Chapter 101 of this title (relating to General Air Quality Rules):

(i) Chapter 101, Subchapter A [~~of this title (relating to General Rules)~~], §101.1 of this title (relating to Definitions), insofar as the terms defined in this section are used to define the terms used in other applicable requirements;

(ii) Chapter 101, Subchapter A, §101.3 and §101.10 of this title (relating to Circumvention; and Emissions Inventory Requirements);

(iii) Chapter 101, Subchapter A, §101.8 and §101.9 of this title (relating to Sampling; and Sampling Ports) if the commission or the executive director has requested such action;

(iv) Chapter 101, Subchapter F [~~of this title (relating to Emissions Events and Scheduled Maintenance, Startup, and Shutdown Activities)~~], §§101.201, 101.211, 101.221, 101.222, and 101.223 of this title (relating to Emissions Event Reporting and Recordkeeping Requirements; Scheduled Maintenance, Startup, and Shutdown Reporting and Recordkeeping Requirements; Operational Requirements; Demonstrations; and Actions to Reduce Excessive Emissions); and

(v) Chapter 101, Subchapter H of this title (relating to Emissions Banking and Trading) as it applies to the emission units at a site;

(G) any site-specific requirement of the state implementation plan;

(H) all of the requirements under Chapter 106, Subchapter A of this title (relating to General Requirements [~~Permits by Rule~~]), or Chapter 116 of this title (relating to Control of Air Pollution by Permits for New Construction or Modification) and any term or condition of any preconstruction permit;

(I) all of the following federal requirements as they apply to the emission units at a site:

(i) any standard or other requirement under Federal Clean Air Act (FCAA), §111 (Standards of Performance for New Stationary Sources);

(ii) any standard or other requirement under FCAA, §112 (Hazardous Air Pollutants);

(iii) any standard or other requirement of the Acid Rain program or Cross-State Air Pollution Rule [~~Clean Air Interstate Rule Programs~~];

(iv) any requirements established under FCAA, §504(b) or §114(a)(3) (Monitoring and Analysis; or Inspections, Monitoring, and Entry);

(v) any standard or other requirement governing solid waste incineration under FCAA, §129 (Solid Waste Combustion);

(vi) any standard or other requirement for consumer and commercial products under FCAA, §183(e) (Control of Emissions from Certain Sources [~~Federal Ozone Measures~~]);

(vii) any standard or other requirement under FCAA, §183(f) (Tank Vessel Standards);

(viii) any standard or other requirement under FCAA, §328 (Air Pollution from Outer Continental Shelf Activities);

(ix) any standard or other requirement under FCAA, Title VI (Stratospheric Ozone Protection), unless EPA has determined that the requirement need not be contained in a permit;

(x) any increment or visibility requirement under FCAA, Title I, Part C (Prevention of Significant Deterioration of Air Quality) or any national ambient air quality standard, but only as it would apply to temporary sources permitted under FCAA, §504(e) (Temporary Sources); and

(xi) any FCAA, Title I, Part C ([~~relating to~~] Prevention of Significant Deterioration) permit issued by EPA; and

(J) the following are not applicable requirements under this chapter, except as noted in subparagraph (I)(x) of this paragraph:

(i) any state or federal ambient air quality standard;

(ii) any net ground level concentration limit;

(iii) any ambient atmospheric concentration limit;

(iv) any requirement for mobile sources;

(v) any asbestos demolition or renovation requirement under 40 Code of Federal Regulations (CFR) Part 61, Subpart M (National Emissions Standards for Asbestos);

(vi) any requirement under 40 CFR Part 60, Subpart AAA (Standards of Performance for New Residential Wood Heaters); and

(vii) any state only requirement (including §111.131 of this title (relating to Definitions), §111.133 of this title (relating to Testing Requirements), §111.135 of this title (relating to Control Requirements for Surfaces with Coatings Containing Lead), §111.137 of this title (relating to Control Requirements for Surfaces with Coatings Containing Less Than 1.0% Lead), and §111.139 of this title (relating to Exemptions).

[~~(3) Carbon dioxide equivalent (CO_2 e) emissions--shall represent an amount of greenhouse gases (GHGs) emitted, and shall be computed by multiplying the mass amount of emissions in tons per year (tpy) for the GHGs, as defined in §101.1 of this title (relating to Definitions), by the gas's associated global warming potential as published in 40 Code of Federal Regulations Part 98, Subpart A, Table A-1 - Global Warming Potentials, and summing the resultant values.~~]

(3) [~~(4)~~] Continuous compliance determination method--For purposes of Subchapter G of this chapter (relating to Periodic Monitoring and Compliance Assurance Monitoring), a method, specified by an applicable requirement, which satisfies the following criteria:

(A) the method is used to determine compliance with an emission limitation or standard on a continuous basis consistent with the averaging period established for the emission limitation or standard; and

(B) the method provides data either in units of the emission limitation or standard or correlated directly with the emission limitation or standard.

(4) [~~(5)~~] Control device--For the purposes of compliance assurance monitoring applicability, specified in §122.604 of this title (relating to Compliance Assurance Monitoring Applicability), the control device definition specified in 40 Code of Federal Regulations Part 64 ([~~, concerning~~] Compliance Assurance Monitoring)[~~,~~] applies.

(5) [~~(6)~~] Deviation--Any indication of noncompliance with a term or condition of the permit as found using compliance method data from monitoring, recordkeeping, reporting, or testing required by the permit and any other credible evidence or information.

(6) [~~(7)~~] Deviation limit--A designated value(s) or condition(s) which establishes the boundary for an indicator of performance. Operation outside of the boundary of the indicator of performance shall be considered a deviation.

(7) [~~(8)~~] Draft permit--The version of a permit available for the 30-day comment period under public announcement or public notice and affected state review. The draft permit may be the same document as the proposed permit.

(8) [~~(9)~~] Emission unit--A discrete or identifiable structure, device, item, equipment, or enclosure that constitutes or contains a point of origin of air pollutants, including appurtenances.

(A) A point of origin of fugitive emissions from individual pieces of equipment, e.g., valves, flanges, pumps, and compressors, shall not be considered an individual emission unit. The fugitive emissions shall be collectively considered as an emission unit based on their relationship to the associated process.

(B) The term may also be used in this chapter to refer to a group of similar emission units.

(C) This term is not meant to alter or affect the definition of the term "unit" for purposes of the Acid Rain Program.

(9) [~~(10)~~] Federal Clean Air Act, §502(b)(10) changes--Changes that contravene an express permit term. Such changes do not include changes that would violate applicable requirements or contravene federally enforceable permit terms and conditions that are monitoring (including test methods), recordkeeping, reporting, or compliance certification requirements.

(10) [~~(11)~~] Final action--Issuance or denial of the permit by the executive director.

(11) [~~(12)~~] General operating permit--A permit issued under Subchapter F of this chapter (relating to General Operating Permits), under which multiple similar stationary sources may be authorized to operate.

(12) [~~(13)~~] Large pollutant-specific emission unit--An emission unit with the potential to emit, taking into account control devices, the applicable air pollutant in an amount equal to or greater

than 100% of the amount, in tons per year, required for a source to be classified as a major source, as defined in this section.

(13) [~~(14)~~] Major source--

(A) For pollutants other than radionuclides, any site that emits or has the potential to emit, in the aggregate the following quantities:

(i) ten tons per year (tpy) or more of any single hazardous air pollutant listed under Federal Clean Air Act (FCAA), §112(b) (Hazardous Air Pollutants);

(ii) 25 tpy or more of any combination of hazardous air pollutant listed under FCAA, §112(b); or

(iii) any quantity less than those identified in clause (i) or (ii) of this subparagraph established by the United States Environmental Protection Agency (EPA) through rulemaking.

(B) For radionuclides regulated under FCAA, §112, the term "major source" has the meaning specified by the EPA by rule.

(C) Any site which directly emits or has the potential to emit, 100 tpy or more of any air pollutant [~~except for greenhouse gases (GHGs)~~]. The fugitive emissions of a stationary source shall not be considered in determining whether it is a major source, unless the stationary source belongs to one of the following categories of stationary sources:

(i) coal cleaning plants (with thermal dryers);

(ii) kraft pulp mills;

(iii) portland cement plants;

(iv) primary zinc smelters;

(v) iron and steel mills;

(vi) primary aluminum ore reduction plants;

(vii) primary copper smelters;

(viii) municipal incinerators capable of charging more than 250 tons of refuse per day;

(ix) hydrofluoric, sulfuric, or nitric acid plants;

(x) petroleum refineries;

(xi) lime plants;

(xii) phosphate rock processing plants;

(xiii) coke oven batteries;

(xiv) sulfur recovery plants;

(xv) carbon black plants (furnace process);

(xvi) primary lead smelters;

(xvii) fuel conversion plant;

(xviii) sintering plants;

(xix) secondary metal production plants;

(xx) chemical process plants (the term chemical processing plant shall not include ethanol production facilities that produce ethanol by natural fermentation included in the North American Industry Classification System codes 312140 or 325193);

(xxi) fossil-fuel boilers (or combination thereof) totaling more than 250 million British thermal units (Btu) per hour heat input;

(xxii) petroleum storage and transfer units with a total storage capacity exceeding 300,000 barrels;

(xxiii) taconite ore processing plants;

(xxiv) glass fiber processing plants;

(xxv) charcoal production plants;

(xxvi) fossil fuel-fired steam electric plants of more than 250 million Btu per hour heat input; or

(xxvii) any stationary source category regulated under FCAA, §111 (Standards of Performance for New Stationary Sources) or §112 for which the EPA has made an affirmative determination under FCAA, §302(j) (Definitions).

(D) Any site, except those exempted under FCAA, §182(f) (NO_x Requirements), which, in whole or in part, is a major source under FCAA, Title I, Part D (Plan Requirements for Nonattainment Areas), including the following:

(i) any site with the potential to emit 100 tpy or more of volatile organic compounds (VOC) or nitrogen oxides (NO_x) in any ozone nonattainment area classified as "marginal or moderate";

(ii) any site with the potential to emit 50 tpy or more of VOC or NO_x in any ozone nonattainment area classified as "serious";

(iii) any site with the potential to emit 25 tpy or more of VOC or NO_x in any ozone nonattainment area classified as "severe";

(iv) any site with the potential to emit ten tpy or more of VOC or NO_x in any ozone nonattainment area classified as "extreme";

(v) any site with the potential to emit 100 tpy or more of carbon monoxide (CO) in any CO nonattainment area classified as "moderate";

(vi) any site with the potential to emit 50 tpy or more of CO in any CO nonattainment area classified as "serious";

(vii) any site with the potential to emit 100 tpy or more of inhalable particulate matter (PM-10) in any PM-10 nonattainment area classified as "moderate";

(viii) any site with the potential to emit 70 tpy or more of PM-10 in any PM-10 nonattainment area classified as "serious"; and

(ix) any site with the potential to emit 100 tpy or more of lead in any lead nonattainment area.

(E) The fugitive emissions of a stationary source shall not be considered in determining whether it is a major source under subparagraph (D) of this paragraph, unless the stationary source belongs to one of the categories of stationary sources listed in subparagraph (C) of this paragraph.

(F) Any temporary source which is located at a site for less than six months shall not affect the determination of a major source for other stationary sources at a site under this chapter or require a revision to the existing permit at the site.

(G) Emissions from any oil or gas exploration or production well (with its associated equipment) and emissions from any pipeline compressor or pump station shall not be aggregated with emissions from other similar units, whether or not the units are in a contiguous area or under common control, to determine whether the units or stations are major sources under subparagraph (A) of this paragraph.

[~~(H) For GHGs, any site that emits or has the potential to emit 100 tpy or more of GHGs on a mass basis and 100,000 tpy~~

~~carbon dioxide equivalent (CO_2 e) emissions or more. The fugitive emissions of a stationary source shall not be considered in determining whether it is a major source, unless the stationary source belongs to one of the categories of stationary sources listed in subparagraph (C) of this paragraph.]~~

(14) [~~(15)~~] Notice and comment hearing--Any hearing held under this chapter. Hearings held under this chapter are for the purpose of receiving oral and written comments regarding draft permits.

(15) [~~(16)~~] Permit or federal operating permit--

(A) any permit, or group of permits covering a site, that is issued, renewed, or revised under this chapter; or

(B) any general operating permit issued, renewed, or revised by the executive director under this chapter.

(16) [~~(17)~~] Permit anniversary--The date that occurs every 12 months after the initial permit issuance, the initial granting of the authorization to operate, or renewal.

(17) [~~(18)~~] Permit application--An application for an initial permit, permit revision, permit renewal, permit reopening, general operating permit, or any other similar application as may be required.

(18) [~~(19)~~] Permit holder--A person who has been issued a permit or granted the authority by the executive director to operate under a general operating permit.

(19) [~~(20)~~] Permit revision--Any administrative permit revision, minor permit revision, or significant permit revision that meets the related requirements of this chapter.

(20) [~~(21)~~] Potential to emit--The maximum capacity of a stationary source to emit any air pollutant under its physical and operational design or configuration. Any certified registration established under §106.6 of this title (relating to Registration of Emissions), §116.611 of this title (relating to Registration to Use a Standard Permit), or §122.122 of this title (relating to Potential to Emit), or a permit by rule under Chapter 106 of this title (relating to Permits by Rule) or other new source review permit under Chapter 116 of this title (relating to Control of Air Pollution by Permits for New Construction or Modification) restricting emissions or any physical or operational limitation on the capacity of a stationary source to emit an air pollutant, including air pollution control equipment and restrictions on hours of operation or on the type or amount of material combusted, stored, or processed, shall be treated as part of its design if the limitation is enforceable by the United States Environmental Protection Agency. This term does not alter or affect the use of this term for any other purposes under the Federal Clean Air Act (FCAA), or the term "capacity factor" as used in Acid Rain provisions of the FCAA or the Acid Rain rules.

(21) [~~(22)~~] Preconstruction authorization--Any authorization to construct or modify an existing facility or facilities under Chapter 106 and Chapter 116 of this title (relating to Permits by Rule; and Control of Air Pollution by Permits for New Construction or Modification). In this chapter, references to preconstruction authorization will also include the following:

(A) any requirement established under Federal Clean Air Act (FCAA), §112(g) (Modifications); and

(B) any requirement established under FCAA, §112(j) (Equivalent Emission Limitation by Permit).

(22) [~~(23)~~] Predictive emission monitoring system--A system that uses process and other parameters as inputs to a computer program or other data reduction system to produce values in terms of the applicable emission limitation or standard.

(23) [~~(24)~~] Proposed permit--The version of a permit that the executive director forwards to the United States Environmental Protection Agency for a 45-day review period. The proposed permit may be the same document as the draft permit.

(24) [~~(25)~~] Provisional terms and conditions--Temporary terms and conditions, established by the permit holder for an emission unit affected by a change at a site, or the promulgation or adoption of an applicable requirement or state-only requirement, under which the permit holder is authorized to operate prior to a revision or renewal of a permit or prior to the granting of a new authorization to operate.

(A) Provisional terms and conditions will only apply to changes not requiring prior approval by the executive director.

(B) Provisional terms and conditions shall not authorize the violation of any applicable requirement or state-only requirement.

(C) Provisional terms and conditions shall be consistent with and accurately incorporate the applicable requirements and state-only requirements.

(D) Provisional terms and conditions for applicable requirements and state-only requirements shall include the following:

(i) the specific regulatory citations in each applicable requirement or state-only requirement identifying the emission limitations and standards;

(ii) the monitoring, recordkeeping, reporting, and testing requirements associated with the emission limitations and standards identified under clause (i) of this subparagraph; and

(iii) where applicable, the specific regulatory citations identifying any requirements that no longer apply.

(25) [~~(26)~~] Renewal--The process by which a permit or an authorization to operate under a general operating permit is renewed at the end of its term under §§122.241, 122.501, or 122.505 of this title (relating to Permit Renewals; General Operating Permits; or Renewal of the Authorization to Operate Under a General Operating Permit).

(26) [~~(27)~~] Reopening--The process by which a permit is reopened for cause and terminated or revised under §122.231 of this title (relating to Permit Reopenings).

(27) [~~(28)~~] Site--The total of all stationary sources located on one or more contiguous or adjacent properties, which are under common control of the same person (or persons under common control). A research and development operation and a collocated manufacturing facility shall be considered a single site if they each have the same two-digit Major Group Standard Industrial Classification [~~(SIC)~~] code (as described in the Standard Industrial Classification Manual, 1987) or the research and development operation is a support facility for the manufacturing facility.

(28) [~~(29)~~] State-only requirement--Any requirement governing the emission of air pollutants from stationary sources that may be codified in the permit at the discretion of the executive director. State-only requirements shall not include any requirement required under the Federal Clean Air Act or under any applicable requirement.

(29) [~~(30)~~] Stationary source--Any building, structure, facility, or installation that emits or may emit any air pollutant. Nonroad engines, as defined in 40 Code of Federal Regulations Part 89 (Control of Emissions from New and In-use Nonroad Engines), shall not be considered stationary sources for the purposes of this chapter.

§122.12. Acid Rain [~~and Clean Air Interstate Rule~~] Definitions.

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

(1) Acid Rain permit--The legally binding and segregable portion of the federal operating permit issued under this chapter, including any permit revisions, specifying the Acid Rain Program requirements applicable to an affected source, to each affected unit at an affected source, and to the owners and operators and the designated representative of the affected source or the affected unit.

(2) Acid Rain Program--The national sulfur dioxide and nitrogen oxides air pollution control and emissions reduction program established in accordance with Federal Clean Air Act, Title IV, contained in 40 Code of Federal Regulations Parts 72 - 78.

[~~(3) Clean Air Interstate Rule permit--The legally binding and federally enforceable written document, or portion of such document, issued by the permitting authority under 40 Code of Federal Regulations Part 96, Subpart CC or Subpart CCC, including any permit revisions, specifying the Clean Air Interstate Rule (CAIR) Nitrogen Oxides (NO_x) Annual Trading Program and CAIR Sulfur Dioxide (SO_2) Trading Program requirements applicable to a CAIR NO_x source and CAIR SO_2 source, to each CAIR NO_x unit and CAIR SO_2 unit at the source, and to the owners and operators and the CAIR designated representative of the source and each such unit.~~]

(3) [~~(4)~~] Designated representative--The responsible individual authorized by the owners and operators of an affected source and of all affected units at the site, as evidenced by a certificate of representation submitted in accordance with the Acid Rain Program, to represent and legally bind each owner and operator, as a matter of federal law, in matters pertaining to the Acid Rain Program. Such matters include, but are not limited to: the holdings, transfers, or dispositions of allowances allocated to a unit; and the submission of or compliance with Acid Rain permits, permit applications, compliance plans, emission monitoring plans, continuous emissions monitor (CEM), and continuous opacity monitor (COM) certification notifications, CEM and COM certification and applications, quarterly monitoring and emission reports, and annual compliance certifications. Whenever the term "responsible official" is used in this chapter, it shall refer to the "designated representative" with regard to all matters under the Acid Rain Program.

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

Filed with the Office of the Secretary of State on August 26, 2016.

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SUBCHAPTER B. PERMIT REQUIREMENTS
DIVISION 1. GENERAL REQUIREMENTS

30 TAC §122.120

Statutory Authority

The amendment is proposed under Texas Water Code (TWC), §5.102, concerning General Powers, which provides the commission with the general powers to carry out its duties under the TWC; TWC, §5.103, concerning Rules, which authorizes the commission to adopt any rules necessary to carry out the powers and duties under the provisions of the TWC and other laws of this state; and TWC, §5.105, concerning General Policy, which authorizes the commission by rule to establish and approve all general policy of the commission. The amendment is also proposed under Texas Health and Safety Code (THSC), Texas Clean Air Act (TCAA), §382.017, concerning Rules, which authorizes the commission to adopt rules consistent with the policy and purposes of the THSC; THSC, §382.011, concerning General Powers and Duties, which authorizes the commission to establish the level of quality to be maintained in the state's air and to control the quality of the state's air; THSC, §382.051, concerning Permitting Authority of Commission; Rules, which authorizes the commission to issue permits to operate a federal source and adopt rules as necessary to comply with changes in federal law or regulations applicable to permits issued under the TCAA; THSC, §382.0515, concerning Application for Permit, which specifies permit application requirements; THSC, §382.054, concerning Federal Operating Permit, which requires sources to obtain a federal operating permit; THSC, §382.0541, concerning Administration and Enforcement of Federal Operating Permit, which authorizes the commission to administer and enforce federal operating permits; THSC, §382.0543, concerning Review and Renewal of Federal Operating Permit, which authorizes the commission to review and renew federal operating permits; and THSC, §382.05102, which relates to the permitting authority of the commission for greenhouse gas emissions. Additional relevant sections are Texas Government Code, §2001.006, which authorizes state agencies to adopt rules or take other administrative action that the agency deems necessary to implement legislation; and Texas Government Code, §2001.142, which provides a time period for presumed notification by a state agency. The amendment is also proposed under Federal Clean Air Act (FCAA), 42 United States Code (USC), §§7661 - 7661e, which requires states to develop and submit permit programs to United States Environmental Protection Agency that implement the requirements of the Title V Permits Program.

The proposed amendment implements TWC, §§5.102, 5.103, and 5.105; THSC, §§382.011, 382.017, 382.051, 382.05102, 382.0515, 382.0518, 382.054, 382.0541, and 382.0543; Texas Government Code, §2001.006 and §2001.142; and FCAA, 42 USC, §§7661 - 7661e.

§122.120. Applicability.

(a) Except as identified in subsection (b) of this section, owners and operators of one or more of the following are subject to the requirements of this chapter:

(1) any site that is a major source as defined in §122.10 of this title (relating to General Definitions);

(2) any site with an affected unit as defined in 40 Code of Federal Regulations Part 72 subject to the requirements of the Acid Rain Program;

(3) any solid waste incineration unit required to obtain a permit under Federal Clean Air Act (FCAA), §129(e) (Permits [~~relating to Solid Waste Combustion~~]); or

(4) any site that is a non-major source which the United States Environmental Protection Agency (EPA), through rulemaking, has designated as no longer exempt or no longer eligible for a deferral from the obligation to obtain a permit. For the purposes of this chapter, those sources may be any of the following:

(A) any non-major source so designated by the EPA, and subject to a standard, limitation, or other requirement under FCAA, §111 ([~~relating to~~] Standards of Performance for New Stationary Sources);

(B) any non-major source so designated by the EPA, and subject to a standard or other requirement under FCAA, §112 ([~~relating to~~] Hazardous Air Pollutants), except for FCAA, §112(r) ([~~relating to~~] Prevention of Accidental Releases); or

(C) any non-major source in a source category designated by the EPA. [~~;~~]

[~~(5) any Clean Air Interstate Rule (CAIR) nitrogen oxides unit, as defined in 40 CFR §96.102, Definitions, if the CAIR nitrogen oxides unit is otherwise required to have a federal operating permit; or~~]

[~~(6) any CAIR sulfur dioxide unit, as defined in 40 CFR §96.202, Definitions, if the CAIR sulfur dioxide unit is otherwise required to have a federal operating permit.~~]

(b) The following are not subject to the requirements of this chapter:

(1) any site that is a non-major source which the EPA, through rulemaking, has designated as exempt from the obligation to obtain a permit; or

(2) any site that is a non-major source which the EPA has allowed permitting authorities to defer from the obligation to obtain a permit.

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

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DIVISION 2. APPLICABILITY

30 TAC §122.122

Statutory Authority

The amendment is proposed under Texas Water Code (TWC), §5.102, concerning General Powers, which provides the commission with the general powers to carry out its duties under the TWC; TWC, §5.103, concerning Rules, which authorizes the commission to adopt any rules necessary to carry out the powers and duties under the provisions of the TWC and other laws of this state; and TWC, §5.105, concerning General Policy, which authorizes the commission by rule to establish and approve all general policy of the commission. The amendment is also proposed under Texas Health and Safety Code (THSC), Texas Clean Air Act (TCAA), §382.017, concerning Rules, which authorizes the commission to adopt rules consistent with the policy and purposes of the THSC; THSC, §382.011, concerning General Powers and Duties, which authorizes the commission to establish the level of quality to be maintained in the state's air and to control the quality of the state's air; THSC, §382.051, concerning Permitting Authority of Commission; Rules, which authorizes the commission to issue permits to operate a federal source and adopt rules as necessary to comply with changes in federal law or regulations applicable to permits issued under the TCAA; THSC, §382.0515, concerning Application for Permit, which specifies permit application requirements; THSC, §382.054, concerning Federal Operating Permit, which requires sources to obtain a federal operating permit; THSC, §382.0541, concerning Administration and Enforcement of Federal Operating Permit, which authorizes the commission to administer and enforce federal operating permits; THSC, §382.0543, concerning Review and Renewal of Federal Operating Permit, which authorizes the commission to review and renew federal operating permits; and THSC, §382.05102, which relates to the permitting authority of the commission for greenhouse gas emissions. Additional relevant sections are Texas Government Code, §2001.006, which authorizes state agencies to adopt rules or take other administrative action that the agency deems necessary to implement legislation; and Texas Government Code, §2001.142, which provides a time period for presumed notification by a state agency. The amendment is also proposed under Federal Clean Air Act (FCAA), 42 United States Code (USC), §§7661 - 7661e, which requires states to develop and submit permit programs to the United States Environmental Protection Agency that implement the requirements of the Title V Permits Program.

The proposed amendment implements TWC, §§5.102, 5.103, and 5.105; THSC, §§382.011, 382.017, 382.051, 382.05102, 382.0515, 382.0518, 382.054, 382.0541, and 382.0543; Texas Government Code, §2001.006 and §2001.142; and FCAA, 42 USC, §§7661 - 7661e.

§122.122. Potential to Emit.

(a) For purposes of determining applicability of the Federal Operating Permit Program under this chapter, the owner or operator of stationary sources without any other federally-enforceable emission rate may limit their sources' potential to emit by maintaining a certified registration of emissions, which shall be federally enforceable [~~federally-enforceable~~]. Emission rates in new source review permits under Chapter 116 of this title (relating to Control of Air Pollution by Permits for New Construction or Modification) and certified registrations provided for under Chapter 106 of this title (relating to Permits by Rule) or Chapter 116 of this title are also federally-enforceable emission rates.

(b) All representations in any registration of emissions under this section with regard to emissions, production or operational limits, monitoring, and reporting shall become conditions upon which the stationary source shall operate. It shall be unlawful for any person to vary from such representation unless the registration is first revised.

(c) The registration of emissions shall include documentation of the basis of emission rates and a certification, in accordance with §122.165 of this title (relating to Certification by a Responsible Official), that the maximum emission rates listed on the registration reflect the reasonably anticipated maximums for operation of the stationary source.

(d) In order to qualify for registrations of emissions under this section, the maximum emission rates listed in the registration must be less than those rates defined for a major source in §122.10 of this title (relating to General Definitions).

(e) The certified registrations of emissions shall be submitted to the executive director; to the appropriate commission regional office; and to all local air pollution control agencies having jurisdiction over the site.

(1) Certified registrations established prior to December 11, 2002, shall be submitted on or before February 3, 2003.

(2) Certified registrations established on or after December 11, 2002, shall be submitted no later than the date of operation.

[(3) Certified registrations established for greenhouse gases (GHGs) (as defined in §101.1 of this title (relating to Definitions)) on or after the effective date of the United States Environmental Protection Agency's final action approving amendments to this section into the State Implementation Plan (SIP) shall be submitted:]

[(A) for existing sites that emit or have the potential to emit GHGs, no later than 12 months after the effective date of EPA's final action approving amendments to this section as a revision to the Federal Operating Permits Program; or]

[(B) for new sites that emit or have the potential to emit GHGs, no later than the date of operation.]

(f) All certified registrations and records demonstrating compliance with a certified registration shall be maintained on-site and shall be provided, upon request, during regular business hours to representatives of the appropriate commission regional office and any local air pollution control agency having jurisdiction over the site. If however, the site normally operates unattended, certified registrations and records demonstrating compliance with the certified registration must be maintained at an office within Texas having day-to-day operational control of the site. Upon request, the commission shall make any such records of compliance available to the public in a timely manner.

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

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DIVISION 3. PERMIT APPLICATION

30 TAC §122.130, §122.132

Statutory Authority

The amendments are proposed under Texas Water Code (TWC), §5.102, concerning General Powers, which provides the commission with the general powers to carry out its duties under the TWC; TWC, §5.103, concerning Rules, which authorizes the commission to adopt any rules necessary to carry out the powers and duties under the provisions of the TWC and other laws of this state; and TWC, §5.105, concerning General Policy, which authorizes the commission by rule to establish and approve all general policy of the commission. The amendments are also proposed under Texas Health and Safety Code (THSC), Texas Clean Air Act (TCAA), §382.017, concerning Rules, which authorizes the commission to adopt rules consistent with the policy and purposes of the THSC; THSC, §382.011, concerning General Powers and Duties, which authorizes the commission to establish the level of quality to be maintained in the state's air and to control the quality of the state's air; THSC, §382.051, concerning Permitting Authority of Commission; Rules, which authorizes the commission to issue permits to operate a federal source and adopt rules as necessary to comply with changes in federal law or regulations applicable to permits issued under the TCAA; THSC, §382.0515, concerning Application for Permit, which specifies permit application requirements; THSC, §382.054, concerning Federal Operating Permit, which requires sources to obtain a federal operating permit; THSC, §382.0541, concerning Administration and Enforcement of Federal Operating Permit, which authorizes the commission to administer and enforce federal operating permits; THSC, §382.0543, concerning Review and Renewal of Federal Operating Permit, which authorizes the commission to review and renew federal operating permits; and THSC, §382.05102, which relates to the permitting authority of the commission for greenhouse gas emissions. Additional relevant sections are Texas Government Code, §2001.006, which authorizes state agencies to adopt rules or take other administrative action that the agency deems necessary to implement legislation; and Texas Government Code, §2001.142, which provides a time period for presumed notification by a state agency. The amendments are also proposed under Federal Clean Air Act (FCAA), 42 United States Code (USC), §§7661 - 7661e, which requires states to develop and submit permit programs to the United States Environmental Protection Agency that implement the requirements of the Title V Permits Program.

The proposed amendments implement TWC, §§5.102, 5.103, and 5.105; THSC, §§382.011, 382.017, 382.051, 382.05102, 382.0515, 382.0518, 382.054, 382.0541, and 382.0543; Texas Government Code, §2001.006 and §2001.142; and FCAA, 42 USC, §§7661 - 7661e.

§122.130. Initial Application Due Dates.

(a) Owners or operators of any site subject to the requirements of this chapter on February 1, 1998, shall submit abbreviated initial applications by February 1, 1998. The executive director shall inform the applicant in writing of the deadline for submitting the remaining application information.

(b) Owners and operators of sites identified in §122.120 of this title (relating to Applicability) that become subject to the requirements of this chapter after February 1, 1998 are subject to the following requirements.

(1) If the site is a new site or a site that will become subject to the program as the result of a change at the site, the owner or operator shall not operate the change, or the new emission units, before an abbreviated application is submitted under this chapter. The executive director shall inform the applicant in writing of the deadline for submitting the remaining information.

(2) If the site becomes subject to the program as the result of an action by the executive director or the United States Environmental Protection Agency (EPA), the owner or operator will submit an abbreviated application no later than 12 months after the action that subjects the site to the requirements of this chapter.

[(3) If the site becomes subject to the program as a result of rulemaking revision that adds greenhouse gas sources to the Federal Operating Permits Program, the owner or operator will submit an abbreviated application no later than 12 months after EPA's final action approving the Federal Operating Permits Program revision.]

(c) Applications submitted under 40 Code of Federal Regulations (CFR) Part 71 (Federal Operating Permit Programs).

(1) If 40 CFR Part 71 is implemented in Texas by the EPA, applications will only be required to be submitted to the EPA.

(2) If all or part of 40 CFR Part 71 is delegated to the commission, information required by this chapter and consistent with the delegation will be required to be submitted to the commission.

§122.132. Application and Required Information for Initial Permit Issuance, Reopening, Renewal, or General Operating Permits.

(a) A permit application shall provide any information, including confidential information as addressed in Chapter 1 of this title (relating to Purpose of Rules, General Provisions), required by the executive director to determine the applicability of, or to codify, any applicable requirement or state-only requirement.

(b) An application for a general operating permit shall only be required to provide the information necessary to determine qualification for, and to assure compliance with, the general operating permit.

(c) An applicant may submit an abbreviated initial permit application, containing only the information in this section deemed necessary by the executive director. The abbreviated application shall include at a minimum, a general application form containing identifying information regarding the site and the applicant and a certification by a responsible official. The executive director shall inform the applicant in writing of the deadline for submitting the remaining information.

[~~(d) An application for a site qualifying under §122.131 of this title (relating to Phased Permit Detail) may be submitted under the phased permit detail process.~~]

(d) [~~(e)~~] An application shall include, but is not limited to, the following information:

(1) a general application form and all information requested by that form;

(2) for each emission unit, information regarding the general applicability determinations, which includes the following:

(A) the general identification of each potentially applicable requirement and potentially applicable state-only requirement (e.g., New Source Performance Standards Subpart Kb [~~NSPS Kb~~]);

(B) the applicability determination for each requirement identified under subparagraph (A) of this paragraph; and

(C) the basis for each determination made under subparagraph (B) of this paragraph;

(3) for each emission unit, [~~except as provided in §122.131 of this title,~~] information regarding the detailed applicability determinations, which includes the following:

(A) the specific regulatory citations in each applicable requirement or state-only requirement identifying the following:

(i) the emission limitations and standards; and

(ii) the monitoring, recordkeeping, reporting, and testing requirements associated with the emission limitations and standards identified under clause (i) of this subparagraph;

(B) the basis for each applicability determination identified under subparagraph (A) of this paragraph;

(4) a compliance plan including the following information:

(A) the following statement: "As the responsible official it is my intent that all emission units shall continue to be in compliance with all applicable requirements they are currently in compliance with, and all emission units shall be in compliance by the compliance dates with any applicable requirements that become effective during the permit term.";

(B) for all emission units addressed in the application, an indication of the compliance status with respect to all applicable requirements, based on any compliance method specified in the applicable requirements and any other credible evidence or information;

(C) for any emission unit not in compliance with the applicable requirements identified in the application, the following information:

(i) the method used for assessing the compliance status of the emission unit;

(ii) a narrative description of how the emission unit will come into compliance with all applicable requirements;

(iii) a compliance schedule (resembling and at least as stringent as any compliance schedule contained in any judicial consent decree or administrative order to which the site is subject), including remedial measures to bring the emission unit into compliance with the applicable requirements; which shall be supplemental to, and shall not sanction noncompliance with, the applicable requirements on which it is based; and

(iv) a schedule for the submission, at least every six months after issuance of the permit, of certified progress reports;

(D) for any emission unit requiring installation, testing, or final verification of operational status of monitoring equipment to satisfy the requirements of compliance assurance monitoring or periodic monitoring, the following information:

(i) an implementation plan and schedule for installing, testing, and performing any other appropriate activities prior to use of the monitoring; and

(ii) milestones for completing such installation, testing, or final verification;

(5) if applicable, information requested by the nationally-standardized forms for the acid rain portions of permit applications, and compliance plans required by the acid rain program;

(6) if applicable, a statement certifying that a risk management plan, or a schedule to submit a risk management plan has been submitted to the appropriate agency in accordance with Federal Clean Air Act [~~FCAA~~], §112(r)(7) (Prevention of Accidental Releases);

[~~(7) for applicants electing the phased permit detail process under §122.131 of this title, a proposed schedule for the incorporation of the remaining detailed applicability determinations into the permit;~~]

(7) [~~(8)~~] for applicants requesting a permit shield, any information requested by the executive director in order to determine whether to grant the shield;

(8) [~~(9)~~] a certification in accordance with §122.165 of this title (relating to Certification by a Responsible Official);

(9) [~~(10)~~] fugitive emissions from an emission unit shall be included in the permit application and the permit in the same manner as stack emissions, regardless of whether the source category in question is included in the list of sources contained in the definition of "Major Source" [~~major source~~]; [~~and~~]

(10) [~~(11)~~] for any application for which the executive director has not authorized initiation of public notice by June 3, 2001, any preconstruction authorizations that are applicable to emission units at the site;

(11) [~~(12)~~] for emission units subject to compliance assurance monitoring, as specified in §122.604 of this title (relating to Compliance Assurance Monitoring Applicability), information specified in 40 Code of Federal Regulations (CFR) §64.3 ([~~concerning~~] Monitoring Design Criteria); and 40 CFR §64.4 ([~~concerning~~] Submittal Requirements), according to the schedule specified in 40 CFR §64.5 ([~~concerning~~] Deadlines for Submittals); and[~~.~~]

(12) [~~(13)~~] for emission units subject to periodic monitoring, as specified in §122.602 of this title (relating to Periodic Monitoring Applicability), proposed periodic monitoring requirements sufficient to yield reliable data from the relevant time period that are representative of the emission unit's compliance with the applicable requirement, and testing, monitoring, reporting, or recordkeeping sufficient to assure compliance with the applicable requirement, shall be submitted for the following permitting actions:

(A) permits issued under §122.201 of this title (relating to Initial Permit Issuance);

(B) permit renewals issued under §122.243 of this title (relating to Permit Renewal Procedures);

(C) permit reopenings issued under §122.231(a) and (b) of this title (relating to Permit Reopenings);

(D) significant permit revisions issued under §122.221 of this title (relating to Procedures for Significant Permit Revisions); and

(E) minor permit revisions issued under §122.217 of this title (relating to Procedures for Minor Permit Revisions).

(e) [~~(f)~~] The executive director shall make a copy of the permit application accessible to the United States Environmental Protection Agency [~~EPA~~].

(f) [~~(g)~~] An application may not omit information needed to determine the applicability of, or to impose, any applicable requirement; however, any facilities that meet the requirements of §116.119 of this title (relating to De Minimis Facilities or Sources) are not required to be included in applications unless the facilities or sources are subject to an applicable requirement.

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

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DIVISION 4. PERMIT CONTENT

30 TAC §§122.142, 122.145, 122.148

Statutory Authority

The amendments are proposed under Texas Water Code (TWC), §5.102, concerning General Powers, which provides the commission with the general powers to carry out its duties under the TWC; TWC, §5.103, concerning Rules, which authorizes the commission to adopt any rules necessary to carry out the powers and duties under the provisions of the TWC and other laws of this state; and TWC, §5.105, concerning General Policy, which authorizes the commission by rule to establish and approve all general policy of the commission. The amendments are also proposed under Texas Health and Safety Code (THSC), Texas Clean Air Act (TCAA), §382.017, concerning Rules, which authorizes the commission to adopt rules consistent with the policy and purposes of the THSC; THSC, §382.011, concerning General Powers and Duties, which authorizes the commission to establish the level of quality to be maintained in the state's air and to control the quality of the state's air; THSC, §382.051, concerning Permitting Authority of Commission; Rules, which authorizes the commission to issue permits to operate a federal source and adopt rules as necessary to comply with changes in federal law or regulations applicable to permits issued under the TCAA; THSC, §382.0515, concerning Application for Permit, which specifies permit application requirements; THSC, §382.054, concerning Federal Operating Permit, which requires sources to obtain a federal operating permit; THSC, §382.0541, concerning Administration and Enforcement of Federal Operating Permit, which authorizes the commission to administer and enforce federal operating permits; THSC, §382.0543, concerning Review and Renewal of Federal Operating Permit, which authorizes the commission to review and renew federal operating permits; and THSC, §382.05102, which relates to the permitting authority of the commission for greenhouse gas emissions. Additional relevant sections are Texas Government Code, §2001.006, which authorizes state agencies to adopt rules or take other administrative action that the agency deems necessary to implement legislation; and Texas Government Code, §2001.142, which provides a time period for presumed notification by a state agency. The amendments are also proposed under Federal Clean Air Act (FCAA), 42 United States Code (USC), §§7661 - 7661e, which requires states to develop and submit permit programs to the United States Environmental Protection Agency that implement the requirements of the Title V Permits Program.

The proposed amendments implement TWC, §§5.102, 5.103, and 5.105; THSC, §§382.011, 382.017, 382.051, 382.05102, 382.0515, 382.0518, 382.054, 382.0541, and 382.0543; Texas Government Code, §2001.006 and §2001.142; and FCAA, 42 USC, §§7661 - 7661e.

§122.142. Permit Content Requirements.

(a) The conditions of the permit shall provide for compliance with the requirements of this chapter.

(b) Each permit issued under this chapter shall contain the information required by this subsection.

(1) Unless otherwise specified in the permit, each permit shall include the terms and conditions in §§122.143 - 122.146 of this title (relating to General Terms and Conditions; Recordkeeping Terms and Conditions; Reporting Terms and Conditions; and Compliance Certification Terms and Conditions).

(2) Each permit shall also contain specific terms and conditions for each emission unit regarding the following:

(A) the generally identified applicable requirements and state-only requirements (e.g., New Source Performance Standards, Subpart Kb [~~NSPS Kb~~]);

(B) [~~except as provided by the phased permit detail process,~~] the detailed applicability determinations, which include the following:

(i) the specific regulatory citations in each applicable requirement or state-only requirement identifying the emission limitations and standards; and

(ii) the monitoring, recordkeeping, reporting, and testing requirements associated with the emission limitations and standards identified under clause (i) of this subparagraph sufficient to ensure compliance with the permit.

(3) Each permit for which the executive director has not authorized initiation of public notice by June 3, 2001 shall contain any preconstruction authorization that is applicable to emission units at the site.

(c) Each permit shall contain periodic monitoring requirements that are sufficient to yield reliable data from the relevant time period that are representative of the emission unit's compliance with the applicable requirement, and testing, monitoring, reporting, or recordkeeping sufficient to assure compliance with the applicable requirement.

[~~(d) For permits undergoing the phased permit detail process, the permit shall contain a schedule for phasing in the detailed applicability determinations consistent with §122.131 of this title (relating to Phased Permit Detail).~~]

(d) [~~(e)~~] For emission units not in compliance with the applicable requirements at the time of initial permit issuance or renewal, the permit shall contain the following:

(1) a compliance schedule or a reference to a compliance schedule consistent with §122.132(d)(4)(C) [~~§122.132(e)(4)(C)~~] of this title (relating to Application and Required Information for Initial Permit Issuance, Reopening, Renewal, or General Operating Permits); and

(2) a requirement to submit progress reports consistent with §122.132(d)(4)(C) [~~§122.132(e)(4)(C)~~] of this title. The progress reports shall include the following information:

(A) the dates for achieving the activities, milestones, or compliance required in the compliance schedule;

(B) dates when the activities, milestones, or compliance required in the compliance schedule were achieved; and

(C) an explanation of why any dates in the schedule of compliance were not or will not be met, and any preventive or corrective measures adopted.

(e) [~~(f)~~] At the executive director's discretion, and upon request by the applicant, the permit may contain a permit shield for specific emission units.

(f) [~~(g)~~] Where an applicable requirement is more stringent than a requirement under the acid rain program, both requirements shall be incorporated into the permit and shall be enforceable requirements of the permit.

(g) [~~(h)~~] Permits shall contain compliance assurance monitoring in accordance with the schedule specified in 40 Code of Federal Regulations §64.5 ([~~concerning~~] Deadlines for Submittals).

(h) [~~(i)~~] Any compliance assurance monitoring requirements for an emission unit shall satisfy the requirements for periodic monitoring.

§122.145. Reporting Terms and Conditions.

Unless otherwise specified in the permit, the following reporting requirements shall become terms and conditions of the permit.

(1) Monitoring reports.

(A) Reports of monitoring data required to be submitted by an applicable requirement, or by the permit, shall be submitted to the executive director.

(B) Reports shall be submitted for at least each six-month period after permit issuance or at the frequency required by an applicable requirement which requires more frequent reporting.

(C) The monitoring reports shall be submitted no later than 30 days after the end of each reporting period.

(D) The reporting of monitoring data does not change the data collection requirements specified in an applicable requirement.

(2) Deviation reports.

(A) The permit holder shall report, in writing, to the executive director all instances of deviations, the probable cause of the deviations, and any corrective actions or preventative measures taken for each emission unit addressed in the permit.

(B) A deviation report shall be submitted for at least each six-month period after permit issuance or at the frequency required by an applicable requirement which requires more frequent reporting. However, no report is required if no deviations occurred over the six-month reporting period.

(C) The deviation reports shall be submitted no later than 30 days after the end of each reporting period.

(D) Reporting in accordance with §101.201 [~~§101.6~~] and §101.211 [~~§101.7~~] of this title (relating to Emissions Event Reporting and Recordkeeping Requirements; and Scheduled Maintenance, Startup, and Shutdown Reporting and Recordkeeping Requirements [~~Upset Reporting and Recordkeeping Requirements and Maintenance, Start-up and Shutdown Reporting, Recordkeeping, and Operational Requirements~~]) does not substitute for reporting deviations under this paragraph.

§122.148. Permit Shield.

(a) At the discretion of the executive director, and upon request by the applicant, the permit may contain a permit shield for specific emission units. The permit shield is a special condition stating that compliance with the conditions of the permit shall be deemed compliance with the specified potentially applicable requirements or specified potentially applicable state-only requirements.

(b) In order for the executive director to determine that an emission unit qualifies for a permit shield, all information required by §122.132(d)(2), (3), and (7) [~~§122.132(e)(2), (3) and (8)~~] of this title (relating to Application and Required Information for Initial Permit Issuance, Reopening, Renewal, or General Operating Permits) must be submitted with the permit application.

(c) The permit shall contain the following information for the emission units addressed by the permit shield:

(1) determinations by the executive director establishing one of the following:

(A) potentially applicable requirements or potentially applicable state-only requirements specifically identified during the application review process are not applicable to the source; or

(B) duplicative, redundant, and/or contradicting applicable requirements or state-only applicable requirements specifically identified during the application review process are superseded by a more stringent or equivalent requirement; and

(2) a statement that compliance with the conditions of the permit shall be deemed compliance with the specified potentially applicable requirements or specified potentially applicable state-only requirements.

(d) Any permit that does not expressly state that a permit shield exists shall not provide a permit shield.

(e) Permit shield provisions shall not be modified by the executive director until notification is provided to the permit holder. No later than 90 days after notification of a change in a determination made by the executive director, the permit holder shall apply for the appropriate permit revision to reflect the new determination.

(f) Provisional terms and conditions are not eligible for a permit shield. Any permit term or condition, under a permit shield, shall not be protected by the permit shield if it is replaced by a provisional term or condition or the basis of the term or condition changes.

(g) Nothing in this section shall alter or affect the following:

(1) the provisions of Federal Clean Air Act (FCAA) [~~FCAA~~], §303 (Emergency Orders);

(2) the liability of an owner or operator of a source for any violation of applicable requirements prior to or at the time of permit issuance;

(3) the applicable requirements of the acid rain program; or

(4) the ability of the United States Environmental Protection Agency [~~EPA~~] to obtain information from a source under FCAA, §114 (Inspections, Monitoring, and Entry).

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

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SUBCHAPTER E. ACID RAIN PERMITS AND CLEAN AIR INTERSTATE RULE

DIVISION 2. CLEAN AIR INTERSTATE RULE

30 TAC §§122.420, 122.422, 122.424, 122.426, 122.428

Statutory Authority

The repeal of the sections is proposed under Texas Water Code (TWC), §5.102, concerning General Powers, which provides the commission with the general powers to carry out its duties under the TWC; TWC, §5.103, concerning Rules, which authorizes the commission to adopt any rules necessary to carry out the powers and duties under the provisions of the TWC and other laws of this state; and TWC, §5.105, concerning General Policy, which authorizes the commission by rule to establish and approve all general policy of the commission. The repeal of the sections is also proposed under Texas Health and Safety Code (THSC), Texas Clean Air Act (TCAA), §382.017, concerning Rules, which authorizes the commission to adopt rules consistent with the policy and purposes of the THSC; THSC, §382.011, concerning General Powers and Duties, which authorizes the commission to establish the level of quality to be maintained in the state's air and to control the quality of the state's air; THSC, §382.051, concerning Permitting Authority of Commission; Rules, which authorizes the commission to issue permits to operate a federal source and adopt rules as necessary to comply with changes in federal law or regulations applicable to permits issued under the TCAA; THSC, §382.0515, concerning Application for Permit, which specifies permit application requirements; THSC, §382.054, concerning Federal Operating Permit, which requires sources to obtain a federal operating permit; THSC, §382.0541, concerning Administration and Enforcement of Federal Operating Permit, which authorizes the commission to administer and enforce federal operating permits; THSC, §382.0543, concerning Review and Renewal of Federal Operating Permit, which authorizes the commission to review and renew federal operating permits; and THSC, §382.05102, which relates to the permitting authority of the commission for greenhouse gas emissions. Additional relevant sections are Texas Government Code, §2001.006, which authorizes state agencies to adopt rules or take other administrative action that the agency deems necessary to implement legislation; and Texas Government Code, §2001.142, which provides a time period for presumed notification by a state agency. The repeal of the sections is also proposed under Federal Clean Air Act (FCAA), 42 United States Code (USC), §§7661 - 7661e, which requires states to develop and submit permit programs to the United States Environmental Protection Agency that implement the requirements of the Title V Permits Program.

The proposed repeal of the sections implements TWC, §§5.102, 5.103, and 5.105; THSC, §§382.011, 382.017, 382.051, 382.05102, 382.0515, 382.0518, 382.054, 382.0541, and 382.0543; Texas Government Code, §2001.006 and §2001.142; and FCAA, 42 USC, §§7661 - 7661e.

§122.420. General Clean Air Interstate Rule Annual Trading Program Permit Requirements.

§122.422. Submission of Clean Air Interstate Rule Permit Applications.

§122.424. Information Requirements for Clean Air Interstate Rule Permit Applications.

§122.426. Clean Air Interstate Rule Permit Contents and Term.

§122.428. Clean Air Interstate Rule Permit Revisions.

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

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TITLE 37. PUBLIC SAFETY AND CORRECTIONS

PART 1. TEXAS DEPARTMENT OF PUBLIC SAFETY

CHAPTER 13. CONTROLLED SUBSTANCES

SUBCHAPTER A. GENERAL PROVISIONS

37 TAC §13.1

The Texas Department of Public Safety (the department) proposes the repeal of §13.1, concerning Definitions. The repeal of §13.1 is filed simultaneously with proposed new Chapter 13.

This repeal, and the proposal of new Chapter 13, is necessary to implement the requirements of Texas Health and Safety Code, Chapter 481 as amended by Senate Bill 195, 84th Legislative Session. The bill eliminates the Controlled Substance Registration program and transfers the Prescription Drug Monitoring program to the Texas Board of Pharmacy. The bill thus necessitates the repeal of significant portions of Chapter 13. This also provides an opportunity to consolidate and update the administrative rules of the two remaining programs, the Precursor Chemical and Laboratory Apparatus permitting program and the Peyote Distributor Registration program.

Suzy Whittenton, Chief Financial Officer, has determined that for each year of the first five-year period the repeal is in effect there will be no fiscal implications for state or local government, or local economies.

Ms. Whittenton has also determined that there will be no adverse economic effect on small businesses or micro-businesses required to comply with the repeal as proposed. There is no anticipated economic cost to individuals who are required to comply with the repeal as proposed. There is no anticipated negative impact on local employment.

In addition, Ms. Whittenton has also determined that for each year of the first five-year period the repeal is in effect, the public benefit anticipated as a result of enforcing the repeal will be greater clarity in the agency's administrative rules and consistency with legislative changes.

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

The department has determined that Chapter 2007 of the Texas Government Code does not apply to this proposal. Accordingly, the department is not required to complete a takings impact assessment regarding this proposal.

Comments on this proposal may be submitted to Steve Moninger, Regulatory Services Division, Department of Public Safety, P.O. Box 4087, MSC-0240, Austin, Texas 78773-0246, or by email at *https://www.txdps.state.tx.us/rsd/contact/default.aspx.* Select "Controlled Substances Registration". Comments must be received no later than thirty (30) days from the date of publication of this proposal.

This repeal is proposed pursuant to Texas Government Code, §411.004(3), which authorizes the Public Safety Commission to adopt rules considered necessary for carrying out the department's work, and Texas Health and Safety Code, §481.003, which authorizes the Public Safety Commission to adopt rules to administer and enforce Chapter 481 of the Health and Safety Code.

Texas Government Code, §411.004(3), and Texas Health and Safety Code, §481.003, are affected by this proposal.

§13.1. 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.

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D. Phillip Adkins
General Counsel
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For further information, please call: (512) 424-5848

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37 TAC §13.1

The Texas Department of Public Safety (the department) proposes new §13.1, concerning Definitions. Proposed new §13.1 is filed simultaneously with the repeal of current §13.1. This proposal and the repeal of current §13.1 is necessary to implement the requirements of Texas Health and Safety Code, Chapter 481 as amended by Senate Bill 195, 84th Legislative Session. The bill eliminates the Controlled Substance Registration program and transfers the Prescription Drug Monitoring program to the Texas Board of Pharmacy. The bill thus necessitates the repeal of significant portions of Chapter 13, and provides an opportunity to consolidate and update the administrative rules of the two remaining programs, the Precursor Chemical and Laboratory Apparatus permitting program and the Peyote Distributor Registration program.

Suzy Whittenton, Chief Financial Officer, has determined that for each year of the first five-year period the rule is in effect there will be no fiscal implications for state or local government, or local economies.

Ms. Whittenton has also determined that there will be no adverse economic effect on small businesses or micro-businesses required to comply with the rule as proposed. There is no anticipated economic cost to individuals who are required to comply with the rule as proposed. There is no anticipated negative impact on local employment.

In addition, Ms. Whittenton has also determined that for each year of the first five-year period the rule is in effect, the public benefit anticipated as a result of enforcing the rule will be greater clarity in the agency's administrative rules and consistency with legislative changes.

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

The department has determined that Chapter 2007 of the Texas Government Code does not apply to this proposal. Accordingly, the department is not required to complete a takings impact assessment regarding this proposal.

Comments on this proposal may be submitted to Steve Moninger, Regulatory Services Division, Department of Public

Safety, P.O. Box 4087, MSC-0240, Austin, Texas 78773-0246, or by email at https://www.txdps.state.tx.us/rsd/contact/default.aspx. Select "Controlled Substances Registration." Comments must be received no later than thirty (30) days from the date of publication of this proposal.

This proposal is made pursuant to Texas Government Code, §411.004(3), which authorizes the Public Safety Commission to adopt rules considered necessary for carrying out the department's work, and Texas Health and Safety Code, §481.003, which authorizes the Public Safety Commission to adopt rules to administer and enforce Chapter 481 of the Health and Safety Code.

Texas Government Code, §411.004(3) and Texas Health and Safety Code, §481.003 are affected by this proposal.

§13.1. Definitions.

(a) The terms in this section, when used in this chapter, have the following meanings, unless the context clearly indicates otherwise.

(1) Act--The Texas Controlled Substances Act (Texas Health and Safety Code, Chapter 481).

(2) Day--A calendar day unless otherwise indicated as a business day.

(3) Department (DPS)--The Texas Department of Public Safety.

(4) Drug Enforcement Administration (DEA)--The Federal Drug Enforcement Administration.

(5) Electronic transmission--The transmission of information in electronic form such as computer to computer, electronic device to computer, email, or the transmission of the exact visual image of a document by way of electronic media.

(6) Record--A notification, order form, statement, invoice, inventory information, or other document for the acquisition or disposal of a controlled substance, precursor, or apparatus created or maintained in any manner by a distributor or permit holder under a record keeping or inventory requirement of federal law, the Act, or this chapter.

(b) For purposes of this chapter, the terms "precursor chemical" and "chemical precursor" are interchangeable.

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

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SUBCHAPTER B. PRECURSOR CHEMICAL LABORATORY APPARATUS (PCLA)

37 TAC §§13.11 - 13.25

The Texas Department of Public Safety (the department) proposes the new §§13.11 - 13.25, concerning Precursor Chemical Laboratory Apparatus (PCLA) Program. Proposed new §§13.11 - 13.25 is filed simultaneously with the repeal of current Subchapter B, concerning Registration. This proposal, and the repeal of current Subchapter B, is necessary to implement the requirements of Texas Health and Safety Code, Chapter 481 as amended by Senate Bill 195, 84th Legislative Session. The bill eliminates the Controlled Substance Registration program and transfers the Prescription Drug Monitoring program to the Texas Board of Pharmacy. The bill thus necessitates the repeal of significant portions of Chapter 13, and provides an opportunity to consolidate and update the administrative rules of the two remaining programs, the Precursor Chemical and Laboratory Apparatus permitting program and the Peyote Distributor Registration program.

Suzy Whittenton, Chief Financial Officer, has determined that for each year of the first five-year period the rules are in effect there will be no fiscal implications for state or local government, or local economies.

Ms. Whittenton has also determined that there will be no adverse economic effect on small businesses or micro-businesses required to comply with the rules as proposed. There is no anticipated economic cost to individuals who are required to comply with the rules as proposed. There is no anticipated negative impact on local employment.

In addition, Ms. Whittenton has also determined that for each year of the first five-year period the rules are in effect, the public benefit anticipated as a result of enforcing the rules will be greater clarity in the agency's administrative rules and consistency with legislative changes.

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

The department has determined that Chapter 2007 of the Texas Government Code does not apply to this proposal. Accordingly, the department is not required to complete a takings impact assessment regarding this proposal.

Comments on this proposal may be submitted to Steve Moninger, Regulatory Services Division, Department of Public Safety, P.O. Box 4087, MSC-0240, Austin, Texas 78773-0246, or by email at https://www.txdps.state.tx.us/rsd/contact/default.aspx. Select "Controlled Substances Registration". Comments must be received no later than thirty (30) days from the date of publication of this proposal.

This proposal is made pursuant to Texas Government Code, §411.004(3), which authorizes the Public Safety Commission to adopt rules considered necessary for carrying out the department's work, and Texas Health and Safety Code, §481.003, which authorizes the Public Safety Commission to adopt rules to administer and enforce Chapter 481 of the Health and Safety Code.

Texas Government Code, §411.004(3) and Texas Health and Safety Code, §481.003 are affected by this proposal.

§13.11. Application.

(a) Applicants for a precursor chemical laboratory apparatus (PCLA) permit under this subchapter must apply in a manner prescribed by the department.

(b) An application for an annual PCLA permit is complete when it contains all information required by the department, including:

(1) Business name;

(2) Business owner/representative;

(3) Storage facility address;

(4) Multiple businesses owned by applicant of agent;

(5) Identification of the PCLA to be obtained;

(6) Description of how the PCLA will be used;

(7) Consent to inspect acknowledgement; and

(8) Any supporting documentation or other information requested by the department.

(c) An application for a one-time PCLA permit is complete when it contains all information required by the department, including:

(1) Applicant's name, address, telephone number, email address (if available), driver license number or Texas identification card number, and date of birth;

(2) Quantity of PCLA associated with the request;

(3) Description of how the PCLA will be used;

(4) Consent to inspect acknowledgement; and

(5) Any supporting documentation or other information requested by the department.

(d) The application form and any additional document or statement required by the department must be signed or electronically acknowledged by:

(1) The applicant, if the applicant is an individual;

(2) A general partner of the applicant, if the applicant is a partnership;

(3) An officer of the applicant, if the applicant is a corporation or other business association; or

(4) The administrator of the applicant, if the applicant is a hospital or teaching institution.

(e) If an incomplete application is received, notice of the deficiency will be sent to the applicant. The applicant will have 60 calendar days after receipt of notice to provide the required information and submit a complete application. If an applicant fails to furnish the documentation, the application will be considered withdrawn, and a new application will be required.

(f) By submitting the application, the applicant agrees to allow the department to conduct a criminal history background check as authorized by law.

(g) No fee is required for a permit under this subchapter.

§13.12. Expiration and Renewal.

(a) An annual permit expires one year from the end of the month of issuance.

(b) A permit may be renewed for up to 180 days after the expiration date. If the permit has been expired for more than 180 days, a new application must be submitted.

(c) An expired permit that has not been renewed within the 180 days cannot be used to receive or transfer chemical precursor or laboratory apparatus.

§13.13. Reporting.

(a) The department issued precursor chemical laboratory apparatus (PCLA) transaction form or its electronic equivalent must be completed by a PCLA distributor to report the required transactional details, including information relating to the recipient of a precursor or apparatus. The distributor must complete all applicable sections of the form.

(b) Except as provided by subsection (c) of this section, the report must be filed not later than the 7th day after the distributor completes the transaction and returned to the department.

(c) A distributor may make the comprehensive monthly report by submitting a computer generated report. This form of reporting must be pre-approved by the department and must include the same information as the PCLA transaction form. The comprehensive monthly report is due by the 30th day following the end of the reported month.

(d) All required reports must be submitted to the department in the form and manner required by the department.

§13.14. Transactions.

(a) A prospective precursor chemical laboratory apparatus (PCLA) recipient must present to the distributor an original one-time permit or an original or electronic file copy of an annual permit.

(b) The distributor must take reasonable steps to ensure proper identification of a potential recipient.

§13.15. Notification of Changes.

(a) An applicant for or holder of an annual permit must notify the department before the seventh day following any modification or change in the individual's business name, address, telephone number or other information required on the application, registration, or permit.

(b) The notification must be in writing and include the signature of the permit holder, applicant, or other individual who is authorized to sign an original application.

§13.16. Security.

(a) A permit holder must establish and maintain effective controls and procedures to prevent unauthorized access, theft, or diversion of any precursor chemical laboratory apparatus (PCLA). The following constitute the minimum security requirements to protect these controlled items. The permit holder must:

(1) Establish and maintain a building, an enclosure within a building, or an enclosed yard that provides reasonably adequate security against the diversion of a controlled item;

(2) Limit access to each storage area to the minimum number of individuals or employees necessary for the permit holder's activities; and

(3) Designate an individual or a limited number of individuals with responsibility for each area in which a controlled item is stored, and authority to enter or control entry into the area.

(b) In the absence of a physical barrier, such as a wall, partition, fence, or similar divider, the permit holder may comply with this section by another form of substantially increased security to limit physical access to the storage area under subsection (a)(2) of this section.

(c) The permit holder will make the designation required by subsection (a)(3) of this section in writing and will make the designation available upon request in the same manner as a record kept under

this chapter. The holder may update the designation record as necessary to reflect current practice.

(d) When maintenance personnel or a business guest, visitor, or similar individual is present in or passes through an area addressed by this section, the permit holder must provide for reasonably adequate observation of the area by an employee specifically designated under subsection (a)(3) of this section.

(e) If a permit holder has an alarm system that is in operation and being monitored, the permit holder must immediately report each unauthorized intrusion or other security breach to the department and to the permit holder's local law enforcement agency.

(f) A permit holder is not required to make the alarm report required under subsection (e) of this section if there is a reasonable explanation for the security breach that does not involve potential diversion.

§13.17. Record Keeping.

(a) A distributor or recipient of a precursor or apparatus must make an accurate and legible record of each distribution; and maintain the record for two years after the date of the transaction.

(b) A distributor satisfies the record keeping requirement under this section by recording and maintaining the record of distribution as a readily retrievable record in an automated data processing system, if the system provides a comprehensive monthly report to the department.

§13.18. Inventory.

(a) Unless exempt under the Act, a distributor or recipient of a precursor or apparatus must establish and maintain an inventory under this section.

(b) A distributor or recipient must conduct an initial inventory to include each precursor chemical laboratory apparatus (PCLA) that is covered by this subchapter and in stock at the time of the inventory. The distributor or recipient must conduct the initial inventory not later than the 90th day after the date the department issues the initial permit under this chapter.

(c) After the initial inventory, a distributor or recipient must conduct another inventory not later than the 24th month following the month of the last inventory.

(d) The department may deem a distributor or recipient to be in compliance with the inventory requirements of this section if the distributor or recipient:

(1) Is a business that routinely conducts an annual inventory of all items; and

(2) Maintains a readily retrievable record of each precursor or apparatus located during the inventory.

§13.19. Inspection.

(a) Upon request of the department, a registrant or permit holder may be provided up to 24 hours, excluding weekends and holidays, to produce any or all records required to be maintained on site for inspection by the department.

(b) All registrants authorized to maintain an offsite central record keeping system shall, upon request, produce the requested records within two business days.

(c) If an individual maintains a record under this chapter using an automated data processing system and if the individual does not have a printer available on site, the individual must:

(1) Make a useable copy available to the department at the close of business the day after the audit; and

(2) Certify that the information contained within the copy is true and correct as of the date of audit and has not been altered, amended, or modified.

(d) No individual in charge of a premise, item, or record covered by the Act or this subchapter may refuse, or interfere with, an inspection. Refusal or interference by an applicant or permit holder may be a ground for the department to deny the application or suspend or revoke the permit.

§13.20. Denial, Suspension, Revocation.

(a) First time violations of this chapter may result in suspension or revocation for a period of up to three months. A second violation within two years may result in the suspension of the registration for a period of up to 6 months. Three or more violations within two years may result in the revocation of the registration, and the denial of any subsequent application for a period of two years.

(b) Denial, suspension, and revocation for violations of the Act and this chapter proceedings will be conducted under the procedures described in Subchapter H of the Act.

§13.21. Administrative Violations and Penalties.

The violations detailed in this section will be subject to an administrative fine of $500 per violation, subject to the factors provided in §481.302 of the Act. These fines may be imposed in lieu of or in addition to suspension or revocation, under the procedures described in Subchapter H of the Act for violations of the Act and this chapter.

(1) Failure to maintain records/inventories.

(2) Failure to provide required reports.

(3) Inaccurate or fraudulent reporting.

(4) Failure to surrender required documents.

(5) Failure to display required signage/license.

(6) Failure to maintain adequate security.

(7) Operating outside scope of license.

(8) Failure to notify of license changes.

(9) Refusing to allow or failure to cooperate with inspections.

(10) Misrepresentation of information on application, record, or report.

(11) Unlawful transfer or receipt of precursor chemical.

(12) Transfer of precursor substance for unlawful manufacture.

(13) Unlawful transfer or receipt of lab apparatus.

(14) Transfer of lab apparatus for unlawful manufacture.

§13.22. Disqualifying Criminal Offenses.

(a) Pursuant to Texas Occupations Code, §53.021(a)(1) the department may revoke a precursor chemical laboratory apparatus (PCLA) permit or deny an application for a PCLA permit if the applicant or permit holder has been convicted of a felony or misdemeanor that directly relates to the duties and responsibilities of a PCLA permit holder.

(b) The department has determined the criminal offenses within Texas Health and Safety Code, Chapters 481 - 486 directly relate to the duties and responsibilities of PCLA permit holder. A conviction for such an offense may result in the denial of an initial or renewal application for a PCLA permit or the revocation of a PCLA permit.

(c) A felony conviction for an offense within Texas Health and Safety Code, Chapters 481 - 486, or a substantially similar offense, is disqualifying for 10 years from the date of the conviction unless a full pardon has been granted.

(d) A Class A or B misdemeanor conviction for an offense within Texas Health and Safety Code, Chapters 481 - 486, or a substantially similar offense, is disqualifying for five years from the date of conviction unless a full pardon has been granted.

(e) For the purposes of this chapter, all references to conviction are to those for which the judgment has become final.

(f) The department may consider the factors specified in Texas Occupations Code, §53.022 and §53.023 in determining whether to grant, deny, or revoke any certificate of registration.

§13.23. Notice and Hearings.

(a) Hearings on administrative penalties, and denials, suspensions or revocations, are governed by Subchapter H of the Act (§481.301 et seq.).

(b) The department may rely on the mailing and electronic mail address and facsimile number currently on file for all purposes relating to notification. The failure to maintain a current mailing and electronic mail address and facsimile number with the department is not a defense to any action based on the registrant's or applicant's failure to respond. Service upon the registrant or applicant of notice is complete and receipt is presumed upon the date the notice is sent, if sent before 5:00 p.m. by facsimile or electronic mail, and 3 days following the date sent if by regular United States mail.

(c) Following adequate notice of a hearing on a contested case before the State Office of Administrative Hearings (SOAH), failure of the respondent to appear at the time of hearing shall entitle the department to request from the administrative law judge an order dismissing the case from the SOAH docket and to informally dispose of the case on a default basis.

(d) In cases brought before SOAH, in the event that the respondent is adjudicated to be in violation of the Act or this chapter after a trial on the merits, the department has authority to assess, in addition to the penalty imposed, the actual costs of the administrative hearing. Such costs include, but are not limited to, investigative costs, witness fees, deposition expenses, travel expenses of witnesses, costs of adjudication before SOAH and any other costs that are necessary for the preparation of the department's case including the costs of any transcriptions of testimony.

(e) The costs of transcribing the testimony and preparing the record for an appeal by judicial review shall be paid by the respondent.

§13.24. Additional or Exempted Chemical Precursor or Laboratory Apparatus.

(a) Under the authority of §481.077(b) and §481.080(c) of the Act, the department has determined that the items detailed in the section should be added to or exempted from the chemical precursor or laboratory apparatus lists.

(b) Chemical precursor additions. The department hereby names the following chemical substances as chemical precursors subject to the Act, §481.077(b):

(1) Red phosphorus; and

(2) Hypophosphorous acid.

(c) Chemical precursor exemptions. The department has not exempted any substances from the list of chemical precursor subject to the Act, §481.077(b).

(d) Laboratory apparatus additions. The department has not added any items to the list of items of chemical laboratory apparatus subject to the Act, §481.080(a).

(e) Laboratory apparatus exemptions. The department has not exempted any items from those chemical laboratory apparatus subject to the Act, §481.080(a).

§13.25. Immediate Chemical Precursor List.

The substances detailed in this section are designated as being an immediate precursor as provided under the Act, §481.002(22):

(1) Benzaldehyde;

(2) Gamma-butyrolactone (other names include: GBL; dihydro-2(3H)-furanone; 1,2-butanolide; 1,4-butanolide; 4-hydroxybutanoic acid lactone; gamma-hydroxybutyric acid lactone);

(3) Isosafrole;

(4) 3,4-methylenedioxyphenyl-2-propanone;

(5) N-methylephedrine, its salts, optical isomers, and salts of optical isomers;

(6) N-methylpseudoephedrine, its salts, optical isomers, and salts of optical isomers;

(7) Piperonal;

(8) Safrole; and

(9) Lithium metal removed from a battery and immersed in kerosene, mineral spirits, or similar liquid that prevents or retards hydration.

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

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D. Phillip Adkins
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SUBCHAPTER B. REGISTRATION

37 TAC §§13.21 - 13.27

The Texas Department of Public Safety (the department) proposes the repeal of §§13.21 - 13.27, concerning Registration. The repeal of §§13.21 - 13.27 is filed simultaneously with proposed new Chapter 13. This repeal, and the proposal of new Chapter 13, is necessary to implement the requirements of Texas Health and Safety Code, Chapter 481 as amended by Senate Bill 195, 84th Legislative Session. The bill eliminates the Controlled Substance Registration program and transfers the Prescription Drug Monitoring program to the Texas Board of Pharmacy. The bill thus necessitates the repeal of significant portions of Chapter 13. This also provides an opportunity to consolidate and update the administrative rules of the two remaining programs, the Precursor Chemical and Laboratory Apparatus permitting program and the Peyote Distributor Registration program.

Suzy Whittenton, Chief Financial Officer, has determined that for each year of the first five-year period the repeals are in effect there will be no fiscal implications for state or local government, or local economies.

Ms. Whittenton has also determined that there will be no adverse economic effect on small businesses or micro-businesses required to comply with the repeals as proposed. There is no anticipated economic cost to individuals who are required to comply with the repeals as proposed. There is no anticipated negative impact on local employment.

In addition, Ms. Whittenton has also determined that for each year of the first five-year period the repeals are in effect, the public benefit anticipated as a result of enforcing the repeals will be greater clarity in the agency's administrative rules and consistency with legislative changes.

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

The department has determined that Chapter 2007 of the Texas Government Code does not apply to this proposal. Accordingly, the department is not required to complete a takings impact assessment regarding this proposal.

Comments on this proposal may be submitted to Steve Moninger, Regulatory Services Division, Department of Public Safety, P.O. Box 4087, MSC-0240, Austin, Texas 78773-0246, or by email at https://www.txdps.state.tx.us/rsd/contact/default.aspx. Select "Controlled Substances Registration". Comments must be received no later than thirty (30) days from the date of publication of this proposal.

This repeal is proposed pursuant to Texas Government Code, §411.004(3), which authorizes the Public Safety Commission to adopt rules considered necessary for carrying out the department's work, and Texas Health and Safety Code, §481.003, which authorizes the Public Safety Commission to adopt rules to administer and enforce Chapter 481 of the Health and Safety Code.

Texas Government Code, §411.004(3) and Texas Health and Safety Code, §481.003, are affected by this proposal.

§13.21. Registration Categories and Schedules.

§13.22. Registration for Research Activities.

§13.23. Application.

§13.24. Fees.

§13.25. Expiration.

§13.26. Requirement to Update Information.

§13.27. Mid-level Practitioner.

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

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SUBCHAPTER C. PEYOTE DISTRIBUTORS

37 TAC §§13.31 - 13.44

The Texas Department of Public Safety (the department) proposes new §§13.31 - 13.44, concerning Peyote Distributors. Proposed new §§13.31 - 13.44 is filed simultaneously with the repeal of current Subchapter C, concerning Peyote. This proposal, and the repeal of current Subchapter C, is necessary in part to implement the requirements of Texas Health and Safety Code, Chapter 481 as amended by Senate Bill 195, 84th Legislative Session. The bill eliminates the Controlled Substance Registration program and transfers the Prescription Drug Monitoring program to the Texas Board of Pharmacy. The bill thus necessitates the repeal of significant portions of Chapter 13, and provides an opportunity to consolidate and update the administrative rules of the Peyote Distributor Registration program. Specifically, proposed §13.43, relating to Exemption from Penalty for Failure to Renew in Timely Manner, and proposed §13.44, relating to Extension of License Renewal Deadlines for Military Members, are necessary to implement the requirements of Occupations Code, Chapter 55 as amended by Senate Bill 1307, 84th Legislative Session. This bill requires the creation of exemptions and extensions for occupational license applications and renewals for military service members, military veterans, and military spouses.

Suzy Whittenton, Chief Financial Officer, has determined that for each year of the first five-year period the rules are in effect there will be no fiscal implications for state or local government, or local economies.

Ms. Whittenton has also determined that there will be no adverse economic effect on small businesses or micro-businesses required to comply with the rules as proposed. There is no anticipated economic cost to individuals who are required to comply with the rules as proposed. There is no anticipated negative impact on local employment.

In addition, Ms. Whittenton has also determined that for each year of the first five-year period the rules are in effect, the public benefit anticipated as a result of enforcing the rules will be greater clarity in the agency's administrative rules and consistency with legislative changes.

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

The department has determined that Chapter 2007 of the Texas Government Code does not apply to this proposal. Accordingly, the department is not required to complete a takings impact assessment regarding this proposal.

Comments on this proposal may be submitted to Steve Moninger, Regulatory Services Division, Department of Public Safety, P.O. Box 4087, MSC-0240, Austin, Texas 78773-0246, or by email at https://www.txdps.state.tx.us/rsd/contact/default.aspx. Select "Controlled Substances Registration". Comments must be received no later than thirty (30) days from the date of publication of this proposal.

This proposal is made pursuant to Texas Government Code, §411.004(3), which authorizes the Public Safety Commission to adopt rules considered necessary for carrying out the department's work, Texas Health and Safety Code, §481.003, which authorizes the Public Safety Commission to adopt rules to administer and enforce Chapter 481 of the Health and Safety Code, and Occupations Code, §55.02 which authorizes a state agency that issues a license to adopt rules to exempt an individual who holds a license issued by the agency from an increased fee or other penalty imposed by the agency for failing to renew the license in a timely manner if the individual establishes to the satisfaction of the agency that the individual failed to renew the license in a timely manner because the individual was serving as a military service member.

Texas Government Code, §411.004(3), Texas Health and Safety Code, §481.003, Occupations Code, §55.02 are affected by this proposal.

§13.31. Application for Peyote Distributor Registration.

(a) An applicant for registration as a peyote distributor must:

(1) Register with the Federal Drug Enforcement Administration (DEA) in compliance with Title 21, USC 21 §§821 - 831;

(2) Submit a complete application to the department;

(3) Submit the names and addresses of all individuals who are to be employed by or under contract with the distributor to engage in any peyote transactions or otherwise come into contact with or possess peyote on behalf of the distributor; and

(4) Certify the individuals listed pursuant to subsection (a)(3) of this section have been instructed in proper peyote harvesting techniques, as provided in §13.34 of this title, relating to Harvesting.

(b) No fee is required for a registration under this subchapter.

§13.32. Expiration and Renewal.

A peyote distributor registration expires one year from the anniversary of the date of issuance, and must be renewed prior to expiration. An expired registration provides no authority to engage in the business of a distributor.

§13.33. Employee/Contractor Information.

(a) The distributor must furnish to the department the name and identifying information of each employee or independent contractor who will possess peyote on behalf of the distributor, and certify the individual has been trained in proper harvesting techniques as provided in §13.34 of this title, relating to Harvesting.

(b) The distributor is responsible for maintaining the accuracy of the information provided to the department, and must notify the department of any change to the information within seven days of the change.

§13.34. Harvesting.

(a) Distributors must ensure the peyote is harvested in compliance with proper harvesting techniques, whereby only the crown is harvested and the non-chlorophyllous stem and root are left intact. Any improperly harvested peyote, including any stems or roots, must be identified as such to prospective buyers, and may not be represented as properly harvested.

(b) Harvested peyote must be protected from insects, mold, and contaminants.

(c) When a distributor or the distributor's employee or contractor is hunting, harvesting, cutting, collecting, transporting, or otherwise in possession of peyote, the individual must carry:

(1) Proof of the distributor's current registration, and in the case of an employee or contractor, an employee identification card or other documentation establishing a current employment or contractual relationship with the registrant; and

(2) Documentation sufficient to show lawful access to the land where the peyote was harvested, including the name and location of the person granting the access.

(d) The documentation required by subsection (b) of this section must be presented upon demand of a representative of the department, a peace officer, a federal official, or the landowner or landowner's representative.

§13.35. Sales.

Distributors are only authorized to sell peyote to those authorized to possess peyote under Texas Health and Safety Code, §481.111. Distributors are responsible for confirming the purchaser's identification and legal authority to possess peyote.

§13.36. Transactional Records.

(a) A distributor must maintain for two years records of all transactions involving peyote. The records must reflect:

(1) The date of the transaction;

(2) The quantity purchased or sold, expressed as both the number of buttons and the weight in pounds and ounces;

(3) The total purchase price;

(4) As applicable, signatures of the purchaser and seller, names, addresses, DPS and DEA registration numbers, tribal identification or government issued identification number, and church affiliation;

(5) If applicable, the name(s) of any employee(s) or contractors engaged in the transaction; and

(6) Any other records required under Title 21 CFR Part 1304.

(b) A distributor must:

(1) Make the records available for inspection and copying by the department upon request, and submit the records to the department upon request;

(2) Create the records contemporaneously with the event recorded; and

(3) Ensure the records are current.

§13.37. Security.

(a) A distributor must establish and maintain effective controls and procedures in order to prevent unauthorized access, theft, or diversion of peyote.

(b) A distributor may not allow access to the peyote storage area to anyone other than an employee identified to the department in

compliance with §13.33 of this title, relating to Employee/Contractor Information, or who is otherwise authorized under Texas Health and Safety Code, §481.111.

§13.38. Inventory.

A distributor must conduct a monthly inventory of all peyote in stock and maintain readily retrievable records of the inventory. The records must be made available for inspection and copying by the department upon request, and the records must be submitted to the department upon request.

§13.39. Reporting of Loss or Theft.

(a) A distributor must notify the department not later than the three days after the date the distributor learns of:

(1) A discrepancy in the amount of peyote ordered from a source inside or outside this state and the amount received, if not back ordered;

(2) A loss or theft during shipment from a source inside or outside this state; or

(3) A loss or theft from current inventory.

(b) A distributor must notify the department of a loss of theft by submitting a report to the department in the manner required by the department.

(c) A report submitted under this section must contain:

(1) The name, address, and telephone number of the business or other person submitting the report;

(2) The printed or typed name of the person preparing the report; and

(3) The date the person prepared the report.

(d) If the report under this section concerns a:

(1) Discrepancy, the report must include:

(A) The name of the item ordered;

(B) The difference in the amount actually received; and

(C) The amount shipped according to the shipping statement or invoice;

(2) Loss or theft from current inventory, the report must include:

(A) The name and amount of the item lost or stolen;

(B) The physical location where the loss or theft occurred; and

(C) The date of discovery of the loss or theft.

(3) Discrepancy, loss, theft, or other potential diversion that occurred during shipment of the item, the report must include:

(A) The name of the common carrier or person who transported the item; and

(B) The date the item was shipped.

§13.40. Denial, Suspension, Revocation.

(a) First time violations of this chapter or Texas Health and Safety Code, §481.111 may result in suspension or revocation for a period of up to three months. A second violation within two years may result in the suspension of the registration for a period of up to six months. Three or more violations within two years may result in the revocation of the registration, and the denial of any subsequent application for a period of two years.

(b) Denial, suspension, and revocation proceedings will be conducted under the procedures described in Subchapter H of the Texas Health and Safety Code, Chapter 481 (§481.301 et seq.) for violations of the Texas Health and Safety Code, §481.111 and this chapter.

§13.41. Administrative Penalties.

The following reflect the department's guidelines for administrative penalties to be used in lieu of or in addition to suspension or revocation actions, under the procedures described in Subchapter H of Texas Health and Safety Code, Chapter 481 (§481.301 et seq.) for violations of Texas Health and Safety Code, §481.111 and this chapter. The violations detailed in this section will be subject to a fine of $500 per violation, subject to the factors provided in §481.302.

(1) Failure to maintain required records.

(2) Failure to provide reports upon request.

(3) Inaccurate or fraudulent reports.

(4) Failure to maintain adequate security.

(5) Operating outside scope of license.

(6) Failure to notify of changes to licensee's employees.

(7) Refusing to allow or failure to cooperate with inspections.

(8) Misrepresentation of information on application, record, or report.

(9) Unlawful transfer or receipt of peyote.

(10) Failure to validate authority of purchaser.

(11) Sale of contaminated peyote.

(12) Improper harvesting.

(13) Misrepresentation relating to sale, including misrepresenting the peyote as properly harvested or as crown material.

§13.42. Notice and Hearings.

(a) Hearings on administrative penalties and other disciplinary actions are governed by Subchapter H of Texas Health and Safety Code, Chapter 481 (§481.301 et seq.).

(b) The department may rely on the mailing and electronic mail address and facsimile number currently on file for all purposes relating to notification. The failure to maintain a current mailing and electronic mail address with the department is not a defense to any action based on the registrant's or applicant's failure to respond. Service upon the registrant or applicant of notice is complete and receipt is presumed upon the date the notice is sent, if sent before 5:00 p.m. by facsimile or electronic mail, and three days following the date sent if by regular United States mail.

(c) Following adequate notice of a hearing on a contested case before the State Office of Administrative Hearings (SOAH), failure of the respondent to appear at the time of hearing shall entitle the department to request from the administrative law judge an order dismissing the case from the SOAH docket and to informally dispose of the case on a default basis.

(d) In cases brought before SOAH, if the respondent is adjudicated to be in violation of Texas Health and Safety Code, §481.111 or this chapter after a trial on the merits, the department has authority to assess, in addition to the penalty imposed, the actual costs of the administrative hearing. Such costs include, but are not limited to, investigative costs, witness fees, deposition expenses, travel expenses of witnesses, costs of adjudication before SOAH and any other costs that

are necessary for the preparation of the department's case including the costs of any transcriptions of testimony.

(e) The costs of transcribing the testimony and preparing the record for an appeal by judicial review shall be paid by the respondent.

§13.43. Exemption from Penalty for Failure to Renew in Timely Manner.

An individual who holds a registration issued under Texas Health and Safety Code, §481.111 is exempt from any increased fee or other penalty for failing to renew the license or registration in a timely manner if the individual establishes to the satisfaction of the department the individual failed to renew the license or registration in a timely manner because the individual was serving as a military service member, as defined in Texas Occupations Code, §55.001.

§13.44. Extension of License Renewal Deadlines for Military Members.

A military service member, as defined in Texas Occupations Code, §55.001, who holds a registration issued under Texas Health and Safety Code, §481.111 is entitled to two years of additional time to complete any requirement related to the renewal of the license.

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

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D. Phillip Adkins
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For further information, please call: (512) 424-5848

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SUBCHAPTER C. PEYOTE

37 TAC §§13.41 - 13.58

The Texas Department of Public Safety (the department) proposes the repeal of §§13.41 - 13.58, concerning Peyote. The repeal of §§13.41 - 13.58 is filed simultaneously with proposed new Chapter 13. This repeal, and the proposal of new Chapter 13, is necessary to implement the requirements of Texas Health and Safety Code, Chapter 481 as amended by Senate Bill 195, 84th Legislative Session. The bill eliminates the Controlled Substance Registration program and transfers the Prescription Drug Monitoring program to the Texas Board of Pharmacy. The bill thus necessitates the repeal of significant portions of Chapter 13. This also provides an opportunity to consolidate and update the administrative rules of the two remaining programs, the Precursor Chemical and Laboratory Apparatus permitting program and the Peyote Distributor Registration program.

Suzy Whittenton, Chief Financial Officer, has determined that for each year of the first five-year period the repeals are in effect there will be no fiscal implications for state or local government, or local economies.

Ms. Whittenton has also determined that there will be no adverse economic effect on small businesses or micro-businesses required to comply with the repeals as proposed. There is no anticipated economic cost to individuals who are required to comply with the repeals as proposed. There is no anticipated negative impact on local employment.

In addition, Ms. Whittenton has also determined that for each year of the first five-year period the repeals are in effect, the public benefit anticipated as a result of enforcing the repeals will be greater clarity in the agency's administrative rules and consistency with legislative changes.

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

The department has determined that Chapter 2007 of the Texas Government Code does not apply to this proposal. Accordingly, the department is not required to complete a takings impact assessment regarding this proposal.

Comments on this proposal may be submitted to Steve Moninger, Regulatory Services Division, Department of Public Safety, P.O. Box 4087, MSC-0240, Austin, Texas 78773-0246, or by email at https://www.txdps.state.tx.us/rsd/contact/default.aspx. Select "Controlled Substances Registration". Comments must be received no later than thirty (30) days from the date of publication of this proposal.

This repeal is proposed pursuant to Texas Government Code, §411.004(3), which authorizes the Public Safety Commission to adopt rules considered necessary for carrying out the department's work, and Texas Health and Safety Code, §481.003, which authorizes the Public Safety Commission to adopt rules to administer and enforce Chapter 481 of the Health and Safety Code.

Texas Government Code, §411.004(3) and Texas Health and Safety Code, §481.003, are affected by this proposal.

§13.41. Subchapter Definitions.

§13.42. Peyote Distributor Registration.

§13.43. Application.

§13.44. Certificate and ID Card.

§13.45. Employee Information.

§13.46. Employee Identification Card.

§13.47. Possession and Display of Identification and Access Information.

§13.48. Source Information.

§13.49. Purchase or Harvest.

§13.50. Sale in Person.

§13.51. Mail Order Sale.

§13.52. Sales Receipt.

§13.53. Quarterly Report.

§13.54. Declaration as Native American Church.

§13.55. Landowner Activity.

§13.56. Security, Record Keeping, Inventory, Inspection, and Reporting Discrepancy, Loss, Theft, or Diversion.

§13.57. Communication with Director (CSR Section).

§13.58. Miscellaneous.

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

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SUBCHAPTER D. MISCELLANEOUS PROVISIONS

37 TAC §13.51

The Texas Department of Public Safety (the department) proposes new §13.51, concerning Ephedrine, Pseudoephedrine, and Norpseudoephedrine. Proposed new §13.51 is filed simultaneously with the repeal of current Subchapter E, concerning Precursors and Apparatus, within which current §13.112, concerning Ephedrine, Pseudoephedrine, and Norpseudoephedrine, appears. This proposal, and the repeal of current Subchapter E, is being proposed in conjunction with the repeal and amendment of significant portions of Chapter 13 necessitated by the requirements of Texas Health and Safety Code, Chapter 481 as amended by Senate Bill 195, 84th Legislative Session. The bill eliminates the Controlled Substance Registration program and transfers the Prescription Drug Monitoring program to the Texas Board of Pharmacy. The need to amend significant portions of Chapter 13 provides an opportunity to update the administrative rule relating to Ephedrine, Pseudoephedrine, and Norpseudoephedrine.

Suzy Whittenton, Chief Financial Officer, has determined that for each year of the first five-year period the rules are in effect there will be no fiscal implications for state or local government, or local economies.

Ms. Whittenton has also determined that there will be no adverse economic effect on small businesses or micro-businesses required to comply with the rules as proposed. There is no anticipated economic cost to individuals who are required to comply with the rules as proposed. There is no anticipated negative impact on local employment.

In addition, Ms. Whittenton has also determined that for each year of the first five-year period the rules are in effect, the public benefit anticipated as a result of enforcing the rules will be greater clarity in the agency's administrative rules and consistency with legislative changes.

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

The department has determined that Chapter 2007 of the Texas Government Code does not apply to this proposal. Accordingly, the department is not required to complete a takings impact assessment regarding this proposal.

Comments on this proposal may be submitted to Steve Moninger, Regulatory Services Division, Department of Public Safety, P.O. Box 4087, MSC-0240, Austin, Texas 78773-0246, or by email at https://www.txdps.state.tx.us/rsd/contact/default.aspx. Select "Controlled Substances Registration". Comments must be received no later than thirty (30) days from the date of publication of this proposal.

This proposal is made pursuant to Texas Government Code, §411.004(3), which authorizes the Public Safety Commission to adopt rules considered necessary for carrying out the department's work, and Texas Health and Safety Code, §481.003, which authorizes the Public Safety Commission to adopt rules to administer and enforce Chapter 481 of the Health and Safety Code.

Texas Government Code, §411.004(3) and Texas Health and Safety Code, §481.003 are affected by this proposal.

§13.51. Ephedrine, Pseudoephedrine, and Norpseudoephedrine.

(a) A wholesale distributor who sells, transfers, or otherwise furnishes a product containing ephedrine, pseudoephedrine, or norpseudoephedrine to a retailer shall obtain before delivering the product:

(1) The retailer's business name, address, area code, and telephone number;

(2) The name of the person making the purchase;

(3) The amount of the product containing ephedrine, pseudoephedrine, or norpseudoephedrine ordered; and

(4) Any other information required by the department.

(b) A wholesale distributor shall make an accurate and legible record of the information in subsection (a) of this section and the amount of the product containing ephedrine, pseudoephedrine, or norpseudoephedrine actually delivered. A wholesale distributor shall retain the record for a period of at least two years after the date of the transaction. The record shall be made available to the department upon request.

(c) Not later than ten business days after receipt of an order for a product containing ephedrine, pseudoephedrine, or norpseudoephedrine requesting delivery of a suspicious quantity of that product, the wholesale distributor shall report the suspicious order to the department on the form and in the manner approved by the department.

(d) A wholesale distributor who distributes a product containing ephedrine, pseudoephedrine, or norpseudoephedrine to a retailer shall make available for immediate inspection to any member of the department during regular business hours upon presentation of proper credentials all files, papers, processes, controls, or facilities appropriate for verification of a required record or report. If the wholesaler is no longer in operation or closed, the records shall be made available within three business days.

(e) A wholesale distributor who fails to comply with the requirements of this section may be subject to administrative penalties, pursuant to Subchapter H of the Act and notification of the proper administrative or law enforcement authorities.

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

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SUBCHAPTER D. TEXAS PRESCRIPTION PROGRAM

37 TAC §§13.71 - 13.83

The Texas Department of Public Safety (the department) proposes the repeal of §§13.71 - 13.83, concerning Texas Prescription Program. The repeal of §§13.71 - 13.83 is filed simultaneously with proposed new Chapter 13. This repeal, and the proposal of new Chapter 13, is necessary to implement the requirements of Texas Health and Safety Code, Chapter 481 as amended by Senate Bill 195, 84th Legislative Session. The bill eliminates the Controlled Substance Registration program and transfers the Prescription Drug Monitoring program to the Texas Board of Pharmacy. The bill thus necessitates the repeal of significant portions of Chapter 13. This also provides an opportunity to consolidate and update the administrative rules of the two remaining programs, the Precursor Chemical and Laboratory Apparatus permitting program and the Peyote Distributor Registration program.

Suzy Whittenton, Chief Financial Officer, has determined that for each year of the first five-year period the repeals are in effect there will be no fiscal implications for state or local government, or local economies.

Ms. Whittenton has also determined that there will be no adverse economic effect on small businesses or micro-businesses required to comply with the repeals as proposed. There is no anticipated economic cost to individuals who are required to comply with the repeals as proposed. There is no anticipated negative impact on local employment.

In addition, Ms. Whittenton has also determined that for each year of the first five-year period the repeals are in effect, the public benefit anticipated as a result of enforcing the repeals will be greater clarity in the agency's administrative rules and consistency with legislative changes.

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

The department has determined that Chapter 2007 of the Texas Government Code does not apply to this proposal. Accordingly, the department is not required to complete a takings impact assessment regarding this proposal.

Comments on this proposal may be submitted to Steve Moninger, Regulatory Services Division, Department of Public Safety, P.O. Box 4087, MSC-0240, Austin, Texas 78773-0246, or by email at https://www.txdps.state.tx.us/rsd/contact/default.aspx. Select "Controlled Substances Registration". Comments must be received no later than thirty (30) days from the date of publication of this proposal.

This repeal is proposed pursuant to Texas Government Code, §411.004(3), which authorizes the Public Safety Commission to adopt rules considered necessary for carrying out the department's work, and Texas Health and Safety Code, §481.003, which authorizes the Public Safety Commission to adopt rules to administer and enforce Chapter 481 of the Health and Safety Code.

Texas Government Code, §411.004(3) and Texas Health and Safety Code, §481.003, are affected by this proposal.

§13.71. Official Prescription Form.
§13.72. Prescriptions.
§13.73. Exceptions to Use of Form.
§13.74. Pharmacy Responsibility - Generally.
§13.75. Pharmacy Responsibility - Electronic Reporting.
§13.76. Waiver from Electronic Reporting.
§13.77. Pharmacy Responsibility - Non-electronic Reporting.
§13.78. Pharmacy Responsibility - Oral, Telephonic, or Emergency Prescription.
§13.79. Pharmacy Responsibility - Modification of Prescription.
§13.80. Pharmacy Responsibility - Out-of-State Practitioner.
§13.81. Return of Unused Official Prescription Form.
§13.82. Release of Prescription Data.
§13.83. Schedule III through V Prescription 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.

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SUBCHAPTER E. PRECURSORS AND APPARATUS

37 TAC §§13.101 - 13.117

The Texas Department of Public Safety (the department) proposes the repeal of §§13.101 - 13.117, concerning Precursors and Apparatus. The repeal of §§13.101 - 13.117 is filed simultaneously with proposed new Chapter 13. This repeal, and the proposal of new Chapter 13, is necessary to implement the requirements of Texas Health and Safety Code, Chapter 481 as amended by Senate Bill 195, 84th Legislative Session. The bill eliminates the Controlled Substance Registration program and

transfers the Prescription Drug Monitoring program to the Texas Board of Pharmacy. The bill thus necessitates the repeal of significant portions of Chapter 13. This also provides an opportunity to consolidate and update the administrative rules of the two remaining programs, the Precursor Chemical and Laboratory Apparatus permitting program and the Peyote Distributor Registration program.

Suzy Whittenton, Chief Financial Officer, has determined that for each year of the first five-year period the repeals are in effect there will be no fiscal implications for state or local government, or local economies.

Ms. Whittenton has also determined that there will be no adverse economic effect on small businesses or micro-businesses required to comply with the repeals as proposed. There is no anticipated economic cost to individuals who are required to comply with the repeals as proposed. There is no anticipated negative impact on local employment.

In addition, Ms. Whittenton has also determined that for each year of the first five-year period the repeals are in effect, the public benefit anticipated as a result of enforcing the repeals will be greater clarity in the agency's administrative rules and consistency with legislative changes.

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

The department has determined that Chapter 2007 of the Texas Government Code does not apply to this proposal. Accordingly, the department is not required to complete a takings impact assessment regarding this proposal.

Comments on this proposal may be submitted to Steve Moninger, Regulatory Services Division, Department of Public Safety, P.O. Box 4087, MSC-0240, Austin, Texas 78773-0246, or by email at https://www.txdps.state.tx.us/rsd/contact/default.aspx. Select "Controlled Substances Registration". Comments must be received no later than thirty (30) days from the date of publication of this proposal.

This repeal is proposed pursuant to Texas Government Code, §411.004(3), which authorizes the Public Safety Commission to adopt rules considered necessary for carrying out the department's work, and Texas Health and Safety Code, §481.003, which authorizes the Public Safety Commission to adopt rules to administer and enforce Chapter 481 of the Health and Safety Code.

Texas Government Code, §411.004(3) and Texas Health and Safety Code, §481.003 are affected by this proposal.

§13.101. Subchapter Definitions.
§13.102. Who Must Obtain Permit.
§13.103. Permit Exception.
§13.104. Requirements for Permit Issuance.
§13.105. Permit Application.
§13.106. Permit Document.
§13.107. Business Letter of Authorization.
§13.108. Waiting Period.
§13.109. Reporting Distribution.
§13.110. NAR-22.
§13.111. Exclusion.
§13.112. Ephedrine, Pseudoephedrine, and Norpseudoephedrine.
§13.113. Out-of-State Activity.
§13.114. Security, Record Keeping, inventory, Inspection, and Reporting Discrepancy, Loss, Theft, or Diversion.
§13.115. Communication with Director (PCLAS).
§13.116. Additions or Deletions.
§13.117. Immediate Precursor List.

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

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SUBCHAPTER H. SECURITY

37 TAC §§13.181 - 13.187

The Texas Department of Public Safety (the department) proposes the repeal of §§13.181 - 13.187, concerning Security. The repeal of §§13.181 - 13.187 is filed simultaneously with proposed new Chapter 13. This repeal, and the proposal of new Chapter 13, is necessary to implement the requirements of Texas Health and Safety Code, Chapter 481 as amended by Senate Bill 195, 84th Legislative Session. The bill eliminates the Controlled Substance Registration program and transfers the Prescription Drug Monitoring program to the Texas Board of Pharmacy. The bill thus necessitates the repeal of significant portions of Chapter 13. This also provides an opportunity to consolidate and update the administrative rules of the two remaining programs, the Precursor Chemical and Laboratory Apparatus permitting program and the Peyote Distributor Registration program

Suzy Whittenton, Chief Financial Officer, has determined that for each year of the first five-year period the repeals are in effect there will be no fiscal implications for state or local government, or local economies.

Ms. Whittenton has also determined that there will be no adverse economic effect on small businesses or micro-businesses required to comply with the repeals as proposed. There is no anticipated economic cost to individuals who are required to comply with the repeals as proposed. There is no anticipated negative impact on local employment.

In addition, Ms. Whittenton has also determined that for each year of the first five-year period the repeals are in effect, the public benefit anticipated as a result of enforcing the repeals will be greater clarity in the agency's administrative rules and consistency with legislative changes.

The department has determined that this proposal is not a "major environmental rule" as defined by Texas Government Code, §2001.0225. "Major environmental rule" is defined to mean a rule that the specific intent of which is to protect the environment

or reduce risk to human health from environmental exposure and that may adversely affect, in a material way, the economy, a sector of the economy, productivity, competition, jobs, the environment or the public health and safety of a state or a sector of the state. This proposal is not specifically intended to protect the environment or reduce risks to human health from environmental exposure.

The department has determined that Chapter 2007 of the Texas Government Code does not apply to this proposal. Accordingly, the department is not required to complete a takings impact assessment regarding this proposal.

Comments on this proposal may be submitted to Steve Moninger, Regulatory Services Division, Department of Public Safety, P.O. Box 4087, MSC-0240, Austin, Texas 78773-0246, or by email at https://www.txdps.state.tx.us/rsd/contact/default.aspx. Select "Controlled Substances Registration". Comments must be received no later than thirty (30) days from the date of publication of this proposal.

This repeal is proposed pursuant to Texas Government Code, §411.004(3), which authorizes the Public Safety Commission to adopt rules considered necessary for carrying out the department's work, and Texas Health and Safety Code, §481.003, which authorizes the Public Safety Commission to adopt rules to administer and enforce Chapter 481 of the Health and Safety Code.

Texas Government Code, §411.004(3) and Texas Health and Safety Code, §481.003, are affected by this proposal.

§13.181. Subchapter Definitions.

§13.182. Registrant - Generally.

§13.183. Pharmacy Registrant.

§13.184. Registrant's Employee.

§13.185. Official Prescription Form.

§13.186. Precursor or Laboratory Apparatus.

§13.187. Minimum Standards.

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

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SUBCHAPTER I. RECORD KEEPING

37 TAC §§13.201 - 13.209

The Texas Department of Public Safety (the department) proposes the repeal of §§13.201 - 13.209, concerning Record Keeping. The repeal of §§13.201 - 13.209 is filed simultaneously with proposed new Chapter 13. This repeal, and the proposal of new Chapter 13, is necessary to implement the requirements of Texas Health and Safety Code, Chapter 481 as amended by Senate Bill 195, 84th Legislative Session. The bill eliminates the Controlled Substance Registration program and transfers the Prescription Drug Monitoring program to the Texas Board of Pharmacy. The bill thus necessitates the repeal of significant portions of Chapter 13. This also provides an opportunity to consolidate and update the administrative rules of the two remaining programs, the Precursor Chemical and Laboratory Apparatus permitting program and the Peyote Distributor Registration program.

Suzy Whittenton, Chief Financial Officer, has determined that for each year of the first five-year period the repeals are in effect there will be no fiscal implications for state or local government, or local economies.

Ms. Whittenton has also determined that there will be no adverse economic effect on small businesses or micro-businesses required to comply with the repeals as proposed. There is no anticipated economic cost to individuals who are required to comply with the repeals as proposed. There is no anticipated negative impact on local employment.

In addition, Ms. Whittenton has also determined that for each year of the first five-year period the repeals are in effect, the public benefit anticipated as a result of enforcing the repeals will be greater clarity in the agency's administrative rules and consistency with legislative changes.

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

The department has determined that Chapter 2007 of the Texas Government Code does not apply to this proposal. Accordingly, the department is not required to complete a takings impact assessment regarding this proposal.

Comments on this proposal may be submitted to Steve Moninger, Regulatory Services Division, Department of Public Safety, P.O. Box 4087, MSC-0240, Austin, Texas 78773-0246, or by email at *https://www.txdps.state.tx.us/rsd/contact/default.aspx*. Select "Controlled Substances Registration". Comments must be received no later than thirty (30) days from the date of publication of this proposal.

This repeal is proposed pursuant to Texas Government Code, §411.004(3), which authorizes the Public Safety Commission to adopt rules considered necessary for carrying out the department's work, Texas Health and Safety Code, §481.003, which authorizes the Public Safety Commission to adopt rules to administer and enforce Chapter 481 of the Health and Safety Code.

Texas Government Code, §411.004(3) and Texas Health and Safety Code, §481.003, are affected by this proposal.

§13.201. Subchapter Definitions.

§13.202. Receipt of Disposition of Controlled Substance.

§13.203. Order Forms (DEA Form 222).

§13.204. Pharmacy Registrant.

§13.205. Practitioner's Designated Agent.

§13.206. Precursor/Apparatus Records.

§13.207. Record Retention Period.

§13.208. Requirement to Update Information.

§13.209. Minimum Standards.

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 August 26, 2016.

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D. Phillip Adkins
General Counsel
Texas Department of Public Safety
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For further information, please call: (512) 424-5848

SUBCHAPTER J. INVENTORY

37 TAC §§13.221 - 13.224

The Texas Department of Public Safety (the department) proposes the repeal of §§13.221 - 13.224, concerning Inventory. The repeal of §§13.221 - 13.224 is filed simultaneously with proposed new Chapter 13. This repeal, and the proposal of new Chapter 13, is necessary to implement Senate Bill 195, 84th Legislative Session. The bill eliminates the Controlled Substance Registration program and transfers the Prescription Drug Monitoring program to the Texas Board of Pharmacy. The bill thus necessitates the repeal of significant portions of Chapter 13. This also provides an opportunity to consolidate and update the administrative rules of the two remaining programs, the Precursor Chemical and Laboratory Apparatus permitting program and the Peyote Distributor Registration program.

Suzy Whittenton, Chief Financial Officer, has determined that for each year of the first five-year period the repeals are in effect there will be no fiscal implications for state or local government, or local economies.

Ms. Whittenton has also determined that there will be no adverse economic effect on small businesses or micro-businesses required to comply with the repeals as proposed. There is no anticipated economic cost to individuals who are required to comply with the repeals as proposed. There is no anticipated negative impact on local employment.

In addition, Ms. Whittenton has also determined that for each year of the first five-year period the repeals are in effect, the public benefit anticipated as a result of enforcing the repeals will be greater clarity in the agency's administrative rules and consistency with legislative changes.

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

The department has determined that Chapter 2007 of the Texas Government Code does not apply to this proposal. Accordingly, the department is not required to complete a takings impact assessment regarding this proposal.

Comments on this proposal may be submitted to Steve Moninger, Regulatory Services Division, Department of Public Safety, P.O. Box 4087, MSC-0240, Austin, Texas 78773-0246, or by email at *https://www.txdps.state.tx.us/rsd/contact/default.aspx.* Select "Controlled Substances Registration". Comments must be received no later than thirty (30) days from the date of publication of this proposal.

This repeal is proposed pursuant to Texas Government Code, §411.004(3), which authorizes the Public Safety Commission to adopt rules considered necessary for carrying out the department's work, and Texas Health and Safety Code, §481.003, which authorizes the Public Safety Commission to adopt rules to administer and enforce Chapter 481 of the Health and Safety Code.

Texas Government Code, §411.004(3) and Texas Health and Safety Code, §481.003, are affected by this proposal.

§13.221. Subchapter Definitions.

§13.222. Controlled Substance Inventory.

§13.223. Precursor/Apparatus Inventory.

§13.224. Minimum Standards.

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

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D. Phillip Adkins
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For further information, please call: (512) 424-5848

SUBCHAPTER K. INSPECTION

37 TAC §§13.231 - 13.237

The Texas Department of Public Safety (the department) proposes the repeal of §§13.231 - 13.237, concerning Inspection. The repeal of §§13.231 - 13.237 is filed simultaneously with proposed new Chapter 13. This repeal, and the proposal of new Chapter 13, is necessary to implement the requirements of Texas Health and Safety Code, Chapter 481 as amended by Senate Bill 195, 84th Legislative Session. The bill eliminates the Controlled Substance Registration program and transfers the Prescription Drug Monitoring program to the Texas Board of Pharmacy. The bill thus necessitates the repeal of significant portions of Chapter 13. This also provides an opportunity to consolidate and update the administrative rules of the two remaining programs, the Precursor Chemical and Laboratory Apparatus permitting program and the Peyote Distributor Registration program.

Suzy Whittenton, Chief Financial Officer, has determined that for each year of the first five-year period the repeals are in effect there will be no fiscal implications for state or local government, or local economies.

Ms. Whittenton has also determined that there will be no adverse economic effect on small businesses or micro-businesses

required to comply with the repeals as proposed. There is no anticipated economic cost to individuals who are required to comply with the repeals as proposed. There is no anticipated negative impact on local employment.

In addition, Ms. Whittenton has also determined that for each year of the first five-year period the repeals are in effect, the public benefit anticipated as a result of enforcing the repeals will be greater clarity in the agency's administrative rules and consistency with legislative changes.

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

The department has determined that Chapter 2007 of the Texas Government Code does not apply to this proposal. Accordingly, the department is not required to complete a takings impact assessment regarding this proposal.

Comments on this proposal may be submitted to Steve Moninger, Regulatory Services Division, Department of Public Safety, P.O. Box 4087, MSC-0240, Austin, Texas 78773-0246, or by email at *https://www.txdps.state.tx.us/rsd/contact/default.aspx.* Select "Controlled Substances Registration". Comments must be received no later than thirty (30) days from the date of publication of this proposal.

This repeal is proposed pursuant to Texas Government Code, §411.004(3), which authorizes the Public Safety Commission to adopt rules considered necessary for carrying out the department's work, and Texas Health and Safety Code, §481.003, which authorizes the Public Safety Commission to adopt rules to administer and enforce Chapter 481 of the Health and Safety Code.

Texas Government Code, §411.004(3) and Texas Health and Safety Code, §481.003, are affected by this proposal.

§13.231. Subchapter Definitions.
§13.232. Location Subject to Inspection.
§13.233. Who May Inspect.
§13.234. Time Limitations.
§13.235. Interference With Inspection.
§13.236. What May be Inspected.
§13.237. Inspection of Permit Holder and Pseudoephedrine Records and Reports.

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

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D. Phillip Adkins
General Counsel
Texas Department of Public Safety
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For further information, please call: (512) 424-5848

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SUBCHAPTER L. REPORTING DISCREPANCY, LOSS, THEFT, OR DIVERSION

37 TAC §§13.251 - 13.254

The Texas Department of Public Safety (the department) proposes the repeal of §§13.251 - 13.254, concerning Reporting Discrepancy, Loss, Theft, or Diversion. The repeal of §§13.251 - 13.254 is filed simultaneously with proposed new Chapter 13. This repeal, and the proposal of new Chapter 13, is necessary to implement the requirements of Texas Health and Safety Code, Chapter 481 as amended by Senate Bill 195, 84th Legislative Session. The bill eliminates the Controlled Substance Registration program and transfers the Prescription Drug Monitoring program to the Texas Board of Pharmacy. The bill thus necessitates the repeal of significant portions of Chapter 13. This also provides an opportunity to consolidate and update the administrative rules of the two remaining programs, the Precursor Chemical and Laboratory Apparatus permitting program and the Peyote Distributor Registration program.

Suzy Whittenton, Chief Financial Officer, has determined that for each year of the first five-year period the repeals are in effect there will be no fiscal implications for state or local government, or local economies.

Ms. Whittenton has also determined that there will be no adverse economic effect on small businesses or micro-businesses required to comply with the repeals as proposed. There is no anticipated economic cost to individuals who are required to comply with the repeals as proposed. There is no anticipated negative impact on local employment.

In addition, Ms. Whittenton has also determined that for each year of the first five-year period the repeals are in effect, the public benefit anticipated as a result of enforcing the repeals will be greater clarity in the agency's administrative rules and consistency with legislative changes.

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

The department has determined that Chapter 2007 of the Texas Government Code does not apply to this proposal. Accordingly, the department is not required to complete a takings impact assessment regarding this proposal.

Comments on this proposal may be submitted to Steve Moninger, Regulatory Services Division, Department of Public Safety, P.O. Box 4087, MSC-0240, Austin, Texas 78773-0246, or by email at https://www.txdps.state.tx.us/rsd/contact/default.aspx. Select "Controlled Substances Registration". Comments must be received no later than thirty (30) days from the date of publication of this proposal.

This repeal is proposed pursuant to Texas Government Code, §411.004(3), which authorizes the Public Safety Commission

to adopt rules considered necessary for carrying out the department's work, and Texas Health and Safety Code, §481.003, which authorizes the Public Safety Commission to adopt rules to administer and enforce Chapter 481 of the Health and Safety Code.

Texas Government Code, §411.004(3), and Texas Health and Safety Code, §481.003, are affected by this proposal.

§13.251. Subchapter Definitions.

§13.252. Applicability.

§13.253. Reporting Discrepancy, Loss, Theft, or Other Potential Diversion.

§13.254. Official Prescription.

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

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D. Phillip Adkins
General Counsel
Texas Department of Public Safety
Earliest possible date of adoption: October 9, 2016
For further information, please call: (512) 424-5848

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SUBCHAPTER M. DENIAL, REVOCATION, AND RELATED DISCIPLINARY ACTION

37 TAC §§13.271 - 13.278

The Texas Department of Public Safety (the department) proposes the repeal of §§13.271 -13.278, concerning Denial, Revocation, and Related Disciplinary Action. The repeal of §§13.271 - 13.278 is filed simultaneously with proposed new Chapter 13. This repeal, and the proposal of new Chapter 13, is necessary to implement the requirements of Texas Health and Safety Code, Chapter 481 as amended by Senate Bill 195, 84th Legislative Session. The bill eliminates the Controlled Substance Registration program and transfers the Prescription Drug Monitoring program to the Texas Board of Pharmacy. The bill thus necessitates the repeal of significant portions of Chapter 13. This also provides an opportunity to consolidate and update the administrative rules of the two remaining programs, the Precursor Chemical and Laboratory Apparatus permitting program and the Peyote Distributor Registration program.

Suzy Whittenton, Chief Financial Officer, has determined that for each year of the first five-year period the repeals are in effect there will be no fiscal implications for state or local government, or local economies.

Ms. Whittenton has also determined that there will be no adverse economic effect on small businesses or micro-businesses required to comply with the repeals as proposed. There is no anticipated economic cost to individuals who are required to comply with the repeals as proposed. There is no anticipated negative impact on local employment.

In addition, Ms. Whittenton has also determined that for each year of the first five-year period the repeals are in effect, the public benefit anticipated as a result of enforcing the repeals will be greater clarity in the agency's administrative rules and consistency with legislative changes.

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

The department has determined that Chapter 2007 of the Texas Government Code does not apply to this proposal. Accordingly, the department is not required to complete a takings impact assessment regarding this proposal.

Comments on this proposal may be submitted to Steve Moninger, Regulatory Services Division, Department of Public Safety, P.O. Box 4087, MSC-0240, Austin, Texas 78773-0246, or by email at *https://www.txdps.state.tx.us/rsd/contact/default.aspx.* Select "Controlled Substances Registration". Comments must be received no later than thirty (30) days from the date of publication of this proposal.

This repeal is proposed pursuant to Texas Government Code, §411.004(3), which authorizes the Public Safety Commission to adopt rules considered necessary for carrying out the department's work, and Texas Health and Safety Code, §481.003, which authorizes the Public Safety Commission to adopt rules to administer and enforce Chapter 481 of the Health and Safety Code.

Texas Government Code, §411.004(3) and Texas Health and Safety Code, §481.003, are affected by this proposal.

§13.271. Subchapter Definitions.

§13.272. General Provisions.

§13.273. Denial.

§13.274. Revocation.

§13.275. Suspension.

§13.276. Probation or Reprimand.

§13.277. Voluntary Surrender.

§13.278. Cancellation.

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

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TRD-201604504
D. Phillip Adkins
General Counsel
Texas Department of Public Safety
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For further information, please call: (512) 424-5848

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SUBCHAPTER N. ADMINISTRATIVE PENALTIES AND HEARINGS

37 TAC §§13.301 - 13.305

The Texas Department of Public Safety (the department) proposes the repeal of §§13.301 - 13.305, concerning Administrative Penalties and Hearings. The repeal of §§13.301 - 13.305 is filed simultaneously with proposed new Chapter 13. This repeal, and the proposal of new Chapter 13, is necessary to implement the requirements of Texas Health and Safety Code, Chapter 481 as amended by Senate Bill 195, 84th Legislative Session. The bill eliminates the Controlled Substance Registration program and transfers the Prescription Drug Monitoring program to the Texas Board of Pharmacy. The bill thus necessitates the repeal of significant portions of Chapter 13. This also provides an opportunity to consolidate and update the administrative rules of the two remaining programs, the Precursor Chemical and Laboratory Apparatus permitting program and the Peyote Distributor Registration program.

Suzy Whittenton, Chief Financial Officer, has determined that for each year of the first five-year period the repeals are in effect there will be no fiscal implications for state or local government, or local economies.

Ms. Whittenton has also determined that there will be no adverse economic effect on small businesses or micro-businesses required to comply with the repeals as proposed. There is no anticipated economic cost to individuals who are required to comply with the repeals as proposed. There is no anticipated negative impact on local employment.

In addition, Ms. Whittenton has also determined that for each year of the first five-year period the repeals are in effect, the public benefit anticipated as a result of enforcing the repeals will be greater clarity in the agency's administrative rules and consistency with legislative changes.

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

The department has determined that Chapter 2007 of the Texas Government Code does not apply to this proposal. Accordingly, the department is not required to complete a takings impact assessment regarding this proposal.

Comments on this proposal may be submitted to Steve Moninger, Regulatory Services Division, Department of Public Safety, P.O. Box 4087, MSC-0240, Austin, Texas 78773-0246, or by email at https://www.txdps.state.tx.us/rsd/contact/default.aspx. Select "Controlled Substances Registration". Comments must be received no later than thirty (30) days from the date of publication of this proposal.

This repeal is proposed pursuant to Texas Government Code, §411.004(3), which authorizes the Public Safety Commission to adopt rules considered necessary for carrying out the department's work, and Texas Health and Safety Code, §481.003, which authorizes the Public Safety Commission to adopt rules to administer and enforce Chapter 481 of the Health and Safety Code.

Texas Government Code, §411.004(3), and Texas Health and Safety Code, §481.003, are affected by this proposal.

§13.301. Informal Hearing.

§13.302. Hearing Procedures.

§13.303. Mailing Address.

§13.304. Request for Hearing.

§13.305. Discretion.

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

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D. Phillip Adkins
General Counsel
Texas Department of Public Safety
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For further information, please call: (512) 424-5848

CHAPTER 27. CRIME RECORDS
SUBCHAPTER M. CRIMINAL HISTORY CLEARINGHOUSE

37 TAC §§27.171 - 27.174

The Texas Department of Public Safety (the department) proposes new §§27.171 - 27.174, concerning Criminal History Clearinghouse. The department is responsible for establishing and maintaining an electronic clearinghouse and subscription service to provide Texas and Federal Bureau of Investigation (FBI) criminal history record information to authorized entities. The department is the record creation point for the computerized criminal history system maintained by the state and is the control terminal for entry of records, in accordance with federal law, rule and policy, into the federal records systems maintained by the FBI. Due to changes in the FBI subscription service, the department is required to have rules to clarify the process for obtaining criminal history record information from the department and the FBI. The department has authority under Texas Government Code, §411.042(g)(6) to establish rules as necessary to establish guidelines for the department's criminal history clearinghouse established under Texas Government Code, §411.0845.

Suzy Whittenton, Chief Financial Officer, has determined that for each year of the first five-year period these rules are in effect there will be no fiscal implications for state or local government, or local economies.

Ms. Whittenton has also determined that there will be no adverse economic effect on small businesses or micro-businesses required to comply with these rules as proposed. There is no anticipated economic cost to individuals who are required to comply with the rules as proposed. There is no anticipated negative impact on local employment.

In addition, Ms. Whittenton has also determined that for each year of the first five-year period the rules are in effect, the public

benefit anticipated as a result of enforcing the rules will be a cost savings to any member of the public that is required to obtain a fingerprint based criminal history check for renewal of a license or employment. Once a person is enrolled they will no longer be required to be fingerprinted for the same purpose again. Eliminating the need for a person to be reprinted for a license renewal or employment recheck will result in a savings of $37 for the applicant each time a renewal is needed. It is important to note that a person will not be able to use this process to fulfill a fingerprint check requirement for a purpose that is different than the original purpose of the check.

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

The department has determined that Chapter 2007 of the Texas Government Code does not apply to this proposal. Accordingly, the department is not required to complete a takings impact assessment regarding this proposal.

Comments on this proposal may be submitted to Angie Kendall, Texas Department of Public Safety, Law Enforcement Support, 5805 N. Lamar Blvd., Austin, Texas 78773. Comments must be received no later than thirty (30) days from the date of publication of this proposal.

This proposal is proposed pursuant to Texas Government Code, §411.004(3) which authorizes the Public Safety Commission to adopt rules considered necessary for carrying out the department's work; §411.042(g)(6), which authorizes the department to adopt reasonable rules relating to a system for providing criminal history record information through the criminal history clearinghouse under §411.0845.

Texas Government Code, §§411.004(3), 411.042(g)(6), and 411.0845 are affected by this proposal.

§27.171. Purpose of the Criminal History Clearinghouse.

The purpose of the criminal history clearinghouse is to:

(1) provide authorized entities with the Texas and FBI fingerprint-based criminal history results.

(2) provide authorized entities with subscription and notification service to disseminate updated criminal history information.

§27.172. Definitions.

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

(1) Department (DPS) - Texas Department of Public Safety.

(2) FBI - Federal Bureau of Investigation.

(3) Identity History Summary - The FBI report of all identification, demographic, and event information, criminal and/or civil, within a Texas and FBI Identity record that may be disseminated to an authorized recipient. Since a Texas and FBI Identity record may now contain criminal and/or civil information, the existence of an Identity History Summary alone does not indicate that any criminal history events exist for that person.

(4) Request for criminal history record information - The processing and entry of a person's complete set of fingerprints in the department's tenprint database and the comparison of those prints to the department's latent print database and if authorized the entry into FBI's tenprint and comparison to the FBI's latent print database.

(5) Subscription - The subscription at the department, the FBI or both.

(6) Subscription term - A lifetime subscription to a person.

(7) Triggering event - Events that can trigger an update to an Identity History Summary. Examples include arrests, dispositions, and sex offender registry.

(8) Validation - A process whereby the subscriber reviews a subscription to determine whether they are still authorized to receive criminal history record information on that individual and updates the subscription accordingly. Validations are required on a yearly basis.

§27.173. Duties of the Department.

(a) The department shall process a request for criminal history record information.

(b) Fingerprints are searched in the department's tenprint and latent print databases.

(c) Fingerprints are submitted to the FBI to be searched in the FBI's tenprint and latent print databases.

(d) Results from both tenprint searches shall be populated in the clearinghouse.

(e) The department shall update clearinghouse records within 48 hours after the department becomes aware that either the Texas or the FBI criminal history has been changed.

(f) The department shall provide subscription validation lists to each subscription entity.

(g) The department shall perform at least a triennial audit on each entity with access to the clearinghouse.

(h) The department shall compare retained fingerprints against all new tenprint and latent fingerprint submissions.

(i) The FBI shall compare retained fingerprints against all new tenprint and latent fingerprint submissions.

§27.174. Duties of Entities Participating in the Clearinghouse.

(a) Entities shall only submit requests for criminal history record information on a person who has authorized the access of their information.

(b) Entities may subscribe to a person in the clearinghouse, if the entity has the authority to view the record.

(c) Entities shall unsubscribe from a person when it no longer has authority to view a record.

(d) Entities shall allow the department and FBI to conduct audits of their clearinghouse accounts to prevent any unauthorized access, use or dissemination of the information.

(e) Entities shall validate their subscriptions in accordance with the department's policies.

(f) Entities shall maintain compliance with the FBI Criminal Justice Information Services Security Policy.

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

Filed with the Office of the Secretary of State on August 26, 2016.

TRD-201604506
D. Phillip Adkins
General Counsel
Texas Department of Public Safety
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For further information, please call: (512) 424-5848

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PART 11. TEXAS JUVENILE JUSTICE DEPARTMENT

CHAPTER 380. RULES FOR STATE-OPERATED PROGRAMS AND FACILITIES

SUBCHAPTER E. BEHAVIOR MANAGEMENT AND YOUTH DISCIPLINE

DIVISION 1. BEHAVIOR MANAGEMENT

37 TAC §380.9535

The Texas Juvenile Justice Department (TJJD) proposes amendments to §380.9535 (Phoenix Program).

The amended rule will clarify that youth in the Phoenix Program receive educational instruction each school day in accordance with the master school schedule (rather than a minimum number of hours each day). The amended rule will also remove the word "substantial" from the term "assault causing substantial bodily injury to staff," in order to match the definition in §380.9503. The amended rule will also clarify that the TJJD division responsible for monitoring and inspections conducts an annual comprehensive review of Phoenix Program files in addition to any random reviews of program files.

FISCAL NOTE

Mike Meyer, Chief Financial Officer, has determined that for each year of the first five years the amended section is in effect, there will be no significant fiscal impact for state or local government as a result of enforcing or administering the section.

PUBLIC BENEFITS/COSTS

Teresa Stroud, Senior Director of State Programs and Facilities, has determined that for each year of the first five years the amended section is in effect, the public benefit anticipated as a result of administering the section will be the availability of rules that have been updated to conform to current laws and to more accurately reflect TJJD's current operational practices.

Mr. Meyer has also determined that there will be no effect on small businesses or micro-businesses. There is no anticipated economic cost to persons who are required to comply with the section as proposed. No private real property rights are affected by adoption of this section.

PUBLIC COMMENTS

Comments on the proposal may be submitted within 30 days after publication of this notice to Josh Bauermeister, Policy Writer, Texas Juvenile Justice Department, P.O. Box 12757, Austin, Texas 78711 or e-mail to policy.proposals@tjjd.texas.gov.

STATUTORY AUTHORITY

The amended section is proposed under Texas Human Resources Code §242.003, which authorizes TJJD to adopt rules appropriate to the proper accomplishment of its functions and to adopt rules for governing TJJD schools, facilities, and programs.

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

§380.9535. Phoenix Program.

(a) Purpose. The Phoenix Program [~~program~~] is designed to protect staff and youth in Texas Juvenile Justice Department (TJJD) state-operated facilities from highly aggressive youth. The Phoenix Program provides [~~while providing~~] these aggressive youth with a highly structured environment designed to reduce their aggression and to help them progress in treatment. This rule sets forth eligibility criteria, standards of treatment, and services to be provided to youth in the program.

(b) Applicability. This rule does not apply to:

(1) youth on parole status, unless parole status is revoked in conjunction with the criteria for admission;

(2) youth with determinate sentences who have been approved by the final TJJD authority for a court hearing to transfer the youth to the Correctional Institutions Division of the Texas Department of Criminal Justice;

(3) youth currently diagnosed with a major emotional disturbance and/or psychiatric disorder that contraindicates admission to the Phoenix Program, [~~program~~] as determined by the director of [~~manager of institutional~~] clinical services at the youth's assigned facility; or

(4) youth with a current diagnosis of intellectual disability that contraindicates admission to the Phoenix Program, [~~program~~] as determined by the director of [~~manager of institutional~~] clinical services at the youth's assigned facility.

(c) Definitions. The following terms, as used in this rule, have the following meanings unless the context clearly indicates otherwise.

(1) Admission, Review, and Dismissal (ARD) Committee--a committee that makes decisions on educational matters relating to special-education-eligible youth.

(2) Assault Causing Moderate or Serious Bodily Injury to Another Youth--intentionally and knowingly engaging in conduct that causes another youth to suffer moderate or serious injury as determined by medical staff.

(3) Assault Causing [~~Substantial~~] Bodily Injury to Staff--intentionally and knowingly engaging in conduct that causes a staff member, contract employee, or volunteer to suffer bodily injury that involves more than passing discomfort or fleeting pain.

(4) Chunking Bodily Fluids at Staff--intentionally and knowingly causing a person to contact the blood, seminal fluid, vaginal fluid, urine, and/or feces of another.

(5) Fighting Causing Moderate or Serious Bodily Injury to Another Youth--intentionally and knowingly engaging in a mutually instigated physical altercation that causes another youth to suffer moderate or serious injury as determined by medical staff.

(6) Isolation--the confinement of a youth in a locked room or cubicle as a tool to manage the behavior of a youth. Rules regarding isolation do not apply:

(A) when doors are routinely locked during normal sleeping hours and isolation has not otherwise been imposed; or [~~and~~]

(B) when [~~do not apply to placement of~~] a youth is placed in the Security Program.

(7) Multi-Disciplinary Team (MDT)--a group of staff who are responsible for partnering with the youth and his/her parent/guardian to facilitate the youth's [~~his/her~~] progress in the rehabilitation program.

(d) General Provisions.

(1) The Phoenix Program [~~program~~] is administered in a location designated for this [~~such~~] purpose. The location is self-contained and the youth do not leave the location except for health-care [~~healthcare~~] appointments or by approval of the facility administrator for a specific programmatic purpose.

(2) Security Program referral/admission and room isolation are used as necessary in accordance with §380.9739 and §380.9740 of this title. The Security Program location for youth in the Phoenix Program [~~program~~] is in the Phoenix Program [~~program~~] unit, using individual youth rooms.

(3) Youth are demoted to the lowest stage in the agency's rehabilitation program upon admission to the Phoenix Program [~~program~~].

(e) Authorized Facilities. The Phoenix Program [~~program~~] may be administered only at TJJD-operated, high-restriction [~~high restriction~~] facilities designated by the executive director.

(f) Program Eligibility. Only the [~~The~~] following youth are eligible for placement in the Phoenix Program [~~program~~]:

(1) a youth who engages in one or more of the following rule violations as defined in subsection (c) of this section:

(A) assault causing moderate or serious bodily injury to another youth;

(B) assault causing [~~substantial~~] bodily injury to staff;

(C) fighting causing moderate or serious bodily injury to another youth; or

(D) chunking bodily fluids at staff; or

(2) a youth who engages in any other major rule violation when the totality of circumstances justifies the placement in the program and the placement is directed by the executive director or designee; or

(3) a youth who commits, on three separate occasions within a 90-day period, [~~committed~~] an assault causing bodily injury, as defined in §380.9503 of this title, when [~~and~~] the second and third assaults are [~~were~~] committed after a [~~Level II due process hearing~~] finding of true with no extenuating circumstances had been made in a Level II due process hearing for the previous assault.

(g) Additional Considerations for Youth Receiving Special-Education Services. When a youth who is receiving special-education services is recommended for placement in the Phoenix Program [~~program~~] due to a rule violation that occurred during school-related activities, the youth's ARD committee must conduct a manifestation determination review.

(1) If the ARD committee determines that the youth's conduct was a direct result of a failure to implement the youth's individualized education program (IEP) or that the conduct was caused by or had a direct and substantial relationship to the youth's disability:

(A) the ARD committee must conduct a functional behavior assessment and develop a behavior intervention plan or, if a behavior intervention plan already exists, modify the existing plan to address the youth's conduct; and

(B) the youth may be removed from his/her regular educational setting and placed in the Phoenix Program [~~program~~] only if the youth's parent or surrogate parent (as defined by 34 CFR §300.519) agrees to a change in the educational setting as part of the youth's behavior intervention plan.

(2) If the ARD committee determines that the youth's conduct was not a result of a failure to implement the youth's IEP and was not caused by and did not have a direct and substantial relationship to the youth's disability, the youth may be removed from his/her regular educational setting and placed in the Phoenix Program [~~program~~]. The ARD committee determines the youth's IEP while the youth is in the Phoenix Program [~~program~~].

(3) Regardless of the results of a manifestation determination review, a youth may be admitted to the Phoenix Program [~~program~~] and may receive educational services in the Phoenix housing area for up to 45 days if the rule violation includes possession of a weapon or the infliction of serious bodily injury upon another person.

(A) For purposes of paragraph (3) of this subsection only, weapon means a weapon, device, instrument, material, or substance, animate or inanimate, that is used for, or is readily capable of, causing death or serious bodily injury, not including a pocket knife with a blade of less than 2 1/2 inches in length.

(B) For purposes of paragraph (3) of this subsection only, serious bodily injury means bodily injury that involves:

(i) a substantial risk of death;

(ii) extreme physical pain;

(iii) protracted and obvious disfigurement; or

(iv) protracted loss or impairment of the function of a bodily member, organ, or mental faculty.

(4) Educational services in the Phoenix Program [~~program~~] must be provided [~~so as~~] to meet the youth's IEP goals set by the youth's ARD committee.

(h) Admission Decision Process.

(1) A Level II due process hearing must be held in accordance with §380.9555 of this title. Unless there are considerations concerning special-education [~~special education~~] services that would make the youth ineligible for placement in the Phoenix Program [~~program~~] as described in subsection (g) of this section, the youth may be referred to the Phoenix Program [~~program~~] if there is a finding of true with no extenuating circumstances that the youth committed a rule violation listed in subsection (f) of this section.

(2) A committee composed of, at a minimum, the dorm supervisor, mental health specialist, and case manager assigned to the Phoenix Program [~~program~~] reviews each youth referred to the program.

(3) The committee may not recommend [~~approval of a youth's~~] admission to the program unless:

(A) a current mental health assessment indicates there is no therapeutic contraindication to placement in the Phoenix Program [~~program~~]; and

(B) the committee determines that the Phoenix Program is [~~program represents~~] the most appropriate intervention under the circumstances.

(4) The division director over residential facilities or his/her designee makes the final decision on whether the youth will be admitted to the Phoenix Program [~~program~~].

(5) If the number of referrals exceeds the number of available beds, priority for admission is given to:

(A) youth with the most dangerous behavior;

(B) youth with chronic aggressive behavior;

(C) youth with greater frequency of weapon use; or

(D) a directive from the executive director or designee.

(i) Placement in the Redirect Program Pending Admission to the Phoenix Program. If, after a Level II hearing, there is a disposition for referral to the Phoenix Program [~~program~~], the youth may be placed in the Redirect Program [~~program~~] pursuant to §380.9517 of this title at the youth's current placement pending admission and transfer of the youth to the Phoenix Program [~~program~~]. The facility may cancel the referral at any time.

(j) Program Components. The Phoenix Program's [~~program's~~] structure is designed to maximize the safety and security of youth and staff.

(1) Physical Structure and Safety Precautions.

(A) Youth are assigned to single-occupancy [~~single~~] housing units in accordance with §380.8524 of this title.

(B) Mechanical restraints may be used in a manner consistent with the use of such restraints in a security unit as provided by §380.9723 of this title.

(C) A structured daily schedule is maintained and posted to provide a predictable and safe environment.

(2) Case Planning.

(A) An individual plan must be developed for each youth. The plan must be written in a language clearly understood by the youth. The plan must:

(i) be based on a comprehensive assessment conducted by the MDT;

(ii) address the specific target behavior or group [~~cluster~~] of behaviors that led to admission to the Phoenix Program [~~program~~], taking into consideration the mental health specialist's recommendations to address the motivation for the behavior;

(iii) involve strategies for intervention and prevention of the target behavior through skills development;

(iv) include a component that addresses transition to the general campus population following graduation from the Phoenix Program [~~program~~]; and

(v) provide clearly written objectives for promotion through levels of the Phoenix Program [~~program~~] and graduation from the Phoenix Program [~~program~~].

(B) Staff must explain the individual plan to the youth. Youth must be provided an opportunity to sign the plan in acknowledgment.

(C) The individual plan and youth's progress with regard to target behaviors and skills development must be reviewed and evaluated at least once every seven days by the MDT.

(3) Academics.

(A) All youth are expected to participate in an educational program. Youth receive educational instruction each school day in accordance with the master school schedule. [~~The educational program must provide for at least six hours of required secondary curriculum on each school day.~~]

(B) All special-education services must be provided in accordance with ARD committee decisions. For youth who are eligible to participate in special-education services, an ARD meeting is held within ten days after admission to the Phoenix Program [~~program~~] to review the IEP. Subsequent ARD meetings and evaluations are completed in compliance with state and federal regulations.

(C) Youth with limited English Proficiency must be provided with appropriate adaptations to the educational program [~~Educational Program~~] as recommended by the Language Proficiency Assessment Committee (LPAC).

(4) Individual Counseling. Youth are provided daily contact and weekly counseling with the assigned case manager or designee. The case manager or designee must immediately refer a youth to a mental health professional if concerns exist as to the youth's mental health status.

(5) Skills Development Groups.

(A) In accordance with the daily schedule, the case manager assigned to the Phoenix Program [~~program~~] conducts groups on topics such as:

(i) aggression control;

(ii) emotional and behavior regulation;

(iii) skills development and demonstration;

(iv) identifying and modifying cognitive distortions;

(v) risk and protective factors; and

(vi) transition issues.

(B) Scheduled behavior groups are provided to all youth and are conducted daily by the assigned juvenile correctional officer.

(6) Medical and Mental Health Services.

(A) Youth receive weekly mental-health-status [~~mental health status~~] exams by the designated mental health specialist while assigned to the Phoenix Program [~~program~~]. Youth also receive weekly psychological counseling if deemed necessary by a mental health specialist.

(B) Youth are seen by medical and/or psychiatric staff, as needed, and treatment is provided as ordered. The [~~Phoenix program~~] mental health specialist assigned to the Phoenix Program continually assesses the youth's mental status, provides individual counseling, and provides consultation with the MDT.

(7) Behavior Management.

(A) Youth are expected to follow a prescribed schedule and commit no rule violations as defined in §380.9503 of this title.

(B) Youth earn privileges in the Phoenix Program [~~program~~] based on progress through the Phoenix Program [~~program~~] levels in accordance with §380.9502 of this title.

(8) Physical Exercise. Youth must be provided with at least one hour of large-muscle exercise seven days per week in an exercise yard if safety and weather permit.

(9) Family Involvement.

(A) Youths' families are encouraged to be involved in the youths' treatment [~~while considerations are made for the safety and security of the program~~].

(B) Youth in the Phoenix Program [~~program~~] are allowed phone calls to approved family members and visitation with immediate family members according to program visitation procedures.

(10) Youth Rights. Basic rights are recognized for each youth in TJJD pursuant to §380.9301 of this title.

(k) Progress in the Phoenix Program. The Phoenix Program [~~program~~] includes three levels. The MDT reviews each youth's progress weekly.

(1) Level I.

(A) This level is completed when the MDT determines that the youth has:

(i) demonstrated basic knowledge of the level objectives as defined in the youth's individual case plan (ICP); and

(ii) participated with the MDT in targeting specific skills for development.

(B) The youth:

(i) attends foundational skills development groups;

(ii) participates in individual sessions with his/her case manager; and

(iii) demonstrates consistent participation in other areas of programming.

(2) Level II.

(A) This level is completed when the MDT determines that the youth has:

(i) identified patterns in his/her thoughts, feelings, attitudes, values, and beliefs that relate to ongoing behaviors;

(ii) demonstrated sufficient competency in the targeted skills to address those behaviors; and

(iii) completed the level objectives as defined in the youth's ICP.

(B) The youth:

(i) attends intermediate skills development groups;

(ii) participates in individual sessions with his/her case manager; and

(iii) demonstrates consistent participation in other areas of programming.

(3) Level III.

(A) This level is completed when the MDT determines that the youth demonstrates and practices skills learned in skills development groups through daily application in situations that present increased risk for the youth. Youth are expected to engage in responsible behaviors and provide leadership in the program. Additional skills are learned as assigned and the plan for reintegration to general campus programming is completed.

(B) The youth:

(i) attends advanced skills development groups;

(ii) participates in individual sessions with his/her case manager; and

(iii) demonstrates consistent participation in other areas of programming.

(l) Progress Reviews.

(1) Multi-Disciplinary Team Reviews.

(A) The MDT reviews the youth's ICP, evaluates progress through program requirements, and reviews the effectiveness of treatment strategies on a weekly basis. The MDT may not promote youth in the stages of the agency's rehabilitation program while the youth is in the Phoenix Program [~~program~~].

(B) The MDT makes decisions regarding promotion within Phoenix Program [~~program~~] levels based on achievement of established criteria.

(i) Level Promotion. Youth meeting the established criteria must be promoted to the next level.

(ii) Level Demotion. The MDT may assign the youth to a lower level when the youth's behavior demonstrates low use of pro-social skills. The MDT may demote one or two levels depending upon the severity of the behavior and/or lack of consistency in the use of pro-social skills.

(2) Individual Case Plan Review. Case plan reviews and updates are conducted in accordance with §380.8701 of this title.

(3) Mental Health Review.

(A) Youth must be evaluated on a regular basis by the Phoenix Program [~~program~~] mental health specialist for the presence of a mental health disorder that contraindicates continued placement in the Phoenix Program [~~program~~].

(B) Youth must be released from the Phoenix Program [~~program~~] at any time for mental health reasons based on the recommendation of the mental health specialist or psychiatrist and the approval of the TJJD director of treatment.

(C) Youth with neurological and/or mental health disorders may be temporarily admitted to a TJJD-operated crisis stabilization unit pursuant to §380.8767 of this title for diagnostic purposes to determine the most appropriate placement.

(m) Graduation from the Phoenix Program.

(1) Youth graduate from the Phoenix Program [~~program~~] upon completion of Level III as described in subsection (k) of this section.

(2) Youth released from the Phoenix Program [~~program~~] are assigned to the Redirect Program [~~program~~] at the receiving facility and are provided support to reintegrate into the general campus population at the receiving facility.

(n) Program Monitoring and Youth Rights.

(1) To ensure the Phoenix Program [~~program~~] is being implemented according to the provisions of this rule, staff from facility administration must visit the program daily and staff from psychology administration must visit the program weekly.

(2) Youth rights staff or a designee must visit the Phoenix Program [~~program~~] daily to ensure that the youth have access to the youth grievance system.

(o) Appeal of Level Assessment in the Phoenix Program. A youth in the Phoenix Program [~~program~~] may appeal the results of a level assessment or of the lack of opportunity to demonstrate comple-

tion of requirements by filing a grievance in accordance with §380.9331 of this title. The person assigned to respond to the youth's grievance must not be a member of the youth's MDT or a staff member who has been involved in the youth's current assessment.

(p) Independent [~~Review Team~~] Oversight.

(1) A managerial staff member designated by the facility administrator who is not assigned to the Phoenix Program [~~program~~] monitors the Phoenix MDT monthly.

(2) The director of facility operations reviews compliance with Phoenix Program [~~program~~] policy and procedure requirements as part of routine facility assessment processes.

(3) A cross-divisional team based in the TJJD Central [~~Austin~~] Office reviews youth who remain on Level I or Level II after 120 days in the program until the youth progresses to the next level. The team conducts quarterly reviews thereafter until the youth graduates from the program.

(4) The TJJD division responsible for monitoring and inspections conducts an annual comprehensive review of the [~~random reviews of~~] Phoenix Program [~~program~~] files and coordinates with other departments as appropriate for reviews of certain components of Phoenix Program [~~program~~] files such as mental health assessments, ICPs, and education service delivery. The division responsible for monitoring and inspections may also conduct random reviews of Phoenix Program files.

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 August 26, 2016.

TRD-201604483
Jill Mata
General Counsel
Texas Juvenile Justice Department
Earliest possible date of adoption: October 9, 2016
For further information, please call: (512) 490-7278

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TITLE 40. SOCIAL SERVICES AND ASSISTANCE

PART 12. TEXAS BOARD OF OCCUPATIONAL THERAPY EXAMINERS

CHAPTER 367. CONTINUING EDUCATION

40 TAC §367.1

The Texas Board of Occupational Therapy Examiners proposes an amendment to §367.1, concerning Continuing Education. The amendment would remove the provision that educational activities that meet the criteria for continuing education as per Chapter 367 that are approved or offered by the American Occupational Therapy Association or the Texas Occupational Therapy Association are pre-approved by the Board and that the Board will review its approval process and continuation thereof for educational activities by January 2005 and at least once each five-year period thereafter. The amendment would clarify continuing education rules, as any educational activity approved or offered by any provider that meets the requirements of Chapter 367 is acceptable as continuing education, and licensees are responsible for choosing continuing education according to the provisions in Chapter 367.

John P. Maline, Executive Director of the Executive Council of Physical Therapy and Occupational Therapy Examiners, has determined that for the first five-year period the amended rule is in effect, there will be no fiscal implications for state or local government as a result of enforcing or administering the rule.

Mr. Maline has also determined that for each of the first five years the rule is in effect, the public benefit anticipated as a result of enforcing the rule will be the expansion of occupational therapy services for consumers. There will be no effect on small businesses and no anticipated economic cost to persons having to comply.

Comments on the proposed amendment may be submitted to Lea Weiss, Occupational Therapy Coordinator, Texas Board of Occupational Therapy Examiners, 333 Guadalupe Street, Suite 2-510, Austin, Texas 78701-3942 or to *lea@ptot.texas.gov* no later than 30 days from the date that this proposed amendment is published in the *Texas Register.*

The amendment is proposed under the Occupational Therapy Practice Act, Title 3, Subtitle H, Chapter 454, Occupations Code, which provides the Texas Board of Occupational Therapy Examiners with the authority to adopt rules consistent with this Act to carry out its duties in administering this Act.

Title 3, Subtitle H, Chapter 454 of the Occupations Code is affected by this proposal.

§367.1. Continuing Education.

(a) The Act mandates licensee participation in a continuing education program for license renewal. All activities taken to complete this requirement must meet the definition of continuing education as outlined in this section. The licensee is solely responsible for keeping accurate documentation of all continuing education requirements and for selecting continuing education as per the requirements in this chapter.

(b) All licensees must complete a minimum of 30 hours of continuing education every two years during the period of time the license is current in order to renew the license and must provide this information as requested.

(c) Those renewing a license more than 90 days late must submit proof of continuing education for the renewal.

(d) Definition of Continuing Education. Continuing education in this chapter is defined as professional development activities that are directly relevant to the profession of occupational therapy.

(e) Each continuing education activity may be counted only one time in two renewal cycles.

[~~(f) Educational activities that meet the criteria for continuing education as per this chapter that are approved or offered by the American Occupational Therapy Association or the Texas Occupational Therapy Association are pre-approved by the Board. The Board will review its approval process and continuation thereof for educational activities by January 2005 and at least once each five-year period thereafter.~~]

(f) [~~(g)~~] Licensees are responsible for choosing CE according to the provisions in this chapter.

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

Filed with the Office of the Secretary of State on August 26, 2016.

TRD-201604486
John P. Maline
Executive Director
Texas Board of Occupational Therapy Examiners
Earliest possible date of adoption: October 9, 2016
For further information, please call: (512) 305-6900

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CHAPTER 369. DISPLAY OF LICENSES

40 TAC §369.1

The Texas Board of Occupational Therapy Examiners proposes an amendment to §369.1, concerning Display of Licenses. The amendment would clarify the section by removing the provision that the wallet-sized license must be carried by the licensee when in practice settings other than the licensee's principal place of business. The amendment would also clarify in this section that a licensee may provide occupational therapy services according to the terms of the license upon online verification of current licensure and license expiration date from the Board's license verification page by removing language referring only to a new licensee with a regular or temporary license. This change would align this section with other existing sections that refer to additional license types that may be verified online.

John P. Maline, Executive Director of the Executive Council of Physical Therapy and Occupational Therapy Examiners, has determined that for the first five-year period the amended rule is in effect, there will be no fiscal implications for state or local government as a result of enforcing or administering the rule.

Mr. Maline has also determined that for each of the first five years the rule is in effect, the public benefit anticipated as a result of enforcing the rule will be the expansion of occupational therapy services for consumers. There will be no effect on small businesses and no anticipated economic cost to persons having to comply.

Comments on the proposed amendment may be submitted to Lea Weiss, Occupational Therapy Coordinator, Texas Board of Occupational Therapy Examiners, 333 Guadalupe Street, Suite 2-510, Austin, Texas 78701-3942 or to *lea@ptot.texas.gov* no later than 30 days from the date that this proposed amendment is published in the *Texas Register.*

The amendment is proposed under the Occupational Therapy Practice Act, Title 3, Subtitle H, Chapter 454, Occupations Code, which provides the Texas Board of Occupational Therapy Examiners with the authority to adopt rules consistent with this Act to carry out its duties in administering this Act.

Title 3, Subtitle H, Chapter 454 of the Occupations Code is affected by this proposal.

§369.1. Display of Licenses.

(a) Licenses must be displayed in accordance with the Act, §454.214.

(b) The original license must be prominently displayed in the licensee's principal place of business as designated by the licensee. [~~The wallet-sized license must be carried by the licensee when in other practice settings.~~] Reproduction of the original license is only authorized for institutional file purposes and not for public display.

(c) A [~~new~~] licensee [~~with a regular or temporary license~~] may provide occupational therapy services according to the terms of the license upon online verification of current licensure and license expiration date from the Board's license verification page. The Board will maintain a secure resource for verification of license status and expiration date on its website.

(d) A licensee shall not make any alteration(s) on a license.

(e) The Board may issue a copy of a license to replace one lost or destroyed upon receipt of a written request and the appropriate fee from the licensee. The Board may issue a replacement copy of a license to reflect a name change upon receipt of a written request, the appropriate fee, and a copy of the legal document (such as a marriage license, court decree, or divorce decree) evidencing the name change.

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

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Texas Board of Occupational Therapy Examiners
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PART 19. DEPARTMENT OF FAMILY AND PROTECTIVE SERVICES

CHAPTER 746. MINIMUM STANDARDS FOR CHILD-CARE CENTERS

The Health and Human Services Commission proposes, on behalf of the Department of Family and Protective Services (DFPS), a repeal of §§746.103, 746.105, 746.107, 746.109, 746.507, 746.615, 746.617, 746.619, 746.621, 746.703, 746.903, 746.905, 746.1019, 746.1031, 746.1033, 746.1035, 746.1041, 746.1043, 746.1101, 746.1103, 746.1113, 746.1115, 746.1301, 746.1325, 746.1401, 746.1403, 746.2411, 746.2801, 746.2809, 746.2813, 746.3005, 746.3409, 746.3411, 746.4607, and 746.5009; new §§746.111, 746.113, 746.121, 746.123, 746.615, 746.1031, 746.1301, 746.1401, 746.2411, 746.2426, 746.3420, 746.3606, and 746.4607; and amendments to §§746.201, 746.301, 746.303, 746.405, 746.501, 746.503, 746.505, 746.603, 746.613, 746.623, 746.631, 746.705, 746.801, 746.803, 746.909, 746.1015, 746.1017, 746.1021, 746.1029, 746.1037, 746.1039, 746.1057, 746.1105, 746.1107, 746.1109, 746.1203, 746.1315, 746.1316, 746.1317, 746.1319, 746.1323, 746.2205, 746.2401, 746.2403, 746.2405, 746.2407, 746.2409, 746.2413, 746.2415, 746.2417, 746.2419, 746.2421, 746.2425, 746.2427, 746.2428, 746.2431, 746.2501, 746.2505, 746.2507, 746.2509, 746.2607, 746.2707, 746.2803, 746.2805, 746.2905, 746.2911, 746.3117, 746.3119, 746.3123, 746.3201, 746.3203, 746.3309, 746.3313, 746.3401, 746.3405, 746.3415, 746.3419, 746.3421, 746.3501, 746.3503, 746.3601, 746.3607, 746.3701, 746.3703, 746.3707, 746.3709, 746.3801, 746.3901, 746.4207, 746.4213, 746.4501, 746.4503, 746.4507, 746.4601, 746.4609, 746.4907, 746.4971, 746.5015, 746.5105, 746.5305, 746.5607, and 746.5621, in Chapter 746, concerning Minimum Standards for Child-Care Centers. The purpose of the repeals, new sections and amendments is to implement Texas Human Resources Code (HRC) §42.042(b) which requires Child Care Licensing (CCL) to conduct a comprehensive review of all

rules and minimum standards every six years. The proposed changes are a result of the comprehensive review of all minimum standards in Chapter 746.

During this review of standards, CCL's goal was to review the concerns of child advocacy groups, child-care centers, children, and parents and to formulate standards that balance children's health and safety with affordability and availability of care.

In preparation for the review of minimum standards, CCL conducted a web-based survey open to permit holders, caregivers, advocates, parents, CCL staff, and anyone in the general public interested in commenting on the standards. The survey was available for public input from late August through December 2014. The next step in the review was to hold a series of 31 stakeholder forums throughout the state between September and November 2015 to solicit additional input from the public about proposed changes to the minimum standards.

Between the web-based survey and the stakeholder forums, CCL received more than 1,200 comments relating to Chapters 745 (Licensing), 744 (Minimum Standards for School-Age and Before- or After-School Programs), 746, and 747 (Minimum Standards for Child-Care Homes) from stakeholders for consideration in the review. These comments, along with a line-by-line review of all minimum standards conducted by both regional and State Office Licensing staff, formed the basis of the first round of recommendations that were then presented to a temporary workgroup. The temporary workgroup was comprised of approximately 15 participants, including providers from child-care centers, a provider from a school-age and before- and after-school program, a parent, representatives from Licensing, and a representative from the Texas Workforce Commission. The workgroup had an introductory meeting on March 22, 2016, and subsequently met twice on April 5, 2016 and May 16, 2016 to review and provide comments regarding the recommended changes to Chapter 746 (and Chapters 744 and 747, which will be proposed at a later date).

DFPS received comments related to ratios and group sizes in the surveys and in the forums. After reviewing these comments and the related current minimum standards, and weighing the impact to providers and families, DFPS is currently maintaining the subchapter on ratios and group sizes as they are currently written. In response to the other comments received, DFPS is recommending changes to over one hundred and thirty-five minimum standards in Chapter 746. In addition to responding to the comments, three other primary goals of this comprehensive review were to (1) make the language of the standards consistent throughout the chapter, (2) delete minimum standards or portions of minimum standards that are duplicative or redundant, and (3) combine minimum standards when appropriate. The last two goals resulted in the deletion of approximately 25 minimum standards. Below is a broad overview of some of the different areas and types of changes that DFPS is recommending:

(1) Repealing, adding, moving, and modifying definitions. One example is the repeal of §746.3409 and §746.3411 which defined "sanitizing" and "disinfecting solution" and combining, modifying, and updating these definitions into one definition for "sanitize" and adding it to New §746.123(40);

(2) Reorganizing Subchapter A by creating three new Divisions: Purpose, Scope, and Definitions. The focus of the reorganization is to provide better clarity and continuity;

(3) Updating or deleting outdated rules or language in the rules, including:

(A) Deleting outdated grandfather clauses (§746.1019 and §746.1113) and outdated wording ("coin operated pay phone" at §746.4507 and "message pagers" at §746.5621);

(B) Updating the immunization minimum standards to be consistent with the current Department of State Health Services rules (§§746.613, 746.615, 746.617, 746.619, 746.621 and 746.623); and

(C) Deleting the use of rectal thermometers and allowing the use of tympanic (ear) thermometers (§746.3601);

(4) Clarifying confusing concepts by:

(A) Adding a new §746.1401 to explain when substitutes, volunteers, and contractors must comply with the minimum standards that apply to employees and caregivers; and

(B) Adding a rule that a sick child may return to care when there is a doctor's statement that the child no longer has the excludable condition, or the child is free of symptoms for 24 hours (§746.3606);

(5) Strengthening the minimum standards when it is necessary for the safety of children, for example:

(A) Adding required operational policies for safe sleep for infants 12 months and younger (§746.501);

(B) Not allowing stacked cribs for children tall enough to hit their head on the stacked crib or ceiling (§746.2413); and

(C) Not allowing children to sleep in restrictive devices (§746.2426); and

(6) Allowing more discretion by providers while still ensuring the safety of children, for example:

(A) Allowing first aid (but not CPR) to be obtained through self-instructional training (§746.1315);

(B) Only requiring cribs for non-walking infants less than 12 months of age (§746.2405); and

(C) Allowing the use of hand sanitizers (§746.3420).

A summary of the changes are:

Subchapter A is being renamed "Purpose, Scope, and Definitions" for clarity and better continuity.

New Division 1, of Subchapter A, is named Purpose and contains the current §746.101.

Section 746.103 regarding pronouns is repealed and its content is being incorporated into new §746.121.

Section 746.105 regarding definitions is repealed and its content is being incorporated into new §746.123. There are many substantive changes made to rule, including the deletion, addition, and modification of many definitions.

Section 746.107 regarding types of operations and scope is repealed and its content is being incorporated into new §746.111, however, the language in the rule regarding grandfather clauses has been removed because the former types of operations that were licensed by DFPS (group day care homes, kindergarten and nursery schools, and school: grades kindergarten and above) have been issued new licenses as child-care centers.

Section 746.109 regarding permit holders and scope is repealed and its content is being incorporated into new §746.113.

New Division 2 of Subchapter A is named Scope and is added for clarity and better continuity.

New §746.111 includes the content from repealed §746.107 with the following substantive changes: (1) the language in §746.107 regarding grandfather clauses has been removed because they are no longer relevant; and (2) language is added to clarify that the minimum standards in this chapter also apply to unlicensed centers that require a license under Chapter 42, HRC.

New §746.113 includes the content from repealed §746.109 with the addition of subsection (b) to clarify that the director, owner, operator, and certain controlling persons at an unlicensed center that is subject to Licensing's regulation, are also responsible for following the Chapter 746 minimum standards.

New Division 3 of Subchapter A is named Definitions and is added for clarity and better continuity.

New §746.121 includes the content from repealed §746.103.

New §746.123 Includes the content from repealed §746.105 with the following substantive changes: (1) several terms are being removed from this rule and are being incorporated in the only rule where the term is used, including baby bungee jumper, baby walker, caregiver-initiated activities, child-initiated activities, and single-use area; (2) several terms are being deleted because the words were not used in this chapter, were already defined in some other section, or were not needed, including child-care location, child passenger safety-seat system (already defined at §746.5607), creative activities, critical illness, group activities, pre-service training, and propped bottle; (3) several terms are being deleted from other rules and added to this definition rule, including CEUs, clock hours, instructor-led training, sanitize (with substantive changes), and self-instructional training; (4) several terms are being added, including child, employee, permit is no longer valid, premises, and restrictive devices; (5) the definitions to several terms have been modified, including administrative clerical duties, age-appropriate, caregiver (this definition is substantively changed), Certified Child-Care Professional Credential, child-care center, Child Development Associate Credential, frequent, inflatable, instructor-led training, janitorial duties, regular, self-instructional training, special care needs, and water activities.

The amendment to §746.201 clarifies that the permit holder is responsible for ensuring that the number of children in care must never exceed the licensed capacity of the center, even when the children are away from the center (e.g. field trip).

The amendment to §746.301 clarifies this rule by: (1) adding the content of the "child-care location" definition, which is deleted; and (2) requiring Licensing to be notified before a center: (A) offers a get-well care program or nighttime care services; and (B) sells or transfers ownership of the center (which is being incorporated from current §746.303).

The amendment to §746.303 deletes paragraph (1) regarding the requirement to notify Licensing before a center sells or transfers ownership of the center, which is being incorporated into §746.301(10).

The amendment to §746.405 deletes the requirement to post the address of the nearest Licensing office, because the workers are now mobile workers and not at a particular office; and clarifies the wording of the rule for accuracy.

The amendment to §746.501: (1) adds requirements for new operational policies for the suspension and expulsion of children, safe sleep for infants 12 months and younger, and procedures for using insect repellant and sunscreen; (2) clarifies the language of the rule; and (3) moves two paragraphs into new subsection (b), which requires notification to parents instead of an operational policy.

The amendment to §746.503 clarifies that a parent's signature for the enrollment agreement and the operational policies may be a signature on one document or several documents (this came from §746.2809(c) which is being deleted).

The amendment to §746.505 clarifies that employees must be notified of any changes to the center's operational policies (this is currently required by repealed §746.2813 for changes to discipline and guidance policy) and child-care enrollment agreement; and clarifies the language of the rule.

Section 746.507 is being repealed because it is already clear that operational policies must be shared with employees at §746.901(6).

The amendment to §746.603 clarifies several paragraphs by stating: (1) admission information is information required in §746.605; (2) TB screening is only needed if required by DSHS or a local health authority; and (3) documentation from a health care professional that allows a deviation from minimum standards must be maintained in the child's record.

The amendment to §746.613: (1) that current immunization records must be kept, including records of any exemptions or exceptions; and (2) the situations where immunizations are not required by the date of admission, including exemptions, exceptions, and provisional enrollment for up to 30 days for homeless children or children in foster care.

Section 746.615 is being repealed and replaced by a proposed new rule that incorporates the repealed language and further explaining the immunization exemptions and exceptions that are allowed by the DSHS rules.

Section 746.617 is being repealed. Its contents will be added to a Helpful Information Box and expounded upon there.

Section 746.619 is being repealed. Its contents will be incorporated into §746.613, except the provisional delay for the alternate care program (a child's immunization may be obtained upon the child's second visit to the alternate care program) is being deleted, because this exception does not currently exist in law.

Section 746.621 is being repealed and its contents will be incorporated into §746.613(c)(2).

The amendment to §746.623 clarifies the documentation requirements that are acceptable for an immunization record, including: (1) what is acceptable as a signature for a health care professional; and (2) the signature of the health-care professional is not required for an official immunization record generated from a state or local health authority or a school.

The amendment to §746.631 clarifies the language of the rule for ease of understanding.

Section 746.703 is being repealed. Its content is being added to a Helpful Information Box after §746.701.

The amendment to §746.705 clarifies how the *Incident/Illness Report* form must be completed.

The amendment to §746.801 clarifies what records must be kept at the center, including: (1) requiring attendance records or time sheets listing all days and hours worked for each employee. This content came from §746.905, which is being deleting; (2) deletes several paragraphs because the items are already required to be

posted at §746.401, such as group activity plans, daily menus, and the most recent licensing inspection report; (3) deleting the requirement of proof of background checks because it is already required at §746.901; and (4) deleting a child tracking system because it is already required at §746.631.

The amendment to §746.803 clarifies that posted records must also be kept for at least three months from the date the record was created.

Section 746.903 is being repealed because it is redundant. The Director's Certificate is already required at §746.1039 and as an employee a Director is already required to receive operational and personnel policies at §746.901(a)(6).

Section 746.905 is being repealed. Its content is being incorporated into §746.801(5).

The amendment to §746.909 clarifies that Licensing may photograph, copy, or scan a center's records.

The amendment to §746.1015 adds citations of the relevant rules regarding the renewal of a director's certificate (for a center licensed for 13 or more children).

The amendment to §746.1017 adds citations of the relevant rules regarding the renewal of a director's certificate (for a center licensed for 12 or fewer children).

Section 746.1019 is being repealed because the grandfather clauses in this rule are no longer necessary.

The amendment to §746.1021 substantially modifies the language of the rule for better readability without changing the substance of the rule.

The amendment to §746.1029 clarifies that the rule addresses "business" management.

Section 746.1031 is being repealed because "Clock hours" is being incorporated into the definitions rule at §746.123 with some modifications for clarity and accuracy.

New §746.1031 reorganizes the placement of repealed §746.1043 for better readability and flow of the rules.

Section 746.1033 is being repealed because it is not accurate. Section 746.1317 currently provides criteria for trainers.

Section 746.1035 is being repealed because "CEUs" is being incorporated into the definitions rule at §746.123.

The amendment to §746.1037 is incorporating the content from repealed §746.1041; and the wording of the question and the answer are also being modified for ease in understanding the rule.

The amendment to §746.1039 clarifies that a director must meet these additional qualifications in addition to the employee qualifications (and minimum qualification of a caregiver, if applicable).

Section 746.1041 is being repealed because the content of this rule is being incorporated into §746.1037(c).

Section 746.1043 is being repealed because the content of this rule is being incorporated into new §746.1031.

The amendment to §746.1057 clarifies the language of the rule for better readability.

Section 746.1101 is being repealed because the content of this rule is being incorporated into the new definition for "employee" and the revamped definition for "caregiver" at §746.123.

Section 746.1103 is being repealed because it is redundant. The information is already included at §746.1105 and §746.1107. However, the graphic with some modifications is being added to a Helpful Information Box after §746.1107.

The amendment to §746.1105 deletes an inaccurate introduction to this rule.

The amendment to §746.1107: (1) updates the terminology related to caregivers; (2) incorporates the content from §746.1115 to clarify "high school equivalent" with non-substantive changes for better readability; and (3) adds a "high school equivalent" for home schooling that adequately addresses basic competencies.

The amendment to §746.1109 clarifies that: (1) a person under the age of 18 who is hired must not be left alone with an individual child; (2) child-care-related career programs may also be approved by charter schools, the Texas Private School Accreditation Commission, or home schools that adequately addresses basic competencies; and (3) for a person under the age of 18 who attends a home-school that adequately addresses basic competencies and has graduated or not graduated, this person must also complete all 24 hours of pre-service training before being placed in a room with children.

Section 746.1113 is being repealed because the grandfather clause is outdated and no longer necessary.

Section 746.1115 is being repealed because the content of this rule is being incorporated into §746.1107(2)(B)(i).

The amendment to §746.1203 clarifies the language of this rule by: (1) deleting "counted in the child/caregiver ratio" because this is the new definition of a caregiver and the language is no longer necessary; (2) changing "administrative and clerical functions" to "administrative and clerical duties, because "duties" is what is defined at §746.123; and

(3) deleting and incorporating the adjectives after "janitorial duties" into the definition for "janitorial duties" at §746.123.

Section 746.1301 is being repealed and replaced with a new rule and a table to: (1) clarify the understanding of the rule; (2) delete the outdated requirements for caregivers hired before September 1, 2011; and (3) delete the Director training Requirements which are already noted in §746.1311.

New §746.1301 takes the relevant information from repealed §746.1301 and creates an updated training chart to clarify the training requirements for employees and caregivers.

The amendment to §746.1315 clarifies that first aid training can now be obtained through self-instructional training.

The amendment to §746.1316 makes the use of "employee" consistent throughout the rule; and "owner" has been clarified in the definition of an "employee" at §746.123. An owner is an employee if the owner is ever on site at the center or transports children.

The amendment to §746.1317: (1) updates the title of the training registry; (2) clarifies that a Child Development Associate credential must be current; and (3) clarifies that subsection (d) applies to both instructor-led and self-instructional training, which came from repealed §746.1325(c).

The amendment to §746.1319 clarifies that while Licensing does not approve training resources, training must comply with the criteria specified in §746.1317, required training topics, and documentation requirements.

The amendment to §746.1323 simplifies and streamlines the requirement for counting training received by employees from another center by deleting the requirement to adjust the annual training year for those employees.

Section 746.1325 is repealed because the definitions for self-instructional and instructor-led training are being incorporated into the definitions rule at §746.123; and the content for subsection (c) is being incorporated into §746.1317(d).

Section 746.1401 is repealed and the content is being incorporated into new §746.1403.

Section 746.1403 is repealed and the content is being incorporated into new §746.1403.

New §746.1403: (1) incorporates the contents from repealed §746.1401 and §746.1403; (2) clarifies that volunteers who only supplement ratios for field trips and water activities do not have to comply with minimum standards for employees and caregivers, but they do have to comply with the minimum standards in Subchapter E regarding ratios; and (3) clarifies when employees and caregivers must complete orientation and pre-service training by.

The amendment to §746.2205 incorporates the definitions for "child-initiated activities" and "caregiver-initiated activities" which are being deleted from the current definitions rule because this is the only rule that discusses these two terms.

The amendment to §746.2401 clarifies the rule by replacing the term "child/ren" with "infant/s".

The amendment to §746.2403 clarifies the rule by replacing the term "children" with "infants"; and clarifies the wording of the rules for better readability and understanding.

The amendment to §746.2405 clarifies that cribs are to sleep in and are only required for non-walking infants younger than 12 months of age; and replaces the term "children" with "infants".

The amendment to §746.2407 deletes the term "rockers" from a list of equipment because it is already defined as a "bouncer seat", which is also included in the list of equipment; and replaces "child" with "infant".

The amendment to §746.2409: (1) incorporates information regarding "port-a-cribs" (which are "non-full-size" cribs as defined by CPSC) from repealed §746.2411 by clarifying that this rule applies to all full-size and non-full-size cribs and must meet the requirements of this rule; (2) requires that only mattresses designed specifically for use with the crib model type may be used; (3) clarifies that cribs must be labeled with the infant's name; and (4) replaces "child" with "infant".

Section 746.2411 is being repealed and: (1) portions of the rule regarding to "port-a-cribs are being incorporated into §746.2409; and (2) portions of the rule regarding "mesh cribs" are being incorporated into new §746.2411.

New §746.2411 clarifies the following (1) the term used for mesh or fabric sided cribs is "play yard"; (2) play yards must be used according to manufacturer's instructions, including the cleaning of the play yard; (3) play yards must have firm, flat mattresses that snugly fits the sides of the play yard, the mattress must be designed by the manufacturer specifically for the play yard model number that is being used, and mattresses must not be supplemented with additional foam material or pads; and (4) the additional play yard requirements.

The amendment to §746.2413 clarifies that stacking wall cribs are allowed if they are only used for an infant that cannot stand or is able to stand without hitting the infant's head on either the top of the crib or the ceiling above the top crib; replaces "child" with "infant"; and modifies the wording of the rule for easier readability and understanding.

The amendment to §746.2415: (1) incorporates the content of the deleted definitions for "baby walkers" and "baby doorway jumpers" from the definition sections, since this is the only rule in which these two terms are used; (2) changes the term from "baby bungee jumper" to "baby doorway jumpers", which is the equipment that is prohibited; (3) modifies the wording of the rule for better readability and understanding; and (4) replaces "children" with "infants".

The amendment to §746.2417 clarifies that when an infant explores outside of the crib, the infant must also be free of restrictive devices; and deletes "confining equipment" because the term is subsumed by "restrictive device".

The amendment to §746.2419 clarifies that propped bottles are not allowed, and replaces "child/ren" with "infant/s".

The amendment to §746.2421 clarifies the question of the rule for better readability and understanding; and replaces the term "child/ren" with "infant/s".

The amendment to §746.2425 deletes the phrase "other confining equipment" to clarify that an infant must not be sleeping in confining equipment.

New §746.2426: (1) clarifies that infants are not allowed to sleep in restrictive devices. If the infant falls asleep in a restrictive device, then the infant must be removed from the device and placed in a crib as soon as possible.

The amendment to §746.2427: (1) clarifies that infants not yet able to turn over must be placed in a face-up sleeping position unless there is a written statement from a health-care professional stating a different sleeping position is medically necessary; (2) Clarifies that infants must sleep in their own cribs; and (3) replaces "child" with "infant".

The amendment to §746.2428 clarifies that swaddling is only allowed if there is a written statement from a health-care professional stating that swaddling a specific child for sleeping purposes is medically necessary.

The amendment to §746.2431 clarifies that the daily reports to parents of infants may be electronic; and replaces "child" with "infant".

The amendment to §746.2501 clarifies the rule by replacing the term "child" with "toddler".

The amendment to §746.2505: (1) clarifies that toddlers should never be allowed to sleep with or walk around with bottles or training cups; and (2) clarifies the language of the rule for better readability and understanding; and (3) replaces "child" with "toddler".

The amendment to §746.2507 deletes the required toddler activities of regular meal and snack times and supervised naptime because these activities are redundant as they are already required by §746.3301 and §746.2901, respectively.

The amendment to §746.2509 clarifies the rule by replacing the term "child" with "toddler".

The amendment to §746.2607 deletes requirements concerning required pre-kindergarten age activities of regular meal and snack times and supervised naptime because they are redun-

dant, as they are already required by §746.3301 and §746.2901, respectively.

The amendment to §746.2707 deletes requirements concerning required school-age activities of regular meal and snack times and supervised naptime because they are redundant, as they are already required by §746.3301 and §746.2901, respectively.

Section 746.2801 is being repealed because the content of this rule is being incorporated into §746.2803.

The amendment to §746.2803 incorporates the content from repealed §746.2801.

The amendment to §746.2805 clarifies that prohibited discipline includes: (1) placing a child in a dark room, whether the door is closed or not; and (2) requiring a child to remain in a restrictive device.

Section 746.2809 is being repealed and: (1) incorporates subsection (a) into §746.501(7); (2) deletes subsections (b) and most of (c) because they are redundant as they are already required by §746.503 and §746.507; and (3) incorporates the portion of subsection (c) relating to separate documents into §746.503.

Section 746.2813 is being repealed because the requirement that parents be given a copy of any updated discipline and guidance policy is already required at §746.505.

The amendment to §746.2905 clarifies that children must not be confined in a restrictive device to make the child rest or sleep.

The amendment to §746.2911 clarifies that lowering the lighting in a room requires enough lighting that a person's eyes do not need to adjust for the person to be able to see upon entering the room.

Section 746.3005 is being repealed because this information only references the subchapter regarding ratios and group sizes. Since it provides no additional information, it is not necessary.

The amendment to §746.3117 relates to caregivers in a get-well care program and: (1) clarifies that these required trainings are in addition to other training requirements; (2) makes the language of paragraph (2) consistent with the language of §746.3119(4); and (3) updates the total annual training hours required from 20 to 29 hours. This requirement changed in September of 2011, but was never updated in this rule.

The amendment to §746.3119 update the total annual training hours required for a director of a get-well program from 30 to 40 hours. This requirement changed in September of 2011, but was never updated in this rule.

The amendment to §746.3123 clarifies that these get-well care program requirements are in addition to those that are required throughout the rest of the chapter.

The amendment to §746.3201 deletes the requirement to notify Licensing before offering nighttime care and incorporates it into §746.301(7).

The amendment to §746.3203 deletes the statement that a center needs a residential child-care license to exceed the nighttime care limits, because this chapter only relates to child-care centers - not residential licensing.

The amendment to §746.3309 deletes "meals" from subsection (d) because parents must not be providing meals for other children.

The amendment to §746.3313 deletes information relating to posting menus and keeping the menus because it is already required by §746.401(5) and §746.803. However, because of the deletion of this information the question and the rule had to be modified to clarify for the remaining issues regarding substituting and rotating menus.

The amendment to §746.3401 makes the term local sanitation official consistent throughout the chapter.

The amendment to §746.3405 clarifies the language of the rule for better readability and understanding.

Section 746.3409 is being repealed, and the definition for "sanitizing" is being incorporated into the new definition for "sanitize" at §746.123.

Section 746.3411 is being repealed, and the definition for "disinfecting solution" is being incorporated into the new definition for "sanitizing" at §746.123.

The amendment to §746.3415 clarifies that employees must wash their hands after removing gloves.

The amendment to §746.3419 deletes the statement that premoistened towelettes, wipes, and waterless hand cleaners are not a substitute for running water. However, a statement will be added to a Helpful Information box that the use of hand sanitizers does not substitute for hand washing in the group care setting.

New §746.3420 clarifies that hand sanitizer may be used as a substitute for washing hands under certain conditions: (1) not used for visibly dirty hands; (2) only used on children 24 months and older; (3) stored out of the reach of children; (4) follow the labeling instructions; and (5) used only with adult supervision.

The amendment to §746.3421 clarifies the rule by replacing the term "child" with "infant".

The amendment to §746.3501 clarifies that powders may be used for diaper changing without obtaining a parent's written permission.

The amendment to §746.3503 clarifies that to prevent a child from falling from a diaper changing surface that is above the floor level the caregiver's hand must remain on the child "or the caregiver must be facing the child" at all times.

The amendment to §746.3505 deletes an outdated reference.

The amendment to §746.3601 updates the language of the rule by deleting the use of rectal temperatures and adding the use of tympanic (ear) temperatures; and also clarifies some of the language of the rule for easier readability.

New §746.3606 clarifies that an ill child may return to the child-care center when: (1) the child is free of illness symptoms for 24 hours; or (2) there is a health-care professional's statement that the child no longer has the excludable disease or condition.

The amendment to §746.3607 modifies the order of a caregiver's response to a critical illness or injury.

The amendment to §746.3701 requires televisions to be anchored, so they cannot tip over.

The amendment to §746.3703 bans the use of e-cigarettes and any type of vapors.

The amendment to §746.3707 adds commissioned security officers as persons who may carry a firearm on the premises of a child-care center; and changes the colloquial term of "law en-

forcement official" to "peace officer", which is defined at §2.12, Code of Criminal Procedure.

The amendment to §746.3709 clarifies the language of the rule for better readability and ease of understanding; and applies the limit of toys that explode or shoot to both the center and on field trips.

The amendment to §746.3801 clarifies that topical ointments like diaper ointment, insect repellant, and sunscreen provided by the parents is not a medication.

The amendment to §746.3901 clarifies that the requirements for animals also apply to field trips.

The amendment to §746.4207 simplifies the exemptions to the indoor activity space requirements.

The amendment to §746.4213 incorporates the definition for "single-use areas", because it is not used in any other rule in this chapter.

The amendment to §746.4501 clarifies that if the manufacturer requires safety straps on chairs, then the safety straps must be fastened whenever a child is using the chair.

The amendment to §746.4503: (1) clarifies that a center may require a parent to provide the cot or mat for the child; (2) deletes the individual crib requirement and naptime requirements because they are already required at §746.2405 and §746.2901 respectively; and (3) modifies the wording of the rule for better readability and ease of understanding.

The amendment to §746.4507 deletes an outdated reference to coin operated pay phones.

The amendment to §746.4601 clarifies that active play equipment must be used according to the manufacturer's instructions.

Section 746.4607 is being repealed and replaced with a new rule for better readability and ease of understanding.

New §746.4607 takes the relevant information from repealed §746.4607 and creates a chart to clarify the maximum height of the highest designated play surface for better readability and ease of understanding; and add a new option for the maximum height of the highest designated play surface to be consistent with the manufacturer's guidelines and the ASTM International Standards.

The amendment to §746.4609 deletes outdated grandfather clauses.

The amendment to §746.4907 deletes an outdated grandfather clause.

The amendment to §746.4971 clarifies that inflatables must be used according to manufacturer's instructions.

Section 746.5009 is being repealed because it is already clear at §746.1203(4) and §746.1205 that a fence does not relieve caregivers of supervision requirements.

The amendment to §746.5015 clarifies that: (1) children must not be left alone with sprinkler equipment; and (2) the splash pad/sprinkler play area must be maintained according to manufacturer's instructions.

The amendment to §746.5105 clarifies the language of the rule for better readability ease of understanding.

The amendment to §746.5305 clarifies that the manufacturer's instructions for mounting a fire extinguisher must be followed.

The amendment to §746.5607 clarifies the term "child passenger safety seat system"; and restructures the rule for better readability and ease of understanding.

The amendment to §746.5621 deletes an outdated reference to message pagers.

Lisa Subia, Chief Financial Officer of DFPS, has determined that for the first five-year period the proposed sections will be in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the section.

Ms. Subia also has determined that for each year of the first five years the sections are in effect the public benefit anticipated as a result of enforcing the sections will be that (1) there will be clarification of the Minimum Standards for Child-Care Centers resulting in more compliance; (2) DFPS will be in compliance with HRC §42.042(b); and (3) there will be reduced risk to children. Other than the cost to an owner of a child-care center as noted below, there is no anticipated economic cost to individual persons who are required to comply with the proposed sections.

The only anticipated adverse impact on small or micro businesses is as a result of the proposed rule change to §746.501. The proposed change will impact licensed child-care centers that meet the definition of a small and micro-business. According to the DFPS FY 2015 Annual Report and Data Book as of August 31, 2015 there were 7,888 licensed child-care centers in Texas.

Chapter 2006 of the Government Code defines a small business as one that is for-profit, independently owned, and has fewer than 100 employees or less than six million dollars in annual gross receipts. A small business that has no more than 20 employees is also defined as a micro-business. Based on a 2010 survey conducted by CCL, of the 7,888 centers it is estimated that 55% (or 4,338) are for profit businesses. Of those 4,338 centers, it is estimated that 98% (or 4,251) have fewer than 100 employees. Of the 4,338 centers, it is estimated that 68% (or 2,950) have fewer than 20 employees. So it is estimated that 4,251 child-care centers are small business, and 2,950 child-care centers are micro-businesses.

Licensing staff developed the methodologies used to calculate the fiscal impact of these rules. The impacts were calculated using cost research conducted by staff and assumptions regarding child-care practices. The key assumptions and methodologies are described in detail below, as these underlie the individual impact calculations for the rule that is projected to have a fiscal impact.

For Licensed Child-Care Centers, the staff time required to comply with the standards will impact Directors. For use in this impact analysis, DFPS will use the following mean wages that were obtained from the Texas Workforce Commission's website for Occupational Wages based on 2014 estimates: For all Directors, DFPS is using a $24.27 per hour mean wage from the Occupational Title of Education Administrator, Preschool and Childcare Center.

Fiscal Impact for Proposed §746.501: This section adds three new operational policies that must be developed: suspension and expulsion of children; safe sleep for infants 12 months and younger; and procedures for providing and applying insect repellent and sunscreen. The fiscal impact to these centers results from staff time to develop policy regarding these three topics. It is anticipated, after discussing this issue with the temporary workgroup, that a Director, or curriculum developer that is similarly

paid, will spend an average of two to four hours developing these three operational policies. Therefore, the approximate one-time cost for the development of these three operational policies is between $48.54 (2 hours X $24.27) and $97.08 (4 hours X $24.27).

The other recommended rule changes should not affect the cost of doing business; does not impose new requirements on any business; and does not require the purchase of any new equipment or any increased staff time in order to comply.

Regulatory Flexible Analysis: As previously noted, of the 7,888 child-care centers, it is estimated that 4,251 of them are small business, and 2,950 of them are micro-businesses. The projected fiscal impact on small and micro-businesses for §746.501 is addressed in the foregoing section. DFPS did consider not requiring each of the new operational policies, but ultimately decided that the one-time cost is appropriately small and merited the changes. These new operational policies will ensure the health and safety of children and prevent the inappropriate removal of children from child-care centers.

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

Questions about the content of the proposal may be directed to Gerry Williams at (512) 438-5559 in DFPS's Child Care Licensing Division. Electronic comments may be submitted to CCLRules@DFPS.state.tx.us. Written comments on the proposal may be submitted to Texas Register Liaison, Legal Services-556, Department of Family and Protective Services E-611, P.O. Box 149030, Austin, Texas 78714-9030, within 30 days of publication in the *Texas Register.*

SUBCHAPTER A. PURPOSE AND DEFINITIONS

40 TAC §§746.103, 746.105, 746.107, 746.109

The repeals are proposed under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The repeals implement HRC §42.042.

§746.103. What do certain pronouns mean as used in this chapter?

§746.105. What do certain words and terms mean when used in this chapter?

§746.107. What types of operations do these minimum standards apply to?

§746.109. Who is responsible for complying with these minimum standards?

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

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Trevor Woodruff
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For further information, please call: (512) 438-5559

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SUBCHAPTER A. PURPOSE, SCOPE, AND DEFINITIONS
DIVISION 2. SCOPE

40 TAC §746.111, §746.113

The new sections are proposed under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The new sections implement HRC §42.042.

§746.111. What types of operations do these minimum standards apply to?

The minimum standards in this chapter apply to:

(1) Licensed child-care centers; and

(2) Any unlicensed child-care center that is subject to Licensing's regulation and requires a license per Chapter 42 of the Human Resources Code.

§746.113. Who is responsible for complying with these minimum standards?

(a) For a licensed child-care center, the permit holder must ensure compliance with all minimum standards in this chapter at all times, with the exception of those minimum standards identified for specific types of child-care programs or activities that the center does not offer. For example, if we license the center to offer only toddler and pre-kindergarten care programs, the center does not have to comply with minimum standards that apply only to infant care, school-age care, get-well care, or nighttime-care programs; however, the center must comply with all other minimum standards.

(b) For an unlicensed child-care center that is subject to Licensing's regulation, the center's director, owner, or operator or any other controlling person who has the ability to influence or direct the center's management, expenditures, or policies must ensure compliance with all minimum standards in this chapter at all times, with the exception of those minimum standards identified for specific types of child-care programs or activities that the unlicensed center does not offer.

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

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DIVISION 3. DEFINITIONS

40 TAC §746.121, §746.123

The new sections are proposed under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The new sections implement HRC §42.042.

§746.121. What do certain pronouns mean when used in this chapter?

The following words have the following meanings when used in this chapter:

(1) I, my, you, and your--An applicant or permit holder, unless otherwise stated.

(2) We, us, our, and Licensing--The Licensing Division of the Texas Department of Family and Protective Services (DFPS).

§746.123. What do certain words and terms mean when used in this chapter?

The words and terms used in this chapter have the meanings assigned to them under §745.21 of this title (relating to What do the following words and terms mean when used in this chapter?), unless another meaning is assigned in this section or another subchapter or unless the context clearly indicates otherwise. In addition, the following words and terms used in this chapter have the following meanings unless the context clearly indicates otherwise:

(1) Activity space--An area or room used for children's activities, including areas separate from a group's classroom.

(2) Administrative and clerical duties--Duties that involve the operation of a child-care center, such as bookkeeping, enrolling children, answering the telephone, and collecting fees.

(3) Admission--The process of enrolling a child in a child-care center. The date of admission is the first day the child is physically present in the center.

(4) Adult--A person 18 years old and older.

(5) Age-appropriate--Activities, equipment, materials, curriculum, and environment that are developmentally consistent with the chronological age of the child being served.

(6) Alternate care program--A program in which no child is in care for more than five consecutive days, and no child is in care for more than 15 days in one calendar month, regardless of the duration of each stay.

(7) Attendance--When referring to a child's attendance, the physical presence of a child at the child-care center's program on any given day or at any given time, as distinct from the child's enrollment in the child-care center.

(8) Bouncer seat--A stationary seat designed to provide gentle rocking or bouncing motion by an infant's movement, or by battery-operated movement. This type of equipment is designed for an infant's use from birth until the child can sit up unassisted.

(9) Caregiver--A person who is counted in the child/caregiver ratio, whose duties include the supervision, guidance, and protection of a child. As used in this chapter, a caregiver must meet the minimum education, work experience, and training qualifications required under Subchapter D of this chapter (relating to Personnel). A caregiver is usually an employee, but may also be a substitute, volunteer, or contactor (also see Division 4 of Subchapter D (relating to Substitutes, Volunteers, and Contractors).

(10) Certified Child-Care Professional Credential--A credential given by the National Early Childhood Program Accreditation to a person working directly with children. The credential is based on assessed competency in several areas of child care and child development.

(11) Certified lifeguard--A person who has been trained in life saving and water safety by a qualified instructor, from a recognized organization which awards a certificate upon successful completion of the training. The certificate is not required to use the term "lifeguard," but the permit holder must be able to document that the certificate represents the type of training described.

(12) CEUs (continuing education units)--A standard unit of measure for adult education and training activities. One CEU equals ten clock hours of participation in an organized, continuing-education experience, under responsible, qualified direction and instruction. Although a person may obtain a CEU in many of the same settings as clock hours, the CEU provider must meet the criteria established by the International Association for Continuing Education and Training to be able to offer the CEU.

(13) Child-care center--A child-care facility that is licensed to care for seven or more children for less than 24 hours per day, at a location other than the permit holder's home. If you were licensed before September 1, 2003, the location of the center could be in the permit holder's home.

(14) Child-care program--The services and activities provided by a child-care center.

(15) Child Development Associate Credential--A credential given by the Council for Professional Recognition to a person working directly with children. The credential is based on assessed competency in several areas of child care and child development.

(16) Child --An infant, toddler, pre-kindergarten age child, or school-age child.

(17) Clock hours--An actual hour of documented:

(A) Attendance at instructor-led training, such as seminars, workshops, conferences, early childhood classes, and other planned learning opportunities, provided by an individual/s as specified in §746.1317(a) of this title (relating to Must the training for my caregivers and the director meet certain criteria?); or

(B) Self-instructional training that was created by an individual/s as specified in §746.1317(a) and (b).

(18) Corporal punishment--The infliction of physical pain on a child as a means of controlling behavior. This includes spanking, hitting, slapping, or thumping a child.

(19) Days--Calendar days, unless otherwise stated.

(20) Employee--A person a child-care center employs full-time or part-time to work for wages, salary, or other compensation. Employees are all of the child-care center staff, including caregivers, kitchen staff, office staff, maintenance staff, the assistant director, the director, and the owner, if the owner is ever on site at the center or transports a child.

(21) Enrollment--The list of names or number of children who have been admitted to attend a child-care center for any given period of time; the number of children enrolled in a child-care center may vary from the number of children in attendance on any given day.

(22) Entrap--A component or group of components on equipment that forms angles or openings that could trap a child's head by being too small to allow the child's body to pass through, or large enough for the child's body to pass through but too small to allow the child's head to pass through.

(23) Field trips--Activities conducted away from the child-care center.

(24) Food service--The preparation or serving of meals or snacks.

(25) Frequent--More than two times in a 30-day period. Note: For the definition of "regularly or frequently present at an operation" as it applies to background checks, see §745.601 of this title (relating to What words must I know to understand this subchapter?).

(26) Garbage--Waste food or items that when deteriorating cause offensive odors and attract rodents, insects, and other pests.

(27) Health check--A visual or physical assessment of a child to identify potential concerns about a child's health, including signs or symptoms of illness and injury, in response to changes in the child's behavior since the last date of attendance.

(28) Health-care professional--A licensed physician, licensed registered nurse with appropriate advanced practice authorization from the Texas Board of Nurse Examiners, a licensed vocational nurse (LVN), licensed registered nurse (RN), or other licensed medical personnel providing health care to the child within the scope of his license. This does not include medical doctors or medical personnel not licensed to practice in the United States.

(29) Individual activities--Opportunities for the child to work independently or to be away from the group, but supervised.

(30) Infant--A child from birth through 17 months.

(31) Inflatable--An amusement ride or device, consisting of air-filled structures designed for use by children, as specified by the manufacturer, which may include bouncing, climbing, sliding, or interactive play. They are made of flexible fabric, kept inflated by continuous air flow by one or more blowers, and rely upon air pressure to maintain their shape.

(32) Instructor-led training--Training characterized by the communication and interaction that takes place between the student and the instructor. The training must include an opportunity for the student to interact with the instructor to obtain clarifications and information beyond the scope of the training materials. For such an opportunity to exist, the instructor must communicate with the student in a timely fashion, including answering questions, providing feedback on skills practice, providing guidance or information on additional resources, and proactively interacting with students. Examples of this type of training include classroom training, web-based on-line facilitated learning, video-conferencing, or other group learning experiences.

(33) Janitorial duties--Those duties that involve the cleaning and maintenance of the child-care center building, rooms, furniture, etc. Cleaning and maintenance include such duties as cleansing carpets, washing cots, and sweeping, vacuuming, or mopping a restroom or a classroom. Sweeping up after an activity or mopping up a spill in a classroom that is immediately necessary for the children's safety is not considered a janitorial duty.

(34) Local sanitation official--A sanitation official designated by the city or county government.

(35) Natural environment--Settings that are natural or normal for all children of an age group without regard to ability or disability. For example, the primary natural group setting for a toddler with a disability would be a play group or child-care center or whatever setting exists for toddlers without disabilities.

(36) Permit is no longer valid--For purposes of this chapter, a permit remains valid through the renewal process. A permit only becomes invalid when your center voluntarily closes or must close because of an enforcement action in Subchapter L of Chapter 745 (relating to Enforcement Actions).

(37) Premises--Includes the child-care center, any lots on which the center is located, any outside ground areas, any outside play areas, and the parking lot.

(38) Regular--On a recurring, scheduled basis. Note: For the definition of "regularly or frequently present at an operation" as it applies to background checks, see §745.601 of this title (relating to What words must I know to understand this subchapter?).

(39) Restrictive device--Equipment that places the body of a child in a position that may restrict airflow or cause strangulation; usually, the child is placed in a semi-seated position. Examples of restrictive devices are car seats, swings, bouncy seats, and high chairs.

(40) Safety belt--A lap belt and any shoulder straps included as original equipment on or added to a vehicle.

(41) Sanitize--The use of a product (usually a disinfecting solution) that is registered by the Environmental Protection Agency (EPA) which substantially reduces germs on inanimate objects to levels considered safe by public health requirements. Many bleach and hydrogen peroxide products are EPA-registered. You must follow the product's labeling instructions for sanitizing (paying particular attention to any instructions regarding contact time and toxicity on surfaces likely to be mouthed by children, such as toys and crib rails). For an EPA-registered sanitizing product or disinfecting solution that does not include labelling instructions for sanitizing (a bleach product, for example), you must follow these steps in order:

(A) Washing with water and soap;

(B) Rinsing with clear water;

(C) Soaking in or spraying on a disinfecting solution for at least two minutes. Rinsing with cool water only those items that children are likely to place in their mouths; and

(D) Allowing the surface or item to air-dry.

(42) School-age child--A child who is five years of age and older, and who will attend school at or away from the child-care center in August or September of that year.

(43) Self-instructional training--Training designed to be used by one individual working alone and at the individual's own pace to complete the lessons or modules. Lessons or modules commonly include questions with clear right and wrong answers. Examples of

this type of training include self-paced web-based training, written materials, or a combination of video or web-based and written materials.

(44) Special care needs--A child with special care needs is a child who has a chronic physical, developmental, behavioral, or emotional condition and who also requires assistance beyond that required by a child generally to perform tasks that are within the typical chronological range of development, including the movement of large and/or small muscles, learning, talking, communicating, self-help, social skills, emotional well-being, seeing, hearing, and breathing.

(45) State or local fire marshal--A fire official designated by the city, county, or state government.

(46) Toddler--A child from 18 months through 35 months.

(47) Universal precautions--An approach to infection control where all human blood and certain human body fluids are treated as if known to be infectious for HIV, HBV, and other blood-borne pathogens.

(48) Water activities--Related to the use of swimming pools, splashing/wading pools, sprinkler play, or other bodies of water.

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

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SUBCHAPTER B. ADMINISTRATION AND COMMUNICATION

DIVISION 1. PERMIT HOLDER RESPONSIBILITIES

40 TAC §746.201

The amendment is proposed under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The amendment implements HRC §42.042.

§746.201. What are my responsibilities as the permit holder?

You are responsible for the following:

(1) - (8) (No change.)

(9) Complying with the child-care licensing law found in Chapter 42 of the Human Resources Code, the applicable minimum standards, and other applicable rules in the Texas Administrative Code; [~~and~~]

(10) Reporting any Department of Justice substantiated complaints related to Title III of the Americans with Disabilities Act, which applies to commercial public accommodations, to DFPS; and[~~.~~]

(11) Ensuring the total number of children in care at the center or away from the center, such as during a field trip, never exceeds the licensed capacity of the center.

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

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DIVISION 2. REQUIRED NOTIFICATION

40 TAC §746.301, §746.303

The amendments are proposed under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The amendments implement HRC §42.042.

§746.301. What changes regarding my child-care center must I notify Licensing about before making the change?

You must notify us in writing before:

(1) Changing the address or location of the child care center;

(2) - (6) (No change.)

(7) Offering new services, relating to minimum standards found in this chapter, such as a get-well care program, nighttime care, transportation, or field trips;

(8) Planned closure of five consecutive days or more, during designated hours of operation, when the operation is not caring for children, with the exception of nationally recognized holidays; [~~or~~]

(9) Going out of business; or [~~.~~]

(10) Sale or transfer of the child-care center ownership, including the incorporation of an existing center.

§746.303. Must I notify Licensing of changes I make regarding the governing body or director of my child-care center?

Yes. You must notify us in writing, no later than five days after a change is made, regarding:

[~~(1) Sale or transfer of the child-care center ownership (including but not limited to incorporation of an existing operation);~~]

(1) [~~(2)~~] The governing body designee;

(2) [~~(3)~~] The board chair for a corporate facility or other executive officer of the governing body;

(3) [~~(4)~~] The address of the governing body or its designee; and

(4) [~~(5)~~] The center director.

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

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DIVISION 3. REQUIRED POSTINGS

40 TAC §746.405

The amendment is proposed under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The amendment implements HRC §42.042.

§746.405. What telephone numbers must I post and where must I post them?

(a) You must post the following telephone numbers:

(1) 911 or, if 911 is not available in your area, you must post the telephone numbers for:

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

(2) (No change.)

(3) The Texas Abuse and Neglect Hotline (1-800-252-5400) [~~DFPS child abuse hotline~~];

(4) The local [~~Nearest~~] Licensing office telephone number [~~and address~~]; and

(5) The child-care center telephone number, name, and address[~~, and telephone number~~].

(b) (No change.)

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

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DIVISION 4. OPERATIONAL POLICIES

40 TAC §§746.501, 746.503, 746.505

The amendments are proposed under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The amendments implement HRC §42.042.

§746.501. What written operational policies must I have?

(a) You must develop written operational policies and procedures that at a minimum address each of the following:

(1) Hours, days, and months of operation;

(2) Procedures for the release of children;

(3) Illness and exclusion criteria;

(4) Procedures for dispensing medications or a statement that medication is not dispensed [~~given~~];

(5) Procedures for handling medical emergencies;

(6) Procedures for parental notifications;

(7) Discipline and guidance that is consistent with Subchapter L of this title (relating to Discipline and Guidance). A copy of Subchapter L may be used for your discipline and guidance policy [~~practices~~];

(8) Suspension and expulsion of children;

(9) Safe sleep for infants 12 months old or younger that is consistent with the rules in Subchapter H of this chapter (relating to Basic Requirements for Infants) that relate to sleep requirements and restrictions, including sleep positioning, and crib requirements and restrictions, including mattresses, bedding, blankets, toys, and restrictive devices;

(10) [~~(8)~~] Meals and food service practices;

(11) [~~(9)~~] Immunization requirements for children, including tuberculosis screening and testing if required by your regional Texas Department of State Health Services or local health authority;

[~~(10) Tuberculin testing requirements;~~]

(12) [~~(11)~~] Hearing and vision screening requirements;

(13) [~~(12)~~] Enrollment procedures, including how and when parents will be notified of policy changes;

(14) [~~(13)~~] Transportation, if applicable;

(15) [~~(14)~~] Water activities, if applicable;

(16) [~~(15)~~] Field trips, if applicable;

(17) [~~(16)~~] Animals, if applicable;

(18) Procedures for providing and applying, as needed, insect repellant and sunscreen, including what types will be used, if applicable;

(19) [~~(17)~~] The procedures for parents to review and discuss with the child-care center director any questions or concerns about the policies and procedures of the child-care center;

[~~(18) The procedures for parents to visit the child-care center at any time during the child-care center's hours of operation to observe their child, the child-care center's operation, and program activities, without having to secure prior approval;~~]

(20) [~~(19)~~] The procedures for parents to participate in the child-care center's operation and activities;

(21) [~~(20)~~] The procedures for parents to review a copy of [~~the minimum standards and~~] the child-care center's most recent Licensing inspection report and how the parent may access the minimum standards online;

(22) [~~(21)~~] Instructions on how a parent may contact the local Licensing office, Texas Abuse and Neglect Hotline [~~DFPS child abuse hotline~~], and DFPS website;

[~~(22) Your method of informing the parents that under the Texas Penal Code, any area within 1000 feet of a child-care center is a gang-free zone, where criminal offenses related to organized criminal activity are subject to harsher penalty. Your method may include:~~]

[~~(A) providing this information in the parent's handbook;~~]

[~~(B) distributing the information in writing to the required recipients; or~~]

[~~(C) informing parents verbally as part of the individual or group parent orientation;~~]

(23) Your emergency preparedness plan;

(24) Your provisions to provide a comfortable place with an adult sized [~~a~~] seat in your center or within a classroom that enables a mother to breastfeed her child. In addition, your policies must inform parents that they have the right to breastfeed or provide breast milk for their child while in care;

(25) Preventing and responding to abuse and neglect of children, including:

(A) Required annual training for employees;

(B) Methods for increasing employee and parent awareness of issues regarding child abuse and neglect, including warning signs that a child may be a victim of abuse or neglect and factors indicating a child is at risk for abuse or neglect;

(C) Methods for increasing employee and parent awareness of prevention techniques for child abuse and neglect;

(D) Strategies for coordination between the center and appropriate community organizations; and

(E) Actions that the parent of a child who is a victim of abuse or neglect should take to obtain assistance and intervention, including procedures for reporting child abuse or neglect;

(26) Procedures for conducting health checks, if applicable; and

(27) Vaccine-preventable diseases for employees, unless your center is in the home of the permit holder. The policy must address the requirements outlined in §746.3611 of this title (relating to What must a policy for protecting children from vaccine-preventable diseases include?).

(b) You must also inform the parents that:

(1) They may visit the child-care center at any time during the child-care center's hours of operation to observe their child, the child-care center's operation, and program activities, without having to secure prior approval; and

(2) Under the Texas Penal Code any area within 1000 feet of a child-care center is a gang-free zone, where criminal offenses related to organized criminal activity are subject to a harsher penalty. You may inform the parents by:

(A) Providing this information in the operational policies;

(B) Distributing the information in writing to the parents; or

(C) Informing the parents verbally as part of an individual or group parent orientation.

§746.503. Must I provide parents with a copy of my operational policies?

Yes. On or before the date of admission, the parents [~~Parents~~] must sign a child-care enrollment agreement or other similar documents, which must include [~~document that includes~~] at least the operational policies listed in this division [~~on or before the date of admission~~]. You must keep this signed document in the child's record or at least one for each family, if siblings are enrolled at the same time.

§746.505. What must I do when I change an operational policy or an item in the child-care enrollment agreement?

When you change an operational policy or your child-care enrollment agreement, you [~~You~~] must notify:

(1) Your employees of any changes; and

(2) The parents in writing of any changes [~~to your operational policies and enrollment agreement~~]. At least one copy of the updated operational policies or child-care enrollment agreement must be signed and dated for each family and kept[~~. You must keep the updated information~~] in the child's record.

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

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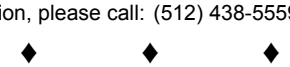

40 TAC §746.507

The repeal is proposed under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study

and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The repeal implements HRC §42.042.

§746.507. Must I provide a copy of my operational policies to my 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.

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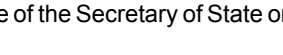

SUBCHAPTER C. RECORD KEEPING
DIVISION 1. RECORDS OF CHILDREN

40 TAC §§746.603, 746.613, 746.615, 746.623, 746.631

The amendments and new section are proposed under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The amendments and new section implement HRC §42.042.

§746.603. What records must I have for children in my care and how long must I keep them?

(a) You must maintain the following records for each child enrolled in your child-care center:

(1) Child-care enrollment agreement specified in §746.503 of this title (relating to Must I provide parents with a copy of my operational policies?);

(2) Admission information specified in §746.605 of this title (relating to What admission information must I obtain for each child?);

(3) Statement of the child's health from a health-care professional;

(4) Immunization records;

(5) Tuberculosis screening and [~~Tuberculin~~] testing information, if required by your regional Texas Department of State Health Services or local health authority [~~applicable~~];

(6) Hearing and vision screening results, if applicable;

(7) Licensing *Incident/Illness Report* form, if applicable;

(8) Sign-in and sign-out logs;

(9) Medication administration records, if applicable; and

(10) A copy of any health-care professional recommendations or orders for providing specialized medical assistance to the child. In some instances minimum standards allow for a deviation from a minimum standard with written documentation from a health care professional. You must also maintain this written documentation.

(b) (No change.)

§746.613. What immunizations must a child [~~are children~~] in my care [~~required to~~] have?

(a) Each child enrolled or admitted to child-care centers must meet and continue to meet applicable immunization requirements specified by the Texas Department of State Health Services (DSHS) [~~in 25 TAC Chapter 97, Subchapter B (relating to Immunization Requirements in Texas Elementary and Secondary Schools and Institutions of Higher Education)~~]. This requirement applies to all children in care from birth through 14 years of age.

(b) You must maintain current immunization records for each child in your care, including any immunization exemptions or exceptions.

(c) [~~(b)~~] All [~~Except as otherwise provided in this division, all~~] immunizations required for the child's age must be completed by the date of admission, unless:[~~.~~]

(1) The child is exempt or excepted from an immunization, and the exemption or exception is verified by the date of admission; or

(2) The child is homeless or a child in foster care and is provisionally admitted for up to 30 days if evidence of immunization is not available. You should immediately refer the child to an appropriate health-care professional to obtain the required immunizations. The DSHS rule at 25 TAC §97.66 (relating to Provisional Enrollment for Students) establishes the guidelines for a provisional enrollment.

§746.615. What exemptions or exceptions are there concerning immunization requirements?

(a) A child may be exempt from immunization requirements for a medical reason or reason of conscience, including a religious belief. To claim an exemption, the person applying for the child's admission must meet criteria specified by the Department of State Health Services (DSHS) rule at 25 TAC §97.62 (relating to Exclusions from Compliance).

(b) For some diseases, a child who previously had a disease and is accordingly naturally immune from it may qualify for an exception to the immunization requirements for the disease. To claim this exception, the person applying for the child's admission must meet the criteria specified by the DSHS rule at 25 TAC §97.65 (relating to Exceptions to Immunization Requirements).

§746.623. What documentation is acceptable for immunization records?

(a) Documentation may be the original immunization record or a photocopy. An official immunization record generated from a state or local health authority, such as a registry, or a record received from school officials including a record from another state, is also acceptable.

(b) The immunization record must include:

(1) The child's name and birth date;

(2) The type of vaccine and the number of doses [~~and vaccine type~~];

(3) The month, day, and year the child received each vaccination; and

(4) The name, address, and signature of the health-care [~~or stamp of the physician or other health~~] professional that administered the vaccine. The following are acceptable as a signature: [~~validating the record.~~]

(A) A rubber stamp signature or electronic signature; or

(B) Another health-care professional's documentation of the immunization, as long as the name and address of the health-care professional that administered the vaccine is documented.

(c) The signature of the health-care professional that administered the vaccine is not required for an official immunization record generated from a state or local health authority or a record received from school officials.

§746.631. Must I have a system for signing children in and out of my care?

(a) Yes. You must have a tracking system for [~~tracking~~] each child coming and going from your child-care center throughout the day. This tracking system must include the name of each child;[,] the date, time of arrival, and time of departure;[,] and the employee or parent's initials or other unique identifier [~~identification~~] code.

(b) All caregivers must have access to the system to determine which children are in care during their work shift, changes in caregivers, and emergency evacuations.

(c) You must keep the tracking information for the previous three months and make it available to Licensing for review upon request.

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40 TAC §§746.615, 746.617, 746.619, 746.621

The repeals are proposed under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The repeals implement HRC §42.042.

§746.615. Are there exemptions for immunization requirements?
§746.617. Where can I find more information on immunizations?
§746.619. When must I have the child's immunization record on file?
§746.621. May I admit a child who is not current on immunizations?

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DIVISION 2. RECORDS OF ACCIDENTS AND INCIDENTS

40 TAC §746.703

The repeal is proposed under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The repeal implements HRC §42.042.

§746.703. Where can I get a copy of Licensing's Incident/Illness Report form?

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

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40 TAC §746.705

The amendment is proposed under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The amendment implements HRC §42.042.

§746.705. Must someone from my child-care center sign the Incident/Illness Report form?

Yes. After the caregiver completes the form, the [~~The~~] director of the child-care center, or if the director is not available, the person in charge of the center must sign and date the completed report.

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DIVISION 3. RECORDS THAT MUST BE KEPT ON FILE AT THE CHILD-CARE CENTER

40 TAC §746.801, §746.803

The amendments are proposed under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The amendments implement HRC §42.042.

§746.801. What records must I keep at my child-care center?

You must maintain and make the following records available for our review upon request, during hours of operation. Paragraphs (14), (15), and (16) [~~(18), (19), and (20)~~] are optional, but if provided, allow Licensing to avoid duplicating the evaluation of standards that have been evaluated by other state agencies within the past year:

(1) Children's records, as specified in Division 1 of this subchapter (relating to Records of Children);

(2) Infant feeding instructions, if applicable;

(3) Personnel and training records, unless on file at a central administrative location;

(4) Licensing *Child-Care Center Director's Certificate;*

(5) Attendance records or time sheets listing all days and hours worked for each employee [~~employees~~];

[~~(6) Children's program activity plans for each age group;~~]

(6) [~~(7)~~] Verification of liability insurance or notice of unavailability, if applicable;

[~~(8) Proof of request for all background checks required by Chapter 745, Subchapter F of this title (relating to Background Checks);~~]

[~~(9) Daily menus;~~]

(7) [~~(10)~~] Medication records, if applicable;

(8) [~~(11)~~] Playground maintenance checklists;

(9) [~~(12)~~] Pet vaccination records, if applicable;

(10) [~~(13)~~] Safety [~~Fire safety~~] documentation for emergency drills, fire extinguishers, and smoke detectors;

[~~(14) Most recent Licensing inspection report, letter, or notice requiring posting;~~]

(11) [~~(15)~~] Most recent fire inspection report, including any written approval from the fire marshall to provide care above or below ground level, if applicable;

(12) [~~(16)~~] Most recent sanitation inspection report;

(13) [~~(17)~~] Most recent gas inspection report, if applicable;

(14) [~~(18)~~] Most recent Department of State Health Services immunization compliance review form, if applicable;

(15) [~~(19)~~] Most recent Texas Department of Agriculture Child and Adult Care Food Program (CACFP) report, if applicable;

(16) [~~(20)~~] Most recent local workforce board Child-Care Services Contractor inspection report, if applicable;

(17) [~~(21)~~] Record of pest extermination, if applicable;

[~~(22) Written approval from the fire marshal to provide care above or below ground level, if applicable;~~]

(18) [~~(23)~~] Most recent DFPS form certifying that you have reviewed each of the bulletins and notices issued by the United States Consumer Product Safety Commission regarding unsafe children's products and that there are no unsafe children's products in use or accessible to children in the child-care center;

[~~(24) System to track when a child's care begins and ends daily;~~]

(19) [~~(25)~~] Documentation for cribs as specified in §746.2409(a)(9) of this title (relating to What specific safety requirements must my cribs meet?), if applicable; and

(20) [~~(26)~~] Documentation for vehicles specified in §746.5627 of this title (relating to What documentation must I keep at the child-care center for each vehicle used to transport children in care?), if applicable.

§746.803. How long must I keep [~~these~~] records at my child-care center?

(a) Unless otherwise stated in this chapter, you [~~You~~] must keep at the child-care center for at least three months from the date the record was created each record that your center is required to post or keep [~~records at the child-care center for at least three months from the date the record was created, unless otherwise stated in this chapter~~].

(b) You must keep training records for the current director and caregivers for at least the current and last full training year.

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DIVISION 4. PERSONNEL RECORDS

40 TAC §746.903, §746.905

The repeals are proposed under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The repeals implement HRC §42.042.

§746.903. What additional personnel records must I maintain for my child-care center director?

§746.905. Must I maintain attendance records or time sheets on my 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.

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40 TAC §746.909

The amendment is proposed under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The amendment implements HRC §42.042.

§746.909. May Licensing access my personnel records?

Yes. Licensing staff must be given immediate access to all personnel records that document compliance with minimum standards. You must allow Licensing to photograph, copy, or scan [~~photocopy~~] these records if requested.

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

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SUBCHAPTER D. PERSONNEL

DIVISION 1. CHILD-CARE CENTER DIRECTOR

40 TAC §§746.1015, 746.1017, 746.1021, 746.1029, 746.1031, 746.1037, 746.1039, 746.1057

The amendments and new section are proposed under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The amendments and new section implement HRC §42.042.

§746.1015. What qualifications must the director of my child-care center licensed for 13 or more children meet?

(a) (No change.)

(b) Options (5) and (6) in subsection (a) of this section require periodic renewal for the director to remain qualified as specified in §746.1053 of this title (relating to Will the director's certificate expire?) and §746.1055 of this title (relating to How often must an expiring certificate be renewed?).

§746.1017. What qualifications must the director of my child-care center licensed for 12 or fewer children meet?

(a) (No change.)

(b) Options (4) and (6) in subsection (a) of this section require periodic renewal for the director to remain qualified as specified in §746.1053 of this title (relating to Will the director's certificate expire?) and §746.1055 of this title (relating to How often must an expiring certificate be renewed?).

§746.1021. What constitutes experience in a licensed child-care center, or in a licensed or registered child-care home?

(a) Only the following types of experience may be counted as experience in a licensed child-care center:

(1) Experience as a director, assistant director, or as a caregiver working directly with children[~~, obtained~~] in a [~~any~~] DFPS licensed or certified child-care center (or similar type of day care center that was formerly licensed, certified, or accredited by DFPS); and[~~, whether paid or unpaid;~~]

[~~(2) Experience as a director, assistant director, or caregiver working directly with children, whether paid or unpaid, in a DFPS licensed day-care center, group day-care home, kindergarten or nursery school, schools: grades kindergarten and above, drop-in care center, or in a DFPS alternatively accredited program; and~~]

(2) [~~(3)~~] Experience as a director, assistant director, or caregiver working directly with children in a licensed or certified child-care center in another state or country.

(b) Only [~~the following types of~~] experience as a primary caregiver or assistant caregiver working directly with children in a DFPS licensed or registered child-care home (or in a group day-care home

that was formerly licensed by DFPS) may be counted as experience in a licensed or registered child-care home.[:]

[(1) Experience as a primary caregiver or assistant caregiver working directly with children, whether paid or unpaid, in a DFPS licensed or registered child-care home;]

[(2) Experience as a director, assistant director, or caregiver working directly with children, whether paid or unpaid in a DFPS licensed group day-care home; or]

[(3) Experience as a primary caregiver of a DFPS registered family home.]

(c) You must have obtained all work experience in a full-time capacity or its equivalent in a part-time capacity. Full-time is defined as at least 30 hours per week. The work experience may be paid or unpaid.

§746.1029. What credit courses does Licensing recognize as business management?

Due to a large variation in credit course titles and content, it is impossible to list all courses that may be counted toward the business management requirement. Business management [Management] courses may include administration of a child-care facility, recreational leadership, accounting, goal and objective setting, performance planning and evaluation, management techniques, risk management and other administrative, management, or supervisory-related courses. Courses in office machines or computer training are not recognized as business management.

§746.1031. What documentation must I provide to Licensing to show that my director has an acceptable child development and business management education?

If requested by Licensing, you must provide original transcripts, supporting documentation such as credit course catalog descriptions, or a course syllabus or outline to determine whether the course is recognized as child development or business management.

§746.1037. May clock hours or CEUs (continuing education units) [(CEUs)] be substituted for any of the educational requirements [in any of the options specified] in this division?

(a) Clock [You may only substitute clock] hours or CEUs may only be substituted for the required credit hours in child development and business management.

(b) [You may substitute] 50 clock hours or five CEUs may only be substituted for every [each] three college credit hours required in child development and/or business management.

(c) The documentation to verify the clock hours or CEUs must be as specified in §746.1329 of this title (relating to What documentation must I provide to Licensing to verify that training requirements have been met?).

§746.1039. What additional [kind of] documentation must I submit to Licensing to show my child-care center director is qualified and when must I submit it?

(a) In addition to showing that your director meets the minimum qualifications for an employee (and minimum qualifications for a caregiver, if applicable), you [You] must submit the following for each director at your child-care center:

(1) A completed Licensing *Personal History Statement* form specifying the education and experience of your designated director;

[(2) A completed Licensing *Request for Criminal History and Central Registry Check* form;]

[(3) A notarized Licensing *Affidavit for Applicants for Employment* form;]

(2) [(4)] A completed Licensing *Governing Body/Director Designation* form; and

(3) [(5)] An original and current Licensing *Child-Care Center Director's Certificate* form; or an original college transcript or original training certificates which verify the educational requirements; and complete dates, names, addresses, and telephone numbers which support the required experience.

(b) You must submit the information to us:

(1) As part of a new application for a permit; or [and]

(2) Within five [ten] days of designating a new director.

§746.1057. What happens if my director's credential expires [I do not submit the documentation confirming the credential is current]?

We will give you a deadline for your director to submit the required documentation or for you to designate another qualified director. If your director allows the certificate to expire without submitting the required documentation, then your center will [and] no longer meet the minimum standards [meets requirements] for a child-care center director[, you violate minimum standards].

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40 TAC §§746.1019, 746.1031, 746.1033, 746.1035, 746.1041, 746.1043

The repeals are proposed under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The repeals implement HRC §42.042.

§746.1019. Are any directors exempt from the qualifications?

§746.1031. What are clock hours?

§746.1033. Must the trainer or provider of clock hours meet specific criteria?

§746.1035. What are CEUs?

§746.1041. What documentation must I have to prove that the person received the clock hours or CEUs?

§746.1043. What documentation must I provide to Licensing to show that my director has acceptable child development and business management education?

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DIVISION 2. CHILD-CARE CENTER EMPLOYEES AND CAREGIVERS

40 TAC §§746.1101, 746.1103, 746.1113, 746.1115

The repeals are proposed under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The repeals implement HRC §42.042.

§746.1101. What is the difference between a child-care center employee and a child-care center caregiver?

§746.1103. Are there different personnel qualifications for employees and caregivers?

§746.1113. Do the caregiver qualifications specified in this division apply to a caregiver that was employed before May 1, 1985?

§746.1115. What does Licensing mean by the term "high school equivalent"?

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

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40 TAC §§746.1105, 746.1107, 746.1109

The amendments are proposed under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The amendments implement HRC §42.042.

§746.1105. What minimum qualifications must each of my child-care center employees meet?

Each child-care center employee [~~who is regularly or frequently present while children are in care~~] must:

(1) (No change.)

(2) Have a current record of a tuberculosis examination, showing the employee is [~~they are~~] free of contagious TB, if required by the regional Texas Department of State Health Services or local health authority;

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

§746.1107. What additional minimum qualifications must each of my caregivers meet?

Except as otherwise provided in this division, each caregiver [~~employee counted in the child/caregiver ratio~~] must comply with minimum standards for employees and must:

(1) (No change.)

(2) Have a:

(A) High school diploma;

(B) High school equivalent, including documentation:

(i) Of a program recognized by the Texas Education Agency (TEA) or other public educational entity in another state, which offers similar training on reading, writing, and math skills taught at the high school level, such as a General Educational Development (GED) certificate; or

(ii) That verifies home-schooling that adequately addresses basic competencies that would be otherwise met by a high-school diploma or GED including basic reading, writing, and math skills; or

(C) (No change.)

(3) Complete eight hours of the required 24 hours of pre-service training, as specified in Division 4 of this subchapter (relating to Professional Development) before being counted in the child/caregiver ratio.

§746.1109. Under what circumstances may I employ a person under the age of 18 or a person who does not have a high school diploma or equivalent as a caregiver?

(a) You may employ a 16 or 17 year old who has a high school diploma or its equivalent and count the person in the child/caregiver ratio, provided that:

(1) You don't leave the person alone with sole responsibility for or in charge of an individual child, a group of children, or the child-care center [~~or a group of children~~];

(2) (No change.)

[~~(3) The person has completed a child-care-related career program, which the Texas Education Agency or another state or federal agency approves~~].

(3) The person has completed a child-care-related career program, which:

(A) The Texas Education Agency (including a charter school), the Texas Private School Accreditation Commission, other

similar educational entity in another state, or federal agency approves; or

(B) A home-school approves, and the person completes all 24 hours of pre-service training before being placed in a room with children.

(b) You may employ a 16,17, or 18 year old who attends high school but has not graduated and count the person in the child/caregiver ratio, provided that:

(1) You don't leave the person alone with sole responsibility for or in charge of an individual child, a group of children, or the child-care center;

(2) (No change.)

[~~(3) The person is currently enrolled in or has completed a child-care-related career program, which the Texas Education Agency or another state or federal agency approves; and~~]

(3) The person is currently enrolled in or has completed a child-care-related career program, which:

(A) The Texas Education Agency (including a charter school), the Texas Private School Accreditation Commission, other similar educational entity in another state, or federal agency approves; or

(B) A home-school approves, and the person completes all 24 hours of pre-service training before being placed in a room with children; and

(4) The person is expected to obtain a high school diploma or equivalent.

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

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DIVISION 3. GENERAL RESPONSIBILITIES FOR CHILD-CARE CENTER PERSONNEL

40 TAC §746.1203

The amendment is proposed under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The amendment implements HRC §42.042.

§746.1203. What additional responsibilities do my caregivers [~~counted in the child/caregiver ratio~~] have?

In addition to the responsibilities for employees specified in this division, caregivers [~~counted in the child/caregiver ratio~~] must:

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

(6) Be free from activities not directly involving the teaching, care, and supervision of children, such as:

(A) Administrative and clerical duties [~~functions~~] that take the caregiver's attention away from the children;

(B) (No change.)

(C) Janitorial duties[~~, such as mopping, vacuuming, and cleaning restrooms. Sweeping up after an activity or mopping up spills may be necessary for the children's safety and are not considered janitorial duties~~]; and

(D) Personal use of electronic devices, such as cell phones, MP3 players, tablets, and video games;

(7) Interact [~~routinely~~] with children in a positive manner;

(8) - (11) (No change.)

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

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DIVISION 4. PROFESSIONAL DEVELOPMENT

40 TAC §746.1301, §746.1325

The repeals are proposed under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The repeals implement HRC §42.042.

§746.1301. What training must I ensure that my employees have?

§746.1325. What is self-instructional and instructor-led training?

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

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40 TAC §§746.1301, 746.1315 - 746.1317, 746.1319, 746.1323

The amendments and new section are proposed under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The amendments and new sections implement HRC §42.042.

§746.1301. What training must I ensure that my employees and caregivers have?

You must make sure that employees and caregivers have the training required in the following chart
Figure: 40 TAC §746.1301

§746.1315. Who must have first-aid and CPR training?

(a) - (c) (No change.)

(d) CPR [~~and first-aid~~] training must not be obtained through self-instructional training.

§746.1316. What additional training must an employee [~~a person~~] have in order to transport a child in care?

(a) An employee [~~or owner~~] must complete two hours of annual training on transportation safety in order to transport a child whose chronological or developmental [~~development~~] age is younger than nine years old. This training is in addition to other required training hours.

(b) The employee [~~person~~] must obtain these two hours of transportation safety training prior to transporting children.

§746.1317. Must the training for my caregivers and the director meet certain criteria?

(a) Training may include clock hours or CEUs provided by:

(1) A training provider registered with the Texas Early Childhood Professional [~~Care and Education Career~~] Development System Training [~~System's Texas Trainer~~] Registry, maintained by the Texas Head Start State Collaboration Office;

(2) - (6) (No change.)

(7) A person who has at least two years of experience working in child development, a child development program, early childhood education, a childhood education program, or a Head Start or Early Head Start program and:

(A) Has a current [~~been awarded a~~] Child Development Associate (CDA) credential; or

(B) (No change.)

(b) (No change.)

(c) Self-instructional training may not be used for CPR [~~or first-aid~~] certification.

(d) All training, including instructor-led and self-instructional training, must include:

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

§746.1319. Does Licensing approve training resources or trainers for training hours?

No. We do not approve or endorse training resources or trainers for training hours; however you must[~~. You should, however,~~] ensure you and your employees receive [~~relevant~~] training that:

(1) Meets the criteria specified in §746.1317 of this title (relating to Must the training for my caregivers and the director meet certain criteria?); [~~from reliable resources, in~~]

(2) Is relevant to the topics specified in this division;[~~,~~] and

(3) The [~~that~~] participants receive original documentation of completion, as specified in this division.

§746.1323. If I hire a caregiver or a director that received training at another child day-care operation, may these hours count towards the annual training requirement at my center?

If the caregiver or director is able to provide documentation of training as specified in §746.1329 of this title (relating to What documentation must I provide to Licensing to verify that training requirements have been met?) obtained from another child day-care operation that we regulate, within two months before coming to work for your child-care center, this training may apply toward the annual training requirement. [~~If you apply this training to the annual training requirement, you must adjust the annual training year due dates for this person accordingly.~~]

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

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DIVISION 5. VOLUNTEERS, SUBSTITUTES, AND CONTRACTORS

40 TAC §746.1401, §746.1403

The repeals are proposed under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The repeals implement HRC §42.042.

§746.1401. What minimum standards must substitutes comply with?

§746.1403. What minimum standards must volunteers or any person under contract with the center comply with?

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DIVISION 5. SUBSTITUTES, VOLUNTEERS, AND CONTRACTORS

40 TAC §746.1401

The new section is proposed under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The new section implements HRC §42.042.

§746.1401. What minimum standards must substitutes, volunteers, or persons under contract with my center comply with?

(a) For purposes of this rule:

(1) Persons under contract with your center are "contractors"; and

(2) It does not matter if a substitute, volunteer, or contractor is paid or unpaid.

(b) Substitutes not counted in the child/caregiver ratio must comply with minimum standards that apply to employees, except as otherwise provided in this division.

(c) Volunteers and contractors who are regularly or frequently present at the child-care center but not counted in the child/caregiver ratio must comply with minimum standards that apply to employees.

(d) Substitutes, volunteers, and contractors who are counted in the child/caregiver ratio must comply with minimum standards that apply to employees and caregivers, except as otherwise noted in subsection (e) of this section.

(e) Volunteers, including parents, who only supplement the ratios for field trips and water activities do not have to comply with the minimum standards that apply to employees and caregivers, but they do have to comply with the relevant minimum standards in Subchapter E of this chapter (relating to Child/Caregiver Ratios and Group Sizes).

(f) Substitutes, volunteers, and contractors who do not meet caregiver qualifications must never be left alone with children.

(g) All substitutes, volunteers (except for those volunteers noted in subsection (e) of this section), and contractors must complete orientation before beginning the relevant duties.

(h) For substitutes, volunteers, and contractors counted in the child/caregiver ratio, the remaining 16 hours of pre-service training (the first eight hours must be completed before being counted in the child/caregiver ratio) must be completed within 90 days of beginning the relevant caregiver duties. If the person completes the pre-service training after the 90 day period, the person must cease performing any caregiver duties at the center until the person completes the pre-service training.

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SUBCHAPTER F. DEVELOPMENTAL ACTIVITIES AND ACTIVITY PLAN

40 TAC §746.2205

The amendment is proposed under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The amendment implements HRC §42.042.

§746.2205. What must [~~should~~] the activity plan include?

(a) The written activity plan must include at least the following:

(1) - (6) (No change.)

(7) Both:

(A) Child-initiated activities, which are those activities that the child chooses on the child's own initiative, and that foster the child's independence. Child initiated activities require equipment, materials, and supplies to be within the reach of a child; [~~child-initiated~~] and

(B) Caregiver-initiated [~~caregiver-initiated~~] activities, which are those activities that are directed or chosen by the caregiver;

(8) - (9) (No change.)

(b) (No change.)

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SUBCHAPTER H. BASIC CARE REQUIREMENTS FOR INFANTS

40 TAC §§746.2401, 746.2403, 746.2405, 746.2407, 746.2409, 746.2411, 746.2413, 746.2415, 746.2417, 746.2419, 746.2421, 746.2425 - 746.2428, 746.2431

The amendments and new sections are proposed under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The amendments and new sections implement HRC §42.042.

§746.2401. What are the basic care requirements for infants?

Basic care for infants must include:

(1) (No change.)

(2) Individual attention given to each infant [~~child~~] including playing, talking, cuddling, and holding;

(3) Holding and comforting an infant [~~a child~~] who is upset;

(4) (No change.)

(5) Talking to infants [~~children~~] as they are fed, changed, and held, such as naming objects, singing, or saying rhymes;

(6) Ensuring the environment is free of objects that may cause choking in infants or toddlers [~~children younger than three years~~]; and

(7) (No change.)

§746.2403. How must I arrange the infant care area?

The room arrangement of the infant care area must:

(1) Make it possible for caregivers to[~~see and/or~~] hear all infants and see all infants [~~children~~] at a glance, and be able to intervene when necessary;

(2) - (6) (No change.)

§746.2405. What furnishings and equipment must I have in the infant care area?

Furnishings and equipment for infants must include at least the following:

(1) An adult-sized rocker or chair;

(2) An individual crib to sleep in for each non-walking infant younger than 12 months of age;

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

(5) A sufficient number of toys to keep the infants [~~children~~] engaged in activities.

§746.2407. Must the equipment I use for infants be equipped with safety straps?

If you use high chairs, swings, strollers, infant carriers, [~~rockers and~~] bouncer seats, or similar types of equipment, they must be equipped with safety straps that must be fastened whenever an infant [~~a child~~] is using the equipment.

§746.2409. What specific safety requirements must my cribs meet?

(a) All full-size and non-full-size cribs must have:

(1) A firm, flat mattress that snugly fits the sides of the crib and that is designed specifically for use with the crib model number. The mattress must not be supplemented with additional foam material or pads.

(2) - (6) (No change.)

(7) No cutout areas in the headboard or footboard that would entrap an infant's [~~a child's~~] head or body;

(8) Drop gates, if present, which fasten securely and cannot be opened by a child; [~~and~~]

(9) Documentation that each crib meets the applicable federal rules at Title 16, Code of Federal Regulations, Parts 1219 or 1220, concerning "Safety Standards for Full-Size Baby Cribs" and "Safety Standards for Non-Full-Size Baby Cribs," respectively, or documentation that each crib is a medical device listed and registered with the U.S. Food and Drug Administration; and[~~.~~]

(10) A label with the infant's name. As an alternative, you may label cribs with a number and have a number/infant assignment map available.

(b) You must sanitize each crib before a different infant [~~child~~] uses it and when soiled.

(c) You must never leave an infant [~~children~~] in the crib with the drop gate down.

§746.2411. Are play yards allowed?

You may use a play yard, which is a mesh or fabric sided crib, if it meets the following safety requirements:

(1) The play yards must be used according to the manufacturer's instructions, including the cleaning of the play yards;

(2) Play yards must have:

(A) A firm, flat mattress that snugly fits the sides of the play yard and that is designed by the manufacturer specifically for this play yard model number. The mattress must not be supplemented with additional foam material or pads;

(B) Sheets that fit snugly and do not present an entanglement hazard;

(C) A mattress that is waterproof or washable;

(D) Secure mattress support hangers, and no loose hardware or improperly installed or damaged parts;

(E) A minimum height of 22 inches from the top of the railing to the mattress support at its lowest level;

(F) Folded sides that securely latch in place when raised;

(G) For play yards that have mesh sides, mesh openings that are 1/4 inch or less;

(H) Mesh or fabric that is securely attached to the top rail, side rail, and floor plate; and

(I) A label with the infant's name. As an alternative, you may label play yards with a number and have a number/infant assignment map available; and

(3) You must never leave an infant in a play yard with a side folded down.

§746.2413. Are stacking wall cribs allowed?

You may use a stacking [~~Yes. Stacking~~] wall crib that meets the [~~cribs must meet the~~] requirements in §746.2409 of this title (relating to What specific safety requirements must my cribs meet?), and you:

(1) Do not stack more than [~~Are limited to~~] two [~~stacked~~] cribs;

(2) Only use a stacked crib for an infant who cannot stand or is able to stand without hitting the infant's head on either the top crib or the ceiling above the top crib;

(3) [~~(2)~~] Use the crib [~~Must be used~~] according to manufacturer's directions; and

(4) [~~(3)~~] Securely latch the crib's doors/gates [~~Doors/gates must be securely latched~~] anytime an infant [~~a child~~] is in the crib.

§746.2415. What [~~Are~~] specific types of equipment am I prohibited from using [~~for use~~] with infants?

You may not use the [~~Yes. The~~] following [~~list of~~] equipment for infants, which has been identified as unsafe for infants by the Consumer Product Safety Commission and the American Academy of Pediatrics[~~, must not be used in the child-care center~~]:

(1) Baby walkers, which are devices that allow an infant to sit inside a walker equipped with rollers or wheels and move across the floor;

(2) Baby doorway [~~bungee~~] jumpers, which are devices that allow an infant to bounce while supported in a seat by an elastic "bungee cord" suspended from a doorway;

(3) - (5) (No change.)

(6) Soft or loose bedding such as blankets, sleep positioning devices, stuffed toys, quilts, pillows, bumper pads, and comforters must not be used in cribs for infants [~~children~~] younger than 12 months of age.

§746.2417. What activities must I provide for infants?

Activities for infants must include at least the following:

(1) (No change.)

(2) Multiple opportunities [~~Opportunities~~] to explore each day that are outside of the crib and any restrictive device [~~or other confining equipment multiple times each day~~];

(3) - (8) (No change.)

§746.2419. Are there specific requirements for feeding infants?

Yes. You must:

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

(3) Never prop or support bottles with some object. The infant [~~child~~] or an adult must hold the bottle;

(4) (No change.)

(5) Ensure infants [~~children~~] no longer being held for feeding are fed in a safe manner;

(6) Label bottles and training cups with the infant's [~~child's~~] first name and initial of last name;

(7) Never allow infants [~~children~~] to walk around with or sleep with a bottle or training cup;

(8) - (9) (No change.)

§746.2421. What [~~Must I obtain~~] written feeding instructions must I obtain for an infant [~~children~~] not ready for table food?

(a) [~~Yes.~~] For an infant who is [~~children~~] not yet ready for table food, you must obtain and follow written feeding instructions that are signed and dated by the infant's [~~child's~~] parent or physician.

(b) You must review and update the feeding instructions with the parent every 30 days until the infant [~~child~~] is able to eat table food.

§746.2425. How long are infants allowed to remain in their cribs after awakening?

An infant may remain in the crib [~~or other confining equipment~~] for up to 30 minutes after awakening, as long as the infant is content and responsive.

§746.2426. May I allow infants to sleep in a restrictive device?

No. You may not allow an infant to sleep in a restrictive device. If an infant falls asleep in a restrictive device, the infant must be removed from the device and placed in a crib as soon as possible.

§746.2427. Are infants required to sleep on their backs?

Infants not yet able to turn over on their own must be placed in a face-up sleeping position in the infant's own crib, unless you have a written statement [~~the child's parent presents written documentation~~] from a health-care professional stating that a different sleeping position is medically necessary [~~allowed or will not harm the infant~~].

§746.2428. May I swaddle an infant to help the infant sleep?

No. You may not lay a swaddled infant down to sleep or rest on any surface at any time unless you have a written statement from a health-care professional stating that swaddling a specific child for sleeping purposes is medically necessary.

§746.2431. Must I share a daily report with parents for each infant in my care?

You must provide a daily written or electronic report to the infant's [~~child's~~] parent when or by the time the infant [~~child~~] is picked up from the child-care center. The report must contain:

(1) Times the infant [~~child~~] slept;

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

(4) Infant's [~~Child's~~] general mood for the day; and

(5) A brief summary of the activities in which the infant [~~child~~] participated.

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40 TAC §746.2411

The repeal is proposed under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The repeal implements HRC §42.042.

§746.2411. Are mesh cribs or port-a-cribs allowed?
The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.

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SUBCHAPTER I. BASIC CARE REQUIREMENTS FOR TODDLERS

40 TAC §§746.2501, 746.2505, 746.2507, 746.2509

The amendments are proposed under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The amendments implement HRC §42.042.

§746.2501. What are the basic care requirements for toddlers?
Basic care for toddlers must include:

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

(3) Individual attention given to each toddler [~~child~~] including playing, talking, and cuddling;

(4) Holding and comforting a toddler [~~child~~] who is upset; and

(5) Ensuring the environment is free of objects that may cause choking in infants or toddlers [~~children younger than three years of age~~].

§746.2505. What furnishings and equipment must I provide for toddlers?
Furnishings and equipment for toddlers must include at least the following:

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

(3) Containers or low shelving that are accessible to toddlers, so toddlers [~~items children~~] can safely obtain the items [~~use~~] without adult intervention [~~direct supervision are accessible to children~~]; and

(4) Bottles and training [~~Training~~] cups, if used, must be [~~that are~~]:

(A) Labeled with the toddler's [~~child's~~] first name and initial of last name or otherwise individually assigned to each toddler [~~child; and/or~~];

(B) Cleaned and sanitized between each use; and

(C) Used for drinking and feeding, and never allow toddlers to sleep with or walk around with a bottle or training cup.

§746.2507. What activities must I provide for toddlers?
Activities for toddlers must include at least the following:

(1) - (6) (No change.)

(7) Opportunities for social/emotional development. Examples of age-appropriate equipment or activities include dress-up clothes and accessories, housekeeping equipment, unbreakable mirrors, washable dolls with accessories, items for practicing buttoning, zipping, lacing, and snapping, and baskets, tubs, and tote bags (not plastic bags) for carrying and toting; and

(8) Opportunities to develop self-help skills such as toileting, hand washing, and feeding.[~~;~~]

[~~(9) Regular meal and snack times; and~~]

[~~(10) Supervised naptimes.~~]

§746.2509. Must I share a daily report with parents for each toddler in my care?
No, however you must have a plan for personal contact with parents that provides for an exchange of information regarding observations, comments, and concerns regarding their toddler [~~child~~].

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SUBCHAPTER J. BASIC CARE REQUIREMENTS FOR PRE-KINDERGARTEN AGE CHILDREN

40 TAC §746.2607

The amendment is proposed under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC

§40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The amendment implements HRC §42.042.

§746.2607. What activities must I provide for pre-kindergarten age children?

Activities for pre-kindergarten age children must include at least the following:

(1) - (6) (No change.)

(7) Opportunities for social/emotional development. Examples of age-appropriate equipment or activities include dress-up clothes and accessories, mirrors, dolls, simple props for different themes, puppets, transportation toys, play animals, and table games; and

(8) Opportunities to develop self-help skills such as toileting, hand washing, returning equipment to storage areas or containers, and serving and feeding.[~~;~~]

[~~(9) Regular meal and snack times; and~~]

[~~(10) Supervised naptimes.~~]

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SUBCHAPTER K. BASIC CARE REQUIREMENTS FOR SCHOOL-AGE CHILDREN

40 TAC §746.2707

The amendment is proposed under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The amendment implements HRC §42.042.

§746.2707. What activities must I provide for school-age children?

Activities for school-age children must include at least the following:

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

(6) Opportunities for active play both indoors and outdoors. Examples of age-appropriate equipment or activities include active games such as tag and Simon says, dancing and creative movement to music and singing, simple games and dramatic or imaginary play that encourages running, stretching, climbing, and walking; and

(7) Opportunities for social/emotional development. Examples of age-appropriate equipment or activities include dolls with detailed, realistic accessories; role-play materials, including real equipment for library, hospital, post office, costumes, makeup and disguise materials; puppets and puppet show equipment; transportation toys, such as small vehicles or models; play and art materials; nature materials; and human and animal figurines.[~~;~~]

[~~(8) Regular meal and snack times; and~~]

[~~(9) Naptimes, or a period of rest for those children too old to nap, during which children should be supervised according to §746.1205 of this title (relating to What does Licensing mean by "supervise children at all times"?).~~]

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

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SUBCHAPTER L. DISCIPLINE AND GUIDANCE

40 TAC §§746.2801, 746.2809, 746.2813

The repeals are proposed under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The repeals implement HRC §42.042.

§746.2801. To what extent may caregivers discipline the children in their care?

§746.2809. Must I have a written discipline and guidance policy?

§746.2813. How often must I update my written discipline and guidance policy?

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

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40 TAC §746.2803, §746.2805

The amendments are proposed under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The amendments implement HRC §42.042.

§746.2803. What methods of discipline and guidance may a caregiver use?

Discipline must be:

(1) Individualized and consistent for each child;

(2) Appropriate to the child's level of understanding;

(3) Directed toward teaching the child acceptable behavior and self-control; and

(4) A [~~caregiver may only use~~] positive method [~~methods~~] of discipline and guidance that encourage self-esteem, self-control, and self-direction, which include at least the following:

(A) [~~(1)~~] Using praise and encouragement of good behavior instead of focusing only upon unacceptable behavior;

(B) [~~(2)~~] Reminding a child of behavior expectations daily by using clear, positive statements;

(C) [~~(3)~~] Redirecting behavior using positive statements; and

(D) [~~(4)~~] Using brief supervised separation or time out from the group, when appropriate for the child's age and development, which is limited to no more than one minute per year of the child's age.

§746.2805. What types of discipline and guidance or punishment are prohibited?

There must be no harsh, cruel, or unusual treatment of any child. The following types of discipline and guidance are prohibited:

(1) - (7) (No change.)

(8) Placing a child in a locked or dark room, bathroom, or closet [~~with the door closed~~]; and

(9) Requiring a child to remain silent or inactive for inappropriately long periods of time for the child's age, including requiring a child to remain in a restrictive device.

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SUBCHAPTER M. NAPTIME

40 TAC §746.2905, §746.2911

The amendments are proposed under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The amendments implement HRC §42.042.

§746.2905. Are children required to sleep during this time?

No. You must not:

(1) Force [~~force~~] a child to sleep or put anything in or on a child's head or body to force the child to rest or sleep; or[~~.~~]

(2) Confine a child in a restrictive device to make the child rest or sleep.

§746.2911. May I lower the lighting in [~~darken~~] the room while children are sleeping?

Yes. You may lower the lighting, provided there is adequate lighting to allow visual supervision of all children in the group at all times. Lighting in a room is adequate if a person's eyes do not need to adjust for the person to be able to see upon entering the room.

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

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SUBCHAPTER N. FIELD TRIPS

40 TAC §746.3005

The repeal is proposed under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and

the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The repeal implements HRC §42.042.

§746.3005. Must I have additional caregivers present to take children on a field trip?

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

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SUBCHAPTER O. GET-WELL CARE PROGRAMS

40 TAC §§746.3117, 746.3119, 746.3123

The amendments are proposed under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The amendments implement HRC §42.042.

§746.3117. Do caregivers in my get-well care program require special training [~~or qualifications~~]?

Yes, in addition to the orientation, pre-service training, and annual training required of caregivers in this chapter, all [~~regular caregiver qualifications,~~] get-well care program caregivers must:

(1) Have current certification in CPR and first aid, including rescue breathing and choking, notwithstanding the training specified in §746.1315 of this title (relating to Who must have first-aid and CPR training?); and

(2) Have five additional hours of annual training in prevention and control of communicable diseases and care of ill children [~~general infection control procedures, recognition and care of children with mild childhood illnesses, and child development activities for children who are ill~~] for a total of 29 [~~20~~] hours per year.

§746.3119. May the director of my well child-care program also direct my get-well care program?

Yes, although the director of your get-well care program must:

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

(4) Have ten additional hours of annual training in prevention and control of communicable diseases[~~,~~] and care of ill children[~~,~~] for a total of 40 [~~30~~] hours per year.

§746.3123. Must my get-well care program follow any special handling procedures?

Yes. In addition to following the minimum standards noted in this Chapter, including Subchapter R (relating to Health Practices), you [~~You~~] must follow these [~~handling~~] procedures when providing get-well care:

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

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SUBCHAPTER P. NIGHTTIME CARE

40 TAC §746.3201, §746.3203

The amendments are proposed under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The amendments implement HRC §42.042.

§746.3201. What is nighttime care?

(a) (No change.)

(b) Nighttime care does not include the occasional sleep-over program offered at infrequent intervals. [~~Notify us before offering either program.~~]

§746.3203. May I provide nighttime care to children at my child-care center?

(a) You [~~Yes, you~~] may care for children both during the day and night if we approve it. Even then, a child may only be in care for:

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

(b) You cannot exceed these limits [~~without getting a license for a residential child-care operation~~].

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SUBCHAPTER Q. NUTRITION AND FOOD SERVICE

40 TAC §746.3309, §746.3313

The amendments are proposed under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The amendments implement HRC §42.042.

§746.3309. May parents provide meals and/or snacks for their children instead of my child-care center providing these?

(a) - (c) (No change.)

(d) You must ensure [~~meals and~~] snacks provided by a parent and shared with other children meet the needs of children who require special diets.

§746.3313. Can I make substitutions and/or rotate the [~~Must I post and maintain~~] daily menus?

Yes[~~. You must~~]:

(1) Substitutions [~~Post daily menus showing all meals and snacks prepared and served by the child-care center where parents and others can see them. Substitutions must be~~] of comparable food value may be made to the daily menu, but you must keep[~~. Keep~~] a record of any substitutions made; and

[~~(2) Date menus and keep copies for review for three months; and~~]

(2) [~~(3)~~] You may [~~If you~~] rotate menus, but you must keep a record of which menu was used for each date.

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SUBCHAPTER R. HEALTH PRACTICES
DIVISION 1. ENVIRONMENTAL HEALTH

40 TAC §§746.3401, 746.3405, 746.3415, 746.3419 - 746.3421

The amendments and new section are proposed under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The amendments and new section implement HRC §42.042.

§746.3401. Must my child-care center have an annual sanitation inspection?

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

(c) If an inspection is not available from a local sanitation official, you must:

(1) Obtain documentation from a [~~state or~~] local sanitation official or county judge stating that an inspection is not available; and

(2) (No change.)

§746.3405. Do I have to make corrections called for in the report?

Yes [~~If required~~], you must comply with corrections, restrictions, or conditions specified by the inspector in the sanitation report, letter, or checklist.

§746.3415. When must employees wash their hands?

Employees must wash their hands:

(1) - (10) (No change.)

(11) After eating, drinking, or smoking; [~~and~~]

(12) After using any cleaners or toxic chemicals; and[~~.~~]

(13) After removing gloves.

§746.3419. How must children and employees wash their hands?

Children 18 months of age and older and employees must wash their hands with soap and running water. [~~Pre-moistened towelettes or wipes and waterless hand cleaners are not a substitute for soap and water.~~]

§746.3420. May I use hand sanitizer as a substitute for washing hands?

You may use hand sanitizers as a substitute for washing hands under the following conditions:

(1) You do not use hand sanitizers to wash hands that are visibly dirty or greasy or have chemicals on them, unless you are away from the classroom and soap and water are not available for hand washing;

(2) You only use hand sanitizers on children 24 months and older;

(3) You store hand sanitizers out of the reach of children when not in use;

(4) You follow the labeling instructions for the appropriate amount to be used and for how long the hand sanitizer needs to remain on the skin surface to be effective; and

(5) Children have adult supervision when using hand sanitizers.

§746.3421. How must I wash an infant's hands?

(a) (No change.)

(b) Use soap and running water as specified in this division when infants are old enough to be raised to the faucet and reach for the water and any other time that the caregiver has reason to believe

the infant [~~child~~] has come in contact with substances that could be harmful to the infant [~~child~~].

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40 TAC §746.3409, §746.3411

The repeals are proposed under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The repeals implement HRC §42.042.

§746.3409. What does Licensing mean when it refers to "sanitizing"?

§746.3411. What is a disinfecting solution?

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

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DIVISION 2. DIAPER CHANGING

40 TAC §746.3501, §746.3503

The amendments are proposed under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The amendments implement HRC §42.042.

§746.3501. What steps must caregivers follow for diaper changing?

Caregivers must:

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

(4) Only [~~Not~~] apply [~~powders,~~] creams, ointments, or lotions with [~~without~~] the parent's written permission. If the parent supplies these items, permission is implicit and you do not need to obtain permission for each use;

(5) Label [~~powders,~~] creams, ointments, or lotions with the individual child's name; and

(6) Keep all diaper-changing supplies out of the reach of children [~~children's reach~~].

§746.3503. What equipment must I have for diaper changing?

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

(c) To prevent a child from falling, a diaper-changing surface that is above the floor level:

(1) Must have a safety mechanism (such as [~~safety straps or~~] raised sides) that is used at all times when the child is on the surface; or

(2) The caregiver's hand must remain on the child or the caregiver must be facing the child at all times when the child is on the surface.

(d) (No change.)

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DIVISION 3. ILLNESS AND INJURY

40 TAC §§746.3601, 746.3606, 746.3607

The amendments and new section are proposed under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The amendments and new section implement HRC §42.042.

§746.3601. What type of illness would prohibit a child from attending the child-care center [~~being admitted for care~~]?

Unless you are licensed to provide get-well care, you must not allow an ill child to attend your child-care center [~~admit an ill child for care~~] if one or more of the following exists:

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

(3) The child has one of the following[,] (unless a medical evaluation by a health-care professional indicates that you can include the child in the child-care center's activities):

(A) An oral [~~Oral~~] temperature above 101 degrees that is [~~and~~] accompanied by behavior changes or other signs or symptoms of illness;

(B) A tympanic (ear) temperature above 100 degrees that is accompanied by behavior changes or other signs or symptoms of illness. Tympanic thermometers are not recommended for children under six months old; [~~Rectal temperature above 102 degrees and accompanied by behavior changes or other signs or symptoms of illness;~~]

(C) An axillary (armpit) [~~Armpit~~] temperature above 100 degrees that is [~~and~~] accompanied by behavior changes or other signs or symptoms of illness; or

(D) (No change.)

(4) (No change.)

§746.3606. When may an ill child return to my child-care center?

An ill child may return to your child-care center when:

(1) The child is free of symptoms of illness for 24 hours; or

(2) You have obtained a health-care professional's statement that the child no longer has an excludable disease or condition.

§746.3607. How should caregivers respond to critical illness or injury?

For a [~~If~~] critical illness or injury that requires immediate attention of a health-care professional [~~physician~~], you must:

(1) Contact emergency medical services (or take the child to the nearest emergency room after you have ensured the supervision of other children in the group);

(2) (No change.)

(3) Contact the child's parent;

(4) Contact the physician identified in the child's record; and

[~~(3) Contact the physician identified in the child's record;~~]

[~~(4) Contact the child's parent; and~~]

(5) (No change.)

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SUBCHAPTER S. SAFETY PRACTICES
DIVISION 1. SAFETY PRECAUTIONS

40 TAC §§746.3701, 746.3703, 746.3707, 746.3709

The amendments are proposed under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The amendments implement HRC §42.042.

§746.3701. What safety precautions must I take to protect children in my child-care center?

All areas accessible to a child must be free from hazards including, but not limited to, the following:

(1) - (6) (No change.)

(7) All storage chests, boxes, trunks, or similar items with hinged lids must be equipped with a lid support designed to hold the lid open in any position, be equipped with ventilation holes, and must not have a latch that might close and trap a child inside; [~~and~~]

(8) All bodies of water such as pools, hot tubs, ponds, creeks, birdbaths, fountains, buckets, and rain barrels must be inaccessible to all children; and[~~.~~]

(9) All televisions must be anchored, so they cannot tip over. A television may be anchored to a rolling cart, as long as it is anchored in a way that the cart will not tip over.

§746.3703. How can I ensure the safety of the children from other persons?

(a) - (c) (No change.)

(d) People must not smoke or use tobacco products, e-cigarettes, or any type of vaporizers at your [~~the~~] child-care center, on the premises, on the playground, in transportation vehicles, or during field trips.

§746.3707. Are firearms or other weapons allowed at my child-care center?

(a) Peace officers as listed in §2.12 of the Code of Criminal Procedure and security officers commissioned by the Texas Private Security Board [~~Law enforcement officials~~] who are trained and certified to carry a firearm on duty may have firearms and [~~or~~] ammunition on the premises of your [~~the~~] child-care center.

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

§746.3709. May I have [~~other~~] toys or other types of equipment that explode [~~explodes~~] or shoot [~~shoots~~] things?

No. Toys that explode or that shoot things, such as caps, BB guns, darts, or fireworks, are prohibited as toys at the child-care center and on field trips [~~for children in both residential and non-residential locations~~]. Toys that explode or shoot things kept on the premises of a child-care center located in your home must remain in a locked cabinet inaccessible to any child during all hours of operation.

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DIVISION 2. MEDICATIONS AND MEDICAL ASSISTANCE

40 TAC §746.3801

The amendment is proposed under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The amendment implements HRC §42.042.

§746.3801. What does "medication" refer to in this division?

In this division, medication means:

(1) (No change.)

(2) A non-prescription medication, excluding topical ointments such as diaper ointment, insect repellant, or sunscreen that has been provided by the parent.

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DIVISION 3. ANIMALS AT THE CHILD-CARE CENTER

40 TAC §746.3901

The amendment is proposed under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The amendment implements HRC §42.042.

§746.3901. What steps must I take to have animals at my child-care center and/or on field trips?

If you choose to have animals on the premises of your child-care center and/or on field trips, you must:

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

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SUBCHAPTER T. PHYSICAL FACILITIES DIVISION 1. INDOOR SPACE REQUIREMENTS

40 TAC §746.4207, §746.4213

The amendments are proposed under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The amendment implements HRC §42.042.

§746.4207. Do these indoor activity space requirements apply to my child-care center if it was licensed before September 1, 2003?

(a) Yes, the only exemption is for child-care [~~Indoor activity space requirements for child-care centers licensed before September 1, 2003, vary based on the following:~~]

[~~(1) Child-care centers licensed as a day-care center before August 31, 1997, must have at least 30 square feet of indoor activity space, for each child you are licensed to serve. Children under 18 months of age must be cared for in rooms and outdoor activity space areas separate from older children unless there are 12 or fewer children in the child-care center.~~]

[~~(2) Child-care centers licensed as a day-care center between August 31, 1997, and September 1, 2003, must have at least 30 square feet of indoor activity space. Each child under 18 months of age must have 30 square feet of indoor activity space in the area in which you provide care. You must care for children under 18 months of age in rooms and outdoor activity space areas separate from older children unless there are 12 or fewer children in the child-care center.~~]

[~~(3)~~] [~~Child-care~~] centers licensed as kindergarten and nursery schools, or schools: grades kindergarten and above, before September 1, 2003. These centers[;] must have at least 20 square feet

of indoor activity space for each child the center is [you are] licensed to serve.

[(4) Child-care centers licensed as a drop-in child-care center or group day-care home before September 1, 2003, must have at least 30 square feet of indoor activity space for each child you are licensed to serve.]

(b) The exemption [exemptions] specified in subsection (a) of this section remains [remain] in effect until a permit issued prior to September 1, 2003, is no longer valid.

§746.4213. How does Licensing determine the indoor activity space?

(a) We determine indoor activity space by:

(1) (No change.)

(2) Rounding all measurements up to the nearest inch; and

(3) Excluding single-use areas, which are areas not routinely used for children's activities, such as a bathroom, hallway, storage room, cooking area of a kitchen, swimming pool, and storage building[. See §746.105(43) of this title (relating to What do certain words and terms mean when used in this chapter?) for more information on single-use areas]; and

(4) (No change.)

(b) (No change.)

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

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DIVISION 4. FURNITURE AND EQUIPMENT

40 TAC §§746.4501, 746.4503, 746.4507

The amendments are proposed under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The amendments implement HRC §42.042.

§746.4501. What type of tables and chairs must I use for [the] children?

(a) Tables and chairs that you use for [the] children must be safe, easy to clean, and of a height and size appropriate for each age group in care.

(b) If the manufacturer requires safety straps on a chair, then the safety straps must be fastened whenever a child is using the chair.

§746.4503. Must I provide a cot or mat for each child to sleep or rest on?

(a) Yes. You must provide or have the parent provide an [the following]:

[(1) An individual crib meeting requirements specified in Subchapter H of this chapter (relating to Basic Care Requirements for Infants) for each non-walking child younger than 18 months to sleep or rest in;]

[(2)] [An] individual cot, bed, or mat that is waterproof or washable for each walking child through four years to sleep or rest on.[; and]

[(3) Individual arrangements for sleep or rest for children five years and older who are in care for more than five hours per day, or whose individual care needs require a nap or rest time.]

(b) Cots, beds, or mats must be labeled with the child's name. As an alternative, you may label [Labeling] cots, beds, or mats with a number and have a number/child [related to a number] assignment map available [may be used] as an alternative.

(c) (No change.)

§746.4507. Must I have a telephone at my child-care center?

[(a)] Yes. You must have:

(1) A telephone at your child-care center with a listed telephone number; or

(2) Access to a telephone located in the same building for use in an emergency and where a person is available to:

(A) Receive incoming calls to the child-care center;

(B) Immediately transmit messages regarding children in care to child-care center caregivers; and

(C) Make outgoing calls for the child-care center as necessary.

[(b) The telephone must not be a coin-operated pay phone.]

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SUBCHAPTER U. INDOOR AND OUTDOOR ACTIVE PLAY SPACE AND EQUIPMENT

DIVISION 1. MINIMUM SAFETY REQUIREMENTS

40 TAC §§746.4601, 746.4607, 746.4609

The amendments and new section are proposed under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation

and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The amendments and new section implement HRC §42.042.

§746.4601. What minimum safety requirements must my active play equipment meet?

Indoor and outdoor active play equipment used both at and away from the child-care center must be safe for the children as follows:

(1) (No change.)

(2) The design, scale, and location of the equipment must be used according to the manufacturer's instructions [~~appropriate for the body size and ability of the children using the equipment~~];

(3) - (11) (No change.)

§746.4607. What is the maximum height of the highest designated play surface allowed?

The maximum height allowed for the highest designated play surface on active play equipment is as follows:

(1) The height that is consistent with the manufacturer's guidelines and the ASTM International standards; or

(2) For equipment designed to be used by children:
Figure: 40 TAC §746.4607(2)

§746.4609. Do the height requirements apply to my child-care center if it was licensed before December 1, 2010?

(a) If you were licensed [~~after September 1, 2003, and~~] before December 1, 2010, [~~and unless you meet one of the conditions specified in subsection (b) of this section~~] the maximum height of active play equipment allowed is:

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

(b) If your [~~A child-care center licensed before December 1, 2010, must comply with the equipment height requirements specified in this division if the~~] center re-designs the existing playground or adds new playground equipment, then you[~~. The permit holder~~] must meet equipment height requirements specified in this division as the changes are made. You must submit a written plan for compliance to us upon request.

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

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40 TAC §746.4607

The repeal is proposed under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The repeal implements HRC §42.042.

§746.4607. What is the maximum height of the highest designated play surface allowed?

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

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DIVISION 5. SURFACING

40 TAC §746.4907

The amendment is proposed under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The amendment implements HRC §42.042.

§746.4907. How should outdoor loose-fill surfacing materials be installed?

(a) You [~~Subject to the requirements in subsection (f) of this section, you~~] must install and maintain loose-fill surfacing materials to a depth of:

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

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

[~~(f) If you were licensed before December 1, 2010, you only have to maintain at least six inches of loose-fill surfacing materials until December 1, 2015, after which date you must comply with subsection (a)(2) of this section when the height of the highest designated play surface is greater than five feet.~~]

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

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DIVISION 7. INFLATABLES

40 TAC §746.4971

The amendment is proposed under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The amendment implements HRC §42.042.

§746.4971. May I use inflatable active play equipment?

You [~~Yes, you~~] may use inflatable equipment both at and away from your child-care center if you follow these guidelines [~~as long as it meets the following~~]:

(1) You use enclosed [~~Enclosed~~] inflatables (such as bounce houses or moon bounces) according to the manufacturer's instructions [~~are used by one child at a time~~];

(2) You use open [~~Open~~] inflatables (such as obstacle courses, slides, or games) [~~are used~~] according to the manufacturer's label and instructions for the user; and

(3) Inflatables that include water activity also comply with all applicable requirements in Subchapter V of this chapter (relating to Swimming Pools, [~~and~~] Wading/Splashing Pools, and Sprinkler Play).

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

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SUBCHAPTER V. SWIMMING POOLS AND WADING/SPLASHING POOLS

40 TAC §746.5009

The repeal is proposed under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The repeal implements HRC §42.042.

§746.5009. Does having a fence relieve me of the duty to supervise children's access to the pool?

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

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SUBCHAPTER V. SWIMMING POOLS AND WADING/SPLASHING POOLS, AND SPRINKLER PLAY

40 TAC §746.5015

The amendment is proposed under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The amendment implements HRC §42.042.

§746.5015. Are there specific safety requirements for sprinkler play?

(a) You must ensure that no child uses sprinkler equipment on or near a hard, slippery surface, such as a concrete driveway, sidewalk, or patio.

(b) You must not leave a child alone with the sprinkler equipment.

(c) You must store sprinkler equipment and water hoses out of the reach of children [~~children's reach~~] when not in use.

(d) You must maintain your splash pad/sprinkler play area according to manufacturer's instructions.

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

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SUBCHAPTER W. FIRE SAFETY AND EMERGENCY PRACTICES

DIVISION 1. FIRE INSPECTION

40 TAC §746.5105

The amendment is proposed under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The amendment implements HRC §42.042.

§746.5105. Must I make all corrections specified in the fire-inspection report?

Yes, [~~if required,~~] you must comply with all corrections, restrictions, or conditions specified by the inspector in the fire inspection report, letter, or checklist.

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

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DIVISION 3. FIRE EXTINGUISHING AND SMOKE DETECTION SYSTEMS

40 TAC §746.5305

The amendment is proposed under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The amendment implements HRC §42.042.

§746.5305. Where must I mount fire extinguishers?

You must mount the fire extinguisher on the wall by a hanger or bracket. The top of the extinguisher must be no higher than five feet above the floor and the bottom at least four inches above the floor or any other surface. If the state or local fire marshal or the manufacturer's instructions has different mounting instructions, you must [~~may~~] follow those instructions. The fire extinguisher must be readily available for immediate use by employees and caregivers.

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

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SUBCHAPTER X. TRANSPORTATION

40 TAC §746.5607, §746.5621

The amendments are proposed under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The amendments implement HRC §42.042.

§746.5607. What child passenger safety seat [~~restraint~~] system must I use when I transport children?

(a) You must use a child passenger safety seat system to restrain a child when transporting the child. The restraint system must meet the federal standards for crash-tested systems as set by the National Highway Traffic Safety Administration and must be properly secured in the vehicle according to manufacturer's instructions.

(b) [~~(a)~~] You must secure each child in an infant only rear-facing child safety seat, rear-facing convertible child safety seat, forward-facing child safety seat, child booster seat, safety vest, harness, or a safety belt, as appropriate to the child's age, height, and weight according to manufacturer's instructions for all vehicles specified in subsection (d) of this section, unless otherwise noted in this subchapter.

[~~(b) All child passenger safety restraint systems must meet federal standards for crash-tested restraint systems as set by the National Highway Traffic Safety Administration, and must be properly secured in the vehicle according to manufacturer's instructions.~~]

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

§746.5621. Must I have a communications device in the vehicle?

You must have one of the following:

(1) A communications device such as a cellular phone[~~, message pager,~~] or two-way radio; or

(2) (No change.)

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

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PART 20. TEXAS WORKFORCE COMMISSION

CHAPTER 804. JOBS AND EDUCATION FOR TEXANS (JET) GRANT PROGRAM

The Texas Workforce Commission (Agency) proposes amendments to §§804.1, 804.11 - 804.13, 804.21 - 804.25, and 804.41 and proposes repeal of §804.14 regarding Jobs and Education for Texans (JET) Grant Program.

CHAPTER 804. JOBS AND EDUCATION FOR TEXANS (JET) GRANT PROGRAM

Subchapter A. Definitions, §804.1

Subchapter B. Advisory Board Composition, Meeting Guidelines, §§804.11 - 804.13

Subchapter C. Grant Program, §§804.21 - 804.25

Subchapter D. Grants to Educational Institutions for Career and Technical Education Programs, §804.41

The Commission proposes the repeal of the following section of Chapter 804, relating to the Jobs and Education for Texans (JET) Grant Program, as follows:

Subchapter B. Advisory Board Composition, Meeting Guidelines, §804.14

PART I. PURPOSE, BACKGROUND, AND AUTHORITY

PART II. EXPLANATION OF INDIVIDUAL PROVISIONS

PART III. IMPACT STATEMENTS

PART IV. COORDINATION ACTIVITIES

PART I. PURPOSE, BACKGROUND, AND AUTHORITY

The purpose of the Chapter 804 rules is to comply with the requirements of House Bill (HB) 3062, enacted by the 84th Texas Legislature, Regular Session (2015), which transferred the administration of the Jobs and Education for Texans (JET) Grant Program from the Texas Comptroller of Public Accounts (Comptroller) to the Texas Workforce Commission (Agency) effective September 1, 2015. Per §8(a)(2) of HB 3062, the Comptroller's rules were transferred to the Agency and have been placed in 40 Texas Administrative Code, Chapter 804.

HB 3062 changed the makeup of the JET advisory board by removing a member of the public designated by the Comptroller and by designating the Chairman of the Agency's three-member Commission as presiding officer of the advisory board. The bill's primary purpose was to include independent school districts (ISDs) as eligible grantees.

PART II. EXPLANATION OF INDIVIDUAL PROVISIONS

SUBCHAPTER A. DEFINITIONS

The Commission proposes the following amendments to Subchapter A:

§804.1. Definitions

Section 804.1(1) defines "Act." Based on a review of the JET rules transferred from the Comptroller, the Agency updates "Act" to properly reference HB 3062.

The previous §804.1(5) definition of "Comptroller" has been removed, as it is no longer applicable to this chapter.

New §804.1(5) defines "Developmental education." Based on a review of the JET rules transferred from the Comptroller, the Agency retains this definition and renumbers accordingly.

New §804.1(6) defines "Emerging industry." Based on a review of the JET rules transferred from the Comptroller, the Agency retains this definition and renumbers accordingly.

New §804.1(7) defines "High-demand occupation." Based on a review of the JET rules transferred from the Comptroller, the Agency retains this definition and renumbers accordingly, with slight modifications. The Agency proposes to amend this definition to state that the Agency may use specific factors to determine whether there is a substantial need for a particular profession, trade, or skill in occupations identified by the 28 Local Workforce Development Boards (Boards), i.e., Board-Area Target Occupations Lists and/or the Agency's labor market projections.

New §804.1(8) adds a new definition for "ISD" as an independent school district, per HB 3062, and is renumbered accordingly.

The definition in §804.1(9) of "in-kind contribution" is removed, as it no longer applies to this chapter.

New §804.1(9) retains the definition for "JET" and is renumbered accordingly.

New §804.1(10) defines "Notice of Availability or NOA." Based on a review of the JET rules transferred from the Comptroller, the Agency retains this definition, updating it to replace "Comptroller" with "Agency" pursuant to HB 3062, and renumbers accordingly.

New §804.1(11) defines "Public junior college." Based on a review of the JET rules transferred from the Comptroller, the Agency retains this definition, with a minor addition of the word "Texas" in reference to the "Education Code," and renumbers accordingly.

New §804.1(12) defines "Public technical institute." Based on a review of the JET rules transferred from the Comptroller, the Agency retains this definition, with a minor addition of the word "Texas" in reference to the "Education Code," and renumbers accordingly.

SUBCHAPTER B. ADVISORY BOARD COMPOSITION, MEETING GUIDELINES

The Commission proposes the following amendments to Subchapter B:

§804.11. Advisory Board Purpose and Composition

Section 804.11(a) establishes the purpose of the advisory board. The Agency proposes to amend §804.11(a) to remove references to "Comptroller" and replace with "Agency."

Previous §804.11(b) designates the presiding officer of the JET advisory board as the Comptroller. The Agency proposes to replace with new §804.11(b)(1) - (6), adding the composition of the advisory board and modifying this section to reflect statutory language by replacing "Comptroller" with "Commission chair," consistent with HB 3062.

§804.12. Meetings Required

Section 804.12(a) explains that the advisory board is required to meet at least once each quarter to review received applications and recommend awarding grants to public junior colleges and public technical institutes. The Agency proposes to amend this subsection to reflect the changes enacted by HB 3062, including allowing the advisory board to meet "as needed," and adding ISDs as eligible grantees.

§804.13. General Advisory Board Responsibilities

Section 804.13 states that the advisory board is responsible for providing advice and recommendations to the Comptroller. The Agency proposes amendments to reflect changes in statutory language, including changing "Comptroller" to "Agency" in §804.13 and §804.13(2) and adding ISDs to §804.13(1).

§804.14. General Comptroller Responsibilities to the Advisory Board

Section 804.14 is repealed because its provisions are duplicated in §804.11(b) and it now serves no substantive purpose.

SUBCHAPTER C. GRANT PROGRAM

The Commission proposes the following amendments to Subchapter C:

§804.21. General Statement of Purpose

Section 804.21 sets forth the purpose for the JET program as awarding grants from the JET fund for the development of career and technical education programs at public junior colleges and public technical institutes that meet the requirements of Texas Education Code §134.006. The Agency proposes to amend Section 804.21 to add ISDs as eligible grantees and to include §134.007 of the Texas Education Code pertaining to ISDs in alignment with the statutory language in HB 3062.

§804.22. Notice of Grant Availability and Application

Section 804.22 of the rules transferred from the Comptroller contains an outdated reference to the "Comptroller." The Agency proposes to replace "Comptroller" with "Agency" to comply with §302.002 of the Texas Labor Code.

§804.23. Grant Award and Acceptance

Section 804.23 of the rules transferred from the Comptroller contains an outdated reference to the "Comptroller." The Agency proposes to replace "Comptroller" with "Agency" to comply with §302.002 of the Texas Labor Code.

§804.24. Reporting Requirements

Section 804.24 of the rules transferred from the Comptroller provides that a public junior college and public technical institute receiving a grant under this chapter must comply with all reporting requirements of the contract in a frequency and format determined by the Comptroller in order to maintain eligibility for grant payments. Failure to comply with the reporting requirements may result in termination of the grant award and the entity being ineligible for future grants under this chapter. The Agency proposes to amend §804.24 to add ISDs to the list of eligible grantees and to reference "Agency" instead of "Comptroller."

§804.25. Enforcement

Section 804.25(a) of the rules transferred from the Comptroller sets forth the requirement that grant funds must be used in compliance with the terms of the contract for the purposes designated in the contract or they will be subject to refund by the grantee, disqualification from receiving further funds under this chapter, or any other available legal remedies. If deemed appropriate, the grantee may also be referred to another department or agency including, but not limited to, the Attorney General's Office, the Comptroller's Criminal Investigation Division, or the Comptroller's Internal Audit Department. The Agency proposes to amend §804.25(a) to remove outdated references to "Comptroller" divisions and departments, and to reflect the Agency's oversight staff, including the State Auditor's Office and the Agency's Office of Investigations to align with the statutory language provided in HB 3062.

Section 804.25(b) of the rules transferred from the Comptroller states that the Comptroller or its designee may audit the use of funds. The Agency proposes to replace "Comptroller or the comptroller's designee" with "Agency" to comply with §302.002 of the Texas Labor Code.

SUBCHAPTER D. GRANTS TO EDUCATIONAL INSTITUTIONS FOR CAREER AND TECHNICAL EDUCATION PROGRAMS

The Commission proposes the following amendments to Subchapter D:

§804.41. Grants for Career and Technical Education Programs

Section 804.41(a) of the rules transferred from the Comptroller sets forth the guidelines for JET grants awarded to public junior colleges and public technical institutes for the development of career and technical education programs that meet the requirements of Texas Education Code §134.006 and Texas Government Code §403.356. The Agency proposes to add ISDs to the list of eligible grantees and to include a cross-reference to Texas Education Code §134.007 pertaining to ISDs to align with the statutory language in HB 3062.

Section 804.41(c) of the rules transferred from the Comptroller states that in awarding a grant under this subchapter, the Comptroller shall primarily consider the potential economic returns to the state from the development of the career and technical education course or program. The Comptroller may also consider whether the course or program:

(1) is part of a new, emerging industry or high-demand occupation;

(2) offers new or expanded dual credit career and technical educational opportunities in public high schools; or

(3) is provided in cooperation with other public junior colleges or public technical institutes across existing service areas.

The Agency proposes to amend this subsection by replacing references to "Comptroller" with "Agency."

Section 804.41(d) of the rules transferred from the Comptroller states that a grant recipient shall provide the matching funds as identified in its application.

(1) Matching funds may be obtained from any source available to the college, including industry consortia, community or foundation grants, individual contributions, and local governmental agency operating funds.

(2) A grant recipient's matching share may consist of one or more of the following contributions:

(A) cash;

(B) equipment, equipment use, materials, or supplies;

(C) personnel or curriculum development cost; and/or

(D) administrative costs that are directly attributable to the project.

(3) The matching funds must be expended on the same project for which the grant funds are provided and valued in a manner acceptable or as determined by the comptroller.

The Agency proposes to amend this section to align with the statutory language provided in HB 3062 by removing "in-kind contributions or equipment use" from the list of allowable matching contributions, relettering this section, and replacing references to "Comptroller" with "Agency."

PART III. IMPACT STATEMENTS

Randy Townsend, Chief Financial Officer, has determined that for each year of the first five years the rules will be in effect, the following statements will apply:

There are no additional estimated costs to the state and to local governments expected as a result of enforcing or administering the rules.

There are no estimated cost reductions to the state and to local governments as a result of enforcing or administering the rules.

There are no estimated losses or increases in revenue to the state or to local governments as a result of enforcing or administering the rules.

There are no foreseeable implications relating to costs or revenue of the state or local governments as a result of enforcing or administering the rules.

There are no anticipated economic costs to persons required to comply with the rules.

There is no anticipated adverse economic impact on small or microbusinesses as a result of enforcing or administering the rules.

Economic Impact Statement and Regulatory Flexibility Analysis

The Agency has determined that the proposed rules will not have an adverse economic impact on small businesses as these proposed rules place no requirements on small businesses.

Doyle Fuchs, Director of Labor Market and Career Information, has determined that there is no significant negative impact upon employment conditions in the state as a result of the rules.

Reagan Miller, Director, Workforce Development Division, has determined that for each year of the first five years the rules are in effect, the public benefit anticipated as a result of enforcing the proposed rules will be to ensure that public junior colleges, public technical institutes, and ISDs that meet the requirements of Texas Education Code §134.006 and §134.007 have opportunities through the JET grant program to develop new career and technical education programs or to enhance existing career and technical education programs.

The Agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the Agency's legal authority to adopt.

PART IV. COORDINATION ACTIVITIES

In the development of these rules for publication and public comment, the Commission sought the involvement of Texas' 28 Boards. The Commission provided the policy concept regarding these rule amendments to the Boards for consideration and review on May 31, 2016. The Commission also conducted a conference call with Board executive directors and Board staff on June 10, 2016, to discuss the policy concept. During the rulemaking process, the Commission considered all information gathered in order to develop rules that provide clear and concise direction to all parties involved.

Comments on the proposed rules may be submitted to TWC Policy Comments, Workforce Policy and Service Delivery, attn: Workforce Editing, 101 East 15th Street, Room 440T, Austin, Texas 78778; faxed to (512) 475-3577; or e-mailed to TWCPolicyComments@twc.state.tx.us. Comments must be received or postmarked no later than 30 days from the date this proposal is published in the *Texas Register.*

SUBCHAPTER A. DEFINITIONS

40 TAC §804.1

The rule is proposed under Texas Labor Code §301.0015 and §302.002(d), which provide the Texas Workforce Commission with the authority to adopt, amend, or repeal such rules as it deems necessary for the effective administration of Agency services and activities.

The proposed rule affects Title 4, Texas Labor Code, particularly Chapters 301 and 302.

§804.1. Definitions.

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

(1) Act--Relating to the Jobs and Education for Texans Grant Program in Texas Education Code, Chapter 134 [~~This term has the meaning given in Education Code, Chapter 134, as adopted by House Bill 3, 81st Legislature, 2009, and House Bill 437, 83rd Legislature, 2013~~].

(2) Advisory board--The advisory board of education and workforce stakeholders created pursuant to the Act.

(3) Career and technical education--Organized educational activities that offer a sequence of courses that:

(A) provides individuals with coherent and rigorous content aligned with challenging academic standards and relevant technical knowledge and skills needed to prepare for further education and careers in high-demand occupations or emerging industries;

(B) includes competency-based applied learning that contributes to the academic knowledge, problem-solving skills, work attitudes, general employability skills, technical skills, and occupation-specific skills, and knowledge of all aspects of an industry, including entrepreneurship, of an individual; or

(C) provides a license, a certificate, or a postsecondary degree.

(4) Certificate or degree completion--Any grouping of workforce or technical courses in sequential order that, when satisfactorily completed by a student, will entitle the student to a Texas Higher Education Coordinating Board (Coordinating Board)--approved

[(THECB)] certificate or associate degree from a public technical institute or public junior college.

[(5) Comptroller--The Comptroller of Public Accounts.]

(5) [(6)] Developmental education--Structured courses, tutorials, laboratories, or other proven instructional efforts that successfully prepare students for college level (and therefore work-ready) courses as measured by passing the state-required college entrance exam (or meeting the Texas Success Initiative requirements).

(6) [(7)] Emerging industry--A growing, evolving or developing industry based on new technological products or concepts.

(7) [(8)] High-demand occupation--A job, profession, skill, or trade for which employers within the State of Texas generally, or within particular regions or cities of the state, have or will have a substantial need. In determining whether there is or will be a substantial need for a particular job, profession, trade, or skill, the Agency [comptroller] may consider occupations identified by the 28 Local Workforce Development Boards (Board-Area Target Occupations Lists) and/or the Agency's labor market projections. [:]

[(A) the Texas Workforce Commission's list of high-demand occupations and/or its labor market projections;]

[(B) whether the occupation has been targeted for Workforce Investment Act (WIA) training as a result of employer or community input; or]

[(C) research, projections, or workforce data that are compiled by the comptroller or derived from one of the following sources:]

[(i) the Texas Workforce Commission;]

[(ii) the United States Department of Labor; or]

[(iii) another source, such as a letter from employers, which provides evidence that a particular job, profession, skill, or trade will provide potential economic benefits to the state or a local or regional area within the state.]

[(9) In-kind contribution--A cash value placed on a non-monetary contribution or investment.]

(8) ISD--Independent school district.

(9) [(10)] JET--The Jobs and Education for Texans Grant Program.

(10) [(11)] Notice of Availability or NOA--The notice of availability that is published by the Agency [comptroller] pursuant to §804.22 [§8.22] of this title (relating to Notice of Grant Availability and Application).

(11) [(12)] Public junior college--Any junior college certified by the Texas Higher Education Coordinating Board (Coordinating Board) [(THECB)] in accordance with Texas Education Code[,] §61.003.

(12) [(13)] Public technical institute--The Lamar Institute of Technology or the Texas State Technical College System, as in accordance with Texas Education Code[,] §61.003.

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 August 24, 2016.

TRD-201604367

Patricia Gonzalez
Deputy Director, Workforce Development
Texas Workforce Commission
Earliest possible date of adoption: October 9, 2016
For further information, please call: (512) 475-0829

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SUBCHAPTER B. ADVISORY BOARD COMPOSITION, MEETING GUIDELINES

40 TAC §§804.11 - 804.13

The rules are proposed under Texas Labor Code §301.0015 and §302.002(d), which provide the Texas Workforce Commission with the authority to adopt, amend, or repeal such rules as it deems necessary for the effective administration of Agency services and activities.

The proposed rules affect Title 4, Texas Labor Code, particularly Chapters 301 and 302.

§804.11. Advisory Board Purpose and Composition.

(a) The advisory board shall assist the Agency [comptroller] in administering JET [the Jobs and Education for Texans (JET) Grant Program].

[(b) The comptroller is the presiding officer of the board.]

(b) The advisory board is composed of six members who serve two-year terms, and are appointed as follows:

(1) one member appointed by the governor;

(2) one member appointed by the lieutenant governor;

(3) one member appointed by the speaker of the house of representatives;

(4) one member appointed by the Coordinating Board;

(5) one member appointed by the Commission; and

(6) the Commission chair, who serves as the presiding officer.

§804.12. Meetings Required.

(a) The advisory board is required to meet at least once each quarter, or as needed, to review received applications and recommend awarding grants under this chapter to public junior colleges, public technical institutes, and ISDs [to public junior colleges and public technical institutes].

[(b) Meetings may be called at the request of the board's presiding officer.]

(b) [(c)] Meetings shall be subject to the requirements of the Open Meetings Act.

§804.13. General Advisory Board Responsibilities.

The advisory board shall provide advice and recommendations to the Agency [comptroller] on:

(1) the manner in which public junior colleges, [and] public technical institutes, and ISDs apply for JET [Jobs and Education for Texans (JET) Grant Program] grants; and

(2) the JET grants to be awarded by the Agency [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.

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40 TAC §804.14

The rule is repealed under Texas Labor Code §301.0015 and §302.002(d), which provide the Texas Workforce Commission with the authority to adopt, amend, or repeal such rules as it deems necessary for the effective administration of Agency services and activities.

The proposed repeal affects Title 4, Texas Labor Code, particularly Chapters 301 and 302.

§804.14. General Comptroller Responsibilities to the Advisory Board.

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

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SUBCHAPTER C. GRANT PROGRAM

40 TAC §§804.21 - 804.25

The rules are proposed under Texas Labor Code §301.0015 and §302.002(d), which provide the Texas Workforce Commission with the authority to adopt, amend, or repeal such rules as it deems necessary for the effective administration of Agency services and activities.

The proposed rules affect Title 4, Texas Labor Code, particularly Chapters 301 and 302.

§804.21. General Statement of Purpose.

In accordance with the Act, the Agency [~~comptroller~~] establishes JET, [~~the Jobs and Education for Texans (JET) Grant Program~~] which shall be administered pursuant to the Act and the rules in this chapter to award grants from the JET fund for the development of [~~new~~] career and technical education programs at public junior colleges, [~~and~~] public technical institutes, and ISDs that meet the requirements of Texas Education Code[~~,~~] §134.006 and §134.007.

§804.22. Notice of Grant Availability and Application.

(a) From time to time, the Agency [~~comptroller~~] may publish a Notice of Availability (NOA) of grant funds under this chapter. The notice shall be published in the *Texas Register* and on the Agency's website [~~comptroller's Web site~~]. In addition to the respective purpose for each grant program under this chapter, the notice may include:

(1) the total grant funds available for award;

(2) the minimum and maximum amount of grant funds available for each grant recipient;

(3) eligibility criteria;

(4) application requirements;

(5) grant award and evaluation criteria;

(6) any grant requirements in addition to those set forth in this chapter;

(7) the date by which the application must be submitted to the Agency [~~comptroller~~];

(8) the anticipated date of grant awards; and

(9) any other information or instructions necessary and appropriate for awarding the grant as determined by the Agency [~~comptroller~~].

(b) To be eligible for a grant award, an applicant meeting the eligibility criteria identified in the NOA shall submit an application in the form and manner as prescribed by the Agency [~~comptroller~~] in [~~the~~] NOA.

(c) The Agency [~~comptroller~~] may request additional information at any time prior to grant award in order to effectively evaluate any application.

§804.23. Grant Award and Acceptance.

(a) To award a grant, the Agency [~~comptroller~~] shall provide a grant contract to the grant recipient that shall contain all the terms and conditions for the use of the grant funds.

(b) To receive grant funds, an applicant must execute and return the contract to the Agency [~~comptroller's office~~].

§804.24. Reporting Requirements.

A public junior college, [~~or~~] public technical institute, or ISD receiving a grant under this chapter must comply with all reporting requirements of the contract in a frequency and format determined by the Agency [~~comptroller~~] in order to maintain eligibility for grant payments. Failure to comply with the reporting requirements may result in termination of the grant award and the entity being ineligible for future grants under this chapter.

§804.25. Enforcement.

(a) Grant funds must be used in compliance with the terms of the contract for the purposes designated in the contract or will be subject to refund by the grantee, disqualification from receiving further funds under this chapter, or any other available legal remedies. If deemed appropriate, the grantee may also be referred to another department or agency including, but not limited to, the State Auditor's Office and the Agency's Office of Investigations [~~the Attorney General's Office, the Comptroller's Criminal Investigation Division, or the Comptroller's Internal Audit Department~~].

(b) The Agency [~~comptroller or the comptroller's designee~~] may audit the use 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.

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Texas Workforce Commission
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SUBCHAPTER D. GRANTS TO EDUCATIONAL INSTITUTIONS FOR CAREER AND TECHNICAL EDUCATION PROGRAMS

40 TAC §804.41

The rule is proposed under Texas Labor Code §301.0015 and §302.002(d), which provide the Texas Workforce Commission with the authority to adopt, amend, or repeal such rules as it deems necessary for the effective administration of Agency services and activities.

The proposed rule affects Title 4, Texas Labor Code, particularly Chapters 301 and 302.

§804.41. Grants for Career and Technical Education Programs.

(a) This subchapter is applicable to [~~the Jobs and Education for Texans (~~]JET[~~) Grant Program~~] awards to public junior colleges, [~~and~~] public technical institutes, and ISDs for the development of career and technical education programs that meet the requirements of Texas Education Code[,] §134.006 and §134.007 and Texas Government Code[,] §403.356.

(b) A grant received under this subchapter may be used only:

(1) to support courses or programs that prepare students for career employment in occupations that are identified by local businesses [~~business~~] as being in high demand;

(2) to finance the initial costs of career and technical education courses or program development, including the costs of purchasing equipment, and other expenses associated with the development of an appropriate course; and

(3) to finance a career and technical education course or program that leads to a license, certificate, or postsecondary degree.

(c) In awarding a grant under this subchapter, the Agency [~~comptroller~~] shall primarily consider the potential economic returns to the state from the development of the career and technical education course or program. The Agency [~~comptroller~~] may also consider whether the course or program:

(1) is part of a new, emerging industry or high-demand occupation;

(2) offers new or expanded dual-credit career and technical educational opportunities in public high schools; or

(3) is provided in cooperation with other public junior colleges or public technical institutes across existing service areas.

(d) A grant recipient shall provide the matching funds as identified in its application.

(1) Matching funds may be obtained from any source available to the college, including [~~in-kind contributions,~~] industry consortia, community or foundation grants, individual contributions, and local governmental agency operating funds.

(2) A grant recipient's matching share may consist of one or more of the following contributions:

(A) cash;

[~~(B) in-kind contributions or equipment use;~~]

(B) [~~(C)~~] equipment, equipment use, materials, or supplies;

(C) [~~(D)~~] personnel or curriculum development cost; and/or

(D) [~~(E)~~] administrative costs that are directly attributable to the project.

(3) The matching funds must be expended on the same project for which the grant funds are provided and valued in a manner acceptable or as determined by the Agency [~~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.

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TITLE 43. TRANSPORTATION

PART 10. TEXAS DEPARTMENT OF MOTOR VEHICLES

CHAPTER 215. MOTOR VEHICLE DISTRIBUTION

The Texas Department of Motor Vehicles (department) proposes amendments to Chapter 215, Motor Vehicle Distribution, Subchapter A, General Provisions, §215.1 and §215.2; Subchapter B, Adjudicative Practice and Procedure, §§215.21 - 215.24, 215.27, 215.29, 215.30, 215.32, 215.34 - 215.49, 215.55, 215.56 and 215.58; Subchapter C, Licenses, Generally, §§215.81 - 215.85 and 215.87 - 215.89; Subchapter D, Franchised Dealers, Manufacturers, Distributors, and Converters, §§215.101, 215.103 - 215.106 and 215.108 - 215.119; Subchapter E, General Distinguishing Numbers, §§215.131 - 215.133, 215.135, 215.137 - 215.141 and 215.144 - 215.159; Subchapter F, Lessors and Lease Facilitators, §§215.171 and 215.173 - 215.181; Subchapter G, Warranty Performance Obligations, §§215.201 - 215.210; Subchapter H, Advertising, §§215.241 - 215.261 and 215.263 - 215.271; Subchapter I, Practice and Procedure for Hearings Conducted by the State Office of Administrative Hearings, §§215.301 - 215.303, 215.305 - 215.308, 215.310, 215.311 and 215.314 - 215.317; and Subchapter J, Administrative Sanctions, §§215.500 - 215.503. The department also proposes the repeals of Subchapter A, §§215.3 - 215.6; Subchapter B, §§215.25, 215.26, 215.28, 215.31, 215.33, 215.50 - 215.54 and 215.57; Subchapter C, §215.86; Subchapter D, §215.107; Subchapter E, §§215.136, 215.142 and 215.143; Subchapter F, §215.172; Subchapter H, §215.262; and Subchapter I, §§215.309, 215.312 and 215.313.

Additionally, the department proposes new §215.160, Duty to Identify Motor Vehicles Offered for Sale as Rebuilt, which outlines the requirements for sale of a repaired, rebuilt or reconstructed vehicle.

EXPLANATION OF PROPOSED AMENDMENTS, NEW SECTION, AND REPEALS

The department conducted a review of its rules under Chapter 215 in compliance with Government Code, §2001.039. Notice of the department's intention to review was published in the June 19, 2015, issue of the *Texas Register* (40 TexReg 4012).

As a result of the review, the department has determined that the reasons for initially adopting Subchapters A-J continue to exist but that certain amendments and repeals, as detailed in the following paragraphs, are necessary.

Amendments to Subchapter A, §215.1 and §215.2 are proposed to replace terminology with defined terms, delete definitions already defined by statute, revise existing terminology for consistency with other department rules, correct referenced citations, and to delete language that duplicates statute. The title of §215.1 is amended for consistency with other department rules. Additional amendments to §215.2 are proposed to delete definitions no longer needed and add and define the term "GDN." The department has determined that the reasons for initially adopting §§215.3 - 215.6 no longer exist and that they should be repealed. Section 215.3 should be repealed because it duplicates language already in statute. Sections 215.4 - 215.6, relating to opinions, should be repealed because those sections are contrary to Government Code, §2001.003(6) which defines a rule as "a state agency statement of general applicability that (i) implements, interprets, or prescribes law or policy, or (ii) describes the procedure or practice requirements of a state agency."

Amendments to Subchapter B, §§215.21 - 215.24, 215.27, 215.29, 215.30, 215.32, 215.34 - 215.49, 215.55, 215.56 and 215.58 are proposed to clarify the purpose of the subchapter, replace terminology with defined terms, correct referenced citations, revise existing terminology for consistency with other department rules, and to delete language contained in statute. An amendment to §215.22 is proposed to add that a violation of that section will be reported to the general counsel of the department in addition to the hearing officer. An additional amendment to §215.34 establishes the last known address of a license holder for purposes of giving notice as "mailing address provided to the department when the license holder applies or renews its license," or notifies the department of a change in address. The department further proposes to amend §215.37 to clarify that the costs of transcribing and preparing a record in a contested case hearing will be assessed to the party requesting the record. An additional amendment to §215.58 is proposed to authorize the director of the division to issue final orders in contested cases that are resolved by summary judgment or summary disposition. Additional amendments are proposed throughout Subchapter B to simplify and clarify language by removing any unnecessary statutory repetition. In addition, amendments are proposed to rename the titles of certain sections for consistency and accuracy. The department has further determined that §§215.25, 215.26, 215.28, 215.31, 215.33, 215.50 - 215.54 and 215.57 duplicate language already contained in statute and are no longer necessary. Therefore, the department proposes to repeal those sections.

Amendments to Subchapter C, §§215.81 - 215.85 and 215.87 - 215.89 are proposed to replace terminology with defined terms, revise existing terminology for consistency with other department rules, correct referenced citations, and to delete language contained in statute. Additional amendments are proposed throughout Subchapter C to replace "division" with "department" for clarification and consistency with current department practice. An amendment is proposed to §215.83 to implement legislative changes regarding "active duty." In addition, the department proposes to amend §215.83 by including the procedures for processing license applications that are currently set out under existing §215.86 because those procedures are more appropriately located under §215.83. Additional amendments to §215.83 are proposed to subdivide the rule to improve formatting and readability. Because the department proposes to incorporate, with amendments, the rule language under §215.86 with §215.83, the department proposes to repeal §215.86. Additional amendments are proposed throughout Subchapter C to rename certain section titles for consistency and accuracy with the language contained in those rules.

Amendments to Subchapter D, §§215.101, 215.103 - 215.106 and 215.108 - 215.119 are proposed to delete language contained in statute, correct referenced citations, replace terminology with defined terms, revise existing terminology for consistency with other department rules and current department practice. An amendment to §215.105 clarifies that the provisions of that section apply only to purchases and transfers involving physical relocation. Amendments to §215.112 are proposed to clarify that the provisions of that section are limited only to motor home shows that require department approval. Additional amendments are proposed throughout Subchapter D to replace "division" with "department" for clarification and consistency with current department practice. The department also proposes amendments throughout Subchapter D to subdivide and restructure the rules for formatting and improved readability. The department has further determined that §215.107 duplicates language contained in statute and therefore, proposes to repeal that section.

Amendments to Subchapter E, §§215.131 - 215.133, 215.135, 215.137 - 215.141 and 215.144 - 215.159 are proposed to replace terminology with defined terms, delete definitions already defined by statute or to add clarifying language to existing definitions, revise existing terminology for consistency with other department rules, correct referenced citations, and to delete language contained in statute. An additional amendment to §215.132 is proposed to add and define the terms "vehicle" and "VIN." An additional amendment to §215.133 includes the acceptance of concealed handgun license (license to carry a handgun) for identification purposes. An amendment to §215.135 specifies that a dealer may not commence business at any location until the department issues a license authorizing that location. Amendments were made to §215.137 to change the title to "Surety Bond" for consistency with statute and to clarify requirements. Amendments were made to §215.138 to clarify use of metal dealer's license plates. Additional amendments to §215.139 subdivide the rule for improved readability and replace existing textual language with graphics under amended subsections (c), (e) and (f)(1). Additional amendments are proposed throughout §215.140 to clarify that different requirements apply to retail dealers and wholesale motor vehicle dealers. Additional amendments to §215.141 clarify sanctions and add an additional sanctionable offense, effective January 1, 2017, for failure to disclose repaired, rebuilt, or reconstructed motor vehicles. An additional amendment to §215.144 is proposed to clarify that license holders are not required to maintain copies of

motor vehicle titles submitted electronically. Additional amendments to §215.145 clarify the requirements for dealer status changes. An additional amendment was made to §215.147 to include acceptance of concealed handgun license (license to carry a handgun) for identification. Additional amendments are proposed to renumber the appendices under §215.153, consistent with the proposed amendments renumbering that section. The department further proposes to repeal §§215.136, 215.142 and 215.143 because those sections are adequately addressed by statute and therefore, are no longer necessary.

An amendment to Subchapter F is proposed to rename the title of that subchapter for consistency with statutorily defined terms. Additional amendments are proposed throughout §§215.171 and 215.173 - 215.181 to delete definitions already defined by statute or to add clarifying language to existing definitions, revise existing terminology for consistency with other department rules, correct referenced citations, and to delete language contained in statute. Additional amendments are proposed throughout Subchapter F to renumber and subdivide certain sections for improved readability. Because the department proposes to delete the definitions under §215.172, the reasons for adopting that section no longer exist. Therefore, the department proposes to repeal §215.172.

Amendments to Subchapter G, §§215.201 - 215.210 are proposed to replace terminology with defined terms, revise existing terminology for consistency with other department rules, correct the referenced citations, and to delete language that is already contained in statute. In addition, the department proposes an amendment to §215.201 to rename the title of that section for consistency with other department rules.

Amendments to Subchapter H, §§215.241 - 215.261 and 215.263 - 215.271 are proposed to revise existing terminology for consistency with other department rules. Additional amendments are proposed to replace terminology with defined terms and to correct referenced citations. The department also proposes to amend §215.241 to replace "Board" with "department" for consistency with current department practice, and to replace "code" with "Occupations Code, Chapter 2301" for clarification. Amendments to §215.244 are proposed to add and define the terms "limited rebate" and "savings claim or discount" and clarify definitions for "Monroney label" and "rebate or cash back." Additional amendments to §215.246 clarify accuracy of Internet advertisements. Amendments are proposed to §215.248 to include Internet and online advertisements. An amendment to §215.249 provides clarification of Manufacturer's Suggested Retail Price (MSRP). Additional amendments to §215.250 are proposed to incorporate the provisions under existing §215.262 relating to savings claims and discount offers with §215.250 because those provisions are more appropriately located under that section. The department further proposes to amend and add additional graphics under proposed subsections (h) - (m) of §215.250. Because the department determined that the savings claims and discount offer provisions under §215.262 are more appropriately located under §215.250, the department proposes to repeal §215.262. In addition, amendments to §215.253 are proposed to add additional clarifying language regarding allowable use of trade-in amounts in advertisements.

Amendments to Subchapter I, §§215.301 - 215.303, 215.305 - 215.308, 215.310, 215.311 and 215.314 - 215.317 are proposed to replace terminology with defined terms and to correct referenced citations for consistency. Additional amendments are proposed throughout that subchapter to replace "matter" with "contested case" and "Board" with "department." An amendment to §215.307 is proposed to establish a license holder's last known address for purposes of giving notice as the "mailing address provided to the department when the license holder applies or renews its license," or notifies the department of a change in address. An additional amendment to §215.314 is proposed to authorize the director of the division to issue a cease and desist order prior to the commencement of a proceeding by the State Office of Administrative Hearings (SOAH). The cease and desist order may be issued without notice and opportunity for hearing if the provisions under Occupations Code, §2301.802(b) are met. An Administrative Law Judge shall hold a hearing to determine whether the interlocutory cease and desist order should remain in effect during the pendency of the proceeding. Additional amendments to §215.317 are proposed to clarify that a motion for rehearing and a reply to a motion for rehearing of an order issued by the board delegate must be decided by the board delegate. The department has also determined that §§215.309, 215.312 and 215.313 duplicate language contained in statute and that those sections should be repealed.

Amendments to Subchapter J, §§215.500 - 215.503 are proposed to replace terminology with statutorily defined terms and to correct referenced citations. Additional amendments to subdivide certain sections of that subchapter are proposed for improved formatting. An amendment to §215.500 is proposed to clarify that an administrative sanction may include denial of an application for a license. An additional amendment to that section establishes the last known address of a license holder for purposes of giving notice as the "mailing address provided to the department when the license holder applies or renews its license," or notifies the department of a change in address. An amendment to §215.503 provides that the department will not refund a fee to a person that is subject to an unpaid civil penalty imposed by a final order.

Additional nonsubstantive amendments are proposed throughout Chapter 215 to correct punctuation, grammar, and capitalization.

The department also proposes new §215.160, Duty to Identify Motor Vehicles Offered for Sale as Rebuilt, which outlines the requirements for sale of a repaired, rebuilt or reconstructed vehicle.

FISCAL NOTE

Linda M. Flores, Chief Financial Officer, has determined that for each of the first five years the amendments, new section, and repeals as proposed are in effect, there will be no fiscal implications for state or local governments as a result of enforcing or administering the amendments and repeals.

David D. Duncan, General Counsel, has certified that there will be no significant impact on local economies or overall employment as a result of enforcing or administering the amendments, new section, and repeals.

PUBLIC BENEFIT AND COST

Mr. Duncan has also determined that for each year of the first five years the amendments, new section, and repeals are in effect, the public benefit anticipated as a result of enforcing or administering the amendments, new section, and repeals will be simplification, clarification and streamlining of the agency's rules. There are no anticipated economic costs for persons required to comply with the amendments, new section, and repeals as proposed.

There will be no adverse economic effect on small businesses or micro-businesses.

TAKINGS IMPACT ASSESSMENT

The department has determined that this proposal affects no private real property interests and that this proposal does not restrict or limit an owner's right to property that would otherwise exist in the absence of government action, and so does not constitute a taking or require a takings impact assessment under the Government Code, §2007.043.

SUBMITTAL OF COMMENTS

Written comments on the proposed amendments, new section, and repeals may be submitted to David D. Duncan, General Counsel, Texas Department of Motor Vehicles, 4000 Jackson Avenue, Building 1, Austin, Texas 78731 or by email to *rules@txdmv.gov.* The deadline for receipt of comments is 5:00 p.m. on October 10, 2016.

SUBCHAPTER A. GENERAL PROVISIONS

43 TAC §215.1, §215.2

STATUTORY AUTHORITY

The amendments are proposed under Transportation Code, §1002.001, which provides the board of the Texas Department of Motor Vehicles with the authority to adopt rules that are necessary and appropriate to implement the powers and the duties of the department; Occupations Code, §2301.155, which requires the board of the Texas Department of Motor Vehicles to adopt rules necessary or convenient to administer Occupations Code, Chapter 2301; and more specifically, Occupations Code, §2301.266, which authorizes the board to adopt rules applicable to the issuance of duplicate licenses; and Occupations Code, §2301.602, which requires the board to adopt rules to enforce Chapter 2301, Subchapter M; Transportation Code, §503.002 which authorizes the board to adopt rules to administer Transportation Code, Chapter 503; and more specifically, Transportation Code, §503.009, which authorizes the board to adopt rules for procedures concerning contested cases; Transportation Code, §503.061, which requires the board to adopt rules regulating the issuance of dealer's license plates; and Transportation Code, §503.0626 and §503.0631, which require the board to adopt rules necessary to implement and manage the department's temporary tag databases.

CROSS REFERENCE TO STATUTE

Government Code, §2001.039; Occupations Code, Chapter 2301; and Transportation Code, Chapter 503.

§215.1. Purpose and Scope. [~~Scope and Purpose.~~]

Occupations Code, Chapter 2301[~~,~~] and Transportation Code, Chapters 503 and 1000 - 1005 [~~1000 through 1005,~~] require the Texas Department of Motor Vehicles to license and regulate motor vehicle dealers, manufacturers, distributors, converters, representatives, vehicle lessors and vehicle lease facilitators, in order to ensure a sound system of distributing and selling motor vehicles;[~~,~~] provide for compliance with manufacturers' warranties; and to [~~manufacturer's warranties,~~] prevent fraud, unfair practices, discrimination, impositions, and other abuses of the people of this state in connection with the distribution and sale of motor vehicles. This [~~The sections under this~~] chapter prescribes [~~prescribe~~] the policies and procedures for the regulation of the motor vehicle industry. [~~regulating motor vehicle dealers, manufacturers, distributors, converters, representatives, lessors and lease facilitators, by regulating licensing, warranty performance obligations, advertising, enforcement, and providing for adjudicative proceedings.~~]

§215.2. Definitions; Conformity with Statutory Requirements.

(a) The definitions contained in Occupations Code, Chapter 2301[~~,~~] and Transportation Code, Chapters 503 and 1000 - 1005 [~~1000 through 1005~~] govern this chapter. [~~All matters of practice and procedure set forth in the Codes shall govern and these rules shall be construed to conform with the Codes in every relevant particular, it being the intent of these rules only to supplement the Codes and to provide procedures to be followed in instances not specifically governed by the Codes.~~] In the event of a conflict, the definition or procedure referenced in Occupations Code, Chapter 2301 controls. [~~shall control.~~]

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

(1) ALJ--An Administrative Law Judge of the State Office of Administrative Hearings.

[~~(2) Appropriate department office--The office of the department that is designated by notice or publication for receipt of a specific filing.~~]

(2) [~~(3)~~] Board--The Board of the Texas Department of Motor Vehicles, including any personnel to whom the board [~~Board~~] delegates any duty assigned.

[~~(4) Chapter 503--Transportation Code, Chapter 503.~~]

[~~(5) Chapter 1000 through 1005--Transportation Code, Chapter 1000 through 1005.~~]

[~~(6) Code--Occupations Code, Chapter 2301.~~]

[~~(7) Codes--Occupations Code, Chapter 2301, and Transportation Code, Chapters 503 and 1000 through 1005.~~]

[~~(8) Department--The Texas Department of Motor Vehicles.~~]

(3) [~~(9)~~] Director--The director of the department [~~division~~] that regulates the distribution and sale of motor vehicles, including[~~. For purposes of this chapter, the definition of "director" also includes~~] any personnel to whom the director delegates any duty assigned under this chapter.

[~~(10) Division--The division that regulates the distribution and sale of motor vehicles.~~]

(4) [~~(11)~~] Executive director--The executive director of the Texas Department of Motor Vehicles.

(5) [~~(12)~~] Final order authority--The person(s) with authority under Occupations Code, Chapter 2301; Transportation Code, Chapters 503 and 1000 - 1005; or board [~~the Codes or Board~~] rules to issue a final order.

(6) GDN--General distinguishing number.

(7) [~~(13)~~] Governmental agency--All other state and local governmental agencies and all agencies of the United States government, whether executive, legislative, or judicial.

[~~(14) Hearings examiner--A person employed by the department to preside over hearings under Occupations Code, Chapter 2301.~~]

(8) [~~(15)~~] Hearing officer--An ALJ, [~~or~~] a hearings examiner [~~under this chapter~~], or any other person designated, employed, or appointed by the department[~~, or employed or appointed,~~] to hold hearings, administer oaths, receive pleadings and evidence, issue subpoenas to compel the attendance of witnesses, compel the production of papers and documents, issue interlocutory orders and temporary in-

junctions, make findings of fact and conclusions of law, issue proposals for decision, and recommend or issue final orders.

[~~(16) License purveyor--Any person who for a fee, commission, or other valuable consideration, other than a certified public accountant or a duly licensed attorney at law, assists an applicant in the preparation of a license application or represents an applicant during the review of the license application.~~]

(9) [~~(17)~~] Motion for rehearing authority--The person(s) with authority under Occupations Code, Chapter 2301; Transportation Code, Chapters 503 and 1000 - 1005; or board [~~the Codes or Board~~] rules to decide a motion for rehearing.

[~~(18) Party in interest--A party against whom a binding determination cannot be had in a proceeding before the department without having been afforded notice and opportunity for hearing.~~]

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

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 August 26, 2016.

TRD-201604507
David D. Duncan
General Counsel
Texas Department of Motor Vehicles
Earliest possible date of adoption: October 9, 2016
For further information, please call: (512) 465-5665

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43 TAC §§215.3 - 215.6

STATUTORY AUTHORITY

The repeals are proposed under Transportation Code, §1002.001, which provides the board of the Texas Department of Motor Vehicles with the authority to adopt rules that are necessary and appropriate to implement the powers and the duties of the department; Occupations Code, §2301.155, which requires the board of the Texas Department of Motor Vehicles to adopt rules necessary or convenient to administer Occupations Code, Chapter 2301; and more specifically, Occupations Code, §2301.266, which authorizes the board to adopt rules applicable to the issuance of duplicate licenses; and Occupations Code, §2301.602, which requires the board to adopt rules to enforce Chapter 2301, Subchapter M; Transportation Code, §503.002 which authorizes the board to adopt rules to administer Transportation Code, Chapter 503; and more specifically, Transportation Code, §503.009, which authorizes the board to adopt rules for procedures concerning contested cases; Transportation Code, §503.061, which requires the board to adopt rules regulating the issuance of dealer's license plates; and Transportation Code, §503.0626 and §503.0631, which require the board to adopt rules necessary to implement and manage the department's temporary tag databases.

CROSS REFERENCE TO STATUTE

Government Code, §2001.039; Occupations Code, Chapter 2301; and Transportation Code, Chapter 503.

§215.3. Duties and Powers of Board.

§215.4. Formal Opinions.

§215.5. Informal Opinions.

§215.6. Exempted Actions.

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

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David D. Duncan
General Counsel
Texas Department of Motor Vehicles
Earliest possible date of adoption: October 9, 2016
For further information, please call: (512) 465-5665

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SUBCHAPTER B. ADJUDICATIVE PRACTICE AND PROCEDURE

43 TAC §§215.21 - 215.24, 215.27, 215.29, 215.30, 215.32, 215.34 - 215.49, 215.55, 215.56, 215.58

STATUTORY AUTHORITY

The amendments are proposed under Transportation Code, §1002.001, which provides the board of the Texas Department of Motor Vehicles with the authority to adopt rules that are necessary and appropriate to implement the powers and the duties of the department; Occupations Code, §2301.155, which requires the board of the Texas Department of Motor Vehicles to adopt rules necessary or convenient to administer Occupations Code, Chapter 2301; and more specifically, Occupations Code, §2301.266, which authorizes the board to adopt rules applicable to the issuance of duplicate licenses; and Occupations Code, §2301.602, which requires the board to adopt rules to enforce Chapter 2301, Subchapter M; Transportation Code, §503.002 which authorizes the board to adopt rules to administer Transportation Code, Chapter 503; and more specifically, Transportation Code, §503.009, which authorizes the board to adopt rules for procedures concerning contested cases; Transportation Code, §503.061, which requires the board to adopt rules regulating the issuance of dealer's license plates; and Transportation Code, §503.0626 and §503.0631, which require the board to adopt rules necessary to implement and manage the department's temporary tag databases.

CROSS REFERENCE TO STATUTE

Government Code, §2001.039; Occupations Code, Chapter 2301; and Transportation Code, Chapter 503.

§215.21. Purpose and Scope. [~~*Objective.*~~]

(a) The purpose [~~objective~~] of this subchapter [~~these rules~~] is to ensure [~~fair, just, and impartial~~] adjudication of the rights of parties in [~~all~~] matters within the jurisdiction of Occupations Code, Chapter 2301 and Transportation Code, Chapters 503 and 1000 - 1005; and to ensure effective administration of Occupations Code, Chapter 2301 and Transportation Code, Chapters 503 and 1000 - 1005 by the department, in accordance with Government Code, Chapter 2001 and Occupations Code, §2301.001 and §2301.152. [~~the Codes, and to ensure fair, just, and effective administration of the Codes in accordance with the intent of the legislature as declared in Occupations Code, §2301.001, and Occupations Code, §2301.152.~~]

(b) Practice and procedure in contested cases [~~filed on or after September 1, 2007, and~~] heard by SOAH are addressed in:

(1) 1 TAC Chapter 155;

(2) [~~(1)~~] Subchapter I of this chapter (relating to Practice and Procedure for Hearings Conducted by the State Office of Administrative Hearings); and

(3) [~~(2)~~] this subchapter, where not in conflict with SOAH rules.

(c) This subchapter applies to contested cases filed under Occupations Code, Chapter 2301 or Transportation Code, Chapter 503; and [~~shall apply~~] to complaints filed on or after January 1, 2014, under Occupations Code, §2301.204 or §§2301.601 - 2301.613, to the extent they do not conflict with state law, rule, or court order. [~~Subchapter M, §§2301.601-2301.613 (the Lemon Law) or Occupations Code, §2301.204 (warranty performance).~~]

§215.22. Prohibited [~~Disclosures and~~] Communications.

(a) No party [~~in interest~~], attorney of record, or authorized representative in any contested case [~~proceeding~~] shall make, [~~submit,~~] directly or indirectly, any ex parte communication, in violation of Government Code, §2001.061, concerning the merits of the contested case [~~such proceeding~~] to the board or hearing officer [~~Board, or any department employee who is~~] assigned to render a decision or make findings of fact and conclusions of law in a contested case.

(b) Violations of this section shall be promptly reported to the hearing officer and the general counsel of the department. The general counsel shall ensure that a copy or summary of the ex parte communication is included with the record of the contested case and that a copy is forwarded to all parties or their authorized representatives. The general counsel may take any other appropriate action otherwise provided by law. [~~and a copy or summary thereof shall be filed with the record of such proceeding and a copy forwarded to all parties of record, and/or any other appropriate action otherwise provided by law.~~]

§215.23. Appearances.

(a) General. Any party to a contested case may appear in person or by an authorized representative. An authorized representative may be required to show authority to represent a party. [~~proceeding before the Board may appear to represent, prosecute, or defend any rights or interests, either in person, by an attorney, or by any other authorized representative. Any individual may appear pro se; and any member of a partnership which is a party to a proceeding or any bona fide officer of a corporation or association may appear for the partnership, corporation, or association. An authorized full time employee may enter an appearance for his employer.~~]

[~~(b) Agreements of representation. The Board may require agreements between a party in interest and an attorney or other authorized representative concerning any pending proceeding to be in writing, signed by the party in interest, and filed as a part of the record of the proceeding.~~]

[~~(c) Lead counsel. The attorney or other authorized representative of a party in interest shall be considered that party's lead counsel in any proceeding and, if present, shall have control in the management of the cause pending before the Board.~~]

(b) [~~(d)~~] Intervention. Any public official or other person having an interest in a contested case [~~proceeding~~] may, upon request to the hearing officer, [~~Board,~~] be permitted to intervene [~~and present any relevant and proper evidence, data, or argument bearing upon the issues involved in the particular proceeding~~]. Any person desiring to intervene in a contested case [~~proceeding~~] may be required to disclose that person's [~~his~~] interest in the contested case [~~proceeding~~] before permission to appear will be granted.

[~~(e) Limitation on appearances. The Board may limit or exclude entirely an attempt by persons to appear in a proceeding when such appearance would be irrelevant or would unduly broaden the scope of the proceeding.~~]

§215.24. Petitions.

(a) Petitions [~~for relief under the Codes or complaints filed alleging violations of the Codes other than those specifically provided for in these rules~~] shall be in writing and shall:[~~, shall~~]

(1) state [~~clearly and concisely~~] the petitioner's [~~grounds of~~] interest in the subject matter, the facts relied upon, and the relief sought; and[~~, and shall~~]

(2) cite the specific code provision(s) or other appropriate law. [~~by appropriate reference the article of the Codes or other law relied upon for relief and, where applicable, the proceeding to which the petition refers.~~]

(b) The original of each petition, pleading, motion, brief, or other document permitted or required to be filed with the department in a contested case shall be signed by the party or the party's authorized representative.

(c) All pleadings filed in a contested case shall be printed or typed on 8-1/2 inch by 11 inch paper in no smaller than 11 point type with margins of at least one inch at the top, bottom, and each side. Each page shall be numbered at the bottom. All text, except block quotations and footnotes, shall be double spaced.

§215.27. Complaints.

(a) Complaints [~~All complaints~~] alleging violations of Occupations Code, Chapter 2301 or Transportation Code, Chapters 503 and 1000 - 1005 [~~the Codes~~] shall be in writing, addressed to the department, [~~appropriate department office~~] and signed by the complainant. Complaint forms will be supplied [~~and assistance may be afforded~~] by the department for the purpose of filing complaints.

(b) A complaint shall contain the name and address of the complainant, the name and address of the party against whom the complaint is made, and a brief statement of the facts forming the basis of the complaint.

(c) If requested by the department, complaints shall be under oath. Before[~~, and before~~] initiating an investigation or other proceeding to determine the merits of the complaint, the department may require from the complainant [~~such~~] additional information [~~as may be~~] necessary to evaluate the merits of the complaint.

§215.29. Computing Time.

Any [~~In computing any~~] period of time prescribed or allowed by this chapter, by order of the board, [~~Board,~~] or by any applicable statute shall be computed in accordance with Government Code, §311.014.[~~, the date of the act or event after which the designated period of time begins to run is not to be included; but the last day of the period so computed is to be included unless it be a Saturday, Sunday, or legal holiday in which event the period runs until the end of the next day which is not a Saturday, Sunday, or legal holiday.~~]

§215.30. Filing of Documents.

(a) Each [~~Every~~] document required or permitted to be filed with the department under [~~related to~~] this chapter shall be delivered:

(1) [~~filed~~] in person;[~~,~~]

(2) by first-class mail to the address of the [~~appropriate~~] department; [~~office,~~] or

(3) by electronic document transfer to [~~at~~] a destination designated by the department. [~~for receipt of those documents.~~]

[~~(b) Except as provided in subsection (e) of this section, delivery by mail shall be complete upon deposit of the document, enclosed~~

~~in a postpaid, properly addressed wrapper, in a post office or official depository under the care and custody of the United States Postal Service.~~]

(b) [~~(e)~~] [~~Except as provided in subsection (e) of this section, delivery by mail as specified in subsection (b) of this section shall be timely if the document is deposited on or before the specified date and received by the appropriate department office not later than the fifth business day after the date of deposit.~~] Delivery by electronic document transfer is considered [~~shall be~~] timely if the document is received by 5:00 p.m. Central Standard Time (CST). [~~5 p.m. (Central Standard Time).~~] Delivery by electronic document transfer after 5:00 p.m. CST [~~5 p.m. (Central Standard Time)~~] shall be deemed received on the following day.

(c) [~~(d)~~] [~~Such document may be delivered by a party to a matter, an attorney of record, or by any other person competent to testify.~~] A certificate by the party or party's authorized representative [~~an attorney of record or the affidavit of any person competent to testify,~~] showing timely delivery of a document in a manner described in this section shall be prima facie evidence [~~of the fact~~] of timely delivery. Nothing[~~, although nothing~~] herein shall preclude the department or any party from offering proof that the [~~subject~~] document was not timely delivered.

(d) [~~(e)~~] To be timely filed, a [~~the~~] document must be received by the department within [~~in the appropriate department office by~~] the time specified by statute, rule, or department order. A document [~~filing~~] received after the specified time, notwithstanding the date of mailing or other means of delivery, shall be deemed untimely. [~~not timely filed.~~]

§215.32. Extension [~~Enlargement~~] of Time.

(a) Except as provided by subsection (b) of this section, when [~~When by these rules or by a notice given thereunder or by order of the Board or the hearing officer having jurisdiction, as the case may be,~~] an act is required or allowed to be done at or within a specified time in accordance with this chapter, the board[~~, except as provided in subsection (b) of this section, the Board~~] or the hearing officer, with good cause shown, may: [~~for cause shown may, at any time in the Board's or the hearing officer's discretion:~~]

(1) [~~with or without motion or notice,~~] order the specific period extended if the extension is requested [~~period enlarged if application therefore is made~~] before the expiration of the period previously specified; [~~originally prescribed or as extended by a previous order;~~] or

(2) [~~upon motion~~] permit the act to be done after the expiration of the specified period, provided [~~where~~] good cause is shown for the failure to act.

(b) Notwithstanding [~~anything contained in~~] subsection (a) of this section, the board or [~~neither the Board nor a~~] hearing officer may not extend [~~enlarge~~] the time for filing a document when a [~~where, by~~] statute or rule specifies the time period by which a document[~~, the document, to be timely filed,~~] must be received by the department. [~~in the appropriate department office by a specified time. The requirements of such statute or rule shall govern the filing of that document. Any such document received after the specified time, notwithstanding the date of mailing or other means of delivery, shall be deemed not timely filed.~~]

§215.34. Notice of Hearing in Contested Cases. [~~Adjudicative Proceedings.~~]

(a) In a contested case, each party is entitled to a hearing, in accordance with Government Code, §2001.051.

[~~(a) In any adjudicative proceeding under the Codes, the notice of hearing shall state:~~]

[~~(1) the name of the party or parties in interest;~~]

[~~(2) the time and place of the hearing;~~]

[~~(3) the docket number assigned to the hearing;~~]

[~~(4) any special rules deemed appropriate for such hearing; and~~]

[~~(5) a clear and concise factual statement sufficient to identify with reasonable definiteness the matters at issue. This can be satisfied by attaching and incorporating by reference the complaint or amended complaint.~~]

(b) A notice of hearing in a contested case shall comply with the requirements of Government Code, §2001.052(a) and [~~Notice of hearing~~] shall be served upon the parties [~~in interest either~~] in person or by certified mail, return receipt requested to the last known address of the parties or their authorized representatives, in accordance with Occupations Code, §2301.705.[~~, addressed to the parties in interest or their agents for service of process.~~]

(c) The last known address of a license applicant, license holder, or other person is the last mailing address provided to the department when the license applicant applies for its license, when a license holder renews its license, or when the license holder notifies the department of a change in the license holder's mailing address.

[~~(c) Notice of hearing shall be presumed to have been received by a person if notice of the hearing was mailed by certified mail, return receipt requested, to the last known address of any person known to have legal rights, duties, or privileges that could be determined at the hearing.~~]

(d) A notice of hearing in a contested case may be amended in accordance with Government Code, §2001.052(b).

[~~(d) Notice of hearing may be amended at the hearing or at any time prior thereto.~~]

§215.35. Reply.

(a) Within 20 days after service of a notice of hearing in a contested case[~~,~~] or within 10 days after service of an amended notice of hearing, a [~~responding~~] party may file a reply [~~in which the matters at issue are specifically admitted, denied, or otherwise explained~~].

(b) [~~(1)~~] A reply shall include [~~Form and filing of replies. All replies shall include a reference to~~] the docket number of the contested case [~~hearing~~] and shall be filed [~~sworn to~~] by the party or party's authorized representative. The original [~~responding party or the attorney of record. The original of the~~] reply shall be filed with the department and a [~~appropriate department office, and one~~] copy shall be served on any [~~upon~~] other parties to the contested case. [~~proceeding, if any.~~]

(c) [~~(2)~~] A party may file an amended reply prior to the contested case hearing. In any contested case when [~~Amendment. A responding party may amend his reply at any time prior to the hearing, and in any case where~~] the notice of hearing has been amended at the contested case hearing, a party, at the discretion of the hearing officer, shall have [~~hearing, a responding party shall be given~~] an opportunity to file an amended reply. [~~amend his reply.~~]

(d) [~~(3)~~] [~~Extension of time.~~] Upon the motion of a [~~responding~~] party, with good cause shown, the department may extend the time to file a reply. [~~within which the reply may be filed.~~]

(e) [~~(4)~~] [~~Default.~~] All allegations shall be deemed admitted by any party not appearing [~~who does not appear~~] at the contested case hearing on the merits.

§215.36. Hearings To Be Public.

Hearings in contested cases [~~adjudicative proceedings~~] shall be open to the public.

§215.37. Recording and Transcriptions of Hearing Cost.

(a) Except as provided by [~~in~~] Subchapter G of this chapter (relating to Warranty Performance Obligations), hearings in contested cases will be transcribed by a court reporter or recorded by the hearing officer. [~~at the discretion of the hearing officer. Any request regarding recording or transcription must be made to the hearing officer at least two days prior to the hearing.~~]

(b) In a contested case [~~those contested cases~~] in which the hearing is transcribed by a court reporter, the costs of transcribing the hearing and for the preparation of an original transcript of the record for the department shall be assessed to the requesting party in the contested case, [~~equally among all parties to the proceeding,~~] unless otherwise directed.

(c) Copies of recordings or transcriptions of a contested case hearing will be provided to any party upon written request and upon payment for the cost of the recordings or transcriptions.

(d) In the event a final decision in a contested case is appealed and the department is required to transmit to the court the original or a certified copy of the record, or any part thereof, the appealing party shall, unless waived by the department, pay the costs of preparation of the record that is required to be transmitted to the court.

§215.38. Consolidation of Proceedings. [~~Joint Record.~~]

No contested case proceedings including [~~No adjudicative proceedings embracing~~] two or more complaints or petitions shall be jointly heard [~~on a joint record~~] without the consent of all parties, [~~in interest~~] unless the hearing officer finds [~~shall find, prior to the consolidation of the proceedings,~~] that justice and efficiency are better served by the consolidation.

§215.39. Waiver of Hearing.

After [~~Subsequent to~~] the issuance of a notice of hearing in a contested case, and in accordance with the deadlines prescribed by [~~as provided in~~] §215.35 of this title [~~subchapter~~] (relating to Reply), a party may waive a [~~responding party may waive such~~] hearing and consent to the entry of an agreed order. Agreed orders proposed by the parties remain subject to the approval of the final order authority.

§215.40. Continuance [~~Postponement~~] of Hearing.

After a contested case has been called on the date assigned for hearing [~~in a proceeding,~~] pursuant to notice, a continuance of the contested case hearing [~~postponement of the case~~] will be granted only upon a showing of good cause. A motion for continuance of a contested case [~~in exceptional circumstances. All motions for postponement of a~~] hearing shall be filed and served on all parties at least five days before the hearing date, except when good cause is shown to consider a motion for continuance filed after the deadline. [~~sufficiently in advance of the date of hearing to permit notice to all parties if postponement should be granted.~~]

§215.41. Presiding Officials.

(a) Hearing officer. [~~A hearing officer of a contested case shall be assigned in accordance with applicable law, including Occupations Code, §2301.704.~~] The term "hearing officer" as used in this section includes the board [~~Board~~] when presiding over a hearing.

(b) [~~(1)~~] Powers and duties. A hearing officer shall conduct fair hearings and shall [~~Hearing officers shall have the duty to conduct fair and impartial hearings, and the power to~~] take all necessary action to administer [~~avoid delay in~~] the disposition of contested cases. A hearing officer's powers include, but are not limited to the authority to: [~~proceedings and to maintain order. Hearing officers shall have all powers necessary to these ends, including the authority to~~]

(1) administer oaths; [~~to~~]

(2) examine witnesses; [~~to~~]

(3) rule upon the admissibility of evidence; [~~to~~]

(4) rule upon motions; and [~~to~~]

(5) regulate the course of the contested case hearing and the conduct of the parties and their authorized representatives. [~~counsel.~~]

(c) Recusal.

(1) [~~(2)~~] [~~Disqualification.~~] If the [~~a~~] hearing officer determines that he or she [~~the hearing officer~~] should be recused from a particular contested case hearing, the hearing officer shall withdraw from the contested case [~~proceeding~~] by giving notice on the record and by notifying the chief hearing officer. [~~appropriate department office of the withdrawal.~~]

(2) A [~~Whenever a party deems the hearing officer to be disqualified to preside in a particular hearing, the~~] party may file a motion to recuse [~~disqualify and remove~~] the hearing officer. The motion to recuse [~~disqualify and remove~~] shall be supported by an affidavit [~~affidavits~~] setting forth the alleged grounds for disqualification. A copy of the motion shall be served on the hearing officer who shall have 10 days [~~within which~~] to reply, and a copy shall be served on all parties or their authorized representatives.

(3) If the hearing officer contests the alleged grounds for disqualification, the chief hearing officer [~~department~~] shall promptly determine the validity of the grounds alleged and render a decision.[~~, such decision being determinative of the issue.~~]

(d) [~~(3)~~] Substitution of hearing officer. If the hearing officer is disqualified, dies, becomes disabled, or withdraws during any contested case proceeding, the chief hearing officer [~~department~~] may appoint another hearing officer to preside over the remainder of the contested case proceeding. [~~who may perform any function remaining to be performed without the necessity of repeating any proceedings in the case.~~]

§215.42. Conduct of Hearing.

Each party in a contested case [~~interest~~] shall have the right to [~~in an adjudicative hearing to due~~] notice, cross examination, presentation of evidence, objection, motion, argument, and all other rights essential to a fair contested case hearing. Except as provided by this chapter [~~Procedures in such hearings, except where otherwise provided by these rules~~] or in the notice of hearing, [~~shall be insofar as reasonably practicable in accordance with~~] the Texas Rules of Civil Procedure, as applied to non-jury civil cases, shall be applicable to hearings in contested cases, as far as reasonably practical. [~~applicable in district and county courts in civil actions heard before the court without a jury.~~]

§215.43. Conduct and Decorum.

(a) All parties, witnesses, counsel, and authorized representatives shall conduct themselves in all contested case hearings with proper dignity, courtesy, and respect for the board, the hearing officer, and other parties. [~~Every party, witness, attorney, or other representative shall comport himself in all proceedings with proper dignity, courtesy, and respect for the Board, the hearing officer, and all other parties. Disorderly conduct will not be tolerated. Attorneys and other representatives of parties shall observe and practice the standards of ethical behavior prescribed for attorneys at law by the Texas Disciplinary Rules of Professional Conduct and the Texas Lawyer's Creed.~~

~~No party to a pending case, and no representative or witness of such a party, shall discuss the merits of such case with the hearing officer outside of the presence of all other parties, or their representatives.~~]

(b) Upon violation of this section, any party, witness, attorney, or authorized [~~other~~] representative may be:

(1) excluded from the contested case [~~any~~] hearing for such period and upon such conditions as are just; or [~~may be~~]

(2) subject to [~~such~~] other just, reasonable, and lawful disciplinary action as the board, hearing officer, or department may order. [~~prescribe.~~]

§215.44. Evidence.

(a) General. The Texas Rules of Evidence shall apply in all contested cases, in accordance with Government Code, Chapter 2001. [~~be applied in all adjudicative hearings to the end that needful and proper evidence shall be conveniently, inexpensively, and speedily adduced while preserving the rights of the parties to the proceeding.~~]

[~~(b) Admissibility. All relevant, material, and reliable evidence shall be admitted. Irrelevant, immaterial, unreliable, and unduly repetitious or cumulative evidence shall be excluded. Immaterial or irrelevant parts of an otherwise admissible document shall be segregated and excluded so far as practicable.~~]

[~~(c) Official records. An official document or record, or an entry therein, when admissible for any purpose, may be evidenced by an official publication thereof or by a copy attested by the officer having legal custody of the record, or by the officer's deputy, and accompanied by a certificate to such effect. This section does not prevent and is not intended to prevent proof of any official record, the absence thereof or official notice thereof by any method authorized by any applicable statute or any rules of evidence in district and county courts.~~]

[~~(d) Entries in the regular course of business. Any writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence, or event, will be admissible as evidence thereof if it appears that it was made in the regular course of business. This section does not prevent and is not intended to prevent proof of any business writing or record by any method authorized by any applicable statute or any rules of evidence in district and county courts.~~]

(b) [~~(e)~~] Documents in department files. The hearing officer may take judicial notice of documents [~~Documents~~] or information in the department's files, in accordance with [~~licensing files may be officially noticed and may be admitted and considered by the hearing officer, as described in~~] Government Code, Chapter 2001.

[~~(f) Abstracts of documents. When documents are numerous, the hearing officer may refuse to receive in evidence more than a limited number of said documents which are typical and representative, but may require the abstraction of the relevant information from the documents and the presentation of the abstract in the form of an exhibit; provided, however, that before admitting such abstract the hearing officer shall afford all parties in interest the right to examine the documents from which the abstract was made.~~]

(c) [~~(g)~~] Exhibits. Exhibits shall be limited to facts with respect to the relevant and material issues involved in a particular contested case. Documentary exhibits [~~proceeding. Exhibits of documentary character~~] shall not unduly encumber the record. Where practical, [~~of the proceeding. Where practicable,~~] the sheets of each exhibit shall not be more than 8-1/2 [~~8 1/2~~] inches by 11 inches in size, and shall be numbered and labeled. The original and one copy of each exhibit offered shall be tendered to the reporter or hearing officer for identification, and a copy shall be furnished to each party [~~in interest~~]. In the event an offered exhibit has been excluded after objection and [~~identified, objected to, and excluded, the hearing officer shall determine whether~~] the party offering the exhibit withdraws the offer, the hearing officer shall [~~and if so,~~] return the exhibit. If the excluded exhibit is not withdrawn, it shall be given an exhibit number for identification and be included in the record only for the purpose of preserving the exception together with the hearing officer's ruling.

§215.45. Stipulation of Evidence.

Evidence may be stipulated by agreement of all parties [~~in interest~~].

§215.46. Objections and Exceptions.

Formal exceptions [~~exception~~] to the ruling of the hearing officer is not necessary. [~~It is sufficient that the party in interest at the time the ruling is made, or sought, make known to the hearing officer the action desired.~~]

§215.47. Motions.

(a) Each [~~Every~~] motion in a contested case [~~relating to a pending proceeding shall~~], unless made during a contested case hearing, shall be in writing and shall state: [~~hearing, be written, and shall set forth~~]

(1) the relief sought; and

(2) the specific reasons and grounds.

(b) If the motion is based upon matters which do not appear of record, the motion [~~it~~] must be supported by affidavit.

(c) Any motion not made during a contested case hearing shall be filed with the hearing officer and a copy shall be served on all parties or their authorized representatives.

§215.48. Briefs.

The hearing officer may direct that the parties file briefs [~~Briefs may be filed~~] in any pending contested case. [~~adjudicative proceeding at such time as may be specified by the hearing officer.~~]

§215.49. Service of Pleading, Petitions, Briefs, and Other Documents. [~~the Like.~~]

(a) A copy of each [~~every~~] document filed in any contested case [~~adjudicative proceeding, after appearances have been entered,~~] shall be served upon all parties or their authorized representatives [~~other parties in interest or their lead counsel,~~] and upon the [~~appropriate~~] department [~~office~~] by sending a copy properly addressed to each party by: [~~first class United States mail, postage prepaid, by actual delivery, or by electronic document transfer to a facsimile number, e-mail address, or website designated for the receipt of those filings. A certificate of such fact shall accompany the document.~~]

(1) first-class mail;

(2) hand delivery;

(3) facsimile; or

(4) email.

(b) A copy of each document may be served upon the department by electronic document transfer at a destination designated by the department.

(c) A certificate of service shall accompany each document.

§215.55. Final Decision.

(a) The board [~~Board~~] has final order authority in a contested case initiated by a complaint filed before January 1, 2014, under Occupations Code, §2301.204 or §§2301.601 - 2301.613[~~, initiated by a complaint filed before January 1, 2014~~].

(b) The hearings examiner has final order authority in a contested case filed on or after January 1, 2014, under Occupations Code, §2301.204 or §§2301.601 - 2301.613[~~, filed on or after January 1, 2014~~].

(c) Except as provided by subsections (a) and (b) of this section, the board [~~Board~~] has final order authority in a contested case filed under Occupations Code, Chapter 2301 or under Transportation Code, Chapter 503.

(d) An order shall be deemed final and binding on all parties and all administrative remedies are deemed to be exhausted as of the effective date, unless a motion for rehearing is filed with the appropriate [~~motion for rehearing~~] authority as provided by law.

§215.56. Submission of Amicus Briefs.

(a) Any interested person may submit [~~wishing to file~~] an amicus brief for consideration in a contested case and should file the brief no later than the deadline for filing exceptions.

(b) A party may submit [~~file~~] one written response to the amicus brief [~~filed by the amicus curiae~~] no later than the deadline for filing replies to exceptions.

(c) Any amicus brief, or response to that brief, not filed within the deadlines prescribed by subsection (b) of this section [~~such time~~] will not be considered, unless good cause is [~~may be~~] shown why the [~~this~~] deadline should be waived or extended.

§215.58. Delegation of Final Order Authority.

(a) In accordance with [~~Pursuant to~~] Occupations Code, §2301.154(c), except as provided by [~~in~~] subsection (b) of this section, the director [~~of the department division that regulates the distribution and sale of motor vehicles~~] is authorized to issue, where there has not been a decision on the merits, a final order in a contested case, including, but not limited to a contested case resolved: [~~final orders in cases without a decision on the merits resolved in the following ways:~~]

(1) by settlement;

(2) by agreed order;

(3) by withdrawal of the complaint;

(4) by withdrawal of a protest;

(5) by dismissal for want of prosecution;

(6) by dismissal for want of jurisdiction;

(7) by summary judgment or summary disposition;

(8) [~~(7)~~] by default judgment; or

(9) [~~(8)~~] when a party waives opportunity for a contested case hearing.

(b) In accordance with [~~Pursuant to~~] Occupations Code, §2301.154(c), the director [~~of the department division that regulates the distribution and sale of motor vehicles~~] is authorized to issue a final order in a contested case filed prior to January 1, 2014, [~~final orders in cases,~~] under Occupations Code, §2301.204 or §§2301.601 - 2301.613[~~, filed prior to January 1, 2014~~].

(c) In a contested case in which [~~contested cases where~~] the board has delegated final order authority under subsections [~~subsection~~] (a) or (b) of this section, a motion [~~motions~~] for rehearing shall be filed with and decided by the final order authority delegate.

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 August 26, 2016.

TRD-201604514
David D. Duncan
General Counsel
Texas Department of Motor Vehicles
Earliest possible date of adoption: October 9, 2016
For further information, please call: (512) 465-5665

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43 TAC §§215.25, 215.26, 215.28, 215.31, 215.33, 215.50 - 215.54, 215.57

STATUTORY AUTHORITY

The repeals are proposed under Transportation Code, §1002.001, which provides the board of the Texas Department of Motor Vehicles with the authority to adopt rules that are necessary and appropriate to implement the powers and the duties of the department; Occupations Code, §2301.155, which requires the board of the Texas Department of Motor Vehicles to adopt rules necessary or convenient to administer Occupations Code, Chapter 2301; and more specifically, Occupations Code, §2301.266, which authorizes the board to adopt rules applicable to the issuance of duplicate licenses; and Occupations Code, §2301.602, which requires the board to adopt rules to enforce Chapter 2301, Subchapter M; Transportation Code, §503.002 which authorizes the board to adopt rules to administer Transportation Code, Chapter 503; and more specifically, Transportation Code, §503.009, which authorizes the board to adopt rules for procedures concerning contested cases; Transportation Code, §503.061, which requires the board to adopt rules regulating the issuance of dealer's license plates; and Transportation Code, §503.0626 and §503.0631, which require the board to adopt rules necessary to implement and manage the department's temporary tag databases.

CROSS REFERENCE TO STATUTE

Government Code, §2001.039; Occupations Code, Chapter 2301; and Transportation Code, Chapter 503.

§215.25. Affidavits.

§215.26. Form of Petitions, Pleadings, and the Like.

§215.28. Docket.

§215.31. Cease and Desist Orders.

§215.33. Expenses of Witness or Deponent.

§215.50. Submission.

§215.51. Findings and Recommendations of Hearing Officer.

§215.52. Filing of Exceptions.

§215.53. Form of Exceptions.

§215.54. Replies to Exceptions.

§215.57. Format for Documents Filed with the Board Subsequent to the Issuance of a Proposal for Decision.

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

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SUBCHAPTER C. LICENSES, GENERALLY

43 TAC §§215.81 - 215.85, 215.87 - 215.89

STATUTORY AUTHORITY

The amendments are proposed under Transportation Code, §1002.001, which provides the board of the Texas Department of Motor Vehicles with the authority to adopt rules that are necessary and appropriate to implement the powers and the duties of the department; Occupations Code, §2301.155, which requires the board of the Texas Department of Motor Vehicles to adopt rules necessary or convenient to administer Occupations Code, Chapter 2301; and more specifically, Occupations Code, §2301.266, which authorizes the board to adopt rules applicable to the issuance of duplicate licenses; and Occupations Code, §2301.602, which requires the board to adopt rules to enforce Chapter 2301, Subchapter M; Transportation Code, §503.002 which authorizes the board to adopt rules to administer Transportation Code, Chapter 503; and more specifically, Transportation Code, §503.009, which authorizes the board to adopt rules for procedures concerning contested cases; Transportation Code, §503.061, which requires the board to adopt rules regulating the issuance of dealer's license plates; and Transportation Code, §503.0626 and §503.0631, which require the board to adopt rules necessary to implement and manage the department's temporary tag databases.

CROSS REFERENCE TO STATUTE

Government Code, §2001.039; Occupations Code, Chapter 2301; and

§215.81. Purpose and Scope [~~Objective~~].

This subchapter implements [~~The objective of this subchapter is to implement the intent of the legislature as declared in~~] Occupations Code, Chapter 2301[~~,~~] and Transportation Code, Chapter 503, regarding licenses required [~~by prescribing rules to regulate businesses requiring licenses~~] under those chapters.

§215.82. Duplicate Licenses and Plates. [~~Administration of Licensing Fees.~~]

(a) A request for a duplicate license must:

(1) be made on a department-approved form; [~~division-approved form,~~]

(2) state [~~stating~~] the reason for the duplicate license; and

(3) be accompanied by the required duplicate license fee.

(b) A license holder may receive [~~The licensee may request~~] one duplicate license at no charge if the license holder: [~~licensee~~]

(1) did not receive the original license; and

(2) makes the request within 45 days of the date [~~time~~] the license was mailed to the license holder. [~~licensee.~~]

(c) A license holder may receive a replacement metal dealer's license plate, if applicable, at no charge if the license holder:

(1) did not receive the metal dealer's license plate; and

(2) makes the request within 45 days of the date the metal dealer's license plate was mailed to the license holder and on a department approved form.

[~~(b) A licensee that fails to renew the license in a timely manner because the person was on active duty in the United States armed forces and serving outside Texas shall be exempt from any increased fee or penalty imposed by the department for failing to renew the license in a timely manner.~~]

§215.83. License Applications, Amendments, or Renewals. [~~Renewal of Licenses.~~]

(a) An application for a new license, license amendment, or license renewal filed with the department must be:

(1) on a form approved by the department;

(2) completed by the applicant, license holder, or authorized representative who is an employee, a licensed attorney, or a certified public accountant;

(3) accompanied by the required fee, paid by check, credit card, or by electronic funds transfer, drawn from an account held by the applicant or license holder, or drawn from a trust account of the applicant's attorney or certified public accountant; and

(4) accompanied by proof of a surety bond, if required.

(b) An authorized representative of the applicant or license holder who files an application with the department may be required to provide written proof of authority to act on behalf of the applicant or license holder.

(c) The department will not provide information regarding the status of an application, application deficiencies, or new license numbers to a person other than a person listed in subsection (a)(2) of this section, unless that person files a written request under Government Code, Chapter 552.

(d) [~~(a)~~] Prior to the expiration of a [~~its existing~~] license, a license holder or authorized representative [~~licensee~~] must file with the department a sufficient license renewal application [~~on a form approved by the department~~]. Failure to receive notice of license expiration from the department does not relieve the license holder [~~licensee~~] from the responsibility to timely file a sufficient license renewal application. A license renewal application is timely filed if: [~~renew.~~]

(1) the department receives a sufficient license renewal application on or before the date the license expires; or

(2) a legible postmark on the envelope transmitting the sufficient license renewal application clearly indicates that the license holder or authorized representative mailed the license renewal application on or before the date the license expires.

(e) An application for a new license or license amendment filed with the department must be sufficient. An application is sufficient if the application:

(1) includes all information and documentation required by the department; and

(2) is filed in accordance with subsection (a) of this section.

(f) [~~(b)~~] A license renewal application received by the department is sufficient if:

(1) the renewal application form is completed by the licensee or authorized representative of the licensee who is an employee, an unpaid agent, a licensed attorney, or certified public accountant;

(2) accompanied by the required license renewal application fee payment; and

(3) accompanied by proof of a surety bond, if required.

(g) If an applicant, license holder, or authorized representative does not provide the information or documentation required by the department, the department will issue a written notice of deficiency. The information or documentation requested in the written notice of deficiency must be received by the department within 20 calendar days of the date of the notice of deficiency, unless the department issues a written extension of time. If an applicant, license holder, or authorized representative fails to respond or fully comply with all deficiencies listed in the written notice of deficiency within the time prescribed by this subsection, the application will be deemed withdrawn and will be administratively closed.

(h) The department will evaluate a sufficient application for a new license, license amendment, or license renewal in accordance with applicable rules and statutes to determine whether to approve or deny the application. If the department determines that there are grounds for denial of the application, the department may pursue denial of the application in accordance with Subchapter J of this chapter (relating to Administrative Sanctions).

(i) The department will process an application for a new license, license amendment, or license renewal filed by a military service member, military spouse, or military veteran in accordance with Occupations Code, Chapter 55. A license holder who fails to timely file a sufficient application for a license renewal because that license holder was on active duty is exempt from any increased fee or penalty imposed by the department for failing to renew the license in a timely manner.

[~~(c) A license renewal application is timely filed if:~~]

[~~(1) the sufficient license renewal application is received by the department on or before the license expiration date; or~~]

[~~(2) a legible postmark on the envelope transmitting the license renewal application clearly indicates that the renewal application was mailed on or before the license expiration date.~~]

[~~(d) A timely and sufficient application shall be accepted for processing. The department will review the application and make a final determination whether to approve or deny the application.~~]

(j) [~~(e)~~] A license holder who timely files a sufficient license renewal application in accordance with subsection (d) of this section [~~A licensee that submits a timely and sufficient license renewal application~~] may continue to operate under the expired license until the license renewal application is [~~finally~~] determined.

(k) [~~(f)~~] A license holder who fails to timely file a sufficient license renewal application in accordance with subsection (d) of this section [~~A licensee that fails to file a timely and sufficient license renewal application~~] is not authorized to continue licensed activities after the date the license expires. A license holder may dispute a decision that a license renewal application was not timely or sufficient by submitting evidence to the department demonstrating that the license renewal application was timely and sufficient. Such evidence must be received by the department within 10 calendar days of the date the department issues notice that a timely or sufficient license renewal application was not received by the department.

[~~(g) License plates issued pursuant to Transportation Code, Chapter 503, Subchapter C expire upon the date the associated license expires or when a timely and sufficient license renewal application is finally determined, whichever is later.~~]

[~~(h) A licensee may rebut a determination that a renewal application was not timely or sufficient by submitting evidence to the department demonstrating the renewal application was timely and sufficient. Such evidence must be received by the department within ten (10) calendar days of the date the department issues notice that a timely or sufficient license renewal application was not received by the department.~~]

(l) [~~(i)~~] The department shall accept a [~~A~~] late license renewal application [~~may be filed~~] up to 90 days after the date the license expires. In accordance with subsection (k) of this section, the license holder [~~license expiration date; however, the applicant~~] is not authorized to continue licensed activities after the date the license expires [~~license expiration date~~] until the department approves the late license renewal application. If the department grants a license renewal under this section [~~renewal license is granted under this subsection~~], the licensing period begins on the date the department issues the renewed license. The license holder [~~license is issued and the licensee~~] may resume licensed activities upon receipt of the department's written verification or upon receipt of the renewed license. [~~the license.~~]

(m) [~~(j)~~] If the department has not received a late license renewal application within 90 days after the date the license expires, [~~expiration date,~~] the department will close the license. A person [~~The entity~~] must apply for and receive a new license before that person [~~the entity~~] is authorized to resume activities requiring a license.

(n) A metal dealer's license plate issued in accordance with Transportation Code, Chapter 503, Subchapter C expires on the date the associated license expires or when a license renewal application is determined, whichever is later.

§215.84. Brokering, New Motor Vehicles.

(a) For purposes of this subchapter, the phrase "arranges or offers to arrange a transaction," as used in Occupations Code, §2301.002, includes the practice of arranging or offering to arrange a transaction involving the sale of a new motor vehicle for a fee, commission, or other valuable consideration. Advertising is not brokering, provided [~~Under Occupations Code, §§2301.002, 2301.006, 2301.251 and 2301.252, the definition of "arranges or offers to arrange a transaction" is construed as soliciting or referring buyers for new motor vehicles for a fee, commission, or other valuable consideration. Advertising would not be included in this definition as long as~~] the person's business primarily includes the business of broadcasting, printing, publishing, or advertising for others in their own names.

(b) A buyer referral service, program, plan, club, or any other entity that accepts a fee [~~fees~~] for arranging a transaction involving the sale of a new motor vehicle is a broker. The payment of a fee to such [~~an~~] entity is aiding and abetting brokering. However, a [~~any~~] referral service, program, plan, club, or other entity that forwards a referral to a dealership [~~referrals to dealerships~~] may lawfully operate in a manner that includes all of the following conditions.[~~:~~]

(1) There is [~~are~~] no exclusive market area [~~areas~~] offered to a dealer [~~dealers~~] by the program. All dealers are allowed to participate in the program on equal terms.

(2) Participation by a dealer [~~dealers~~] in the program is not restricted by conditions, such as limiting the number of line-makes [~~franchise lines~~] or discrimination by size of dealership or location. The total [~~Total~~] number of participants in the program may be restricted if the program is offered to all dealers at the same time, with no regard to the line-make. [~~franchise line.~~]

(3) All participants pay the same fee for participation in the program. The program fee [~~that~~] shall be a weekly, monthly, or annual

fee, regardless of the size, location, or line-makes sold by the dealer. [~~line-make of the dealership.~~]

(4) A person is not to be charged a fee on a per referral fee basis or any other basis that could be considered a transaction-related fee.

(5) The program does not set or suggest to the dealer any price of a motor vehicle or a trade-in. [~~vehicles or trade-ins.~~]

(6) The program does not advertise or promote its plan in a manner that implies that the buyer, as a customer of that program, receives a special discounted price that cannot be obtained unless the customer is referred through that program.

(c) Subsections [~~The provisions of subsections~~] (a) and (b) of this section do not apply to any person or entity [~~which is~~] exempt from the broker definition in Occupations Code, §2301.002. [~~§2301.002(3).~~]

(d) All programs must comply with Subchapter H of this chapter (relating to Advertising).

§215.85. Brokering, Used Motor Vehicles.

(a) Transportation Code, §503.021 prohibits a person[~~, prohibits persons~~] from engaging in [~~the~~] business as a dealer, directly or indirectly, including by consignment without a GDN. The phrase "directly or indirectly" [~~general distinguishing number. "Directly or Indirectly"~~] includes the practice of arranging or offering to arrange a transaction involving the sale of a used motor vehicle for a fee, commission, or other valuable consideration. A person who is a bona fide employee of a dealer holding a GDN and acts for the dealer is not a broker for the purposes of this section.

(b) A buyer referral service, program, plan, club, or any other entity that accepts a fee [~~fees~~] for arranging a transaction involving the sale of a used motor vehicle is required to meet the requirements for and obtain a GDN, [~~general distinguishing number~~] unless the referral service, program, plan, or club is operated in the following manner.[~~:~~]

(1) There is [~~are~~] no exclusive market area [~~areas~~] offered to a dealer [~~dealers~~] by the program. All dealers are allowed to participate in the program on equal terms.

(2) Participation by a dealer [~~dealers~~] in the program is not restricted by conditions, such as limiting the number of line-makes [~~franchise lines~~] or discrimination by size of dealership or location. The total [~~Total~~] number of participants in the program may be restricted if the program is offered to all dealers at the same time, with no regard to the line-make. [~~franchise line.~~]

(3) All participants pay the same fee for participation in the program. The program fee [~~that~~] shall be a weekly, monthly, or annual fee, regardless of the size, location, or line-makes sold by the dealer. [~~line-make of the dealership.~~]

(4) A person is not to be charged a fee on a per referral fee basis or any other basis that could be considered a transaction-related fee.

(5) The program does not set or suggest to the dealer any price of a motor vehicle or a trade-in. [~~vehicles or trade-ins.~~]

(6) The program does not advertise or promote its plan in a manner that implies that the buyer, as a customer of that program, receives a special discounted price that cannot be obtained unless the customer is referred through that program.

(c) All programs must comply with Subchapter H of this chapter (relating to Advertising).

§215.87. License and Metal Dealer's License Plate Terms and Fees.

(a) Except as provided by other law, the term of a license or metal dealer's license plate issued by the department [~~division~~] under Occupations Code, Chapter 2301 or Transportation Code, Chapter 503 is two years.

(b) A metal dealer's license plate [~~Metal plates~~] issued by the department expires on the date the associated license expires. [~~division in connection with a license expire on the same date as the license.~~]

(c) The fee for a license or metal dealer's license plate is computed by multiplying the applicable annual fee by the number of years of the license term. The entire amount of the fee is due at the time of application for the license or license renewal.

§215.88. Criminal Offense and Action on License.

(a) This section describes board [~~Board~~] or department action on a license application or an existing license issued by the department under Transportation Code, Chapter 503 or Occupations Code, Chapter 2301, including denial, revocation, and suspension, and identifies the types of criminal offenses that directly relate to the duties and responsibilities of the occupations licensed under Transportation Code, Chapter 503 or Occupations Code, Chapter 2301.

(b) Except as provided by subsection (e) of this section, the board [~~Board~~] or department will consider denial of an application for a license or revocation or suspension of a license in accordance with the requirements of:

(1) Occupations Code, Chapter 53;

(2) Occupations Code, Chapter 2301, Subchapter N;

(3) Government Code, Chapter 2001 [~~(Administrative Procedure Act)~~]; and

(4) board [~~Board~~] rules.

(c) The terms [~~term~~] "applicant" or "person" as used in this section includes:

(1) an applicant for a license or other authorization issued by the department;

(2) the holder of a license or other authorization issued by the department;

(3) a person's spouse with a community property interest in the entity licensed or to be licensed by the department;

(4) a controlling shareholder of a business entity licensed by the department;

(5) a person holding 50% or more ownership interest in a business entity licensed by the department;

(6) a person acting in a representative capacity for the applicant or license holder, including an owner, president, vice-president, member of the board of directors, chief executive officer, chief financial officer, chief information officer, chief managing officer, treasurer, controller, director, principal, manager of business affairs, or similar position of a business entity; or

(7) any person who becomes a person described in this subsection.

(d) An action taken by the board [~~Board~~] or department under this section may be based on an act or omission by an officer, director, partner, trustee, or other person acting in a representative capacity for the applicant or license holder.

(e) Upon receipt of an order or notice regarding an applicant or license holder issued under Family Code, Chapter 232, the board [~~Board~~] or department will deny [~~refuse to approve~~] an application for

issuance of a license, will not renew an existing license, or will suspend a license or other authorization issued by the department. The board's [~~Board~~] or department's action, based upon receipt of an order or notice issued under Family Code, Chapter 232, on the application for a license or existing license is not subject to the provisions of Government Code, Chapter 2001, including notice, hearing, or opportunity for hearing. Upon [~~On~~] receipt of an order vacating or staying an order suspending a license issued under Family Code, Chapter 232, the board [~~vacating or staying an order suspending a license, the Board~~] or department will issue the affected license to the applicant or license holder if the applicant or license holder is otherwise qualified for the license.

(f) No person currently imprisoned for conviction of a felony under any state or federal law is eligible for or may retain a license or authorization issued by the department.

(g) The board [~~Board~~] or department will revoke a license issued by the department upon the license holder's [~~licensee's~~] imprisonment following a felony conviction, felony community supervision revocation, revocation of parole, or revocation of mandatory supervision.

(h) The board [~~Board~~] or department may revoke a license issued by the department upon the license holder's imprisonment for a felony conviction, felony community supervision revocation, revocation of parole, or revocation of mandatory supervision, of a person defined by [~~in~~] subsection (c) of this section or identified in subsection (d) of this section.

(i) The board [~~Board~~] or department may suspend a license, revoke a license, or disqualify a person from receiving a license issued by the department if:

(1) a person has been convicted of an offense that directly relates to the duties and responsibilities of the licensed occupation. Any such action shall be made after consideration of the factors listed in Occupations Code, §53.022 and[~~,~~] §53.023, and the guidelines issued by the department pursuant to Occupations Code, §53.025;

(2) a person has been convicted of an offense that does not directly relate to the duties and responsibilities of the licensed occupation and that was committed less than five years before the date the person applies for the license;

(3) a person has been convicted of an offense listed in Code of Criminal Procedure, Article 42.12, Section 3g; [~~Section 3g, Article 42.12, Code of Criminal Procedure;~~] or

(4) a person has been convicted of a sexually violent offense, as defined by Code of Criminal Procedure, Article 62.001. [~~Article 62.001, Code of Criminal Procedure.~~]

(j) For purposes of Occupations Code, §53.021, the following criminal offenses directly relate to the duties and responsibilities of the occupations licensed by the department:

(1) Penal Code, Chapter 15, Preparatory Offenses;

(2) Penal Code, Chapter 16, Criminal Instruments, Interception of Wire or Oral Communication, and Installation of Tracking Device;

(3) Penal Code, Chapter 19, Criminal Homicide;

(4) Penal Code, Chapter 20, Kidnapping, Unlawful Restraint, and Smuggling of Persons;

(5) Penal Code, Chapter 20A, Trafficking of Persons;

(6) Penal Code, Chapter 21, Sexual Offenses;

(7) Penal Code, Chapter 22, Assaultive Offenses;

(8) Penal Code, Chapter 25, Offenses Against [~~against~~] the Family;

(9) Penal Code, Chapter 28, Arson, Criminal Mischief, and Other Property Damage or Destruction;

(10) Penal Code, Chapter 29, Robbery;

(11) Penal Code, Chapter 30, Burglary and Criminal Trespass;

(12) Penal Code, Chapter 31, Theft;

(13) Penal Code, Chapter 32, Fraud;

(14) Penal Code, Chapter 33, Computer Crimes;

(15) Penal Code, Chapter 33A, Telecommunications Crimes;

(16) Penal Code, Chapter 34, Money Laundering;

(17) Penal Code, Chapter 35, Insurance Fraud;

(18) Penal Code, Chapter 36, Bribery and Corrupt Influence;

(19) Penal Code, Chapter 37, Perjury and Other Falsification;

(20) Penal Code, Chapter 38, Obstructing Governmental Operation;

(21) Penal Code, Chapter 71, Organized Crime;

(22) Code of Criminal Procedure, Chapter 62, Sex Offender Registration Program, involving an offense for which the person has been required to register as a sex offender;

(23) Transportation Code, Chapter 501, Certificate of Title Act;

(24) Transportation Code, Chapter 502, Registration of Vehicles;

(25) Transportation Code, Chapter 503, Dealer's and Manufacturer's Vehicle License Plates;

(26) Transportation Code, Chapter 504, License Plates;

(27) Transportation Code, Chapter 520, Miscellaneous Provisions;

(28) Transportation Code, Chapter 547, Vehicle Equipment;

(29) Transportation Code, Chapter 548, Compulsory Inspection of Vehicles;

(30) Transportation Code, Chapter 727, Modification of, Tampering with, and Equipment of Motor Vehicles;

(31) Transportation Code, Chapter 728, Subchapter B, Sale of Master Key for Motor Vehicle Ignitions;

(32) Occupations Code, Chapter 2301, Subchapter R, Regulation of Certain Commercial Uses of Motor Vehicles;

(33) Tax Code, Chapter 23, Appraisal Methods and Procedures;

(34) Tax Code, Chapter 152, Taxes on Sale, Rental, and Use of Motor Vehicles;

(35) Business and Commerce Code, Chapter 17, Deceptive Trade Practices;

(36) Health and Safety Code, Chapter 365, Litter;

(37) Health and Safety Code, Chapter 481, Texas Controlled Substances Act;

(38) Health and Safety Code, Chapter 482, Simulated Controlled Substances;

(39) Health and Safety Code, Chapter 483, Dangerous Drugs;

(40) Water Code, Chapter 7, Enforcement;

(41) United States Code, Title 15, Chapter 28, Disclosure of Automobile Information, especially 15 U.S.C. §1233, Violations and Penalties;

(42) United States Code, Title 18, Chapter 63, Mail Fraud and Other Fraud Offenses;

(43) United States Code, Title 49, Chapter 301, Motor Vehicle Safety, especially 49 U.S.C. §30170, Criminal Penalties; or

(44) United States Code, Title 49, Chapter 327, Odometers, especially 49 U.S.C. §32709, Penalties and Enforcement.

§215.89. Fitness.

(a) In determining a person's fitness for a license issued or to be issued by the department under Transportation Code, Chapter 503 or Occupations Code, Chapter 2301, the board [~~Board~~] or department will consider:

(1) the requirements of Occupations Code, Chapter 53;

(2) the provisions of Occupations Code, §2301.651;

(3) any specific statutory licensing criteria or requirements;

(4) mitigating factors; and

(5) other evidence of a person's fitness, as allowed by law, including the standards identified in subsection (b) of this section.

(b) The board [~~Board~~] or department may determine that a person is unfit to perform the duties and discharge the responsibilities of a license holder and may, following notice and an opportunity for hearing, deny a person's license application or revoke or suspend a license if the person:

(1) fails to meet or maintain the qualifications and requirements of licensure;

(2) is convicted by any local, state, or federal authority of an offense listed in §215.88(j) of this title (relating to Criminal Offense and Action on License) or is convicted in any jurisdiction of an offense containing elements that are substantially similar to the elements in the offenses in §215.88(j) [~~of this title~~];

(3) omits information or provides false, misleading, or incomplete information regarding a criminal conviction on an initial application, renewal application, or application attachment for a license or other authorization issued by the department or by any local, state, or federal regulatory authority;

(4) is found to have violated an administrative or regulatory requirement based on action taken on a license, permit, or other authorization, including disciplinary action, revocation, suspension, denial, corrective action, cease and desist order, or assessment of a civil penalty, administrative fine, fee, or similar assessment, by the board [~~Board~~], department, or any local, state, or federal regulatory authority;

(5) is insolvent or fails to obtain or maintain financial resources sufficient to meet the financial obligations of the licensee;

(6) is a corporation that fails to maintain its charter, certificate, registration, or other authority to conduct business in Texas;

(7) is assessed a civil penalty, administrative fine, fee, or similar assessment by the board [~~Board~~], department, or a local, state, or federal regulatory authority for violation of a requirement governing or impacting the distribution or sale of a vehicle or a motor vehicle and fails to comply with the terms of a final order or fails to pay the penalty pursuant to the terms of a final order;

(8) was or is a person defined by §215.88(c) [~~in §215.88(c) of this title~~] or identified in §215.88(d) [~~of this title~~], or a manager or affiliate of a sole proprietorship, partnership, corporation, association, trust, estate, or other legal entity whose actions or omissions could be considered unfit, who is ineligible for licensure, or whose current or previous license, permit, or other authorization issued by any local, state, or federal regulatory authority has been subject to disciplinary action including suspension, revocation, denial, corrective action, cease and desist order, or assessment of a civil penalty, administrative fine, fee, or similar assessment;

(9) has an ownership interest with a person whose actions or omissions could be considered unfit, who is ineligible for licensure, or whose current or previous license, permit, or other authorization issued by any local, state, or federal regulatory authority has been subject to disciplinary action, including suspension, revocation, denial, corrective action, cease and desist order, or assessment of a civil penalty, administrative fine, fee, or similar assessment, by the board [~~Board~~], department, or any local, state, or federal regulatory authority;

(10) is a business entity that is operated, managed, or otherwise controlled by a relative or family member and that person could be considered unfit, is ineligible for licensure, or whose current or previous license, permit, or other authorization issued by any local, state, or federal regulatory authority has been subject to disciplinary action, including suspension, revocation, denial, corrective action, cease and desist order, or assessment of a civil penalty, administrative fine, fee, or similar assessment; or

(11) is found in an order issued through a contested case hearing [~~an administrative proceeding~~] to be unfit or acting in a manner detrimental to the system of distribution or sale of motor vehicles in Texas, the economy of the state, the public interest, or the welfare of Texas citizens.

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 August 26, 2016.

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David D. Duncan
General Counsel
Texas Department of Motor Vehicles
Earliest possible date of adoption: October 9, 2016
For further information, please call: (512) 465-5665

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43 TAC §215.86

STATUTORY AUTHORITY

The repeal is proposed under Transportation Code, §1002.001, which provides the board of the Texas Department of Motor Vehicles with the authority to adopt rules that are necessary and appropriate to implement the powers and the duties of the department; Occupations Code, §2301.155, which requires

the board of the Texas Department of Motor Vehicles to adopt rules necessary or convenient to administer Occupations Code, Chapter 2301; and more specifically, Occupations Code, §2301.266, which authorizes the board to adopt rules applicable to the issuance of duplicate licenses; and Occupations Code, §2301.602, which requires the board to adopt rules to enforce Chapter 2301, Subchapter M; Transportation Code, §503.002 which authorizes the board to adopt rules to administer Transportation Code, Chapter 503; and more specifically, Transportation Code, §503.009, which authorizes the board to adopt rules for procedures concerning contested cases; Transportation Code, §503.061, which requires the board to adopt rules regulating the issuance of dealer's license plates; and Transportation Code, §503.0626 and §503.0631, which require the board to adopt rules necessary to implement and manage the department's temporary tag databases.

CROSS REFERENCE TO STATUTE

Government Code, §2001.039; Occupations Code, Chapter 2301; and Transportation Code, Chapter 503.

§215.86. Processing of License Applications, Amendments, or Renewals.

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

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SUBCHAPTER D. FRANCHISED DEALERS, MANUFACTURERS, DISTRIBUTORS, AND CONVERTERS

43 TAC §§215.101, 215.103 - 215.106, 215.108 - 215.119

STATUTORY AUTHORITY

The amendments are proposed under Transportation Code, §1002.001, which provides the board of the Texas Department of Motor Vehicles with the authority to adopt rules that are necessary and appropriate to implement the powers and the duties of the department; Occupations Code, §2301.155, which requires the board of the Texas Department of Motor Vehicles to adopt rules necessary or convenient to administer Occupations Code, Chapter 2301; and more specifically, Occupations Code, §2301.266, which authorizes the board to adopt rules applicable to the issuance of duplicate licenses; and Occupations Code, §2301.602, which requires the board to adopt rules to enforce Chapter 2301, Subchapter M; Transportation Code, §503.002 which authorizes the board to adopt rules to administer Transportation Code, Chapter 503; and more specifically, Transportation Code, §503.009, which authorizes the board to adopt rules for procedures concerning contested cases; Transportation Code, §503.061, which requires the board to adopt rules regulating the issuance of dealer's license plates; and Transportation Code, §503.0626 and §503.0631, which require the board to adopt rules necessary to implement and manage the department's temporary tag databases.

CROSS REFERENCE TO STATUTE

Government Code, §2001.039; Occupations Code, Chapter 2301; and Transportation Code, Chapter 503.

§215.101. Purpose and Scope. [~~Objective.~~]

This subchapter implements [~~The objective of these rules is to implement the intent of the legislature as declared in~~] Occupations Code, Chapter 2301[~~,~~] and Transportation Code, Chapters 503 and 1000 - 1005. [~~1000 through 1005, by prescribing rules to regulate businesses requiring licenses under the Code.~~]

§215.103. Service-only [~~Service-Only~~] Facility.

(a) A service-only facility is a location occupied and operated by a franchised dealer that is a completely separate, noncontiguous [~~non-contiguous~~] site, from the franchised dealer's new motor vehicle sales and service or sales only location, where the franchised dealer will only perform warranty and nonwarranty [~~non-warranty~~] repair services. Except as allowed in subsection (d) of this section, warranty repair services may only be performed at either a licensed dealership or a licensed service-only facility.

(b) A franchised dealer must obtain a license to operate a service-only facility. A [~~The~~] dealer may not obtain a service-only facility license to service a particular line of new motor vehicles, unless that [~~the~~] dealer is franchised and licensed to sell that line.

(c) A service-only facility is [~~considered~~] a dealership [~~under Occupations Code, §2301.002(8), and is therefore~~] subject to protest under Occupations Code, Chapter 2301. [~~§2301.652.~~]

(d) Upon the manufacturer's or distributor's prior written approval, which cannot be unreasonably withheld, only a franchised dealer of the manufacturer or distributor may contract with another person as a subcontractor [~~sub-contractor~~] to perform warranty repair services that the dealer is authorized to perform under a franchise agreement with a manufacturer or distributor. Payment shall be made by the franchised dealer to the subcontractor [~~sub-contractor~~] and not by the manufacturer or distributor to the subcontractor. [~~sub-contractor.~~]

(e) A person with whom a franchised dealer contracts[~~, as described in subsection (d) of this section,~~] to perform warranty repair services is not eligible to obtain a service-only facility license and may not advertise [~~to the public~~] the performance of warranty repair services in any manner to the public.

§215.104. Changes to Franchised Dealer's [~~Dealer~~] License.

(a) In accordance with Occupations Code, §2301.356, a franchised dealer must file an application to amend the franchised dealer's license in order to request inclusion of an additional line-make at the dealer's currently licensed showroom.

(1) In accordance with §215.110 of this title (relating to Evidence of Franchise), the franchised dealer must attach to the amendment application a copy of:

(A) the executed franchise agreement;

(B) the required excerpt from the executed franchise agreement; or

(C) an evidence of franchise form completed by the manufacturer, distributor, or representative.

(2) The amendment application for an additional franchise at the showroom is considered an original application and is subject to protest, in accordance with Occupations Code, Chapter 2301.

[~~(a) To effectuate Occupations Code, §2301.356, every licensed dealer who proposes to conduct business at a currently licensed showroom under a franchise that is additional to or that differs from the franchise or franchises on which the license is then based shall file an application to amend the license on the form prescribed by the division, attaching a copy of the franchise agreement. The amended application will be considered as if it were an original application to operate under the additional franchise as to all matters except those reflected by the license as issued.~~]

(b) A franchised dealer may propose to sell or [~~licensed dealer who proposes to sell and/or~~] assign to another any interest in the licensed entity, whether a corporation or otherwise, provided [~~so long as~~] the physical location of the licensed entity remains the same.[~~,~~]

(1) The franchised dealer shall notify the department [~~division~~] in writing within 10 [~~ten~~] days of the sale or assignment of interest [~~change~~] by filing an application to amend the franchised dealer's license.

(2) If the sale or assignment of any portion of the business results in a change of business entity, then the purchasing entity or assignee [~~purchasing/assignee entity~~] must apply for and obtain a new license in the name of the new business entity.

(3) A publicly-held corporation needs only to [~~Publicly-held corporations need only~~] inform the department [~~division~~] of a change in ownership if one person or entity acquires 10% or greater interest in the licensed entity. [~~licensee.~~]

(c) A franchised dealer is required to file an amendment application within 10 days of a license change, including:

(1) deletion of a line-make from the dealer's license;

(2) a change of assumed name on file with the Office of the Secretary of State or county clerk;

(3) a change of mailing address;

(4) a change of telephone number;

(5) a change of facsimile number; or

(6) a change of email address.

(d) A franchised dealer is required to file a business entity amendment application within 10 days of an entity change, including:

(1) a change in management, dealer principal, or change of other person who is in charge of a franchised dealer's business activities, including a managing partner, officer, director of a corporation, or similar person; or

(2) a change of legal entity name on file with the Office of the Secretary of State.

[~~(c) In the event of a change in management reflected by a change of the general manager, dealer principal, or other person who is in charge of a licensee's business activities, whether a managing partner, officer, or director of a corporation, or otherwise, the division shall be advised by means of an application for an amended license.~~]

(e) [~~(d)~~] If a licensed new motor vehicle dealer changes or converts from one type of business entity to another type of business entity without changing ownership of the dealership, the submission of a franchise agreement in the name of the new entity is not required in conjunction with an application. The franchise agreement on file with the department [~~division~~] prior to the change or conversion of the dealer's business entity type applies to the successor entity until the parties agree to replace the franchise agreement. This subsection does not apply to a sole proprietorship or general partnership.

(f) [~~(e)~~] If a dealer adopts a plan of conversion under a state or federal law that allows one legal entity to be converted into another legal entity, only an application to amend the license is necessary to be filed with the department [~~division~~]. The franchise agreement on file with the department [~~division~~] continues to apply to the converted entity. If a license holder becomes another legal entity [~~the entity change is accomplished~~] by any means other than by conversion, a new application is required, subject to subsection (e) [~~(d)~~] of this section.

(g) [~~(f)~~] In addition to obtaining permission from the manufacturer or distributor, a franchised dealer [~~A licensee~~] shall obtain department [~~division~~] approval prior to [~~the~~] opening [~~of~~] a supplemental location or relocating[~~, or the relocation of~~] an existing location. A franchised dealer [~~licensee~~] must notify the department [~~division~~] when closing an existing location.

§215.105. Notification of License Application; Protest Requirements.

(a) The provisions of this section are not applicable to an application filed with the department for a franchised dealer license as a result of the purchase or transfer of an existing entity holding a current franchised dealer's license that does not involve a physical relocation of the purchased or transferred line-makes.

(b) [~~(a)~~] Upon receipt of an application for a new motor vehicle dealer's license, including an application filed with the department [~~division~~] by reason of the relocation of an existing dealership, the department [~~division~~] shall give notice of the filing of the application to each franchised dealer [~~all dealer licensees~~] that may have standing to protest the application.

(c) [~~(b)~~] If it appears to the department that there are no dealers with standing to protest, then no notice shall be given.

(d) [~~(c)~~] A person holding a franchised dealer's license [~~Any dealer licensee holding a franchise~~] for the sale of the same line-make of a new motor vehicle as proposed for sale in the subject application and that has [~~with~~] standing to protest the application may file with the department [~~division~~] a notice of protest opposing [~~in opposition to the application and~~] the granting of a license.

(e) [~~(d)~~] A franchised [~~The~~] dealer that wishes to protest the application shall give notice in accordance with Occupations Code, Chapter 2301. [~~its notice of protest in the following manner.~~]

(1) The notice of protest shall be in writing and shall be signed by an authorized officer or other official authorized to sign on behalf of the protesting dealer [~~licensee~~] filing the notice.

(2) The notice of protest shall state the statutory basis upon which the protest is made and assert how the protesting dealer meets the standing requirements under §215.119 of this title (relating to Standing to Protest) to protest the application.

(3) The notice of protest shall state that the protest is not made for purposes of delay or for any other purpose except for justifiable cause.

(4) If a protest is filed against an application for the establishment of a dealership or for addition of a line-make at an existing dealership, the notice of protest shall state under which [~~the~~] provision of Occupations Code, Chapter 2301[~~, under which~~] the protest is made.

[~~(e) The provisions of this section shall not be applicable to any application filed with the division for a dealer license as a result of the purchase or transfer of an existing entity holding a current franchise license which does not involve any physical relocation of the purchased or transferred line-makes.~~]

§215.106. Time for Filing Protest.

(a) A notice of protest must be:

(1) received by the department [~~in the division offices in Austin~~] not later than 5:00 p.m. Central Standard Time (CST) on the date 15 days from the date of mailing of the department's [~~division's~~] notification to the license holder [~~licensees~~] of the filing of the application;

(2) filed with the department by United States mail, facsimile, hand delivery, or through the department's designated electronic filing system when available; however, a notice of protest may not be filed by email; [~~e-mail~~] and

(3) accompanied by the [~~statutorily~~] required [~~protest~~] filing fee. If the filing fee does not accompany the notice of protest, the [~~statutorily required protest filing~~] fee must be received by the department [~~in the division offices in Austin~~] not later than 5:00 p.m. CST on the date 20 days from the date of mailing of the department's [~~division's~~] notification to the license holder [~~licensees~~] of the filing of the application.

(b) The department will reject a notice of protest if:

(1) the complete notice of protest is not filed within 15 days from the date of mailing of the department's notification to the license holder of the filing of the application; or

(2) the required filing fee is not remitted within 20 days from the date of mailing of the department's notification to the license holder of the filing of the application.

[~~(b) Failure to file a formal notice of protest within the specified time period shall result in the disallowance of the protest.~~]

[~~(c) Failure to remit the statutorily required protest~~] ~~filing fee within the specified time period shall result in the disallowance of the protest.~~]

§215.108. Addition or Relocation of Line-make. [~~Line Make.~~]

An application to amend [~~for the amendment of~~] an existing new motor vehicle dealer's license for [~~by~~] the addition of another line-make at the existing dealership or for the relocation of a line-make to the existing dealership shall be deemed [~~to be~~] an "application to establish a dealership" insofar as the line-make to be added is concerned, and shall be subject to the provisions of §215.105 of this title (relating to Notification of License Application; Protest Requirements) and §215.106 of this title (relating to Time for Filing Protest). [~~§§215.105-215.107 of this subchapter (relating to Notification of License Application; Protest Requirements; Time for Filing Protest; and Hearing).~~]

§215.109. Replacement Dealership.

An application for a new motor vehicle dealer's license for a dealership intended as a replacement for a previously existing dealership shall be deemed [~~to be~~] an application for a "replacement dealership" required to be established in accordance with [~~pursuant to~~] Occupations Code, §2301.453 and shall not be subject to protest under the provisions of §215.105 of this title [~~subchapter~~] (relating to Notification of License Application; Protest Requirements), provided that:

(1) the application states that the applicant is intended as a replacement dealership and identifies the prior dealership to be replaced;

(2) the manufacturer or distributor of the line-make gives notice to the department and to other dealers franchised for the same line-make that meet the provisions of [~~division and to its other like-line dealers pursuant to~~] Occupations Code, §2301.652(b) [~~within 60 days following the closing of the prior dealership~~];

(3) the notice under paragraph (2) of this subsection is given within 60 days following the closing of the prior dealership;

(4) [~~(3)~~] the application is filed with the department [~~division~~] not later than one year following the closing of the prior dealership; and

(5) [~~(4)~~] the location of the applicant's proposed dealership is not more than two miles [~~greater than two miles~~] from the location of the prior dealership.

§215.110. Evidence of Franchise.

(a) Upon application for a new motor vehicle dealer's license or an amendment of an [~~dealer license, or application for amendment of~~] existing new motor vehicle dealer's [~~dealer~~] license to add a line-make, [~~in addition to other attachments required to be submitted with the application,~~] the applicant must submit a photocopy of the [~~those~~] pages of the franchise agreement(s) that [~~which~~] reflect the parties to the agreement(s), [~~and~~] the authorized signatures of the parties to the agreement(s), and each line-make [~~for each line of motor vehicle~~] listed in the application. To meet this requirement temporarily for the purpose of application processing, a [~~A~~] form prescribed by the department [~~division~~] and completed by the manufacturer or distributor [~~manufacturer/distributor~~] may be submitted with the application in lieu of the information described in this subsection [~~to meet this requirement temporarily, for purposes of application processing~~]. The applicant must submit the required photocopies of the franchise agreement(s)[~~, as~~] described in this subsection[~~,~~] immediately upon the applicant's receipt of the franchise agreement(s). [~~receipt.~~]

(b) Upon application to relocate a new motor vehicle dealership, [~~in addition to other attachments required to be submitted with the application,~~] the applicant must submit a form prescribed by the department [~~division~~] and completed by the manufacturer or distributor [~~manufacturer/distributor~~] that identifies the license holder [~~licensee~~] and the new location.

§215.111. Notice of Termination or Discontinuance [~~Noncontinuance~~] of Franchise and Time for Filing Protest.

A notice of termination or discontinuance [~~noncontinuance~~] of a dealer's franchise shall be given by a manufacturer or distributor in accordance with [~~the requirements of~~] Occupations Code, §2301.453[~~,~~] not less than 60 days prior to the effective date of the franchise termination or discontinuance [~~thereof~~]. A notice of protest of the franchise termination or discontinuance [~~noncontinuance~~] by a dealer pursuant to Occupations Code, §2301.453[~~,~~] shall be in writing and shall be filed with the department [~~in the Board's office in Austin,~~] prior to the effective date of the franchise termination or discontinuance [~~noncontinuance as~~] stated in the notice from the manufacturer or distributor.

§215.112. Motor Home Show Limitations and Restrictions.

(a) Applicability. This rule implements Occupations Code, §2301.358 and is expressly limited to motor home shows that require department approval in accordance with subsection (b) of this section.

(b) Show approval required. Without written approval by the department, a person may not promote or conduct a show involving a new motor home that will be sold or offered for sale.

(c) Show requirements. The department may approve a motor home show in accordance with this section if the show:

(1) does not exceed six consecutive days;

(2) is not conducted within 90 days of a previous show in the same county; and

(3) complies with Occupations Code, Chapter 2301; Transportation Code, Chapters 503 and 1000 - 1005; and board rules.

(d) Additional motor home shows. The department may authorize additional motor home shows in any county upon a showing of

good cause by the promoter for waiver from the show requirements of subsection (c) of this section.

(e) Show approval requirements. For purposes of this section, the promoter or coordinator of a motor home show must submit an application to the department. The application must:

(1) be completed and submitted on a form and in the manner prescribed by the department;

(2) be accompanied by all required attachments;

(3) be submitted no less than 30 days and no more than 90 days before the proposed show date;

(4) be accompanied by a $25,000 surety bond if the promoter or coordinator of the show is not a license holder, an association of license holders, or an organization of license holders;

(5) affirm that at least three franchised dealers of new motor homes, each participating with at least one different line-make, will participate in the show;

(6) affirm that each franchised dealer that participates in the show holds a valid franchised dealer's license issued by the department for each motor home line-make that the franchised dealer will participate with in the show; and

(7) designate either Saturday or Sunday for suspension of the sale of any motor home, in accordance with Transportation Code, Chapter 728, Subchapter A, when the show is conducted over a consecutive Saturday and Sunday.

(f) Dealer participation approval required. Without written approval by the department, a motor home dealer may not participate in a show of new motor homes, where a motor home will be sold or offered for sale.

(g) Dealer participation requirements. A dealer of new motor homes requesting approval to participate in a show must submit a sufficient application to the department. To be sufficient, the application must be on a form prescribed by the department and accompanied by all required attachments.

(h) Located within 70 miles of show site. For the purpose of this section, a franchised dealer located within 70 miles of the site of the proposed show has a right equal to any other franchised dealer that is also located within 70 miles of the show site to participate in the show with a like-line motor home.

(i) Located more than 70 miles from show site. For the purpose of this section, a franchised dealer that is located more than 70 miles from the proposed show site does not have a right to participate in the show; however, the department may approve that franchised dealer to participate in the motor home show, if:

(1) there is no franchised dealer of a like-line motor home located within 70 miles of the proposed show site; or

(2) the franchised dealer obtains a written waiver from each like-line franchised motor home dealer located within 70 miles of the proposed show site.

(j) Suspension of sales. For the purpose of this section and pursuant to Transportation Code, Chapter 728, Subchapter A, when a show is conducted over a consecutive Saturday and Sunday, all franchised dealers of motor homes will suspend sales on the same Saturday or Sunday, as designated by the show promoter or coordinator. On the day sales are suspended, a motor home dealer:

(1) may quote a price;

(2) may open and attend to the motor home product;

(3) may not sell, offer to sell, negotiate a price, or enter into a contract or letter of intention to contract for the sale of the motor home; and

(4) is not required to remove or cover the suggested retail price the manufacturer may have affixed to the motor home.

[~~(a) A dealer licensed by the division who is authorized to sell new motor homes may attend and sell at any motor home show that has been approved by the division.~~]

[~~(b) The scope of this rule is expressly limited to new motor home shows and exhibitions. It does not apply to other types of motor vehicle distribution activities, static displays, or any other provision of Occupations Code, Chapter 2301 other than §2301.355 and §2301.358. Other motor vehicle shows, exhibitions, or static displays will be reviewed by division staff on a case by case basis.~~]

[~~(c) Approval must be sought by the show promoter or coordinator no less than 30 days and no more than 90 days prior to the proposed show date. All applications for motor home shows must be submitted on the forms and in the manner prescribed by the division, and must be accompanied by all required attachments. If the promoter or coordinator is not a licensee, an association of licensees, or organization of licensees, the application must be accompanied by a $25,000 surety bond to assure compliance with Occupations Code, Chapter 2301 and department rules, as well as other regulations pertaining to the sale of new motor vehicles.~~]

[~~(d) There must be at least three dealers participating in the show, representing at least three different line-makes at the show, for the show to qualify for approval. Each participating new motor vehicle dealer must have a current, valid, Texas new motor vehicle dealer's license to sell the particular line of motor home to be shown.~~]

[~~(e) The duration of any motor home show shall not exceed six consecutive days. If a show is conducted over a consecutive Saturday and a Sunday, sales will be suspended by all motor vehicle dealers on the same Saturday or Sunday to achieve uniform compliance with the Blue Law under Transportation Code, Chapter 728, Subchapter A. On the day sales are suspended, a motor home dealer:~~]

[~~(1) may quote a price and discuss finance options;~~]

[~~(2) may not sell, offer to sell, negotiate a price, or enter into a contract or letter of intention to contract for the sale of the product;~~]

[~~(3) may open and attend to the motor home product;~~]

[~~(4) is not required to remove or cover the suggested retail price the manufacturer may have affixed to the motor home.~~]

[~~(f) No motor home show shall occur in a county within 90 days of a previous motor home show within that county. Upon a showing of good cause, the division may authorize additional motor home shows in any county. Any motor home dealer may attend a motor home show so long as no like line dealership is located within 70 miles of the show site, unless a written waiver is obtained from the like line dealer or dealers located within 70 miles of the show site. Any like line dealer within 70 miles of the show site has a superior and exclusive right to represent that line at the proposed show. If there are two or more like line dealers located within 70 miles of the show site, each has equal right to participate in the proposed show.~~]

§215.113. Manufacturer Ownership of Franchised Dealer; Good Cause Extension; Dealer Development.

(a) In the absence of a showing of good cause, an [~~An~~] application for a new motor vehicle dealer's license of [~~in~~] which a manufacturer or distributor[~~, as those terms are defined in Occupations Code,~~

~~Chapter 2301,~~] owns any interest in or has control of the dealership entity must be submitted to the department [~~division~~] no later than 30 days before:

(1) the opening of the dealership;[,]

(2) close of the buy-sell agreement;[,] or

(3) the expiration of the current license[, ~~whichever is the case~~].

(b) If a manufacturer or distributor applies for a new motor vehicle dealer's license of [~~in~~] which the manufacturer or distributor holds an ownership interest in or has control of the dealership entity in accordance with [~~under the terms of~~] Occupations Code, §2301.476(d) - (f) [~~§2301.476(d)~~], the license application must contain a sworn statement from the manufacturer or distributor that the dealership was purchased from a franchised dealer and is for sale at a reasonable price and under reasonable terms and conditions, and that the manufacturer or distributor intends to sell the dealership to a person not controlled or owned by the manufacturer or distributor within 12 months of acquiring the dealership, except as provided by [~~in~~] subsection (h) of this section.

(c) A request for an extension of the initial 12 month period for manufacturer or distributor ownership or control of a new motor vehicle dealership, in accordance with Occupations Code, §2301.476(e), must be submitted to the department in accordance with subsection (a) of this section[,] along with a sufficient [~~complete~~] application to renew the new motor vehicle dealer's license. The request must contain a detailed explanation, including appropriate documentary support, to show the manufacturer's or distributor's good cause for failure to sell the dealership within the initial 12 month period. The director will evaluate the request and determine whether the license should be renewed for a period not to exceed 12 months or deny the renewal application. If the renewal application is denied, the manufacturer or distributor may request a hearing on the denial [~~to be conducted~~] in accordance with Occupations Code, §§2301.701 - 2301.713.

(d) Requests for extensions after the first extension is granted, as provided by [~~in~~] Occupations Code, §2301.476(e), must be submitted at least 120 days before the expiration of the current license. Upon receipt of a subsequent request, the board [~~Board~~] will initiate a hearing in accordance with Occupations Code, §§2301.701 - 2301.713, at which the manufacturer or distributor will be required to show good cause for the failure to sell the dealership. The manufacturer or distributor has the burden of proof and the burden of going forward on the sole issue of good cause for the failure to sell the dealership.

(e) The department [~~division~~] will give notice of the hearing described in subsection (d) of this section to all other franchised dealers [~~dealer licensees~~] holding franchises for the sale and service or service only of the same line-make of new motor vehicles that [~~who~~] are located in the same county in which the dealership owned or controlled by the manufacturer or distributor is located or in an area within 15 miles of the dealership owned or controlled by the manufacturer or distributor. Such dealers, if any, will be allowed to intervene and protest the granting of the subsequent extension. Notices of intervention by dealers afforded a right to protest under Occupations Code, §2301.476(e)[,] must be filed with the department [~~division's Docket Clerk~~] within 15 days of the date of mailing of the notice of hearing, and a copy must be [~~with a copy~~] provided to the manufacturer or distributor. The department will reject a notice of intervention if the notice is not filed at least 30 days before: [~~Failure to file a formal notice of intervention within the specified time period will result in the disallowance of the intervention.~~]

(1) the opening of the dealership;

(2) close of the buy-sell agreement; or

(3) the expiration of the current license.

(f) A hearing under subsection (d) [~~subsections (d) and (e)~~] of this section will be conducted as expeditiously as possible, but not later than 120 days after receipt of the subsequent request for extension from the manufacturer or distributor. An [~~A SOAH~~] ALJ will prepare a written decision and proposed findings of fact and conclusions of law as soon as possible, but not later than 60 calendar days after the hearing is closed. The new motor vehicle dealer's license that is the subject of the hearing will continue in effect until a final decision on the request for a subsequent extension is rendered by the board. [~~Board on the request for a subsequent extension.~~]

(g) The procedures [~~procedure~~] described in subsections (d) - (f) of this section will be followed for all extensions requested by the manufacturer or distributor after the initial extension.

(h) An application for a new motor vehicle dealer's license of [~~in~~] which a manufacturer or distributor owns any interest in the dealership entity in accordance with [~~under the terms of~~] Occupations Code, §2301.476(g)[,] must contain sufficient documentation to show that the applicant meets the requirements of Occupations Code, §2301.476(g). [~~the following:~~]

[~~(1) that the dealer development candidate is part of a group of persons who have historically been underrepresented in the manufacturer's or distributor's dealer body or is an otherwise qualified person who lacks the resources to purchase a dealership outright;~~]

[~~(2) that the manufacturer or distributor is in a bona fide relationship with the dealer development candidate;~~]

[~~(3) that the dealer development candidate has made a significant investment in the dealership, subject to loss;~~]

[~~(4) that the dealer development candidate has an ownership interest in the dealership; and~~]

[~~(5) that the dealer development candidate operates the dealership under a plan to acquire full ownership of the dealership within a reasonable time and under reasonable terms and conditions.~~]

§215.114. Sale of a Vehicle by a Manufacturer or Distributor at a Wholesale Motor Vehicle [~~Vehicles by Manufacturer/Distributor at Wholesale~~] Auction.

A manufacturer or distributor [~~who is~~] licensed under Occupations Code, Chapter 2301[,] or a wholly owned [~~wholly-owned~~] subsidiary of a manufacturer or distributor, may sell motor vehicles it owns to dealers through a licensed Texas wholesale motor vehicle auction. A GDN is sued to a licensed manufacturer, distributor, or wholly owned subsidiary of a manufacturer or distributor shall be canceled, unless otherwise allowed under Occupations Code, Chapter 2301. [~~General distinguishing numbers currently issued to licensed manufacturers, distributors, or their wholly-owned subsidiaries shall be cancelled on the date this rule becomes effective, except where otherwise allowed under the Code.~~]

§215.115. Manufacturer, Distributor, and Converter Records.

(a) A manufacturer or distributor must maintain, for a minimum period of 48 months, a record of each vehicle sold to any person in this state. The manufacturer or distributor shall make the record available during business hours for inspection and copying by a representative of the department.

(b) A converter must maintain, for a minimum period of 48 months, a record of each vehicle converted to any person in this state, including to a Texas franchised dealer. The converter shall make the record available during business hours for inspection and copying by a representative of the department.

[~~(a) Manufacturers and distributors must keep records of all vehicles they sell to any person in this state for a minimum period of 48 months. These records shall be made available for inspection and copying by a representative of the department during business hours.~~]

[~~(b) Converters must keep records of all vehicles converted and distributed to Texas franchised dealers for a minimum period of 48 months. These records shall be made available for inspection and copying by a representative of the department during business hours.~~]

(c) A manufacturer, distributor, or converter is required to maintain at its licensed location a record reflecting each purchase, sale, or conversion for a minimum period of 24 months. [~~Records reflecting purchases, sales, or conversions for at least the preceding 24 months must be maintained at the licensed location.~~] Records for prior time periods may be kept off-site.

(d) Within 15 days of [~~Upon~~] receipt of a request sent by mail or electronic document transfer from a representative of the department, a manufacturer, distributor, or converter must submit a copy [~~copies~~] of specified records to the address listed in the request [~~within 15 days~~].

(e) Records required to be maintained [~~kept~~] and made available to the department must include the following: [~~shall contain the following information:~~]

(1) the date of sale or conversion of the motor vehicle;

(2) the VIN [~~vehicle identification number~~];

(3) the name and address of the purchasing dealer or converter;

(4) a copy of or a record [~~copies of or records~~] with the information contained in the manufacturer's certificate of origin [~~Manufacturer's Certificate of Origin~~] or title;

(5) information regarding the prior status of the motor vehicle such as the Reacquired Vehicle Disclosure Statement;

(6) the repair history of any motor vehicle subject to a warranty complaint;

(7) technical service bulletin [~~bulletins~~] or equivalent advisory; and [~~advisories; and,~~]

(8) any audit of a dealership. [~~audits of dealerships.~~]

(f) Any record required by the department may be maintained [~~Electronic records. Any records required to be kept may be kept~~] in an electronic format, if the electronic record [~~records~~] can be printed at the licensed location upon request for the record by a representative of the department.

§215.116. Lease or Sublease Listing.

A dealer that lists its dealership for lease or sublease to mitigate damages in accordance with Occupations Code, §2301.4651(e)[~~,~~] is required to list for lease or sublease:

(1) the entire real property if the termination or discontinuance effectively terminates all line-makes and all franchises for the entire dealership; or

(2) only that portion of the real property associated with the terminated line-make or franchise, if the termination or discontinuance does not affect all line-makes and all franchises of the dealership.

§215.117. Market Value Property Appraisal.

(a) A market value property appraisal assessment made in accordance with Occupations Code, §2301.482(c)[~~,~~] requires three general certified real estate appraisers [~~that have been~~] certified by the State of Texas.

(b) Necessary real estate and necessary construction are each determined by the applicable property use agreement.

(c) To determine market value of property in accordance with Occupations Code, §2301.482(c), an average of the market value property appraisals will be calculated from the independent market value property assessment determinations of the three general certified real estate appraisers.

§215.118. Determination of Affected County for Dealership Relocation.

The most recent population data reported by the federal decennial census is used to identify an affected county defined by [~~under~~] Occupations Code, §2301.6521.

§215.119. Standing to Protest.

(a) A protesting dealer [~~protestant~~] has the burden to demonstrate standing to protest.

(b) Standing requirements are established by the type of application.

(1) Protest of an application to establish a dealership or to add a new line-make to an existing dealership requires the protesting dealer [~~protestant~~] to meet standing requirements under Occupations Code, §2301.652;

(2) Protest of an application to relocate a dealership requires the protesting dealer [~~protestant~~] to meet standing requirements under Occupations Code, §2301.652;

(3) Protest of an application to relocate a dealership within an affected county or from an affected county to an adjacent affected county requires the protesting dealer [~~protestant~~] to meet standing requirements under Occupations Code, §2301.6521;

(4) Protest of an application to relocate an economically impaired dealership requires the protesting dealer [~~protestant~~] to meet standing requirements under Occupations Code, §2301.6522; and

(5) Protest of an application filed by a manufacturer, distributor, or representative for an extension of time for ownership or control of a dealership requires the protesting dealer [~~protestant~~] to meet standing requirements under Occupations Code, §2301.476.

(c) A person has standing to protest an application to establish a dealership or to add a franchised line-make at an existing dealership if:

(1) the person is a franchised dealer of the same line-make; and

(2) the person's dealership is located either in the same county as, or within 15 miles of, the dealership for which the application was filed.

(d) Except as provided in subsections (e) and (f) of this section, a person has standing to protest an application to relocate a dealership or to relocate a franchised line-make of an existing dealership if:

(1) the person is a franchised dealer of the same line-make;

(2) the person's dealership is located either in the same county as, or within 15 miles of, the dealership for which the application for relocation is filed;

(3) the proposed relocation site is more than two miles from the location where the dealership is currently licensed; and

(4) the proposed relocation site is nearer to the protesting franchised dealer than the location from which the relocating dealership is currently licensed.

(e) An application may be filed under Occupations Code, §2301.6521 to relocate a dealership from a location in an affected county to a location that is either within the same affected county or in an adjacent affected county.

(1) No dealer has standing to protest an application filed in accordance with this subsection if the proposed relocation site is two miles or less from the relocating dealer's existing licensed location.

(2) No dealer has standing to protest an application filed in accordance with this subsection if the proposed relocation site is farther from the protesting dealer's licensed location than the relocating dealer's existing licensed location.

(3) If a dealership of the same line-make as the relocating dealership is located within 15 miles of the proposed relocation site, then a person has standing to protest an application to relocate[,] filed in accordance with this subsection, if:

(A) the person is a franchised dealer of the same line-make;

(B) the person's dealership is located within 15 miles of the proposed relocation site;

(C) the proposed relocation site is more than two miles from the location where the dealership is currently licensed; and

(D) the proposed relocation site is nearer to the protesting franchised dealer than the location from which the relocating dealership is currently licensed.

(4) If no dealership of the same line-make as the relocating dealership is located within 15 miles of the proposed relocation site, then a person has standing to protest an application to relocate[,] filed in accordance with this subsection, if:

(A) the person is a franchised dealer of the same line-make;

(B) no other dealership of the same line-make is located nearer to the proposed relocation site;

(C) the person's dealership is located in the same affected county as the relocating dealership is proposed to be located;

(D) the proposed relocation site is more than two miles from the location where the relocating dealership is currently licensed; and

(E) the proposed relocation site is nearer to the protesting franchised dealer than the location from which the relocating dealership is currently licensed.

(f) If an economically impaired dealer files an application under Occupations Code, §2301.6522[,] to relocate its dealership, then a dealer may have [~~has~~] standing to protest the application if:

(1) the dealer is franchised for a line-make that is the same as a line-make proposed to be relocated;

(2) the proposed relocation site is more than two miles closer to the protesting dealer's dealership than the site of the economically impaired dealer's existing licensed location; and

(3) there is no other dealer located nearer to the proposed relocation site that is franchised for a line-make that is proposed to be relocated.

(g) A dealer has standing to protest an application for an extension of time that was filed by a manufacturer, distributor, or representative under Occupations Code, §2301.476[,] if:

(1) the protesting dealer is franchised for a line-make being sold or serviced from the dealership owned or controlled by a manufacturer, distributor, or representative; and

(2) the protesting dealer is located either in the same county as, or within 15 miles of, the dealership owned or controlled by the manufacturer, distributor, or representative.

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 August 26, 2016.

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David D. Duncan
General Counsel
Texas Department of Motor Vehicles
Earliest possible date of adoption: October 9, 2016
For further information, please call: (512) 465-5665

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43 TAC §215.107

STATUTORY AUTHORITY

The repeal is proposed under Transportation Code, §1002.001, which provides the board of the Texas Department of Motor Vehicles with the authority to adopt rules that are necessary and appropriate to implement the powers and the duties of the department; Occupations Code, §2301.155, which requires the board of the Texas Department of Motor Vehicles to adopt rules necessary or convenient to administer Occupations Code, Chapter 2301; and more specifically, Occupations Code, §2301.266, which authorizes the board to adopt rules applicable to the issuance of duplicate licenses; and Occupations Code, §2301.602, which requires the board to adopt rules to enforce Chapter 2301, Subchapter M; Transportation Code, §503.002 which authorizes the board to adopt rules to administer Transportation Code, Chapter 503; and more specifically, Transportation Code, §503.009, which authorizes the board to adopt rules for procedures concerning contested cases; Transportation Code, §503.061, which requires the board to adopt rules regulating the issuance of dealer's license plates; and Transportation Code, §503.0626 and §503.0631, which require the board to adopt rules necessary to implement and manage the department's temporary tag databases.

CROSS REFERENCE TO STATUTE

Government Code, §2001.039; Occupations Code, Chapter 2301; and Transportation Code, Chapter 503.

§215.107. Hearing.

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

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General Counsel
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SUBCHAPTER E. GENERAL DISTINGUISHING NUMBERS

43 TAC §§215.131 - 215.133, 215.135, 215.137 - 215.141, 215.144 - 215.160

STATUTORY AUTHORITY

The new rule and amendments are proposed under Transportation Code, §1002.001, which provides the board of the Texas Department of Motor Vehicles with the authority to adopt rules that are necessary and appropriate to implement the powers and the duties of the department; Occupations Code, §2301.155, which requires the board of the Texas Department of Motor Vehicles to adopt rules necessary or convenient to administer Occupations Code, Chapter 2301; and more specifically, Occupations Code, §2301.266, which authorizes the board to adopt rules applicable to the issuance of duplicate licenses; and Occupations Code, §2301.602, which requires the board to adopt rules to enforce Chapter 2301, Subchapter M; Transportation Code, §503.002 which authorizes the board to adopt rules to administer Transportation Code, Chapter 503; and more specifically, Transportation Code, §503.009, which authorizes the board to adopt rules for procedures concerning contested cases; Transportation Code, §503.061, which requires the board to adopt rules regulating the issuance of dealer's license plates; and Transportation Code, §503.0626 and §503.0631, which require the board to adopt rules necessary to implement and manage the department's temporary tag databases.

CROSS REFERENCE TO STATUTE

§215.131. Purpose and Scope. [~~Objective.~~]

This subchapter implements [~~The objective of this subchapter is to implement the intent of the legislature as declared in~~] Transportation Code, Chapter 503[~~,~~] and Occupations Code, Chapter 2301[~~, by prescribing rules to regulate businesses requiring general distinguishing numbers~~].

§215.132. Definitions.

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

(1) Barrier--A material object or set of objects that separates or demarcates.

(2) Charitable organization--Has the meaning assigned by Transportation Code, §503.062(e). [~~An organization that is established and exists for the purpose of relieving poverty, the advancement of education, religion, or science, the promotion of health, governmental, or municipal purposes, or other purposes beneficial to the community without financial gain.~~]

(3) Consignment sale--The owner-authorized sale of a motor vehicle by a person other than the owner[~~, under the terms of a written authorization from the owner~~].

[~~(4) Dealer--Any person who is regularly and actively engaged in the business of buying, selling, or exchanging new or used motor vehicles, motorcycles, motor homes, mobility motor vehicles, house trailers, or trailers or semitrailers as defined in Transportation Code, §501.001 et seq., or Transportation Code, §502.001 et seq., at either wholesale or retail, either directly, indirectly, or by consignment.~~]

[~~(5) Independent mobility motor vehicle dealer--A nonfranchised dealer who:~~]

[~~(A) holds a general distinguishing number issued by the department under Transportation Code, Chapter 503;~~]

[~~(B) holds a converter's license issued under Occupations Code, Chapter 2301;~~]

[~~(C) is engaged in the business of buying, selling, or exchanging mobility motor vehicles and servicing or repairing the devices installed on mobility motor vehicles at an established and permanent place of business in this state; and~~]

[~~(D) is certified by the manufacturer of each mobility device that the dealer installs, if the manufacturer offers that certification.~~]

(4) [~~(6)~~] House trailer--A nonmotorized vehicle designed for human habitation and for carrying persons and property on [~~upon~~] its own structure and for being drawn by a motor vehicle. A house trailer [~~The term~~] does not include manufactured housing. A towable recreational vehicle, [~~Towable recreational vehicles~~] as defined by [~~in~~] Occupations Code, §2301.002, is [~~are~~] included in the terms "house trailer" or "travel trailer."

(5) [~~(7)~~] License--A dealer's GDN [~~general distinguishing number~~] assigned by the department identifying the type of business for a specified [~~division for the~~] location from which the person engages in business.

[~~(8) Mobility motor vehicle--A motor vehicle that is designed and equipped to transport a person with a disability and that:~~]

[~~(A) has a chassis that contains:~~]

[~~(i)~~ ~~a permanently lowered floor or lowered frame; or~~]

[~~(ii)~~ ~~a permanently raised roof and raised door;~~]

[~~(B) contains at least one of the following:~~]

[~~(i)~~ ~~an electronic or mechanical wheelchair, scooter, or platform lift that enables a person to enter or exit the vehicle while occupying a wheelchair or scooter;~~]

[~~(ii)~~ ~~an electronic or mechanical wheelchair ramp; or~~]

[~~(iii)~~ ~~a system to secure a wheelchair or scooter to allow for a person to be safely transported while occupying the wheelchair or scooter; and~~]

[~~(C) is installed as an integral part or permanent attachment to the motor vehicle's chassis.~~]

(6) [~~(9)~~] Person--Has the meaning assigned by Occupations Code, §2301.002. [~~Any individual, firm, partnership, corporation, or other legal entity.~~]

(7) [~~(10)~~] Sale--With regard to a specific vehicle, the transfer of possession of that vehicle to a purchaser for consideration.

(8) [~~(11)~~] Temporary tag--A buyer's temporary tag, converter's temporary tag, or dealer's temporary tag as described under Transportation Code, Chapter 503. [~~A buyer tag, converter tag, or dealer tag.~~]

(9) [~~(12)~~] Towable recreational vehicle--Has the same meaning as "house trailer" defined by this section. [~~See definition for House Trailer in this section.~~]

(10) [~~(13)~~] Travel Trailer--Has the same meaning as "house trailer" defined by this section. [~~See definition for House Trailer in this section.~~]

(11) Vehicle--Has the meaning assigned by Transportation Code, §503.001.

(12) VIN--Vehicle identification number.

[~~(14) Wholesale dealer--A licensed dealer who only sells or exchanges vehicles with other licensed dealers.~~]

§215.133. General Distinguishing Number.

(a) No person may engage in business as a dealer unless that person has a currently valid general distinguishing number assigned by the department [~~division~~] for each location from which the person engages in business. If a dealer consigns more than five vehicles in a calendar year for sale from a location other than the location for which the dealer holds a general distinguishing number, the dealer must also hold a general distinguishing number for the consignment location.

(b) The provisions of subsection (a) of this section do not apply to:

(1) a person who sells or offers for sale fewer than five vehicles of the same type as herein described in a calendar year and such vehicles are owned by him and registered and titled in his name;

(2) a person who sells or offers to sell a vehicle acquired for personal or business use if the person does not sell or offer to sell to a retail buyer and the transaction is not held for the purpose of avoiding the provisions of Transportation Code, §503.001 et seq., and this subchapter;

(3) an agency of the United States, this state, or local government;

(4) a financial institution or other secured party selling a vehicle in which it holds a security interest, in the manner provided by law for the forced sale of that vehicle;

(5) a receiver, trustee, administrator, executor, guardian, or other person appointed by or acting pursuant to the order of a court;

(6) an insurance company selling a vehicle acquired from the owner as the result of paying an insurance claim;

(7) a person selling an antique passenger car or truck that is at least 25 years old or a collector selling a special interest motor vehicle as defined in Transportation Code, §683.077, if the special interest vehicle is at least 12 years old;

(8) a licensed auctioneer who, as a bid caller, sells or offers to sell property to the highest bidder at a bona fide auction if neither legal nor equitable title passes to the auctioneer and if the auction is not held for the purpose of avoiding another provision of Transportation Code, §503.001 et seq., and this subchapter; and provided that if an auction is conducted of vehicles owned, legally or equitably, by a person who holds a general distinguishing number, the auction may be conducted only at a location for which a general distinguishing number has been issued to that person or at a location approved by the department [~~division~~] as provided in §215.135 of this subchapter (relating to More than One Location); and

(9) a person who is a domiciliary of another state and who holds a valid dealer license and bond, if applicable, issued by an agency of that state, when the person buys a vehicle from, sells a vehicle to, or exchanges vehicles with a person who:

(A) holds a current valid general distinguishing number issued by the department, [~~division,~~] if the transaction is not intended to avoid the terms of Transportation Code, §503.001 et seq.; or

(B) is a domiciliary of another state if the person holds a valid dealer license and bond, if applicable, issued by that state, and if the transaction is not intended to avoid the terms of Transportation Code, §503.001 e t seq.

(c) Application for a general distinguishing number shall be on a form prescribed by the department [~~division~~] properly completed by the applicant showing all information requested thereon and shall be submitted to the department [~~division~~] accompanied by the following:

(1) proof of a $25,000 surety bond as provided in §215.137 of this title (relating to Surety Bond); [~~Security Requirements);~~]

(2) the fee for the general distinguishing number as prescribed by law for each type of license requested;

(3) the fee as prescribed by law for each metal dealer [~~metal~~] plate requested as prescribed by law;

(4) a copy of each assumed name certificate on file with the Office of the Secretary of State or county clerk; and

(5) a photocopy of at least one of the following documents for the owner, president, or managing partner of the dealership:

(A) current driver's license;

(B) current Department of Public Safety identification;

(C) current concealed handgun license or license to carry a handgun issued by the Texas Department of Public Safety under Government Code, Chapter 411, Subchapter H;

(D) [~~(C)~~] current passport; or

(E) [~~(D)~~] current United States armed forces identification.

(d) A person who applies for a general distinguishing number and will operate as a dealer under a name other than the name of that person shall use the name under which that person is authorized to do business, as filed with the Office of the Secretary of State or county clerk, and the assumed name of such legal entity shall be recorded on the application using the letters "DBA."

(e) If the general distinguishing number is issued to a corporation, the dealer's name and assumed name used by the dealer, as on file with the Office of the Secretary of State, shall be recorded on the application.

(f) A wholesale dealer licensee may buy, sell, or exchange vehicles with licensed dealers. A wholesale dealer licensee holder may not sell or exchange vehicles at retail.

(g) An independent mobility motor vehicle dealer shall retain and produce for inspection all records relating to the license requirements under Occupations Code, §2301.002(17-a) and all information and records required under Transportation Code, §503.0295.

(h) An application for a general distinguishing number may be denied if an applicant for such license has committed any act that could result in license cancellation or revocation under Transportation Code, §503.001 et seq.; Occupations Code, §2301.001 et seq.; or any rule or regulation of the department.

(i) Upon request by the department, the applicant shall submit documents demonstrating that the applicant owns the real property on which the business is situated or has a written lease for the property that has a term of not less than the term of the license.

§215.135. More than One Location.

(a) A dealer that holds a GDN [~~holding a general distinguishing number~~] for a particular type of vehicle may operate from more than one location within the limits of a city, provided each [~~such~~] location is operated by the same legal entity and meets the requirements of

§215.140 of this title [~~subchapter~~] (relating to Established and Permanent Place of Business).

(b) Additional locations [~~which are~~] not located within the limits of the same city of the initial dealership are required to:

(1) obtain a new GDN; and [~~separate license and security~~]

(2) provide a new surety bond reflecting the additional location, unless the licensed location is exempt by statute from the surety requirement. [~~from the security requirement by statute.~~]

(c) A dealer that relocates from a point outside the limits of a city or relocates to a point not within the limits of the same city of the initial location is required to:

(1) obtain a new GDN; and

(2) provide a new surety bond reflecting the new address, unless the licensed location is exempt by statute from the surety requirement.

[~~(c) Dealerships that are relocated from a point outside the limits of a city, or relocated to a point not within the limits of the same city of the initial location are required to obtain a new license and provide new security reflecting the new address unless the location is exempt from the security requirement by statute.~~]

(d) A dealer shall notify the department [~~division~~] in writing within 10 days of [~~the~~] opening, closing, or relocating any licensed [~~relocation of any dealership~~] location. Each [~~new~~] location must meet and maintain the requirements of §215.140 [~~of this subchapter~~].

(e) A dealer may not commence business at any location until the department issues a license specific to that location.

§215.137. Surety Bond. [~~Security Requirements.~~]

[~~(a) Unless exempt pursuant to subsection (d) of this section, a dealer shall maintain a $25,000 bond conditioned on the dealer's payment of all valid bank drafts drawn by the dealer for the purchase of motor vehicles and the dealer's transfer of good title to each motor vehicle the dealer offers for sale. The bond must be valid for the same period of time as the dealer's license and is subject to the following:~~]

[~~(1) The bond shall be on a form which is prescribed by the division and approved by the attorney general and issued by a company duly authorized to do business in the state of Texas.~~]

(a) [~~(2)~~] The surety bond required by Transportation Code, §503.033 [~~The bond~~] shall be in the legal business name in which the dealer's license will be issued and shall contain the complete physical address of each dealership location licensed under the GDN [~~general distinguishing number~~] that the surety bond is intended to cover.

(b) [~~(3)~~] A surety bond executed by an agent representing [~~who represents~~] a bonding company or surety must be supported by an original power of attorney from the bonding company or surety.

(c) The identity of the obligee on a surety bond or a rider to a surety bond must be approved by the department. A surety bond or rider to a surety bond may be identified as:

(1) a person who obtains a court judgment assessing damages and attorney's fees for an act or omission on which the bond is conditioned; or

(2) unknown.

(d) A bonding company that pays any claim against a surety bond shall immediately report the payment to the department.

(e) A bonding company shall give written notice to the department 30 days prior to canceling any surety bond.

[~~(b) Recovery against the bond may be made by any person who obtains a court judgment assessing damages and/or attorneys fees for an act or omission on which the bond is conditioned. If the person seeking to obtain such a court judgment is a dealer, that dealer shall notify the division of the claim immediately upon filing suit on the bond.~~]

[~~(c) Payment of any judgment by the bonding company shall be immediately reported to the division in writing.~~]

(f) [~~(d)~~] The surety bond required by this section does [~~The provisions of subsection (a) of this section do~~] not apply to a:

(1) franchised motor vehicle dealer [~~who is~~] licensed by the department; [~~division;~~]

(2) franchised motorcycle dealer [~~who is~~] licensed by the department; [~~division;~~]

(3) franchised house trailer or travel trailer dealer licensed by the department; or

(4) trailer or semitrailer [~~trailer/semitrailer~~] dealer licensed by the department.

§215.138. Use of Metal Dealer's [~~Dealer~~] License Plates.

(a) A metal dealer's license plate [~~Metal dealer license plates~~] shall be attached to the rear license plate holder of a vehicle in accordance with [~~vehicles on which such plates may be displayed pursuant to~~] Transportation Code, §503.061.

(b) A [~~Although not a requirement, a~~] copy of the receipt for the metal dealer's license plate issued by the department [~~division~~] should be carried in the vehicle so that the receipt [~~it~~] can be presented to law enforcement personnel upon request.

(c) [~~(b)~~] A metal dealer's license plate [~~Metal dealer license plates~~] may not be displayed on:

(1) a laden commercial vehicle [~~vehicles~~] being operated or moved on [~~upon~~] the public streets or highways; or

(2) [~~on~~] the dealer's service or work vehicle, [~~vehicles,~~] except as provided by Transportation Code, §503.068(b-1).

[~~(1) Examples of vehicles considered as service or work vehicles for purposes of this subsection are:~~]

[~~(A) a vehicle used for towing or transporting other vehicles;~~]

[~~(B) a vehicle, including a light truck, used in connection with the operation of the dealer's shops or parts department;~~]

[~~(C) a courtesy car on which a courtesy car sign is displayed;~~]

[~~(D) a rental or lease vehicle; and~~]

[~~(E) a boat trailer owned by a dealer or manufacturer that is used to transport more than one boat.~~]

[~~(2) A light truck is not considered to be a laden commercial vehicle when it is:~~]

[~~(A) mounted with a camper unit; or~~]

[~~(B) towing a trailer for recreational purposes.~~]

[~~(3) As used in this subsection, "light truck" has the meaning assigned by Transportation Code, §541.201.~~]

(d) For purposes of this section, a dealer's service or work vehicle includes:

(1) a vehicle used for towing or transporting another vehicle;

(2) a vehicle, including a light truck, used in connection with the operation of the dealer's shops or parts department;

(3) a courtesy car on which a courtesy car sign is displayed;

(4) a rental or lease vehicle; and

(5) a boat trailer owned by a dealer or manufacturer that is used to transport more than one boat.

(e) As used in this section, "light truck" has the meaning assigned by Transportation Code, §541.201.

(f) For purposes of this section, a light truck is not considered a laden commercial vehicle when it is:

(1) mounted with a camper unit; or

(2) towing a trailer for recreational purposes.

(g) [~~(c)~~] A metal dealer's license plate [~~Metal dealer license plates~~] may be displayed only on the type of vehicle for which the GDN [~~general distinguishing number~~] is issued and for which a dealer is licensed to sell. A nonfranchised dealer may not display a metal dealer's license plate on a new motor vehicle. [~~Non-franchised dealers may not display metal dealer plates on new motor vehicles.~~]

(h) A metal dealer's license plate may be displayed only on a vehicle that has a valid inspection in accordance with Transportation Code, Chapter 548.

(i) [~~(d)~~] A dealer shall maintain a record of each metal dealer's license [~~dealer metal~~] plate issued to that dealer. The record must contain: [~~that contains:~~]

(1) the assigned metal dealer's license plate number;

(2) the year and make of the vehicle to which the metal dealer's license plate is affixed;

(3) the VIN [~~vehicle identification number (VIN)~~] of the vehicle; and

(4) the name of the person in control of the vehicle.

(j) If a dealer cannot account for a metal dealer's license plate that the department issued to that dealer, the dealer must:

(1) document the metal dealer's license plate as "void" in the metal dealer's license plate record;

(2) within three days of discovering that the metal dealer's license plate is missing, report to the department in writing that the metal dealer's license plate is lost or stolen; and

(3) if found, cease use of the metal dealer's license plate.

(k) A metal dealer's license plate is no longer valid for use after the dealer reports to the department that the metal dealer's license plate is missing.

[~~(e) Dealer metal plates that cannot be accounted for shall be voided in the dealer's record and reported as missing to the department within three days of the date that the discovery is made. After a plate is reported as missing, it is no longer valid for use.~~]

[~~(f) The dealer's record required under subsections (d) and (e) of this section shall be available at the dealer's location during normal working hours for review by a representative of the department.~~]

§215.139. Metal Dealer's License [~~Dealer~~] Plate Allocation.

(a) The number of metal dealer's license [~~dealer~~] plates a dealer may order for business use is [~~allocated~~] based on the type of license for which the dealer applied [~~for~~] and the number of vehicles the dealer sold during the previous year. [~~New license applicants are allotted a predetermined number of metal dealer plates during the first license term.~~]

(b) A new license applicant is allotted a predetermined number of metal dealer's license plates for the duration of the dealer's first license term.

[~~(b) The maximum number of metal dealer plates issued to a new license applicant during the first license term is, unless otherwise qualified to receive more:~~]

[~~(1) Franchised motor vehicle dealer - 5;~~]

[~~(2) Franchised motorcycle dealer - 5;~~]

[~~(3) Independent motor vehicle dealer - 2;~~]

[~~(4) Independent motorcycle dealer - 2;~~]

[~~(5) Franchised or independent travel trailer dealer - 2;~~]

[~~(6) Utility trailer or semi-trailer dealer - 2;~~]

[~~(7) Independent mobility vehicle dealer - 2; and~~]

[~~(8) Wholesale dealer - 1.~~]

(c) Unless otherwise qualified under this section, the maximum number of metal dealer's license plates the department will issue to a new license applicant during the applicant's first license term is indicated in the following table.
Figure: 43 TAC §215.139(c)

[~~(c) A newly licensed dealership with a previous license status is not subject to the initial allotment limits described in subsection (b) of this section, and may rely on that previous license status to obtain dealer plates, if it is:~~]

(d) A dealer that submits an application to the department for a license is not subject to the initial allotment limits described in this section and may rely on that dealer's existing allocation of metal dealer's license plates if that dealer is:

(1) a franchised dealership [~~that has been~~] subject to a buy-sell agreement, regardless of a change in the entity or ownership; [~~or~~]

(2) any type of dealer that is relocating [~~relocates~~] and has been licensed by the department for a period of one year or longer; or[~~.~~]

(3) any type of dealer that is changing its business entity type and has been licensed by the department for a period of one year or longer.

(e) The maximum number of metal dealer's license plates the department will issue to a vehicle dealer per license term is indicated in the following table.
Figure: 43 TAC §215.139(e)

[~~(d) The maximum number of dealer plates issued to a motor vehicle dealer per license term is:~~]

[~~(1) Franchised motor vehicle dealer - 30;~~]

[~~(2) Franchised motorcycle dealer - 10;~~]

[~~(3) Independent motor vehicle dealer - 3;~~]

[~~(4) Independent motorcycle dealer - 3;~~]

[~~(5) Franchised or independent travel trailer dealer - 3;~~]

[~~(6) Utility trailer or semi-trailer dealer - 3;~~]

[~~(7) Independent mobility vehicle dealer - 3; and~~]

[~~(8) Wholesale dealer - 1.~~]

(f) [~~(e)~~] A dealer may obtain more than the maximum number of metal dealer's license plates provided by [~~plates set out in subsections (b) or (d) of~~] this section[~~,~~] by submitting to the department proof of sales for the previous 12-month period that justifies additional allocation.

(1) The number of additional metal dealer's license plates the department will issue to a dealer that demonstrates a need through proof of sales is indicated in the following table.
Figure: 43 TAC §215.139(f)(1)

[~~(1) The dealer may receive the following additional plates:~~]

[~~(A) Wholesale dealers- 1;~~]

[~~(B) Dealers selling fewer than 50 vehicles - 1;~~]

[~~(C) Dealers selling 50 to 99 vehicles - 2;~~]

[~~(D) Dealers selling 100 to 200 vehicles - 5; or~~]

[~~(E) Dealers selling more than 200 vehicles may receive any number of dealer plates at the dealer's discretion.~~]

(2) For purposes of this [~~subsection and subsection (f) of this~~] section, proof of sales for the previous 12-month period may consist of a copy of the most recent vehicle inventory tax declaration [~~recently filed Vehicle Inventory Tax Declaration~~] or monthly statements [~~duly~~] filed with the [~~proper~~] taxing authority in the county of the dealer's licensed [~~dealership's~~] location. Each copy must be stamped as received by the taxing [~~tax~~] authority. A [~~Any~~] franchised dealer's [~~renewal~~] license renewal application that indicates sales of more than 200 units is considered to be proof of sales of more than 200 units and no additional proof is required.

(3) The department may not issue more than two metal dealer's license plates to a wholesale motor vehicle dealer. For purposes of this section, a wholesale motor vehicle dealer's proof of sales may be demonstrated to the department by submitting:

(A) evidence of the wholesale motor vehicle dealer's sales for the previous 12-month period, if the wholesale motor vehicle dealer has been licensed during those 12 months; or

(B) other documentation approved by the department demonstrating the wholesale motor vehicle dealer's transactions.

(g) [~~(f)~~] The director may waive the metal dealer's license [~~dealer~~] plate issuance restrictions [~~in accordance with this subsection~~] if the waiver is essential for the continuation of the business. The director will determine [~~base the determination of~~] the number of metal dealer's license [~~dealer~~] plates the department will issue based [~~dealer will receive~~] on the dealer's past sales, dealer's inventory, and any other factor [~~factors that~~] the director determines pertinent.

(1) A request for a waiver must be submitted to the director in writing and specifically state why the additional plate is [~~plates are~~] necessary for the continuation of the applicant's business.

(2) A request for a waiver must be accompanied by proof of the dealer's sales for the previous 12-month period, [~~year~~] if applicable.

(3) A wholesale motor vehicle dealer may not apply for a waiver of the metal dealer's license [~~dealer~~] plate issuance restrictions.

(4) A waiver granted by the director under this section [~~subsection~~] for a specific number of metal dealer's license plates is valid for four years.

(h) This section does not apply to a personalized prestige dealer's license plate issued in accordance with Transportation Code, §503.0615.

§215.140. Established and Permanent Place of Business.

A dealer must meet the following requirements at each licensed location and [~~must~~] maintain the [~~following~~] requirements during the [~~entire~~] term of the license.

(1) Business hours for retail dealers.

(A) A retail dealer's office [~~facility~~] shall be open at least four days per week for at least four consecutive hours per day.

(B) The retail dealer's business hours for each day of the week must be posted at the main entrance of the retail dealer's office that is accessible to the public. The owner or a bona fide employee of the retail dealer shall be at the retail dealer's licensed location during the posted business hours for the purposes [~~purpose~~] of buying, selling, exchanging, or leasing vehicles. If the owner or a bona fide employee is not available to conduct business during the retail dealer's posted business hours due to special circumstances or emergencies, a separate sign must be posted indicating the date and time the retail dealer will resume operations. Regardless of the retail dealer's business hours, the retail dealer's telephone must be answered from 8:00 a.m. to 5:00 p.m. weekdays by a bona fide employee, answering service, or answering machine.

(2) Business hours for wholesale motor vehicle dealers. A dealer that [~~who~~] holds only a wholesale motor vehicle dealer's license must post its business hours at the main entrance of the wholesale motor vehicle dealer's office. A wholesale motor vehicle dealer shall be at the wholesale motor vehicle dealer's licensed location [~~for~~] at least two weekdays per week for at least two consecutive hours per day. Regardless of the wholesale motor vehicle dealer's business hours, the wholesale motor vehicle dealer's telephone must be answered from 8:00 a.m. to 5:00 p.m. weekdays by a bona fide employee, answering service, or answering machine.

(3) Business sign requirements for retail dealers. A retail dealer must display a conspicuous, permanent sign with letters at least six inches in height showing the retail dealer's business name or assumed name substantially similar to the name reflected on the retail dealer's license[~~,~~] under which the retail dealer conducts business. The sign must be permanently mounted at the address listed on the application for the retail dealer's [~~dealer~~] license. A retail dealer may use a temporary sign or banner if that retail [~~the~~] dealer can show proof that a sign [~~is on order~~] that meets the requirements of [~~set out in~~] this paragraph has been ordered.

(4) Business sign requirements for wholesale motor vehicle dealers. A wholesale motor vehicle dealer must display a conspicuous, permanent sign with letters at least six inches in height showing the wholesale motor vehicle dealer's business name or assumed name substantially similar to the name reflected on the wholesale motor vehicle dealer's license[~~,~~] under which the wholesale motor vehicle dealer conducts business. The sign must be permanently mounted on the business property and shall be on the main door to the wholesale motor vehicle dealer's office or on the outside of the building that houses [~~housing~~] the wholesale motor vehicle dealer's office. If the wholesale motor vehicle dealer's office [~~dealership~~] is located in an office building with one or more other businesses and an outside sign is not permitted by the landlord, a business sign permanently mounted on or beside the main door to the wholesale motor vehicle dealer's office with letters at least two inches in height is acceptable. A wholesale motor vehicle dealer may use a temporary sign or banner if the wholesale motor vehicle dealer can show proof that a sign [~~is on order~~] that meets the requirements of [~~set out in~~] this paragraph has been ordered.

(5) Office structure for a retail dealer and a wholesale motor vehicle dealer. [~~retail and wholesale dealers.~~]

(A) A dealer's office [~~The office of a retail or wholesale dealer~~] must be located in a building[~~,~~] with connecting exterior walls on all sides.

(B) A dealer's office must comply with all applicable local zoning ordinances and deed restrictions.

(C) A dealer's office may not be located within a residence, apartment [~~house~~], hotel, motel, or rooming house.

(D) The physical address of the dealer's office must be recognized by the U.S. Postal Service or capable of receiving U.S. mail. The department will not mail a license or a metal dealer's license plate to an out of state address. [~~Licenses and metal dealer plates will not be mailed to any out-of-state address.~~]

(E) A portable-type office structure may qualify as an office only if the structure meets the requirements of this section and is not a readily moveable trailer or other vehicle.

(6) Required office equipment for a retail dealer and a wholesale motor vehicle dealer [~~dealers~~]. At a minimum, a dealer's [~~the~~] office must be equipped with:

(A) a desk;

(B) two chairs;

(C) Internet access; and

(D) a working telephone number listed in the business name or assumed name under which the dealer conducts [~~does~~] business.

(7) Number of retail dealers in one office. Not more than four retail dealers may be located in the same business structure.

(8) Number of wholesale motor vehicle dealers in one office. Not more than eight wholesale motor vehicle dealers may be located in the same business structure.

(9) Office sharing prohibition for retail dealers and wholesale motor vehicle dealers. [~~Wholesale and retail dealers office sharing prohibition.~~] Unless otherwise authorized by the Transportation Code, a retail [~~motor vehicle~~] dealer and a wholesale motor vehicle dealer[~~, either of which is~~] licensed after September 1, 1999, may not be located in the same business structure.

(10) Dealer housed with other business.

(A) If a person conducts business as a dealer in conjunction with another business owned by the same person and under the same name as the other business, the same telephone number may be used for both businesses. If the name of the dealer differs from the name [~~that~~] of the other business, a separate telephone listing and a separate sign for each business is required.

(B) A person may conduct business as a dealer in conjunction with another business not owned by that person only if the dealer owns the property on which business is conducted or has a separate lease agreement from the owner of that property that meets [~~meeting~~] the requirements of [~~paragraph (13) of~~] this section. The same telephone number may not be used by both businesses. The dealer must have separate business signs, telephone listings, and office equipment required under this section.

(11) Display area requirements.

(A) A wholesale motor vehicle dealer is not required to have display space at the wholesale motor vehicle dealer's business premises.

(B) A retail dealer must have an area designated as display space for the retail dealer's inventory. A retail dealer's designated display area must comply with the following requirements. [~~in accordance with this subsection.~~]

(i) [~~(A)~~] The display area must be located at the retail dealer's business address or contiguous with the retail dealer's address. A noncontiguous [~~non-contiguous~~] storage lot is permissible only if there is no public access and no sales activity occurs at the storage lot. A sign stating the retail dealer's name, telephone number, and the fact the property is a storage lot is permissible.

(ii) [~~(B)~~] The [~~A dealer's~~] display area must be of sufficient size to display at least five vehicles of the type for which the GDN [~~general distinguishing number~~] is issued. Those spaces must be reserved exclusively for the retail dealer's inventory and may not be shared or intermingled with another business or a public parking area, a driveway to the office, or another dealer's display area.

(iii) [~~(C)~~] The display area may not be on a public easement, right-of-way, or driveway unless the governing body having jurisdiction of the easement, right-of-way, or driveway expressly consents in writing to use as a display area. If the easement, right-of-way, or driveway is a part of the state highway system, use as a display area may only be authorized by a lease agreement.

(iv) [~~(D)~~] If the retail dealer shares a display or parking area with another business, including another dealer, the dealer's vehicle inventory [~~If the display area is in conjunction with another dealership or another business that is not related to the sale or operation of motor vehicles, the display area for the dealer's inventory~~] must be separated from the other business's display or [~~any other business's or dealer's~~] parking area by a material object or barrier [~~barricade~~] that cannot be readily removed. [~~moved by an individual.~~]

(v) [~~(E)~~] The display area must be adequately illuminated if the retail dealer is open at night [~~after sundown~~] so that a vehicle [~~vehicles~~] for sale can be properly inspected by a potential buyer. [~~any prospective customer.~~]

(vi) [~~(F)~~] The display area may be located inside a building.

(12) Dealers holding a license issued under Occupations Code, Chapter 2302. [~~Dealer with salvage dealer license.~~] If a dealer also holds a license issued under Occupations Code, Chapter 2302, each salvage motor [~~salvage dealer license, each salvage~~] vehicle that is offered for sale on the premises of the dealer's display area must be clearly and conspicuously marked with a sign informing a potential buyer [~~that informs the potential buyers~~] that the vehicle is a salvage motor vehicle. This requirement does not apply to a licensed salvage pool operator.

(13) Lease requirements. If the premises from which a dealer conducts business, including any display area, is not owned by the dealer, the dealer must maintain a lease that is continuous during the period of time [~~with the period~~] for which the dealer's license will be issued. The [~~That~~] lease agreement must be on a properly executed form containing at a minimum:

(A) the name of the landlord as the lessor of the premises and the name of the dealer as the tenant or lessee of the premises; [~~names of the lessor and lessee;~~]

(B) the period of time for which the lease is valid; [~~and~~]

(C) the street address or legal description of the property, provided that if only a legal description of the property is included, [provided,] the applicant must attach a statement that the property description in the lease agreement is the street address identified on the application; and[.]

(D) the signature of the landlord as the lessor and the signature of the dealer as the tenant or lessee.

(14) Dealer must display license. A dealer must display the dealer's [dealer] license issued by the department at all times in a manner that makes the license easily readable by the public and in a conspicuous place at each place of business for which the dealer's license [it] is issued. If the dealer's license applies to more than one location, a copy of the original license may be displayed in each supplemental location.

§215.141. Sanctions.

(a) The board or department may:

(1) deny an application;

(2) revoke a license;

(3) suspend a license; and

(4) assess a civil penalty or other action against a license applicant, a license holder, or a person engaged in business for which a license is required.

[(a) Revocation/Denial. The Board may deny, revoke, or suspend a dealer's license (general distinguishing number) or assess civil penalties against any person if that person:]

(b) The board or department may take action described in subsection (a) of this section if a license applicant, a license holder, or a person engaged in business for which a license is required:

(1) fails to maintain a good and sufficient bond in the amount of $25,000 if required;

(2) fails to maintain records required under this chapter; [an established and permanent place of business conforming to the regulations pertaining to office, sign, and display space requirements;]

(3) refuses [to permit] or fails to comply with a request by a representative of the department to examine and copy during the license holder's business hours at the licensed location: [the]

(A) sales records required to be maintained by [kept under] §215.144 of this title (relating to Records); [subchapter (relating to Record of Sales and Inventory) and]

(B) ownership papers for a vehicle [vehicles] owned by that dealer or under that dealer's control;[,] and

(C) evidence of ownership or a current lease agreement for the property on which the business is located; [lease rights on the property upon which the dealer's business is located, during posted working hours or through a request made by the department pursuant to these rules;]

(4) refuses or fails to timely comply with a request for records made by a representative of the department;

(5) [(4)] holds a wholesale motor vehicle dealer's license and: [dealer license and, without notifying the division and meeting the vehicle display space requirements of §215.140 of this subchapter, is found to be selling or offering to sell a vehicle to someone other than a licensed dealer, unless authorized by statute;]

(A) fails to meet the requirements of §215.140 of this title (relating to Established and Permanent Place of Business); or

(B) sells or offers to sell a motor vehicle to a person other than a licensed dealer;

(6) [(5)] sells or offers to sell a type of vehicle that the person is not licensed to sell;

(7) [(6)] fails to notify the department [division] of a change of the license holder's physical address, [physical or] mailing address, [and/or] telephone number, or email address within 10 days of the [after such] change;

(8) [(7)] fails to notify the department [division] of a license holder's [dealer's] name change or ownership change within 10 days of the [after such] change;

(9) [(8)] except as provided by law, issues more than one buyer's temporary tag for the purpose of extending the purchaser's operating privileges for more than 60 days;

(10) [(9)] fails to remove a license plate or registration insignia [license plates as required by law] from a vehicle that is displayed for sale;

(11) [(10)] misuses a metal dealer's [metal dealer] license plate or a temporary tag;

(12) [(11)] fails to display a metal dealer's [dealer] license plate or temporary tag, as required by law; [plates or tags in a manner conforming to the regulations pertaining to the display of such plates and tags;]

[(12) fails to satisfy the notification requirements of §215.144 of this subchapter;]

(13) holds open a title [titles] or fails to take assignment of a certificate [all certificates] of title, manufacturer's certificate, [certificates,] or other basic evidence of ownership for a vehicle [vehicles] acquired by the dealer, or fails to assign the certificate of title, manufacturer's certificate, or other basic evidence of ownership for a vehicle sold; [vehicles sold (All certificates of title, manufacturer's certificates, or other basic evidence of ownership for vehicles owned by a dealer must be properly executed showing transfer of ownership into the name of the dealer.);]

(14) fails to remain regularly and actively engaged in the business of buying, selling, or exchanging vehicles of the type for which the GDN [general distinguishing number] is issued by the department;

(15) violates a provision of Occupations Code, Chapter 2301; Transportation Code Chapters 503 and 1000 - 1005; a board order or rule; or a [any of the provisions the Codes, or any rule or] regulation of the department relating to the sale, lease, distribution, financing, or insuring of vehicles, including advertising rules under [set out in] Subchapter H of this chapter (relating to Advertising);

(16) is convicted of an offense that directly relates to the duties or responsibilities of the occupation;

(17) is determined by the board or department, in accordance with §215.89 of this title (relating to Fitness), to be unfit to hold a license;

(18) [(16)] has not assigned at least five vehicles in the prior 12 months, provided the dealer has been licensed more than 12 months;

(19) [17] files a false or forged: [title or]

(A) title document, including an affidavit making application for a certified copy of a title; or

(B) tax document, including a sales tax statement or affidavit; [application for certified copy of a title;]

(20) [~~(18)~~] uses or allows use of that dealer's license or location for the purpose of avoiding a provision of Occupations Code, Chapter 2301; Transportation Code, Chapters 503 and 1000 - 1005; [~~the provisions of the dealer law~~] or other laws;

(21) [~~(19)~~] omits information or makes a material misrepresentation in any application or other documentation [~~information~~] filed with the department; [~~division;~~]

(22) [~~(20)~~] fails to remit payment as ordered for a civil penalty assessed by the board or department; [~~for civil penalties assessed by the Board;~~]

(23) [~~(21)~~] sells a new motor vehicle [~~vehicles~~] without a franchised dealer's license issued by the department; [~~division;~~]

(24) [~~(22)~~] utilizes a temporary tag that fails to meet the requirements of [~~specifications as cited in~~] §215.153 of this title [~~subchapter~~] (relating to Specifications for All Temporary Tags); [~~or~~]

(25) [~~(23)~~] violates any state or federal law or regulation relating to the sale of a motor vehicle; or[~~.~~]

(26) effective January 1, 2017, knowingly fails to disclose that a motor vehicle has been repaired, rebuilt, or reconstructed and issued a title under Transportation Code, §501.100.

~~[(b) Civil penalties. The Board may assess a civil penalty of not less than $50 nor more than $1,000 against a person that is found to have engaged in conduct described in subsection (a) of this section, and in determining the amount of any such penalty may consider the relevant circumstances, including but not limited to the factors enumerated in Occupations Code, §2301.801(b).]~~

~~[(c) Warning letter. In lieu of imposing sanctions under subsection (a) or (b) of this section, the division may issue a warning letter to a person notifying that person of the nature of the violation, and specifying the date by which corrective action is to be completed and full compliance is to be met; provided, however, that the Board may not issue a warning letter in more than three subsequent violations of the same or similar nature by that person in the same calendar year.]~~

§215.144. Records. [~~Record of Sales and Inventory.~~]

(a) Purchases [~~Purchase~~] and sales records. A dealer must maintain [~~keep~~] a complete record of all vehicle purchases and sales for a minimum period of 48 months and make the record [~~those records~~] available for inspection and copying by a representative of the department during business hours.

(b) Independent mobility motor vehicle dealers. An independent mobility motor vehicle dealer must keep a complete written record of each [~~records relating to a~~] vehicle purchase, vehicle sale, [~~or sale~~] and any adaptive work performed on each [~~the~~] vehicle for a minimum period of 36 months after the date the adaptive work is performed on the vehicle.

(c) Location of records. A dealer's record [~~Records~~] reflecting purchases and sales for [~~at least~~] the preceding 13 months must be maintained at the dealer's licensed location. Original titles are not required to be kept at the licensed location, but must be made available to the agency upon reasonable request. A dealer's record [~~location. Records~~] for prior time periods may be kept off-site [~~at a location within the same county~~].

(d) Request for records. Within 15 days of [~~Upon~~] receipt of a request sent by mail or electronic document transfer from a representative of the department, [~~the division,~~] a dealer must deliver a copy of the [~~produce copies of~~] specified records to the address listed in the request [~~within 15 days.~~] If a dealer has a concern about the origin of a records request, the dealer may verify that request with the division prior to submitting its records.

(e) Content of records. A dealer's complete record for each vehicle purchase or vehicle sale must contain: [~~As used in this subsection, a complete record of vehicle purchases and sales shall contain the following information or documents:~~]

(1) the date of the purchase;

(2) the date of the sale;

(3) the VIN; [~~vehicle identification number;~~]

(4) the name and address of the person selling the vehicle to the dealer;

(5) the name and address of the person purchasing the vehicle from the dealer;

(6) the name and address of the consignor [~~selling dealer~~] if the vehicle is offered for sale by consignment;

(7) except for [~~in~~] a purchase or sale where the Tax Code does not require payment of motor vehicle sales tax, a [~~by a wholesale dealer,~~] copy of the receipt, titled "Tax [~~Tax~~] Collector's Receipt for Texas Title Application/Registration/Motor Vehicle Tax" [~~Tax, Form 31~~];

(8) a copy of [~~copies of any and~~] all documents, forms, and agreements applicable to a particular sale, including a copy of: [~~including, but not limited to title applications, work-up sheets, Manufacturer's Certificates of Origin, titles or photocopies of the front and back of titles, factory invoices, sales contracts, retail installment agreements, buyer's orders, bills of sale, waivers, or other agreements between the seller and purchaser;~~]

(A) the title application;

(B) the work-up sheet;

(C) the front and back of manufacturer's certificate of origin or manufacturer's statement of origin, unless the title is obtained through the electronic title system;

(D) the front and back of the title, unless the title is obtained through the electronic title system;

(E) the factory invoice;

(F) the sales contract;

(G) the retail installment agreement;

(H) the buyer's order;

(I) the bill of sale;

(J) any waiver;

(K) any other agreement between the seller and purchaser; and

(L) Form VTR-136, relating to County of Title Issuance, completed and signed by the buyer;

(9) the original manufacturer's certificate of origin, original manufacturer's statement of origin, or original title for motor vehicles offered for sale by a dealer, and a properly stamped original manufacturer's certificate of origin, original manufacturer's statement of origin, or original title for motor vehicles sold by a dealer if the title transaction is entered into the electronic system by the dealer;

(10) [~~(9)~~] the dealer's monthly Motor Vehicle Seller Financed Sales Returns, if any; and

(11) [~~(10)~~] if the vehicle sold is a motor home or a towable recreational vehicle[~~,~~] subject to inspection under Transportation Code, Chapter 548, a copy of the written notice provided to the buyer at the time of the sale, [~~sale~~] notifying the buyer that the vehicle is subject to inspection requirements.

(f) Title assignments. [~~All certificates of title, manufacturer's certificates, or other evidence of ownership for vehicles offered for sale or which have been acquired by a dealer must be properly assigned into the dealer's name.~~]

(1) For each vehicle a dealer acquires or offers for sale, the dealer must properly take assignment in the dealer's name of any:

(A) title;

(B) manufacturer's statement of origin;

(C) manufacturer's certificate of origin; or

(D) other evidence of ownership.

(2) A dealer must apply in the name of the purchaser of a [~~motor~~] vehicle for the registration of the [~~motor~~] vehicle with the appropriate county tax assessor-collector as selected by the purchaser.

(3) To comply [~~To be in compliance~~] with Transportation Code, §501.0234(f), a registration is [~~and~~] considered filed within a reasonable time if the registration is filed within:[~~, a registration filed in Texas must be filed within~~]

(A) 20 working days of the date of sale of the vehicle for a vehicle registered in Texas; or [~~. For a transaction that is dealer-financed, a registration filed in Texas within~~]

(B) 45 days of the date of sale of the vehicle for a dealer-financed transaction involving a vehicle that is registered in Texas. [~~will be considered filed within a reasonable time.~~]

(4) The dealer is required to [~~shall~~] provide to the purchaser the receipt for the registration application.

(5) The dealer is required to [~~and~~] maintain a copy of the receipt for the registration application in the dealer's sales file.

(g) Out of state sales. For [~~Out-of-state sales. When~~] a sales transaction involving [~~involves~~] a vehicle to be transferred out of state, the dealer must:[~~,~~]

(1) within 20 working days of the date of sale, either file the application for certificate of title on behalf of [~~for~~] the purchaser or deliver the properly assigned evidence of ownership to the purchaser; and[~~.~~]

(2) maintain in the dealer's record at the dealer's licensed location [~~In such instance,~~] a photocopy of the completed sales tax exemption form for out of state [~~out-of-state~~] sales approved by the Texas Comptroller of Public Accounts [~~shall be maintained on file at the dealer's business location~~].

(h) Consignment sales. A dealer offering a vehicle for sale by consignment shall have a written consignment agreement [~~for the vehicle~~] or a power of attorney for [~~covering~~] the vehicle, and shall, after the sale of the vehicle, take assignment of the vehicle in the dealer's name and, pursuant to subsection (f), apply in the name of the purchaser for transfer of title and registration, if the vehicle is to be registered, with the appropriate county tax assessor-collector as selected by the purchaser. The dealer must, for a minimum of 48 months, [~~and shall~~] maintain a record of each [~~such~~] vehicle offered for sale by consignment, including the VIN and the name of the owner of the vehicle offered for sale by consignment. [~~by vehicle identification number and owner of each such vehicle handled on consignment for a minimum of 48 months.~~]

(i) Public motor vehicle auctions.

(1) A GDN holder that [~~general distinguishing number holder who~~] acts as a public motor vehicle auction must comply with [~~the requirements relating to consignment sales as set out in~~] subsection (h) of this section.

(2) A public motor vehicle auction:

(A) is not required to take assignment of title of a vehicle [~~vehicles~~] it offers for sale;[~~, but~~]

(B) must take assignment of title of a vehicle from a consignor prior to making application for title on behalf of the buyer; and[~~.~~]

(C) [~~(3)~~] [~~A public motor vehicle auction~~] must make application for title on behalf of the purchaser and remit motor vehicle sales tax within 20 working days of the sale of the [~~motor~~] vehicle.

(3) A GDN holder may not sell another GDN holder's vehicle at a public motor vehicle auction.

(j) Wholesale motor vehicle auction records. A wholesale motor vehicle auction license holder must maintain, for a minimum of 48 months, [~~auction must keep~~] a complete record of each vehicle purchase and sale [~~all vehicle purchases and sales~~] occurring through the wholesale motor vehicle auction. The wholesale motor vehicle auction license holder shall make the record [~~auction for a minimum period of 48 months and such records shall be made~~] available for inspection and copying by a representative of the department during business hours.

(1) A wholesale motor vehicle auction license holder must maintain at the licensed location a record reflecting each purchase and sale [~~Records reflecting purchases and sales~~] for at least the preceding 24 months [~~must be maintained at the licensed location~~]. Records for prior time periods may be kept off-site [~~at a location within the same county~~].

(2) Within 15 days of [~~Upon~~] receipt of a request sent by mail[~~,~~] or by electronic document transfer from a representative of the department, a wholesale motor vehicle auction license holder must deliver a copy of the [~~auction must submit copies of~~] specified records to the address listed in the request [~~within 15 days~~].

(3) A wholesale motor vehicle auction license holder's complete record of each vehicle purchase and sale shall, at a minimum, contain: [~~The records required to be kept by a wholesale auction shall at a minimum provide the following information:~~]

(A) the date of sale;

(B) the VIN; [~~vehicle identification number;~~]

(C) the name and address of the person selling the vehicle;

(D) the name and address of the person purchasing the vehicle;

(E) the dealer license number of both the selling dealer and the purchasing dealer, [~~seller and buyer~~] unless either is exempt from holding a license;

(F) all information necessary to comply with the Truth in Mileage Act;

(G) auction access documents, including the written authorization and revocation [~~cancellation~~] of authorization for an agent

or employee, in accordance with [~~agents, employees, or representatives required by~~] §215.148 of this title [~~subchapter~~] (relating to Dealer Agents);

(H) invoices, bills of sale, checks, drafts, or other documents that identify the vehicle, the parties, or the purchase price;

(I) any information regarding the prior status of the vehicle such as the Reacquired Vehicle Disclosure Statement or other lemon law disclosures; and

(J) a copy [~~copies~~] of any written authorization [~~authorizations~~] allowing an agent of a dealer to enter the auction.

(k) Electronic records. A license holder may maintain a record in an electronic format if the license holder can print the record at the licensed location upon request by a representative of the department. A license holder does not have to maintain a copy of a vehicle title if the title is submitted through the electronic title system. [~~Any records required to be kept by a licensee may be kept in an electronic format, if the electronic records can be printed at the licensed location upon request by a representative of the department. Original hard copy titles or photocopies of the front and back of titles of vehicles in a dealer's inventory shall be kept in a secure location at the licensed location or within the same county as the licensed location.~~]

§215.145. Change of Dealer's Status.

(a) A dealer's name change requires [~~shall require~~] a new bond or a rider to the existing bond reflecting the new dealer name, unless the dealer is not otherwise required to purchase a bond. [~~The dealer may retain the same general distinguishing number.~~]

(b) A dealer shall notify the department [~~division~~] in writing within 10 days of a [~~if there is any~~] change of ownership. A licensed dealer that [~~who~~] proposes to sell or [~~and/or~~] assign to another any interest in the licensed entity, whether a corporation or otherwise, and provided [~~so long as~~] the physical location of the licensed entity remains the same, shall notify the department [~~division~~] in writing within 10 [~~ten~~] days of the change by filing an application to amend the license. If the sale or assignment of any portion of the business results in a change of entity, then the new entity must apply for and obtain a new license. A publicly held corporation [~~Publicly-held corporations need~~] only needs to inform the department [~~division~~] of a change in ownership if one person or entity acquires a 10% [~~10 percent~~] or greater interest in the licensed entity. [~~licensee.~~]

(c) Upon the death of a dealer of a dealership [~~If a dealership is~~] operated as a sole proprietorship [~~and the sole proprietor dies~~], either the surviving spouse of the deceased dealer[~~,~~] or other individual deemed qualified by the department [~~division,~~] shall submit to the department [~~division~~] a bond rider adding the name of the surviving spouse or other qualifying person [~~his or her name~~] to the bond for the remainder of the bond and license term. The surviving spouse or other qualifying person [~~That person~~] may continue dealership operations under the current dealer license until the end of the license term. [~~its expiration. In the event the qualifying individual is a surviving spouse, he or she may change the ownership of the dealership upon renewal of the license without applying for a new general distinguishing number by submitting additional information regarding ownership, business background, and financial responsibility as required for a new application.~~]

(d) For purposes of subsection (c) of this section, if the qualifying person is the sole proprietor's surviving spouse, then the surviving spouse may change the ownership of the dealership at the time the license is renewed without applying for a new GDN. At the time the renewal application is filed, the sole proprietor's surviving spouse is required to submit to the department:

(1) an application to amend the business entity;

(2) a copy of the sole proprietor's certificate of death, naming the surviving spouse;

(3) the required ownership information; and

(4) a bond in the name of the surviving spouse.

(e) For purposes of subsection (c) of this section, if the qualifying person is not the surviving spouse, then the qualifying person may operate the sole proprietorship business during the term of the license. The qualifying person must file with the department:

(1) an application to amend the business entity, identifying the qualifying person as the manager;

(2) an ownership information form, indicating that the qualifying person has no ownership interest in the business; and

(3) a bond rider adding the individual's name to the existing bond.

(f) For purposes of subsection (c) of this section, if the qualifying person is not the surviving spouse, then at the time the license is due to be renewed, the qualifying person must file with the department an application for a new GDN.

(g) A determination made under this section does not impact a decision made by the board under Occupations Code, §2301.462, Succession Following Death of Dealer.

§215.146. Metal Converter's License Plates.

(a) A metal [~~Metal~~] converter's license plate [~~plates~~] shall be attached to the rear license plate holder of a vehicle in accordance with [~~vehicles on which the plates may be displayed pursuant to~~] Transportation Code, §503.0618.

[~~(b) Metal converter's license plates tags may be displayed only on the type of vehicle that the converter is engaged in the business of assembling or modifying.~~]

[~~(c) When an unregistered new motor vehicle is sold to a converter, the selling dealer shall remove the dealer's temporary tag. The selling dealer may attach a buyer's temporary tag to that vehicle or the purchasing converter may display a converter's temporary tag or metal converter plate on that vehicle.~~]

(b) [~~(d)~~] A converter shall maintain a record of each metal converter's license plate [~~converter metal plate~~] issued to that converter. The record of each metal converter's license plate issued must contain: [~~that contains:~~]

(1) the assigned metal converter's license plate number;

(2) the year and make of the vehicle to which the metal converter's license plate is affixed;

(3) the VIN [~~vehicle identification number~~] of the vehicle [~~(VIN)~~]; and

(4) the name of the person in control of the vehicle.

(c) If a converter cannot account for a metal converter's license plate that the department issued to the converter, the converter must:

(1) document the metal converter's license plate as "void" in the converter's metal license plate record;

(2) within three days of discovering that the plate is missing, report to the department in writing that the metal converter's license plate is lost or stolen; and

(3) if found, cease use of the metal converter's license plate.

(d) A metal converter's license plate is no longer valid for use after the converter reports to the department that the plate is missing.

(e) A metal converter's license plate record shall be made available for inspection and copying by the department at the converter's licensed location during the converter's posted business hours.

[~~(e) Converter metal plates that cannot be accounted for shall be voided in the converter's dealer's record and reported as missing to the department within three days of the date that the discovery is made. After a plate is reported as missing it is no longer valid.~~]

[~~(f) The converter's record, required under subsections (d) and (e) of this section, shall be available at the converter's location during normal working hours for review by a representative of the department.~~]

§215.147. Export Sales.

(a) Before selling a motor vehicle for export from the United States to another country, a dealer must obtain a legible photocopy of the buyer's government-issued photo identification document. The photo identification document must be issued by the jurisdiction where the buyer resides and be [~~may consist of~~]:

(1) a passport;

(2) a driver's license;

(3) a concealed handgun license or license to carry a handgun issued by the Texas Department of Public Safety under Government Code, Chapter 411, Subchapter H;

[~~(3) a consular identity document;~~]

(4) a national identification certificate or identity document; or

(5) other identification document containing the: [~~issued by the jurisdiction where the buyer resides that is able to be verified by law enforcement and includes the~~]

(A) name of the issuing jurisdiction;[~~, the~~]

(B) buyer's full name;[~~,~~]

(C) buyer's foreign address;[~~,~~]

(D) buyer's date of birth;[~~,~~]

(E) buyer's photograph;[~~,~~] and

(F) buyer's signature.

(b) A dealer that sells a vehicle for export from the United States shall place a stamp on the title that includes the words "For Export Only" and includes the license holder's GDN. The stamp must be legible, in black ink, at least two inches wide, and placed on the:

(1) back of the title in all unused dealer reassignment spaces; and

(2) front of the title in a manner that does not obscure any names, dates, mileage statements, or other information printed on the title.

[~~(b) All licensees that sell a vehicle for export from the United States shall stamp in black ink on the back of the title in all unused dealer reassignment spaces the words "For Export Only" and their General Distinguishing Number. The licensee shall also place the stamp on the front of the title in a manner that does not obscure any names, dates, mileage statements or other information printed on the title. The stamp must be at least two inches wide, and all text and the license number must be clearly legible.~~]

(c) In addition to the records required to be maintained by §215.144 of this title (relating to Records), a dealer shall maintain, for each motor vehicle sold for export, a sales file record. The sales file record shall be made available for inspection and copying upon request by the department. The sales file record of each vehicle sold for export shall contain: [~~§215.144(d) and (i) of this subchapter (relating to Record of Sales and Inventory), a licensee shall maintain the following records in the sales file for each vehicle sold for export and shall make those records available upon request by a representative of the department:~~]

(1) a [~~A~~] completed copy of the Texas Motor Vehicle Sales Tax Exemption Certificate for Vehicles Taken Out of State [~~for each vehicle sold~~], indicating that the vehicle has been purchased for export to a foreign country;

(2) a [~~A~~] copy of the front and back of the title of [~~to~~] the vehicle, showing the "For Export Only" stamp and the GDN of the dealer; and [~~General Distinguishing Number of the auction or dealer;~~]

[~~(3) A legible copy of each buyer's photo identification document; and~~]

(3) [~~(4)~~] if [~~If~~] applicable, an Export-only Sales Record Form, listing each motor vehicle sold for export only.

(d) A dealer, at the time of sale of a vehicle for export, shall:

(1) enter the information required by Transportation Code, §503.061 in the temporary tag database;

(2) designate the sale as "For Export Only"; and

(3) issue a buyer's temporary tag, in accordance with Transportation Code, §503.063. [~~temporary buyer's tag as required by Transportation Code, §503.063 after entering the information in the database as required by Transportation Code, §503.061, and report the sale as for export.~~]

§215.148. Dealer Agents.

(a) A dealer must provide written authorization to each person with whom the dealer's agent or employee will conduct business on behalf of the dealer, including to a person that:

(1) buys and sells motor vehicles for resale; or

(2) operates a licensed auction.

(b) If a dealer's agent or employee that conducts business on behalf of the dealer commits an act or omission that would be cause for denial, revocation, or suspension of a license in accordance with Occupations Code, Chapter 2301, the board may:

(1) deny an application for a license; or

(2) revoke or suspend a license.

(c) The board may take action described in subsection (b) of this section after notice and an opportunity for hearing, in accordance with Occupations Code, Chapter 2301.

(d) A dealer's authorization to an agent or employee shall:

(1) be in writing;

(2) be signed by the dealer principal or person in charge of daily activities of the dealership;

(3) include the agent's or employee's name, current mailing address, and telephone number;

(4) include the dealer's business name, address, and dealer license number or numbers;

(5) expressly authorize buying or selling by the specified agent or employee;

(6) state that the dealer is liable for any act or omission regarding a duty or obligation of the dealer that is caused by that agent or employee, including any financial considerations to be paid for the vehicle;

(7) state that the dealer's authorization remains in effect until the recipient of the written authorization is notified in writing of the revocation of the authority; and

(8) be maintained as a required dealer's record and made available upon request by a representative of the department, in accordance with the requirements of §215.144 of this title (relating to Records).

[~~(a) In regard to the duties and obligations of a dealer, a dealer is responsible for the acts and omissions of any agent, representative, or employee if that dealer has given authority to any person for that agent, representative, or employee to act on the behalf of the dealer. This section is not to be construed in any manner to allow retail sales by any dealer agent or representative. The term "employee" used in this section includes only those persons paid by the licensee and reported on the federal form W-2, Wage and Tax Statement.~~]

[~~(b) A dealer must provide written authorization to any person buying or selling motor vehicles for resale or operating a licensed auction for the sale of motor vehicles for resale with which an agent, representative, or employee will be conducting business or acting on the dealer's behalf.~~]

[~~(1) Once a dealer has given written authorization for an agent, representative, or employee to buy and sell motor vehicles for resale for that dealer, the dealer shall be liable for any acts or omissions regarding duties and obligations of dealers caused by that agent, representative, or employee unless and until either the earlier of written notification of revocation of the agent's, representative's or employee's authority or revocation of the dealer's license.~~]

[~~(2) Written authorization shall be a letter on the dealership letterhead of the dealer authorizing buying or selling, or on a form approved by the director, and stating that the dealer is liable for any acts or omissions regarding duties and obligations of dealers, caused by that agent, representative, or employee including any financial considerations to be paid for the vehicle unless and until the recipient is notified in writing of the revocation of the authority. The letter or form shall be signed by the dealer principal or person in charge of daily activities of the dealership.~~]

[~~(3) The written authorization shall include the employee, agent or representative's name; current mailing address; phone number; the business name, address, and license number of the dealer with whom the employee or agent is associated. The written authorization is a record that must be kept as all other records set out in §215.144 of this subchapter (relating to Record of Sales and Inventory) and shall be made available to a division representative upon request.~~]

(e) [~~(c)~~] A license holder, including a wholesale motor vehicle auction license holder that [~~Any licensee, including wholesale auctions who act on behalf of others, who~~] buys and sells vehicles on a wholesale basis, including by sealed bid, is required to verify the authority of any person claiming to be an agent or employee of a licensed dealer who purports to be buying or selling a motor vehicle: [~~either an employee, agent or representative who represents they are buying or selling motor vehicles~~]

(1) on behalf of a licensed dealer; or[~~.~~]

(2) under the written authority of a licensed dealer.

(f) [~~(d)~~] A title to a vehicle bought by an agent or employee [~~Titles to vehicles bought by an employee, agent or representative~~] of a dealer shall be:

(1) reassigned to the dealer by the seller or by the auction; and [~~auction and~~]

(2) shall not be delivered to the agent or employee, [~~agent or representative~~] but delivered only to the dealer [~~, the dealer's employee,~~] or the dealer's financial institution.

(g) Notwithstanding the prohibitions in this section, an authorized agent[~~, representative~~] or employee may sign a [~~any~~] required odometer statement. [~~statements.~~]

(h) [~~(e)~~] In a wholesale transaction for the purchase of a motor vehicle, the seller may accept as consideration only:

(1) a check or a draft drawn [~~Only checks or drafts drawn~~] on the purchasing dealer's account;[~~, or~~]

(2) a cashier's check [~~cashiers checks~~] in the name of the purchasing dealer;[~~,~~] or

(3) a wire transfer [~~wire transfers~~] from the purchasing dealer's bank account [~~shall be accepted for motor vehicles purchased in a wholesale transaction~~].

§215.149. Independent Mobility Motor Vehicle Dealers.

In accordance with Occupations Code, §2301.361, [~~§2301.362,~~] a transaction occurs through or by a franchised dealer of the motor vehicle's chassis line-make [~~line make~~] if the franchised dealer applies for title and registration of the mobility motor vehicle in the name of the purchaser. An independent mobility motor vehicle dealer may prepare the documentation necessary for a franchised dealer to comply with the requirements of Transportation Code, §501.0234 in connection with the sale of a mobility motor vehicle.

§215.150. Authorization to Issue Temporary Tags.

(a) A dealer that holds a GDN may issue a dealer's temporary tag, buyer's temporary tag, or a preprinted Internet-down temporary tag [~~Dealers who hold a General Distinguishing Number license may issue dealer temporary tags, buyer's temporary tags, and Internet-down temporary tags~~] for each type of vehicle the dealer is licensed to sell. A converter that [~~who~~] holds a converter's license under Occupations Code, Chapter 2301 may issue a converter's temporary tag. [~~converter temporary tags.~~]

(b) A license holder [~~Licensees~~] may issue an applicable dealer's temporary tag, buyer's temporary tag, or converter's temporary tag [~~temporary dealer, buyer's, or converter tags~~] until the [~~a~~] license is canceled [~~cancelled~~], revoked, or suspended [~~in accordance with law~~].

[~~(c) A dealer's authorization to obtain numbers in advance for use on Internet-down tags may be modified, suspended, or revoked after opportunity for hearing in accordance with Occupations Code, Chapter 2301 and Government Code, Chapter 2001, if the dealer has misused the tags or failed to comply with the requirements for issuance and recordkeeping in Transportation Code, §503.067 or this subchapter.~~]

§215.151. Temporary Tags, General Use Requirements, and Prohibitions.

(a) A dealer shall secure a temporary tag to a vehicle in the license plate display area located at the rear of the vehicle, so that the entire temporary tag is visible and legible at all times, including when the vehicle is being operated.

[~~(a) All temporary tags shall be displayed in the rear license plate display area of the vehicle. The tag must be secured to the vehicle so that the entire tag is visible and legible.~~]

(b) All printed information on a temporary tag must be visible and may not be covered or obstructed by any plate holder or other device or material.

[~~(c) Homemade tags or tags that have buyer's tag information printed on one side and dealer's tag information printed on the other side are not permitted.~~]

(c) [~~(d)~~] A [~~Each~~] motor vehicle that is being transported using the full mount method, the saddle mount method, the tow bar method, or any combination of those methods in accordance with Transportation Code, §503.068(d), must have a dealer's temporary tag, a [~~or~~] converter's temporary tag, or a buyer's temporary tag, whichever is applicable, affixed to the motor vehicle being transported. [~~that vehicle.~~]

§215.152. Obtaining Numbers for Issuance of Temporary Tags.

(a) A dealer or a converter is required to [~~Dealers and converters must~~] have Internet access to connect to the temporary tag databases maintained by the department.

(b) Except as provided by §215.157 of this title [~~subchapter~~] (relating to Advance Numbers, Preprinted Internet-down [~~Buyer's~~] Temporary Tags), before a temporary tag may be issued and displayed on a vehicle, a [~~the~~] dealer or converter must:

(1) enter in the temporary tag [~~into the~~] database information about the vehicle, dealer, converter, or buyer, as appropriate;[~~,~~] and

(2) obtain a specific number for the temporary tag. [~~tag before a temporary tag may be issued and displayed on a vehicle.~~]

§215.153. Specifications for All Temporary Tags.

(a) Information printed or completed on a temporary tag [~~all temporary tags~~] must be in black ink on a white background. Other than for a motorcycle [~~For vehicles, other than motorcycles~~], a completed buyer's, dealer's, converter's, or preprinted [~~buyer, dealer, converter, and~~] Internet-down temporary tag shall be six [~~6~~] inches high and at least [~~by a minimum of~~] 11 inches wide. For a motorcycle [~~motorcycles~~], the completed buyer's, dealer's, converter's, or preprinted [~~buyer, dealer, converter, and~~] Internet-down temporary tag shall be four [4] inches high and at least seven [~~by 7~~] inches wide.

(b) A temporary tag [~~All temporary tags~~] must be:

(1) composed of plastic or other durable, weather-resistant material; or[~~, or must be~~]

(2) sealed in a two [~~2~~] mil clear poly bag that encloses the entire temporary tag.

(c) A dealer or converter may manually copy the information [~~provided~~] from the temporary tag database to a preprinted [~~pre-printed~~] temporary tag template. A temporary tag completed in this manner must: [~~in accordance with the specifications of the appropriate appendix listed in subsection (c) of this section. Temporary tags completed by hand must have~~]

(1) display the information drawn in letters and numerals with a permanent, thick, black marking pen; and[~~.~~]

(2) comply with the specifications of the applicable temporary tag identified by the following appendices:

[~~(c)~~] [~~If a dealer uses the option provided by subsection (b) of this section, the dealer or converter shall use the design of the respective temporary tag from the appropriate following Appendices:~~]

(A) [~~(1)~~] Appendix A-1 - Dealer's Temporary Tag [~~Dealer~~] - Assigned to Specific Vehicle;
Figure: 43 TAC §215.153(c)(2)(A)
[~~Figure: 43 TAC §215.153(c)(1)~~]

(B) [~~(2)~~] Appendix A-2 - Dealer's Temporary Tag [~~Dealer~~] - Assigned to Agent;
Figure: 43 TAC §215.153(c)(2)(B)
[~~Figure: 43 TAC §215.153(c)(2)~~]

(C) [~~(3)~~] Appendix B-1 - Buyer's Temporary Tag [~~Buyer~~];
Figure: 43 TAC §215.153(c)(2)(C)
[~~Figure: 43 TAC §215.153(c)(3)~~]

(D) [~~(4)~~] Appendix B-2 - Preprinted Internet-down Temporary Tag; and
Figure: 43 TAC §215.153(c)(2)(D)
[~~Figure: 43 TAC §215.153(c)(4)~~]

(E) [~~(5)~~] Appendix C-1 - Converter's Temporary Tag [~~Converter~~].
Figure: 43 TAC §215.153(c)(2)(E)
[~~Figure: 43 TAC §215.153(c)(5)~~]

§215.154. Dealer's [~~Dealer~~] Temporary Tags.

(a) A dealer's temporary tag [~~Dealer temporary tags~~] may be displayed only on the type of vehicle for which the GDN [~~general distinguishing number~~] is issued and for which the [~~a~~] dealer is licensed by the department to sell.

[~~(b) Dealer temporary tags may be used by the dealer only to:~~]

[~~(1) demonstrate the vehicle or cause the vehicle to be demonstrated to a prospective buyer for sale purposes only;~~]

[~~(2) convey or cause the vehicle to be conveyed:~~]

[~~(A) from one of the dealer's places of business in this state to another of the dealer's places of business in this state;~~]

[~~(B) from the dealer's place of business to a place where the vehicle is to be repaired, reconditioned, or serviced;~~]

[~~(C) from the state line or a location in this state where the vehicle is unloaded to the dealer's place of business;~~]

[~~(D) from the dealer's place of business to a place of business of another dealer;~~]

[~~(E) from the point of purchase by the dealer to the dealer's place of business;~~]

[~~(F) to road test the vehicle;~~]

[~~(3) use the vehicle for or allow its use by a charitable organization or use the vehicle or allow its use in parades; or~~]

[~~(4) permit a customer to temporarily operate a vehicle while the customer's vehicle is being repaired. A vehicle-specific type dealer temporary tag shall be used for this purpose.~~]

[~~(c) A vehicle being conveyed under this section is exempt from the inspection requirements of Transportation Code, Chapter 548.~~]

(b) [~~(d)~~] A wholesale motor vehicle auction license holder that also holds a dealer GDN [~~A dealer who holds a wholesale motor vehicle auction general distinguishing number~~] may display a dealer's temporary tag on a vehicle that is being [~~its dealer temporary tags on any vehicles that are~~] transported to or from the licensed auction location [~~by a bona fide employee or agent of the auction~~].

(c) [~~(e)~~] When an unregistered vehicle is sold to another dealer, the selling dealer shall remove the selling dealer's [~~its dealer~~] temporary tag. The purchasing dealer may display its dealer temporary tag or

its metal dealer's license [dealer] plate on the vehicle. [If a vehicle is consigned from one dealer to another, the vehicle must display the temporary tag of the dealer to which that vehicle was consigned.]

(d) [(f)] A dealer's temporary tag [Dealer temporary tags] may not be displayed on:

(1) a laden commercial vehicle [vehicles] being operated or moved on [upon] the public streets or highways; or

(2) on the dealer's service or work vehicles.

(e) [(1)] For purposes of this section, a dealer's service or work vehicle includes: [Examples of vehicles considered as service or work vehicles for purposes of this subsection are:]

(1) [(A)] a vehicle used for towing or transporting other vehicles;

(2) [(B)] a vehicle, including a light truck, used in connection with the operation of the dealer's shops or parts department;

(3) [(C)] a courtesy car [on which a courtesy car sign is displayed];

(4) [(D)] a rental or lease vehicle; and

(5) [(E)] any boat trailer owned by a dealer or manufacturer that is used to transport more than one boat.

[(2) A light truck is not considered to be a laden commercial vehicle when it is:]

[(A) mounted with a camper unit; or]

[(B) towing a trailer for recreational purposes.]

(f) [(3)] For purposes of subsection (d) of this section, a [A] vehicle bearing a dealer's temporary tag is not considered [to be] a laden commercial vehicle when the vehicle [it] is:

(1) [(A)] towing another vehicle bearing the same dealer's temporary tags;[,] and

(2) [(B)] both vehicles are being conveyed from the dealer's place of business to a licensed wholesale motor vehicle [auto] auction or from a licensed wholesale motor vehicle [auto] auction to the dealer's place of business.

(g) [(4)] As used in this section, "light truck" has the [same] meaning assigned by Transportation Code, §541.201.

(h) [(g)] A dealer's [dealer] temporary tag may not be used to operate a vehicle for the personal use of a dealer or a dealer's employee.

(i) [(h)] A dealer's [dealer] temporary tag must show its expiration date, which must [which may] not exceed 60 days after the date the temporary tag was issued. [its date of issuance.]

(j) [(i)] A dealer's [dealer] temporary tag may be issued by a dealer to a specific motor vehicle in the dealer's inventory or to a dealer's agent who is authorized to operate a motor vehicle owned by the dealer.

(k) [(j)] A dealer that [who] issues a dealer's [dealer] temporary tag to a specific vehicle must ensure that the following information is placed on the temporary tag:

(1) the vehicle-specific number from the temporary tag database;

(2) the year and make of the vehicle;

(3) the VIN [vehicle identification number (VIN)] of the vehicle; [and]

(4) the month, day, and year of the temporary tag's expiration; and[.]

(5) the name of the dealer.

(l) [(k)] A dealer that [who] issues a dealer's [dealer] temporary tag to an agent must ensure that the following information is placed on the temporary tag:

(1) the specific [agent-specific] number from the temporary tag database; [and]

(2) the month, day, and year of the temporary tag's expiration; and[.]

(3) the name of the dealer.

§215.155. Buyer's Temporary Tags.

(a) A buyer's temporary [buyer's] tag may be displayed only on a vehicle that can be legally operated on [may be operated upon] the public streets and highways and for which a sale has been consummated.

(b) A buyer's temporary tag may be displayed only a vehicle that has a valid inspection in accordance with Transportation Code, Chapter 548.

(c) For a wholesale transaction, the purchasing dealer places on the motor vehicle its own:

(1) dealer's temporary tag; or

(2) metal dealer's license plate.

[(b) A dealer must place a temporary buyer's tag on any new or used vehicle sold by the dealer, except for a vehicle sold in a wholesale transaction in which the purchasing dealer places its own dealer temporary tag or the purchasing dealer's metal dealer plate on the vehicle.]

(d) [(c)] A buyer's temporary tag is [Temporary buyer's tags are] valid until the earlier of:

(1) the date on which the vehicle is registered; or

(2) the 60th day after the date of purchase.

(e) [(d)] The dealer must ensure that the following information is placed on a buyer's temporary tag that the dealer issues:

(1) the vehicle-specific number obtained from the temporary tag database;

(2) the year and make of the vehicle;

(3) the VIN [vehicle identification number (VIN)] of the vehicle; [and]

(4) the month, day, and year of the expiration of the buyer's temporary tag; and [tag's expiration.]

(5) the name of the dealer.

§215.156. Buyer's Temporary Tag Receipt.

A dealer must provide a buyer's temporary tag receipt to the buyer of each vehicle for [to] which a buyer's temporary tag is issued, regardless of whether the buyer's temporary tag is issued using the temporary tag database or if the tag is a preprinted [in the ordinary course of business or is an] Internet-down temporary tag. The dealer may print the image of the buyer's temporary tag receipt issued from the temporary tag database or create [construct] the form using the same information. The dealer shall instruct the buyer to keep a copy of the buyer's temporary tag receipt in the vehicle until the vehicle is registered in the buyer's name and until metal plates are affixed to the vehicle. The buyer's temporary tag receipt must include the following information:[.]

(1) the issue date of the buyer's temporary tag;

(2) the year, make, model, body style, color, and VIN [~~vehicle identification number (VIN)~~] of the vehicle sold;

(3) the vehicle-specific temporary tag number;

(4) the expiration date of the temporary tag;

(5) the date of the sale;

(6) the name of the issuing dealer and the dealer's license number; and

(7) the buyer's name and mailing address.

§215.157. Advance Numbers, Preprinted Internet-down [~~Buyer's~~] Temporary Tags.

(a) In accordance with Transportation Code, §503.0631(d), a dealer may obtain an advance supply of preprinted Internet-down temporary tags with specific numbers and buyer's temporary tag receipts to issue in lieu of buyer's temporary tags if the dealer is unable to access the Internet.

(b) If a dealer is unable to access the Internet at the time of a sale, the dealer must complete the preprinted Internet-down temporary buyer's tag and buyer's temporary tag receipt by providing details of the sale, signing the buyer's temporary tag receipt, and retaining a copy. The dealer must [~~and sign the buyer's receipt, retain a copy of the signed buyer's receipt, and~~] enter the required information regarding [~~on~~] the sale in the temporary tag [~~into the~~] database not later than the close of the next business day that the dealer has access to the Internet. The buyer's temporary tag receipt must include [~~have~~] a statement that the dealer has Internet access[~~,~~] but, at the time of the sale, the dealer was unable to access the Internet or the temporary tag database.

§215.158. General Requirements and Allocation of Preprinted Internet-down Temporary Tag Numbers.

(a) [~~Preprinted tags with Internet-down numbers shall be kept in a secure place.~~] The dealer is responsible for the safekeeping of preprinted Internet-down temporary tags and shall store them in a secure place. The dealer [~~those tags and~~] shall report any loss, theft, or destruction of preprinted Internet-down temporary [~~those~~] tags to the department within 24 hours of discovering [~~the time of~~] the loss, theft, or destruction.

(b) A dealer may use a preprinted Internet-down temporary tag [~~Tags with Internet-down numbers may be used~~] up to 12 months after the date the preprinted Internet-down temporary tag is created. [~~of issuance of the tag from the database.~~] A dealer may create replacement preprinted Internet-down temporary tags [~~tags with Internet-down numbers,~~] up to the maximum allowed, when:

(1) a dealer uses one or more preprinted Internet-down temporary tags and then enters the required information in the temporary tag database [~~tags with Internet-down numbers and then enters the data into the system,~~] after access to the temporary tag database [~~system~~] is again available; or

(2) a preprinted Internet-down temporary tag expires. [~~tag with an Internet-down number expires.~~]

(c) The number of preprinted Internet-down temporary tags that [~~tags with Internet-down numbers~~] a dealer may create is equal to the greater [~~greatest~~] of:

(1) the number of preprinted Internet-down temporary tags previously allotted by the department to the dealer;

(2) 30 [~~thirty~~]; or

(3) 1/52 of the dealer's total annual sales.

(d) For good cause shown, a dealer may obtain more than the number of preprinted Internet-down temporary tags described in subsection (c) of this section. The director of the Vehicle Titles and Registration Division of the department[~~,~~] or that director's delegate[~~,~~] may approve, in accordance with this subsection, an additional allotment of preprinted Internet-down temporary tags [~~with Internet-down numbers~~] for a dealer if the additional allotment is essential for the continuation of the dealer's business. The director of the Vehicle Titles and Registration Division of the department[~~,~~] or that director's delegate[~~,~~] will base the determination of the additional allotment of preprinted Internet-down temporary tags on the dealer's past sales, inventory, and any other factors that the director of the Vehicle Titles and Registration Division of the department[~~,~~] or that director's delegate[~~,~~] determines pertinent, such as an emergency. A request for additional preprinted Internet-down temporary tags [~~tags with Internet-down numbers~~] must specifically state why the additional preprinted Internet-down temporary tags are necessary for the continuation of the applicant's business.

§215.159. Converter's Temporary Tags.

[~~(a) Converter's temporary tags may be used only by the converter or the converter's employees on unregistered vehicles to:~~]

[~~(1) demonstrate the vehicle, or cause the vehicle to be demonstrated, to a prospective buyer who is a franchised motor vehicle dealer or an employee of a franchised motor vehicle dealer; or~~]

[~~(2) convey the vehicle or cause the vehicle to be conveyed:~~]

[~~(A) from one of the converter's places of business in this state to another of the converter's places of business in this state;~~]

[~~(B) from the converter's place of business to a place where the vehicle is to be assembled, repaired, reconditioned, modified, or serviced;~~]

[~~(C) from the state line or a location in this state where the vehicle is unloaded to the converter's place of business;~~]

[~~(D) from the converter's place of business to a place of business of a franchised motor vehicle dealer; or~~]

[~~(E) to road test the vehicle.~~]

[~~(b) Prospective buyers who are employees of a franchised dealer or a converter may operate a vehicle displaying converter's temporary tags during a demonstration.~~]

[~~(c) A vehicle being conveyed while displaying a converter's temporary tag is exempt from the inspection requirements of Transportation Code, Chapter 548.~~]

[~~(d) Converter's temporary tags may not be used to operate a vehicle for the converter's or a converter's employee's personal use.~~]

(a) [~~(e)~~] A converter's temporary tag [~~Converter's temporary tags~~] may be displayed only on the type of vehicle that the converter is engaged in the business of assembling or modifying.

[~~(f) When an unregistered new motor vehicle is sold to a converter, the selling dealer shall remove a dealer's temporary tag. The selling dealer may attach a buyer's temporary tag to the vehicle or the purchasing converter may display a converter's temporary tag or metal converter plate on the vehicle.~~]

(b) [~~(g)~~] A converter's [~~A converter~~] temporary tag must show its expiration date, which may not be more than 60 days after the date of its issuance.

[~~(h) A converter temporary tag may be issued by a converter to a specific vehicle or to a converter's agent who is authorized to operate a motor vehicle owned by the converter.~~]

(c) [~~(i)~~] A converter that [~~who~~] issues a converter's temporary [~~converter's~~] tag to a specific vehicle shall ensure that the following information is placed on the converter's temporary tag:

(1) the vehicle-specific [~~vehicle specific~~] number from the temporary tag database;

(2) the year and make of the vehicle;

(3) the VIN [~~vehicle identification number (VIN)~~] of the vehicle; [~~and~~]

(4) the month, day, and year of [~~the tag's~~] expiration of the converter's temporary tag; and[~~.~~]

(5) the name of the converter.

[~~(j) A converter who issues a temporary converter's tag to an agent shall ensure that the following information is placed on the tag:~~]

[~~(1) the agent-specific number from the database; and~~]

[~~(2) the month, day, and year of the tag's expiration.~~]

§215.160. Duty to Identify Motor Vehicles Offered for Sale as Rebuilt.

(a) For each motor vehicle a dealer displays or offers for retail sale and which has been a salvage motor vehicle as defined by Transportation Code, §501.091(15) and a regular title subsequently issued under Transportation Code, §501.100, a dealer shall disclose in writing that the motor vehicle has been repaired, rebuilt, or reconstructed and issued a title under Transportation Code, §501.100. The written disclosure must:

(1) be visible from outside of the motor vehicle; and

(2) contain lettering that is reasonable in size, stating as follows: *"This motor vehicle has been repaired, rebuilt or, reconstructed after formerly being titled as a salvage motor vehicle."*

(b) Upon the sale of a motor vehicle which has been a salvage motor vehicle as defined by Transportation Code, §501.091(15) and a regular title subsequently issued under Transportation Code, §501.100, a dealer shall obtain the purchaser's signature on the vehicle disclosure form or on an acknowledgement written in eleven point or larger font that states as follows: *"I, (name of purchaser), acknowledge that at the time of purchase, I am aware that this vehicle has been repaired, rebuilt, or reconstructed and was formerly titled as a salvage motor vehicle."*

(c) The purchaser's acknowledgement as required in subsection (b) of this section may be incorporated in a Buyer's Order, a Purchase Order, or other disclosure document. This disclosure does not require a separate signature.

(d) An original signed acknowledgement required by subsection (b) of this section or a signed vehicle disclosure form shall be given to the purchaser and a copy of the signed acknowledgement or vehicle disclosure form shall be retained by the dealer in the records of motor vehicles sales required by §215.144 of this title (relating to Records). If the acknowledgement is incorporated in a Buyer's Order, a Purchase Order, or other disclosure document, a copy of that document must be given to the purchaser and a copy retained in the dealer's records in accordance with §215.144.

(e) This section does not apply to a wholesale motor vehicle auction.

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

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David D. Duncan
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Earliest possible date of adoption: October 9, 2016
For further information, please call: (512) 465-5665

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43 TAC §§215.136, 215.142, 215.143

STATUTORY AUTHORITY

The repeals are proposed under Transportation Code, §1002.001, which provides the board of the Texas Department of Motor Vehicles with the authority to adopt rules that are necessary and appropriate to implement the powers and the duties of the department; Occupations Code, §2301.155, which requires the board of the Texas Department of Motor Vehicles to adopt rules necessary or convenient to administer Occupations Code, Chapter 2301; and more specifically, Occupations Code, §2301.266, which authorizes the board to adopt rules applicable to the issuance of duplicate licenses; and Occupations Code, §2301.602, which requires the board to adopt rules to enforce Chapter 2301, Subchapter M; Transportation Code, §503.002 which authorizes the board to adopt rules to administer Transportation Code, Chapter 503; and more specifically, Transportation Code, §503.009, which authorizes the board to adopt rules for procedures concerning contested cases; Transportation Code, §503.061, which requires the board to adopt rules regulating the issuance of dealer's license plates; and Transportation Code, §503.0626 and §503.0631, which require the board to adopt rules necessary to implement and manage the department's temporary tag databases.

CROSS REFERENCE TO STATUTE

Government Code, §2001.039; Occupations Code, Chapter 2301; and Transportation Code, Chapter 503.

§215.136. Off-site Sales.

§215.142. GDN Sanction and Qualification Hearing.

§215.143. Manufacturers License Plates.

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

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SUBCHAPTER F. LESSORS AND LEASE FACILITATORS

43 TAC §§215.171, 215.173 - 215.181

STATUTORY AUTHORITY

The amendments are proposed under Transportation Code, §1002.001, which provides the board of the Texas Department

of Motor Vehicles with the authority to adopt rules that are necessary and appropriate to implement the powers and the duties of the department; Occupations Code, §2301.155, which requires the board of the Texas Department of Motor Vehicles to adopt rules necessary or convenient to administer Occupations Code, Chapter 2301; and more specifically, Occupations Code, §2301.266, which authorizes the board to adopt rules applicable to the issuance of duplicate licenses; and Occupations Code, §2301.602, which requires the board to adopt rules to enforce Chapter 2301, Subchapter M; Transportation Code, §503.002 which authorizes the board to adopt rules to administer Transportation Code, Chapter 503; and more specifically, Transportation Code, §503.009, which authorizes the board to adopt rules for procedures concerning contested cases; Transportation Code, §503.061, which requires the board to adopt rules regulating the issuance of dealer's license plates; and Transportation Code, §503.0626 and §503.0631, which require the board to adopt rules necessary to implement and manage the department's temporary tag databases.

CROSS REFERENCE TO STATUTE

Government Code, §2001.039; Occupations Code, Chapter 2301; and Transportation Code, Chapter 503.

§215.171. Purpose and Scope. [~~Objective.~~]

This subchapter implements [~~The objective of this subchapter is to implement the intent of the legislature as declared in~~] Occupations Code, Chapter 2301 and more specifically[~~, and in particular~~], §§2301.251, 2301.253, 2301.254, 2301.261, 2301.262, 2301.357, and 2301.551 - 2301.556[~~, by prescribing rules to regulate the business of leasing motor vehicles in this state~~].

§215.173. License.

(a) No person may engage in business as a vehicle lessor or a vehicle lease facilitator unless that person holds a valid license issued by the department [~~has a currently valid license assigned by the division~~], or is otherwise exempt by law from obtaining such a license.

(b) Any person who facilitates vehicle leases on behalf of a vehicle lease facilitator must:

(1) be on the vehicle lease facilitator's payroll and receive compensation from which social security, federal unemployment tax, [~~in which Social Security, Federal Unemployment Tax,~~] and all other appropriate taxes are withheld from the representative's paycheck and [~~said taxes are~~] paid to the proper taxing authority; and

(2) have work details such as when, where, and how the final results are achieved, directed, and controlled by the vehicle lease facilitator.

§215.174. Application for a License.

(a) An applicant [~~Application~~] for a vehicle lessor's or vehicle lease facilitator's license must submit a sufficient application to the department. To be sufficient, the application must [~~shall~~] be on a form prescribed by the department and accompanied by all required supporting documentation. [~~division, properly completed by the applicant, and shall be submitted with supporting documentation showing all information requested.~~]

(b) The supporting documentation for a vehicle lessor's license application shall include:

[~~(1) a letter of appointment for each lease facilitator or acceptable substitute as designated by the division;~~]

(1) [~~(2)~~] [~~a~~] verification of the criminal background of each owner and officer of the applicant, if applicable;

(2) [~~(3)~~] the fee required [~~for the license as prescribed~~] by law for each type of license required;

(3) [~~(4)~~] a copy of each assumed name certificate on file with the appropriate recording entity, such as the Office of the Secretary of State or the county clerk; [~~and~~]

(4) [~~(5)~~] a sample copy of the vehicle lease agreement between the vehicle lessor and a lessee;[~~.~~]

(5) a sample copy of the required fee disclosure statement regarding fees paid by the vehicle lessor to a vehicle lease facilitator for the facilitation of a vehicle lease or a statement that no such fees were or will be paid;

(6) a list including the business name(s), DBA(s), and addresses of lease facilitators with whom the applicant conducts or intends to conduct business; and

(7) a list of other satellite offices that conduct business in the State of Texas that includes the address, phone number, and name of the contact person for each location.

(c) The supporting documentation for a vehicle lease facilitator's license application shall include:

[~~(1) a letter of appointment from each lessor or acceptable substitute as designated by the division;~~]

(1) [~~(2)~~] [~~a~~] verification of the criminal background of each owner and officer of the applicant, if applicable;

(2) [~~(3)~~] the fee required [~~for the license as prescribed~~] by law for each type of license required;

(3) [~~(4)~~] a copy of each assumed name certificate on file with the appropriate recording entity, such as the Office of the Secretary of State or the county clerk;

(4) [~~(5)~~] a sample copy of the vehicle lease agreement between each of the lessors the lease facilitator represents, and the [~~a~~] lessee; [~~and~~]

(5) a sample copy of the required fee disclosure statement regarding fees paid by a vehicle lessor to the vehicle lease facilitator for the facilitation of a vehicle lease or a statement that no such fees were or will be paid;

(6) a list of all vehicle lessors, including names and addresses, for [~~with~~] whom any vehicle lease facilitator solicits or procures a lessee. The vehicle lease facilitator shall update the list upon renewal of a license and within 10 [~~executes leases. This list must be updated in writing upon renewal of a license, and within ten~~] days of the addition of any vehicle lessor to this list; and[~~.~~]

(7) a copy of the representation agreement between the vehicle lease facilitators and each lessor.

§215.175. Sanctions.

(a) The board or department may:

(1) deny a vehicle lessor or vehicle lease facilitator application;

(2) revoke or suspend a vehicle lessor or vehicle lease facilitator license; or

(3) assess a civil penalty or take other action on a vehicle lessor or vehicle lease facilitator applicant or license holder, or a person engaged in business for which a vehicle lessor or vehicle lease facilitator license is required.

[(a) Revocation/Denial. The Board may revoke, deny or suspend a lessor or lease facilitator's license, or assess civil penalties, if that lessor or lease facilitator:]

(b) The board or department may take action described in subsection (a) of this section if a vehicle lessor or vehicle lease facilitator applicant or license holder, or a person engaged in business for which a vehicle lessor or vehicle lease facilitator license is required:

(1) fails to maintain an established and permanent place of business required by [conforming to] §215.177 of this title [subchapter] (relating to Established and Permanent Place of Business);

(2) fails to maintain records required under this subchapter;

(3) [(2)] refuses [to permit] or fails to comply with a request by a representative of the department [division] to examine during the vehicle lessor's or vehicle lease facilitator's posted business hours at the vehicle lessor's or vehicle lease facilitator's licensed location: [the current and previous year's leasing records required to be kept under §215.178 of this subchapter (relating to Records of Leasing) and ownership papers for vehicles owned, leased, or under that lessor or lease facilitator's control, and evidence of ownership or lease agreement for the property upon which the business is located:]

(A) a vehicle leasing record required to be maintained by §215.178 of this title (relating to Records Required for Vehicle Lessors and Vehicle Lease Facilitators);

(B) ownership papers for a vehicle owned, leased, or under that vehicle lessor's or vehicle lease facilitator's control; or

(C) evidence of ownership or a current premises lease agreement for the property upon which the business is located;

[(A) during normal working hours at the lessor's or lease facilitator's permanent place of business, or]

[(B) through a request made by the division pursuant to these rules;]

(4) refuses or fails to timely comply with a request for records made by a representative of the department;

(5) [(3)] fails to notify the department in writing within 10 days [division] of a change of the vehicle lessor or vehicle lease facilitator license holder's: [address within ten days after such change;]

(A) mailing address;

(B) physical address;

(C) telephone number; or

(D) email address;

(6) [(4)] fails to notify the department in writing within 10 days [division] of a change of the vehicle lessor or vehicle lease facilitator license holder's name or ownership; [lessor/lease facilitator's name or ownership within ten days after such a change;]

(7) [(5)] fails to comply with [observe] the fee restrictions or other requirements under [as described in] Occupations Code, §2301.357 or [and] §§2301.551 - 2301.556;

(8) [(6)] fails to maintain [leasing and/or] advertisement records or otherwise fails to comply with the advertising requirements of: [as described in these rules;]

(A) §215.178; or

(B) Subchapter H of this chapter (relating to Advertising);

[(7) fails to remain regularly and actively engaged in the business of leasing vehicles or facilitating the leasing of vehicles for which the license is issued;]

(9) [(8)] violates any law relating to the sale, lease, distribution, financing, or insuring of motor vehicles;

(10) is convicted of an offense that, in accordance with Occupations Code, Chapter 53 and with §215.88 of this title (relating to Criminal Offense and Action on License), directly relates to the duties or responsibilities of the licensed occupation;

(11) is determined by the board or department, in accordance with §215.89 of this title (relating to Fitness), to be unfit to hold a vehicle lessor or vehicle lease facilitator license;

(12) [(9)] uses or allows use of a vehicle lessor or vehicle lease facilitator license in violation of any law or for the purpose of avoiding any provision [provisions] of Occupations Code, Chapter 2301; or

(13) [(10)] wilfully omits material information or makes a material misrepresentation in any application or other documentation [information] filed with the department. [division;]

[(11) fails to update in writing the list of lessors, including names and addresses, with which any lease facilitator executes leases within ten days of any changes to this list and upon renewal of the license;]

[(12) violates any state or federal law relating to the leasing of new motor vehicles.]

(c) The board or department may take action on a vehicle lessor's license or assess civil penalties for the vehicle lessor's failure to notify the department in writing within 10 days of any change, addition, or deletion to the list of vehicle lease facilitators with whom the vehicle lessor conducts business, including any change to a vehicle lease facilitator's mailing address, physical address, telephone number, or email address.

(d) The board or department may take action on a vehicle lease facilitator's license or assess civil penalties for the vehicle lease facilitator's failure to notify the department in writing within 10 days of any change, addition, or deletion to the list of vehicle lessors for whom the vehicle lease facilitator conducts business, including any change to a vehicle lessor's mailing address, physical address, telephone number, or email address.

(e) The board or department may take action on a vehicle lessor's or vehicle lease facilitator's license if the vehicle lessor or vehicle lease facilitator accepts a fee from a dealer, directly or indirectly, for referring a customer who purchases or considers purchasing a motor vehicle.

[(b) Referral fees prohibited. A lessor or lease facilitator may not, directly or indirectly, accept a fee from a dealer for referring customers who purchase or consider purchasing vehicles.]

§215.176. More Than One Location.

(a) A vehicle lease facilitator [Lease facilitators] must be licensed separately for each business location.

(b) A vehicle lessor or vehicle lease facilitator that relocates [Lessors or lease facilitators that relocate] from a point outside the limits of a city or relocates[, or relocate] to a point not within the limits of the same city of the initial location is [are] required to obtain a new license.

(c) A vehicle lessor is [Lessors are] required to obtain a license for the vehicle lessor's primary location. A vehicle lessor [their primary

~~locations. Lessors~~] must provide the address, telephone number, and the name of a contact person for all other satellite offices that conduct business in the state of Texas.

§215.177. Established and Permanent Place of Business.

(a) A vehicle lessor or vehicle lease facilitator operating within the State [~~state~~] of Texas must meet the following requirements at each location where vehicles are leased or offered for lease.

(1) Physical location requirements.

(A) A vehicle lessor or vehicle lease facilitator operating within the State of [~~within~~] Texas must be open to the public. The vehicle lessor's or vehicle [~~lessor or~~] lease facilitator's business hours for each day of the week must be posted at the main entrance of the office. The[~~, and the~~] owner or an employee of the vehicle lessor or vehicle lease facilitator must be at the location during the posted business hours for the purpose of leasing vehicles. In the event the owner or an employee is not available to conduct business during the posted business hours, a separate sign must be posted indicating the date and time such owner or employee will resume vehicle leasing operations.

(B) A vehicle lessor's or vehicle leasing facilitator's office [~~The~~] structure must be of sufficient size to accommodate the following required equipment: [~~and must be equipped with~~]

(i) a desk and chairs from which the vehicle lessor or vehicle lease facilitator transacts [~~his~~] business; and [~~. The office also must be equipped with~~]

(ii) a working telephone number [~~instrument~~] listed in the business name or assumed name under which the vehicle lessor or vehicle lease facilitator conducts [~~does~~] business.

(C) [~~(B)~~] A vehicle lessor or vehicle lease facilitator that files an application for a new license or a vehicle lessor that files an application for a satellite location must comply with [~~supplemental location must conform to~~] the following requirements.[~~:~~]

(i) The office must be located in a building[~~,~~] with connecting exterior walls on all sides.

(ii) The office must comply with all applicable local zoning ordinances and deed restrictions.

(iii) The office may not be located within a residence, apartment, hotel, motel, or rooming house.

(iv) The physical address of the office must be recognized by the U.S. Postal Service and [~~or~~] capable of receiving U.S. mail.

(D) [~~(C)~~] A portable-type office structure may qualify as an office only if the structure meets the[~~, provided it meets the minimum~~] requirements of this section and is not a readily moveable trailer or other [~~such~~] vehicle.

(E) One or more licensed vehicle lessors or vehicle lease facilitators, or a combination of one or more licensed vehicle lessors and vehicle lease facilitators may occupy the same business structure and conduct vehicle leasing operations in accordance with the license held by the vehicle lessor or licensed vehicle lease facilitator. Each person engaged in business as a vehicle lessor or vehicle lease facilitator must have:

[~~(D)~~] [~~In those instances when two or more lessors or lease facilitators occupy the same business locations and conduct their respective leasing operations under different names, one office structure for all lessors or lease facilitators operating from such location will be acceptable; provided, however, each lessor or lease facilitator must have:~~]

(i) a separate desk from which that vehicle lessor or vehicle lease facilitator transacts business;

(ii) a separate working telephone number listed [~~instrument, number, and listing~~] in the vehicle lessor or vehicle lease facilitator's business name or assumed name;

(iii) a separate right of occupancy that meets [~~meeting~~] the requirements of this section; and[~~.~~]

(iv) a vehicle lessor or vehicle lease facilitator license issued by the department in the name of the vehicle lessor or vehicle lease facilitator.

(F) [~~(E)~~] A vehicle lease facilitator's established and permanent place of business[~~, as prescribed in this rule,~~] must be physically located within the State [~~state~~] of Texas.

(2) Sign requirements. A vehicle lessor or vehicle lease facilitator shall display a conspicuous and permanent sign at the licensed location showing the name under which the vehicle lessor or vehicle lease facilitator conducts business. Outdoor signs must contain letters that are at least [~~no smaller than~~] six inches in height.

(3) Premises lease [~~Lease~~] requirements. If the premises from which a licensed vehicle lessor or vehicle lease facilitator conducts business is [~~are~~] not owned by the license holder, the license holder must maintain for the licensed location a valid premises lease that is continuous during the period of time for which the vehicle [~~licensee, such licensee shall maintain a lease continuous for the same period of time as the~~] lessor's or vehicle lease facilitator's license will be issued. The premises[~~, and such~~] lease agreement must [~~shall~~] be on a properly executed form containing at a minimum[~~, but not limited to the following information~~]:

(A) the name of the landlord of the premises and the name of the vehicle lease facilitator as the tenant of the premises; [~~names of the lessor and lessee;~~]

(B) the street address or legal description of the property, provided that if only a legal description of the property is included, the applicant must attach a statement that the property description in the lease agreement is the street address identified on the application; [~~or street address;~~] and

(C) the period of time for which the premises lease is valid.

(b) A vehicle lessor that does not deal directly with the public to execute vehicle leases and whose licensed location is in another state [~~and who does not deal directly with the public to execute leases~~] must meet the following requirements at each location.

(1) Physical location requirements.

(A) The vehicle lessor's office structure must be of sufficient size to accommodate the following required equipment: [~~and must be equipped with~~]

(i) a desk and chairs from which the vehicle lessor transacts [~~his~~] business; and[~~. The office also must be equipped with~~]

(ii) a working telephone number [~~instrument~~] listed in the business name or assumed name under which the vehicle lessor conducts [~~lessor or lease facilitator does~~] business.

(B) A vehicle lessor that files an application for a new license or a satellite location with a primary [~~supplemental location~~

~~whose~~] licensed location [~~is~~] in another state must conform to the following requirements.[~~:~~]

(i) The office must be located in a building[~~,~~] with connecting exterior walls on all sides.

(ii) The office must comply with all applicable local zoning ordinances and deed restrictions.

(iii) The office may not be located within a residence, apartment, hotel, motel, or rooming house.

(iv) The physical address of the office must be recognized by the U.S. Postal Service and [~~or~~] capable of receiving U.S. mail.

(C) A portable-type office structure may qualify as an office only if the structure meets the[~~, provided it meets the minimum~~] requirements of this section and is not a readily moveable trailer or other [~~such~~] vehicle.

(D) More than one licensed vehicle lessor may occupy the same business structure and conduct vehicle leasing operations under different names in accordance with the license held by each vehicle lessor. Each person engaged in business as a vehicle lessor must have:

[~~(D)~~] [~~In those instances when two or more lessors occupy the same business locations and conduct their respective leasing operations under different names, one office structure for all lessors operating from such location will be acceptable; provided, however, each lessor must have:~~]

(i) a separate desk from which that vehicle lessor transacts business;

(ii) a separate working telephone number listed [~~instrument, number, and listing~~] in the vehicle lessor's business name or assumed name;

(iii) a separate right of occupancy that meets [~~meeting~~] the requirements of this section; and[~~.~~]

(iv) a vehicle lessor license issued by the department in the name of the vehicle lessor.

(2) Sign requirements. An out of state vehicle lessor shall display a conspicuous and permanent sign at the licensed location showing the name under which the vehicle lessor conducts business. Outdoor signs must contain letters at least [~~no smaller than~~] six inches in height.

(3) Premises lease [~~Lease~~] requirements. If the out of state premises from which a licensed vehicle lessor conducts business is [~~are~~] not owned by the license holder, the license holder must maintain a valid premises lease for [~~that person or entity, that person or entity shall maintain a lease on~~] the property of the licensed location. The premises lease must be continuous during the period of time for which the license will be issued. The premises lease agreement must [~~continuous for the same period of time as the license, and such agreement shall~~] be on a properly executed form containing at a minimum:[~~, but not limited to the following information:~~]

(A) the name [~~names~~] of the landlord of the premises and the name of the licensed lessor identified as the tenant of the premises; [~~lessor and lessee;~~]

(B) the street address or legal description of the property, provided that if only a legal description of the property is included, the applicant must attach a statement that the property description in the lease agreement is the street address identified on the application; [~~or street address;~~] and

(C) the period of time for which the premises lease is valid.

(c) [~~Independence.~~] A vehicle lessor or vehicle lease facilitator shall be independent of financial institutions and dealerships in location and in business activities, unless that vehicle lessor or vehicle lease facilitator is an:

(1) employee or [~~of, a~~] legal subsidiary of the financial institution or dealership; or[~~, or an~~]

(2) entity wholly owned by the financial institution or dealership.

(d) For [~~the~~] purposes of this section, [~~subsection,~~] an employee is a person who meets the requirements of §215.173(b) of this title [~~chapter~~] (relating to License).

§215.178. Records Required for Vehicle Lessors and Vehicle Lease Facilitators [~~of Leasing~~].

(a) Purchase and leasing records. A vehicle lessor or vehicle lease facilitator must maintain [~~keep~~] a complete record of all vehicle purchases and sales for [~~a minimum period of~~] at least one year after the expiration of the vehicle lease.

(1) Records reflecting vehicle lease transactions that [~~have~~] occurred within the preceding 24 months must be maintained at the licensed location. Records for prior time periods may be kept off-site at a location within the same county or within 25 miles of the licensed location.

(2) Within 15 days of [~~Upon~~] receipt of a request sent by mail or by electronic document transfer from a representative of the department, a vehicle lessor or vehicle lease facilitator must deliver a copy of the [~~produce copies of~~] specified records to the address listed in the request [~~within 15 days~~].

(b) Content of records. A complete record for a vehicle lease transaction must contain: [~~As used in this subsection, a complete lease file shall contain the following information or documents:~~]

(1) the name, address [~~names, addresses~~], and telephone number [~~numbers~~] of the lessor of the vehicle subject to [~~in~~] the transaction;

(2) the name, mailing address, physical address, [~~names, addresses~~] and telephone number of each [~~numbers of the~~] lessee of the vehicle subject to [~~in~~] the transaction;

(3) the name, address, [~~names, addresses~~] telephone number, [~~numbers~~] and license number [~~numbers~~] of the lease facilitator of the vehicle subject to [~~in~~] the transaction;

(4) the name, home address, and telephone number of each employee of the vehicle lease facilitator that [~~who~~] handled the transaction;

(5) a complete description of the vehicle involved in the transaction, including the VIN; [~~its vehicle identification number (VIN);~~]

(6) the name, address, telephone number, and GDN [~~general distinguishing number~~] of the dealer selling the vehicle, as well as the franchise license number of the dealer if the vehicle involved in the transaction is a new motor vehicle;

(7) the amount of fee [~~received by or~~] paid to the vehicle lease facilitator or a statement that no fee was paid;

(8) a copy [~~copies~~] of the buyer's [~~buyers~~] order and sales contract for the vehicle;

(9) a copy of the vehicle lease contract;

(10) a copy [~~copies~~] of all other contracts, agreements, or disclosures between the vehicle lease facilitator and the consumer lessee; and

(11) a copy [~~copies~~] of the front and back of the manufacturer's statement of origin, manufacturer's certificate of origin, [~~Manufacturer's Statement/Certificate of Origin~~] or the title of the vehicle if the vehicle involved in the transaction is a new motor vehicle.

(c) Records of advertising. A vehicle lessor or vehicle lease facilitator must maintain a copy [~~copies~~] of all advertisements, brochures, scripts, or an [~~or~~] electronically reproduced copy [~~copies,~~] in whatever medium appropriate, of promotional materials for a period of at least 18 months. Each copy is[~~,~~] subject to inspection upon request by a representative of the department [~~Board~~] at the business of the license holder during posted [~~licensee during regular~~] business hours.

(1) Vehicle Lessors and vehicle lease facilitators must comply with all federal and state advertising laws and regulations, including [~~All advertisements by lessors or lease facilitators must be in accordance with~~] Subchapter H of this chapter (relating to Advertising).

(2) A vehicle lessor or vehicle lease facilitator [~~Lessors and lease facilitators~~] may not state or infer in any advertisement, either directly or indirectly, that the [~~in any manner such as advertisements, stationery or business cards that their~~] business involves the sale of new motor vehicles.

(d) Title assignments. Each certificate [~~All certificates~~] of title, manufacturer's certificate [~~certificates~~] of origin, or other evidence of ownership for a vehicle that has [~~vehicles which have~~] been acquired by a vehicle lessor for lease must be properly assigned [~~properly~~] from the seller in the vehicle [~~into the~~] lessor's name.

(e) Letters of appointment. A letter [~~All letters~~] of appointment between a vehicle lessor and a vehicle [~~each lessor or~~] lease facilitator with whom the vehicle lessor conducts [~~the licensee does~~] business must be executed by both parties.

(f) Electronic records. Any record [~~records~~] required to be maintained [~~kept~~] by a vehicle lessor or vehicle lease facilitator may be maintained [~~kept~~] in an electronic format, provided [~~if~~] the electronic record [~~records~~] can be printed at the licensed location upon request for the record by a representative of the department.

§215.179. Change of Vehicle Lessor or Vehicle Lease Facilitator Status.

(a) Change of ownership. A vehicle lessor or vehicle lease facilitator that [~~who~~] proposes to sell or [~~and/or~~] assign to another any interest in the licensed entity, whether a corporation or otherwise, provided [~~so long as~~] the physical location of the licensed entity remains the same, shall notify the department [~~division~~] in writing within 10 [~~ten~~] days by filing an application to amend the license. If the sale or assignment of any portion of the business results in a change of entity, then the purchasing or assignee [~~purchasing/assignee~~] entity must apply for and obtain a new license. A publicly held corporation licensed as a vehicle lessor or vehicle lease facilitator needs only inform the department [~~Publicly held corporations licensed as lessors or lease facilitators need only inform the division~~] of a change in ownership if one person or entity acquires 10% or greater interest in the licensed entity. [~~licensee.~~]

(b) Change of operating status of business location. A license holder [~~licensee~~] shall obtain department [~~division~~] approval prior to opening a satellite location or relocating [~~the opening of a supplemental location, or the relocation of~~] an existing location, in accordance with §215.176 of this title [~~subchapter~~] (relating to More than One Location). A license holder [~~Also, a licensee~~] must notify the department [~~division~~] when closing an existing location or a satellite location.

§215.180. Required Notices to Lessees.

Vehicle lessors and vehicle [~~Lessors and~~] lease facilitators shall provide notice of the complaint procedures provided by Occupations Code, §§2301.204 and 2301.601 - 2301.613 to each lessee of a new motor vehicle with whom they enter into a vehicle [~~transact a~~] lease.

§215.181. General Distinguishing Number Exception.

A licensed vehicle lessor is not required to hold a GDN [~~It is not necessary for a licensed lessor to hold a general distinguishing number (GDN)~~] in order to sell a motor vehicle that the vehicle lessor owns to [~~lessor owns, to either~~] the lessee or to a duly licensed dealer, either directly or through a licensed wholesale motor vehicle auction. A licensed vehicle lessor may not purchase a motor vehicle [~~lessor is not allowed to purchase vehicles~~] at a wholesale motor vehicle auction. Any existing GDN held by a vehicle lessor that [~~lessor who~~] does not otherwise qualify for a GDN shall be canceled. A vehicle [~~cancelled. A~~] lessor whose GDN has been canceled [~~cancelled~~] under this section may reapply for a GDN once all the qualifications for a GDN are met.

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

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David D. Duncan
General Counsel
Texas Department of Motor Vehicles
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For further information, please call: (512) 465-5665

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43 TAC §215.172

STATUTORY AUTHORITY

The repeal is proposed under Transportation Code, §1002.001, which provides the board of the Texas Department of Motor Vehicles with the authority to adopt rules that are necessary and appropriate to implement the powers and the duties of the department; Occupations Code, §2301.155, which requires the board of the Texas Department of Motor Vehicles to adopt rules necessary or convenient to administer Occupations Code, Chapter 2301; and more specifically, Occupations Code, §2301.266, which authorizes the board to adopt rules applicable to the issuance of duplicate licenses; and Occupations Code, §2301.602, which requires the board to adopt rules to enforce Chapter 2301, Subchapter M; Transportation Code, §503.002 which authorizes the board to adopt rules to administer Transportation Code, Chapter 503; and more specifically, Transportation Code, §503.009, which authorizes the board to adopt rules for procedures concerning contested cases; Transportation Code, §503.061, which requires the board to adopt rules regulating the issuance of dealer's license plates; and Transportation Code, §503.0626 and §503.0631, which require the board to adopt rules necessary to implement and manage the department's temporary tag databases.

CROSS REFERENCE TO STATUTE

Government Code, §2001.039; Occupations Code, Chapter 2301; and Transportation Code, Chapter 503.

§215.172. 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.

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SUBCHAPTER G. WARRANTY PERFORMANCE OBLIGATIONS

43 TAC §§215.201 - 215.210

STATUTORY AUTHORITY

The amendments are proposed under Transportation Code, §1002.001, which provides the board of the Texas Department of Motor Vehicles with the authority to adopt rules that are necessary and appropriate to implement the powers and the duties of the department; Occupations Code, §2301.155, which requires the board of the Texas Department of Motor Vehicles to adopt rules necessary or convenient to administer Occupations Code, Chapter 2301; and more specifically, Occupations Code, §2301.266, which authorizes the board to adopt rules applicable to the issuance of duplicate licenses; and Occupations Code, §2301.602, which requires the board to adopt rules to enforce Chapter 2301, Subchapter M; Transportation Code, §503.002 which authorizes the board to adopt rules to administer Transportation Code, Chapter 503; and more specifically, Transportation Code, §503.009, which authorizes the board to adopt rules for procedures concerning contested cases; Transportation Code, §503.061, which requires the board to adopt rules regulating the issuance of dealer's license plates; and Transportation Code, §503.0626 and §503.0631, which require the board to adopt rules necessary to implement and manage the department's temporary tag databases.

CROSS REFERENCE TO STATUTE

Government Code, §2001.039; Occupations Code, Chapter 2301; and Transportation Code, Chapter 503.

§215.201. Purpose and Scope. [~~Objective and Definitions.~~]

(a) This subchapter implements Occupations Code, §2301.204 and §§2301.601 - 2301.613.

[~~(a) It is the objective of this subchapter to implement the intent of the legislature as declared in Occupations Code, Chapter 2301, Subchapter M (§§2301.601-2301.613) and Occupations Code, §2301.204. These rules provide a simplified and fair procedure for the enforcement of these provisions of the Code, including the processing of complaints, the conduct of hearings, and the formal or informal disposition of complaints filed by owners seeking relief under these provisions of the Code.~~]

(b) Practice and procedure in contested cases heard by the department's [~~State~~] Office of Administrative Hearings (OAH) are addressed in Subchapter B of this chapter (relating to Adjudicative Practice and Procedure) [~~(SOAH) are provided for in Subchapter I of this chapter (relating to Practice and Procedure for Hearings Conducted by the State Office of Administrative Hearings)~~] and the provisions of this subchapter to the extent that the provisions do not conflict with state law, rule, or court order. [~~SOAH rules.~~]

(c) [~~(b)~~] The following words and terms, when used in this subchapter, shall have the following meanings, unless the context clearly indicates otherwise.

(1) Comparable Motor Vehicle--A new motor vehicle, with comparable mileage, from the same manufacturer, converter, or distributor's product line and the same model year or newer as the motor vehicle to be replaced or as reasonably equivalent to the motor vehicle to be replaced.

(2) Lemon Law--Refers to Occupations Code, Chapter 2301, Subchapter M (§§2301.601-2301.613).

[~~(3) Owner--A person as defined by Occupations Code, §2301.601(2).~~]

(3) [~~(4)~~] Warranty Performance--Refers to Occupations Code, §2301.204.

§215.202. Filing of Complaints.

(a) Lemon law complaints. [~~Law Complaints.~~]

(1) Complaints seeking [~~for~~] relief under the lemon law must be in writing [~~written~~] and filed with the department. A complaint filed with the department shall be delivered:

(A) in person to the department; [~~by hand delivery to the department's headquarters building in Austin,~~]

(B) by mail to the address of the department;[~~, or~~]

(C) by email [~~by e-mail or facsimile transmission~~] to a department-designated email address; or [~~e-mail address or~~]

(D) by facsimile transmission to a department-designated facsimile number.

(2) Complaints may be submitted in letter or other written format, or on complaint forms provided by the department.

(3) [~~(2)~~] Complaints shall [~~should~~] state sufficient facts to enable the department and the party complained against to know the nature of the complaint and the specific problems or circumstances forming [~~which form~~] the basis of the claim for relief under the lemon law.

(4) [~~(3)~~] Complaints shall, at a minimum, [~~should~~] provide the following information:

(A) the name, address, and telephone [~~phone~~] number of the motor vehicle owner;

(B) the identification of the motor vehicle, including the [~~vehicle by~~] make, model, [~~and~~] year, and manufacturer's VIN; [~~vehicle identification number;~~]

(C) the type of warranty coverage;

(D) the name and address of the dealer[~~,~~] or other person from whom the motor vehicle was purchased or leased, including the name and address of the vehicle lessor, if applicable;

(E) the date of delivery of the motor vehicle to the original owner[~~;~~] and in the case of a demonstrator, the date the motor vehicle was placed into demonstrator service;

(F) the motor vehicle mileage at the time when: [~~time~~]

(i) the motor vehicle was purchased or leased;[~~, mileage when~~]

(ii) problems with the motor vehicle were first reported; and[;]

(iii) the complaint was filed;

(G) the name of the dealer or the name of the manufacturer's, converter's, or distributor's agent to whom the problems were first reported[; and current mileage];

(H) [(G)] identification of the motor vehicle's existing problems and a brief description of the history of problems and repairs on the motor vehicle, including:

(i) the date and mileage of each repair; and

(ii) a copy of each repair order[; with copies of repair orders] where possible;

(I) [(H)] the date the motor [date on which written notification of complaint was given to the] vehicle manufacturer, converter, or distributor received written notification of the complaint;[; and]

(J) the date and results of the motor vehicle inspection, if the motor vehicle was [if the vehicle has been] inspected by the manufacturer, converter, or distributor[; the date and results of such inspection]; and

(K) [(I)] any other information [which] the complainant deems relevant [believes to be pertinent] to the complaint.

(5) [(4)] The department's staff will provide information concerning the complaint procedure and complaint forms to any person requesting [information or] assistance.

(6) [(5)] The filing fee required under the lemon law should be remitted with the complaint by any form of payment accepted by the department. The filing fee is nonrefundable, but a complainant that [who] prevails in a case is entitled to reimbursement of the filing fee from the nonprevailing party. Failure to remit the filing fee with the complaint will delay commencement of the 150-day period referenced in paragraph (8) [(7)] of this subsection and may result in dismissal of the complaint.

(7) [(6)] The commencement of a lemon law proceeding occurs on the date the filing fee is received [of receipt of the filing fee] by the department or its authorized agent.

(8) [(7)] If the hearings examiner has not issued an order within 150 days after the commencement of the lemon law proceeding in accordance with paragraph (7) [(6)] of this subsection, department staff shall notify the parties by mail that the complainant may file a civil action in state district court to seek relief under the lemon law. The notice will inform the complainant of the complainant's right to continue the lemon law complaint through the department. The 150-day period shall be extended upon request of the complainant or if a delay in the proceeding is caused by the complainant.

(b) Warranty performance complaints (repair-only relief). [Performance Complaints (Repair-Only Relief).]

(1) Complaints for warranty performance relief filed with the department must comply with the requirements of subsection (a)(1) - (4) [(a)(1) - (3)] of this section.

(2) A [No] filing fee is not required for a complaint that is subject to [filed for] a warranty performance claim.

(3) A complaint may be filed with the department in accordance with this section if [If] the defect in the motor vehicle subject to [that is the subject of] the warranty performance complaint was reported to the manufacturer, converter, distributor, or to an [or distributor or its] authorized agent prior to the expiration of the warranty period[; a complaint may be filed with the department in accordance with this section].

(4) If the defect is not [cannot be] resolved pursuant to §215.205 of this title [subchapter] (relating to Mediation; Settlement), a hearing will be scheduled and conducted in accordance with Government Code, Chapter 2001, subject to [this subchapter and] Occupations Code, Chapter 2301, Subchapter O and this subchapter.

(5) The final order authority will issue an order on the warranty performance complaint. A party who disagrees with the order may oppose the order in accordance with [using the procedures described in] §215.207 of this title [subchapter] (relating to Contested Cases: Final Orders).

(6) Department staff will provide information concerning the complaint procedure and complaint forms to any person requesting [information or] assistance.

§215.203. Review of Complaints.

Department staff will promptly review a complaint [All complaints will be reviewed promptly by department staff] to determine if the complaint meets [whether they satisfy] the minimum requirements of a lemon law or a warranty performance complaint.

(1) If department staff cannot determine [it cannot be determined] whether a complaint meets [satisfies] the minimum lemon law or warranty performance requirements, the complainant will be contacted for additional information.

(2) If department staff determines [it is determined] that the complaint meets [does meet] the minimum lemon law or warranty performance requirements, the complaint will be processed in accordance with [the procedures set forth in] this subchapter.

§215.204. Notification to Manufacturer, Converter, or Distributor.

(a) Upon receipt of a complaint for lemon law or warranty performance relief, the department will:

(1) provide notification of the complaint to, and request a response from, the appropriate manufacturer, converter, or distributor; and[; and a response to the complaint will be requested. The department will also]

(2) provide a copy of the complaint to, and may request a response from, the selling dealer and any other dealer [dealers that have been] involved with the complaint[; and a response may be requested].

(b) The manufacturer shall, upon request by the department, provide a copy of the warranty for the motor vehicle subject to the lemon law or warranty performance complaint.

§215.205. Mediation; Settlement.

(a) Department [Before a complaint filed under Occupations Code, §§2301.204 or §2301.601 - 2301.613 is scheduled for a hearing, department] staff will attempt to settle or resolve a lemon law or warranty performance complaint through nonbinding mediation before a hearing on the complaint is scheduled. [effect a settlement or resolution of the complaint through mediation.]

(b) The parties are required [While the mediation is not binding, all parties are required] to participate in the nonbinding mediation process in good faith.

(c) In a case filed under Occupations Code, §2301.204 or §§2301.601 - 2301.613, the mediator shall qualify for appointment as an impartial third party in accordance with Civil Practice and Remedies Code, Chapter 154.

§215.206. Hearings.

Lemon law or warranty performance complaints that satisfy the jurisdictional requirements of the Occupations Code will be set for hearing. Notification[, and notification] of the date, time, and place of the hearing will be given to all parties by certified mail. Additional information contained in the notice of hearing shall be consistent with §215.34 of this title (relating to Notice of Hearing in Contested Cases).

(1) When [Where] possible, hearings will be held in the city in which [where] the complainant resides [or at a location reasonably convenient to the complainant].

(2) Hearings will be scheduled at the earliest date possible, provided that a 10-day notice or other notice[, or such other notice as is] required by law[,] is given to all parties.

(3) Hearings will be conducted expeditiously by a hearings examiner in accordance with Government Code, Chapter 2001, subject to Occupations Code, Chapter 2301, Subchapter O[; Occupations Code, §2301.704]; and with the provisions of Subchapter B of this chapter (relating to Adjudicative Practice and Procedure) and this subchapter.

(4) Hearings will be conducted informally [informal]. The parties have the right to be represented by attorneys at a hearing, although attorneys are not required. Any party who intends to be represented at a hearing by an attorney or an authorized representative [at a hearing] must notify the hearings examiner, the department, and any [the] other party in writing at least five business days prior to the hearing. Failure to provide [such] notice will result in postponement of the hearing if [postponement is] requested by any [the] other party.

(5) Subject to a hearings examiner ruling, a party may present that party's case [hearings examiner rulings, parties may present their cases] in full, including testimony from witnesses[,] and documentary evidence such as repair orders, warranty documents, and the motor vehicle sales contract.

(6) By agreement of the parties and with the written approval of the hearings examiner, the hearing may be conducted by written submission [submissions] only or by telephone.

(7) Except for a hearing [hearings] conducted by written submission [only], each party may be questioned by the other party[,] at the discretion of the hearings examiner.

(8) Except for a hearing [hearings] conducted by written submission [only] or by telephone, the complainant must bring the motor vehicle in question to the hearing so that the motor vehicle may be inspected and test driven, unless otherwise ordered by the hearings examiner upon a showing of good cause by the complainant.

(9) The department may have the motor vehicle in question inspected by an expert prior to the hearing, if the department determines that an expert opinion may assist in arriving at a decision. An inspection under this section [Any such inspection] shall be made only upon prior notice to all parties, who shall have the right to be present at such inspection. A copy [Copies] of any findings or report from such inspection will be provided to all parties before, or at, the hearing.

(10) Except for hearings conducted by written submission [only], all hearings will be recorded by the hearings examiner. A copy of the recording [Copies of the hearing recordings] will be provided to any party upon request and upon payment for the cost of the copy, as provided by law or board rules.

§215.207. Contested Cases: Final Orders.

(a) A motion for rehearing of a final order issued by the board for a complaint filed [Board] under Occupations Code, Chapter 2301, Subchapters E or M shall proceed in accordance with Occupations Code, §2301.713. [Subchapter E or M, shall follow the procedures in Subchapter I of this chapter (relating to Practice and Procedure for Hearings Conducted by the State Office of Administrative Hearings).]

[(b) A motion for rehearing of a final order issued by a hearings examiner shall follow the procedures in this subsection.]

(b) [(1)] The hearings examiner shall [will] prepare a final order as soon as possible, but not later than 60 days after the hearing is closed, or as otherwise provided by law. The final order shall [will] include the hearings examiner's findings of fact and conclusions of law. The final order shall be sent by the department to all parties by certified mail. [of record]

(c) [(2)] A party who [that] disagrees with the final order may file a motion for rehearing in accordance with Government Code, Chapter 2001, subject to Occupations Code, Chapter 2301, Subchapter O. A motion for rehearing of a final order issued by a hearings examiner must: [within 20 days from the date of the notification of the final order.]

(1) be filed with and decided by the chief hearings examiner;

[(3) A motion for rehearing of a final order issued by a hearings examiner must be filed with the appropriate department office and decided by the chief hearings examiner.]

(2) [(4)] [A motion for rehearing must] include the specific reasons, exceptions, or grounds [that are] asserted by a party as the basis of the request for a rehearing; and[. A motion for rehearing shall]

(3) recite, if applicable, the specific findings of fact, conclusions of law, or any other portions of the final order to which the party objects.

(d) [(5)] Replies to a motion for rehearing must be filed with the chief hearings examiner in accordance with Government Code, Chapter 2001, subject to Occupations Code, Chapter 2301, Subchapter O. [motion for rehearing authority under Occupations Code, §2301.713 within 30 days after the date of the notification of the final order.]

[(6) The motion for rehearing authority must act on the motion within 45 days after the date of notification of the final order, or as otherwise provided by law, or the motion is overruled by operation of law. The motion for rehearing authority may, by written order, extend the period for filing, replying to, and taking action on a motion for rehearing, not to exceed 90 days after the date of notification of the final order. In the event of an extension of time, the motion for rehearing is overruled by operation of law on the date fixed by the written order of extension, or in the absence of a fixed date, 90 days after the date of notification of the final order.]

(e) [(7)] If the chief hearings examiner [motion for rehearing authority] grants a motion for rehearing, the parties will be notified by mail and a[. A] rehearing will be scheduled promptly [as promptly as possible]. After rehearing, a final order shall be issued with any additional findings of fact or conclusions of law, if necessary to support the final order. The chief hearings examiner [motion for rehearing authority also] may issue an order granting the relief requested in a motion for rehearing or requested in a reply to a motion for rehearing [replies thereto] without the need for a rehearing. If a motion for rehearing and the relief requested is denied, an order [so stating] will be issued.

(f) [(8)] A party who has exhausted all administrative remedies[,] and who is aggrieved by a final order in a contested case from which appeal may be taken is entitled to judicial review pursuant to Government Code, Chapter 2001, subject to Occupations Code, Chapter 2301, Subchapter P [§§2301.751 - 2301.756], under the substantial evidence rule. A petition for judicial review [The petition] shall be filed in a district court of Travis County [or in the Court

~~of Appeals for the Third Court of Appeals District~~] within 30 days after the order is final and appealable. A copy of the petition must be served on the final order authority and any other parties of record. After service of the petition and within the time permitted for filing an answer, the final order authority shall transmit to the reviewing court the original or a certified copy of the entire record of the proceeding. If the court orders that new evidence [~~to~~] be presented to the final order authority, the final order authority [~~such decision-maker~~] may modify the findings and decision or order by reason of the new evidence, and shall transmit the additional record to the court.

§215.208. Lemon Law Relief Decisions.

(a) Unless otherwise indicated, this section applies to decisions that relate to lemon law complaints. Decisions shall give effect to the presumptions provided in Occupations Code, §2301.605, where applicable.

(1) If it is found that the manufacturer, distributor, or converter is not able to conform the motor vehicle to an applicable express warranty by repairing or correcting a defect in the complainant's motor vehicle, creating [~~vehicle which creates~~] a serious safety hazard or substantially impairing [~~impairs~~] the use or market value of the motor vehicle after a reasonable number of attempts, and that the affirmative defenses provided under Occupations Code, §2301.606[~~,~~] are not applicable, the final order authority shall issue a final order to the manufacturer, distributor, or converter to:

(A) replace the motor vehicle with a comparable motor vehicle, less a reasonable allowance for the owner's use of the vehicle;[~~,~~] or

(B) accept the return of the motor vehicle from the owner and refund [~~to the owner~~] the full purchase price of the motor vehicle to the owner, [~~vehicle,~~] less a reasonable allowance for the owner's use of the motor vehicle.

(2) In any decision in favor of the complainant, the final order authority will, to the extent possible, accommodate the complainant's request with respect to replacement or repurchase of the motor vehicle[~~, to the extent possible~~].

(b) This subsection applies only to the repurchase of motor vehicles.

(1) When [~~Where~~] a refund of the purchase price of a motor vehicle is ordered, the purchase price shall be the total purchase price of the motor vehicle, excluding [~~vehicle, but shall not include~~] the amount of any interest, finance charge, or insurance premiums. The award to the motor vehicle owner shall include reimbursement of [~~for~~] the amount of the lemon law complaint filing fee paid by, or on behalf of, the motor [~~the~~] vehicle owner. The refund shall be made payable to the motor vehicle owner and to any lienholder, respective to their ownership interest. [~~the lienholder, if any, as their interests require.~~]

(2) There is a rebuttable presumption that a motor vehicle has a useful life of 120,000 miles. Except in cases where the preponderance of the evidence shows that the motor vehicle has a longer or shorter expected useful life than 120,000 miles, the reasonable allowance for the owner's use of the motor vehicle shall be that amount obtained by adding subparagraphs (A) and (B) of this paragraph.

(A) The [~~the~~] product obtained by multiplying the purchase price, as defined in paragraph (1) of this subsection, of the motor vehicle[~~, as defined in paragraph (1) of this subsection,~~] by a fraction having as its denominator 120,000 and having as its numerator the number of miles that the motor vehicle traveled from the time of delivery to the owner to the first report of the defect or condition forming the basis of the repurchase order; and

(B) 50% [~~50 percent~~] of the product obtained by multiplying the purchase price by a fraction having as its denominator 120,000 and having as its numerator the number of miles that the motor vehicle traveled after the first report of the defect or condition forming the basis of the repurchase order. The number of miles during the period covered in this paragraph shall be determined from the date of the first report of the defect or condition forming the basis of the repurchase order through the date of the hearing.

(3) There is a rebuttable presumption that the useful life of a towable recreational vehicle is 3,650 days or 10 years. [~~(10 years).~~] Except in cases where a preponderance of the evidence shows that the vehicle has a longer or shorter expected useful life than 3,650 days or 10 years, [~~(10 years),~~] the reasonable allowance for the owner's use of the towable recreational vehicle shall be that amount obtained by adding subparagraphs (A) and (B) of this paragraph.

(A) The product obtained by multiplying the purchase price, as defined in paragraph (1) of this subsection, of the towable recreational vehicle[~~, as defined in paragraph (1) of this subsection,~~] by a fraction having as its denominator 3,650 days or 10 years, [~~(10 years),~~] except the denominator shall be 1,825 days or five years, [~~(5 years),~~] if the towable recreational vehicle is occupied on a full time basis, and having as its numerator the number of days from the time of delivery to the owner to the first report of the defect or condition forming the basis of the repurchase order.

(B) 50% [~~50 percent~~] of the product obtained by multiplying the purchase price by a fraction having as its denominator 3,650 days or 10 years, [~~(10 years),~~] except the denominator shall be 1,825 days or five years, [~~(5 years),~~] if the towable recreational vehicle is occupied on a full time basis, and having as its numerator the number of days of ownership after the first report of the defect or condition forming the basis of the repurchase order. The number of days during the period covered in this paragraph shall be determined from the date of the first report of the defect or condition forming the basis of the repurchase order through the date of the hearing.

(C) Any day or part of a day that the vehicle is out of service for repair will be deducted from the numerator in determining the reasonable allowance for use of a towable recreational vehicle in this paragraph.

(c) This subsection applies only to leased motor vehicle relief.

(1) Except in cases involving unusual and extenuating circumstances[~~,~~] supported by a preponderance of the evidence, when a [~~where~~] refund of the purchase price of a leased motor vehicle is ordered, the purchase price shall be allocated and paid to the lessee and the vehicle lessor, respectively, in accordance with [~~set out as follows in~~] subparagraphs (A) and (B) of this paragraph.

(A) The lessee shall receive the total of:

(i) all lease payments previously paid by the lessee to the vehicle [~~him to the~~] lessor under the terms of the lease; and

(ii) all sums previously paid by the lessee to the vehicle [~~him to the~~] lessor in connection with entering into the lease agreement, including, but not limited to[~~,~~] any capitalized cost reduction, down payment, trade-in, or similar cost, plus sales tax, license, [~~and~~] registration fees, and other documentary fees, if applicable.

(B) The vehicle lessor shall receive the total of:

(i) the actual price paid by the vehicle lessor for the motor vehicle, including tax, title, license, and documentary fees, if paid by the vehicle lessor and [~~lessor, and as~~] evidenced in a bill of sale, bank draft demand, tax collector's receipt, or similar instrument; and [~~plus~~]

(ii) an additional 5.0% of the [~~5 percent of such~~] purchase price plus any amount or fee paid by vehicle lessor to secure the lease or interest in the lease.[~~;~~]

(C) [~~(iii)~~] A credit [~~provided, however, that a credit,~~] reflecting all of the payments made by the lessee[~~,~~] shall be deducted from the actual purchase price that [~~which~~] the manufacturer, converter, or distributor is required to pay the vehicle lessor, as specified in subparagraph (B)(i) and (ii) of this paragraph. [~~clauses (i) and (ii) of this subparagraph.~~]

(2) When the final order authority orders a manufacturer, converter, or distributor to refund the purchase price in a leased vehicle transaction, the motor vehicle shall be returned to the manufacturer, converter, or distributor with clear title upon payment of the sums indicated in paragraph (1)(A) and (B) of this subsection. The vehicle lessor shall transfer title of the motor vehicle to the manufacturer, converter, or distributor, as necessary to effectuate the lessee's rights. The lease shall be terminated without penalty to the lessee.

(3) Refunds shall be made to the lessee, vehicle lessor, and to any lienholder, respective to their ownership interest. [~~any lienholders as their interest may appear.~~] The refund to the lessee under paragraph (1)(A) of this subsection shall be reduced by a reasonable allowance for the lessee's use of the motor vehicle. A reasonable allowance for use shall be computed in accordance with [~~according to the formula in~~] subsection (b)(2) or (3) of this section, using the amount in paragraph (1)(B)(i) of this subsection as the applicable purchase price.

(d) This subsection applies only to replacement of motor vehicles.

(1) Upon issuance of an order from the final order authority to a manufacturer, converter, or distributor to replace a motor vehicle, the manufacturer, converter, or distributor shall:

(A) promptly [~~Promptly~~] authorize the exchange of the complainant's motor vehicle with the complainant's choice of any comparable motor vehicle; and[~~.~~]

(B) instruct [~~Instruct~~] the dealer to contract the sale of the selected comparable motor vehicle with the complainant under the following terms.[~~:~~]

(i) The sales price of the comparable motor vehicle shall be the vehicle's Manufacturer's Suggested Retail Price (MSRP);

(ii) The trade-in value of the complainant's motor vehicle shall be the MSRP at the time of the original transaction, less a reasonable allowance for the complainant's use of the complainant's motor vehicle. [~~vehicle; and~~]

(iii) The use allowance for replacement relief shall be calculated in accordance with [~~using the formulas outlined in~~] subsection (b)(2) and (3) of this section.

(2) Upon any replacement of a complainant's motor vehicle, the complainant shall be responsible for payment or financing of the usage allowance of the complainant's vehicle, any outstanding liens on the complainant's vehicle, and applicable taxes and fees associated with the new sale, excluding documentary fees.

(A) If the comparable motor vehicle has a higher MSRP than the complainant's vehicle, the complainant shall be responsible at the time of sale to pay or finance the difference in the two vehicles' MSRPs to the manufacturer, converter or distributor.

(B) If the comparable motor vehicle has a lower MSRP than the complainant's vehicle, the complainant will be credited the difference in the MSRP between the two motor vehicles. The difference credited shall not exceed the amount of the calculated usage allowance for the complainant's vehicle.

(3) The complainant is responsible for obtaining [~~to obtain~~] financing, if necessary, to complete the transaction.

(4) The replacement transaction, as described in paragraphs (2) and (3) of this subsection, shall be completed as specified in the final order. If the replacement transaction cannot be completed [~~this cannot be accomplished~~] within the ordered time period, the manufacturer shall repurchase the complainant's motor vehicle in accordance with [~~pursuant to~~] the repurchase provisions of this section. If repurchase relief occurs, a party may request calculation of the repurchase price by the final order authority.

(e) If the final order authority finds that a complainant's motor vehicle does not qualify for replacement or repurchase, an order may be entered in any proceeding, where appropriate, requiring repair work to be performed or other action taken to obtain compliance with the manufacturer's, converter's, or distributor's warranty obligations.

(f) If the motor vehicle is substantially damaged or if there is an adverse change in the motor vehicle's condition [~~its condition,~~] beyond ordinary wear and tear, from the date of the hearing to the date of repurchase, and the parties are unable to agree on an amount allowed for such damage or condition, either party may request reconsideration by the final order authority of the repurchase price contained in the final order.

(g) In any award in favor of a complainant, the final order authority may require the dealer involved to reimburse the complainant, manufacturer, converter, or distributor for the cost of any items or options added to the motor vehicle if one or more of those [~~such~~] items or options contributed to the defect that is the basis for the order, repurchase, or replacement. This subsection shall not be interpreted to require a manufacturer, converter, or distributor to repurchase a motor vehicle due to a defect or condition that was solely caused by a dealer add-on item or option.

§215.209. Incidental Expenses.

(a) When a refund of the purchase price or replacement of a motor vehicle is ordered, the complainant shall be reimbursed for certain incidental expenses incurred by the complainant from loss of use of the motor vehicle because of the defect or nonconformity which is the basis of the complaint. The expenses must be reasonable and verifiable. [~~verified through receipts or similar written documents.~~] Reimbursable incidental expenses include, but are not limited to the following costs:

(1) alternate transportation;

(2) towing;

(3) telephone calls or mail charges directly attributable to contacting the manufacturer, distributor, converter, or dealer regarding the motor vehicle;

(4) meals and lodging necessitated by the motor vehicle's failure during out of town [~~out-of-town~~] trips;

(5) loss or damage to personal property;

(6) attorney fees if the complainant retains counsel after notification that the respondent is represented by counsel; and

(7) items or accessories added to the motor vehicle at or after purchase, less a reasonable allowance for use.

(b) Incidental expenses shall be included in the final repurchase price required to be paid by a manufacturer, converter, or distributor to a prevailing complainant or in the case of a motor vehicle

replacement, shall be tendered to the complainant at the time of replacement.

(c) When awarding reimbursement for the cost of items or accessories presented under subsection (a)(7) of this section, the hearings examiner shall consider the permanent nature, functionality, and value added by the items or accessories and whether the items or accessories are original equipment manufacturer (OEM) parts or non-OEM parts.

§215.210. Compliance with Order Granting Relief.

(a) Compliance with an order issued by the final order authority will be monitored by the department.

(b) [~~(1)~~] A complainant is not bound by a final decision and order [~~and may either accept or reject the decision~~].

(c) [~~(2)~~] If a complainant does not accept the final decision, the proceeding before the final order authority will be deemed concluded and the complaint file closed.

(d) [~~(3)~~] If the complainant accepts the final decision, then the manufacturer, converter, or distributor, and the dealer to the extent of the dealer's responsibility, if any, shall immediately take such action as is necessary to implement the final decision and order.

(e) [~~(4)~~] If a manufacturer, converter, or distributor replaces or repurchases a motor vehicle pursuant to an order issued by the final order authority, reacquires a vehicle to settle a complaint filed under Occupations Code, §2301.204 or §§2301.601 - 2301.613, [~~Chapter 2301, Subchapter M or Occupations Code, §2301.204,~~] or brings a motor vehicle into the State [~~state~~] of Texas that [~~which~~] has been reacquired to resolve a warranty claim in another jurisdiction, then the manufacturer, converter, or distributor shall, prior to the resale of such motor vehicle, retitle [~~vehicle, re-title~~] the vehicle in Texas and shall:

(1) issue a disclosure statement on a form provided by or approved by the department; and[~~. In addition, the manufacturer, converter, or distributor reacquiring the vehicle shall~~]

(2) affix a department-approved disclosure label in a conspicuous [~~disclosure label provided by or approved by the department on an approved~~] location in or on the motor vehicle.

(f) The [~~Both the~~] disclosure statement and [~~the~~] disclosure label required under subsection (e) of this section shall accompany the motor vehicle through the first retail purchase. No person or entity holding a license or GDN [~~general distinguishing number~~] issued by the department under Occupations Code, Chapter 2301 or Transportation Code, Chapter 503 shall remove or cause the removal of the disclosure label until delivery of the motor vehicle to the first retail purchaser.

(g) A manufacturer, converter, or distributor shall provide to the department [~~in writing,~~] the name, address, and telephone number of the transferee [~~any transferee, regardless of residence,~~] to whom the manufacturer, distributor, or converter[~~, as the case may be,~~] transfers the motor vehicle on the disclosure statement [~~vehicle~~] within 60 days of each transfer. The selling dealer shall return the completed disclosure statement to the department within 60 days of the retail sale of a reacquired motor vehicle.

(h) The [~~Any manufacturer, converter, or distributor or holder of a general distinguishing number who violates this section is liable for a civil penalty or other sanctions prescribed by the Occupations Code. In addition, the~~] manufacturer, converter, or distributor must repair the defect or condition in the motor vehicle that resulted in the vehicle being reacquired and issue[~~, at a minimum,~~] a basic warranty excluding non-OEM items or accessories, for a minimum of 12 months or 12,000 miles, whichever comes first. The [~~for (12 months/12,000 mile, whichever comes first), except for non-original equipment manufacturer items or accessories, which~~] warranty shall be provided to the first retail purchaser of the motor vehicle.

(i) [~~(5)~~] In the event this section conflicts with [~~of any conflict between this section and~~] the terms contained in a cease and desist order, the terms of the cease and desist order shall prevail.

(j) [~~(6)~~] The failure of any manufacturer, converter, distributor, or dealer to comply with a final order issued by the final order authority within the time period prescribed in the order may subject the manufacturer, converter, [~~or~~] distributor, or dealer to formal action by the department, including the assessment of civil penalties or other sanctions prescribed by Occupations Code, Chapter 2301, for the failure to comply with an order issued by the final order authority.

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

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David D. Duncan
General Counsel
Texas Department of Motor Vehicles
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SUBCHAPTER H. ADVERTISING

43 TAC §§215.241 - 215.261, 215.263 - 215.271

STATUTORY AUTHORITY

The amendments are proposed under Transportation Code, §1002.001, which provides the board of the Texas Department of Motor Vehicles with the authority to adopt rules that are necessary and appropriate to implement the powers and the duties of the department; Occupations Code, §2301.155, which requires the board of the Texas Department of Motor Vehicles to adopt rules necessary or convenient to administer Occupations Code, Chapter 2301; and more specifically, Occupations Code, §2301.266, which authorizes the board to adopt rules applicable to the issuance of duplicate licenses; and Occupations Code, §2301.602, which requires the board to adopt rules to enforce Chapter 2301, Subchapter M; Transportation Code, §503.002 which authorizes the board to adopt rules to administer Transportation Code, Chapter 503; and more specifically, Transportation Code, §503.009, which authorizes the board to adopt rules for procedures concerning contested cases; Transportation Code, §503.061, which requires the board to adopt rules regulating the issuance of dealer's license plates; and Transportation Code, §503.0626 and §503.0631, which require the board to adopt rules necessary to implement and manage the department's temporary tag databases.

CROSS REFERENCE TO STATUTE

Government Code, §2001.039; Occupations Code, Chapter 2301; and Transportation Code, Chapter 503.

§215.241. Purpose and Scope. [~~Objective.~~]

This subchapter implements [~~The objective of this subchapter is to implement the intent of the legislature as declared in~~] Occupations Code, Chapter 2301[~~,~~] by regulating the advertising of persons under the jurisdiction of the department [~~Board~~] by requiring truthful and accurate advertising practices for the benefit of the citizens of this state.

§215.242. General Prohibition.

A person advertising motor vehicles shall not use false, deceptive, unfair, or misleading advertising. In addition to a violation of a specific advertising rule, any other advertising or advertising practices found by the department [~~Board~~] to be false, deceptive, or misleading, whether herein described, [~~or not enumerated herein~~] shall be deemed a violation of Occupations Code, Chapter 2301 [~~violations of the Code,~~] and shall also be considered a violation [~~violations~~] of this rule. [~~the general prohibition.~~]

§215.243. Specific Rules.

The violation of an advertising rule shall be considered by the department [~~Board~~] as a prima facie violation of Occupations Code, Chapter 2301.

§215.244. Definitions.

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

(1) Advertisement--

(A) An oral, written, graphic, or pictorial statement or representation made in the course of soliciting business, including, but not limited to [~~without limitation,~~] a statement or representation:

(i) made in a newspaper, magazine, or other publication;[~~, or~~]

(ii) contained in a notice, sign, poster, display, circular, pamphlet, or letter;[~~, or~~]

(iii) aired on the radio; [~~on radio,~~]

(iv) broadcast on the Internet or television; or[~~, or~~]

(v) streamed via an online service. [~~via an on-line service, or on television.~~]

(B) Advertisement [~~The term~~] does not include direct communication between a person or person's [~~dealer or dealer's~~] representative and a prospective purchaser.

(2) Advertising provision--

(A) A provision of Occupations Code, Chapter 2301, [~~the Code~~] relating to the regulation of advertising; or

(B) A rule relating to the regulation of advertising, adopted pursuant to the authority of Occupations Code, Chapter 2301. [~~the Code.~~]

(3) Bait advertisement--An alluring but insincere offer to sell or lease a product of which the primary purpose is to obtain a lead to a person [~~leads to persons~~] interested in buying or leasing merchandise of the type advertised and to switch a consumer [~~consumers~~] from buying or leasing the advertised product in order to sell or lease some other product at a higher price or on a basis more advantageous to the dealer. [~~advertiser.~~]

(4) Balloon payment--Any scheduled payment made as required by a consumer credit transaction that is more than twice as large as the average of all prior scheduled payments except the down payment.

[~~(5) Buyers guide--A form as required by the Federal Trade Commission under 16 Code of Federal Regulations, Part 455. This form is to be completed and displayed on the side window of a vehicle that has been driven more than the limited use necessary in moving or road testing a new vehicle prior to delivery to a consumer.~~]

(5) [~~(6)~~] Clear and conspicuous--The statement, representation, or term being disclosed is of such size, color, contrast, and audibility and is presented so as to be readily noticed and understood. All language and terms, including abbreviations, shall be used in accordance with their common or ordinary usage and meaning.

(6) [~~(7)~~] Dealership addendum--A form that is [~~which is to be~~] displayed on a window of a motor vehicle when the dealership installs special features, equipment, parts, or accessories, or charges for services not already compensated by the manufacturer or distributor for work required to prepare a motor vehicle for delivery to a buyer.

(A) The purpose of the addendum is to disclose:

(i) [~~(A)~~] that it is supplemental;

(ii) [~~(B)~~] any added feature, service, equipment, part, or accessory, including the retail price, charged and added by the dealership [~~and the retail price therefore~~];

(iii) [~~(C)~~] any additional charge to the selling price such as additional dealership markup; and

(iv) [~~(D)~~] the total dealer selling price.

(B) The dealership addendum form shall not be deceptively similar in appearance to the Monroney label, as defined by paragraph (12) of this section. [~~manufacturer's label, which is required to be affixed by every manufacturer to the windshield or side window of each new motor vehicle under the Automobile Information Disclosure Act.~~]

(7) [~~(8)~~] Demonstrator--A new motor vehicle that is currently in the inventory of the automobile dealership and used [~~or has been used~~] primarily for test drives by customers and for other purposes [~~other dealership purposes and so~~] designated by the dealership.

(8) [~~(9)~~] Disclosure--Required information that is clear, conspicuous, and accurate.

(9) [~~(10)~~] Factory executive/official motor vehicle--A new motor vehicle that has been used exclusively by an executive or official of the dealer's franchising manufacturer, distributor, or their subsidiaries.

(10) [~~(11)~~] Licensee--Any person required to obtain a license from the department.

(11) Limited rebate--A rebate that is not available to every consumer purchasing or leasing a motor vehicle because qualification for receipt of the rebate is conditioned or restricted in some manner. A rebate conditioned or restricted to purchasers who are residents of the contiguous United States is not a limited rebate.

(12) Monroney [~~Manufacturer's~~] label--The label required by the Automobile Information Disclosure Act, 15 U.S.C. §§1231 - 1233, to be affixed [~~by the manufacturer~~] to the windshield or side window of certain [~~each~~] new motor vehicles [~~automobile~~] delivered to the dealer and that contains information about the motor vehicle, including, but not limited to:[~~.~~]

(A) the retail price of the motor vehicle suggested by the manufacturer;

(B) the retail delivered price suggested by the manufacturer for each accessory or item of optional equipment, physically attached to the motor vehicle at the time of its delivery to a dealer, which is not included within the price of the motor vehicle as stated in subparagraph (A) of this paragraph;

(C) the amount charged, if any, to a dealer for the transportation of the motor vehicle to the location at which it is delivered to the dealer; and

(D) the total of the amounts specified pursuant to subparagraphs (A), (B), and (C) of this paragraph.

(13) Online [~~On-line~~] service--A network that connects computer users.

(14) Rebate or cash back--A sum of money applied to the purchase or lease of a motor vehicle or refunded after full payment has been rendered for the benefit of the purchaser. [~~refunded to a purchaser or for the benefit of the purchaser after full payment has been rendered. The purchaser may choose to reduce the amount of the purchase price by the sum of money or the purchaser may opt for the money to be returned to himself or for his benefit subsequent to payment in full.~~]

(15) Savings claim or discount--An offer to sell or lease a motor vehicle at a reduced price, including a manufacturer's or distributor's customer rebate, a dealer discount, or a limited rebate.

(16) [~~(15)~~] Subsequent violation--Conduct that is the same or substantially the same as conduct the department [~~Board~~] has previously alleged in an earlier communication to be a violation of an advertising provision.

§215.245. Availability of Motor Vehicles.

(a) A dealer [~~licensee~~] may advertise a specific new motor vehicle or line-make of vehicles for sale if the specific motor vehicle or line-make is in the possession of the dealer [~~licensee~~] at the time the advertisement is placed.[~~, or if~~]

(b) If the specific motor vehicle or line-make is not in the possession of the dealer [~~licensee~~] at the time the advertisement is placed, the dealer must [~~licensee~~] clearly and conspicuously disclose [~~discloses~~] that fact in the advertisement and state [~~states~~] that the motor vehicle may be obtained from the manufacturer, distributor, or some other source. The advertisement must set[~~; and~~]

[~~(1)~~] [~~the advertisement sets~~] forth the number of motor vehicles available at the advertised price, if a price is advertised, at the time the advertisement is placed[~~;~~] or

[~~(2)~~] the [~~a~~] dealer can show that it has the number of motor vehicles available to meet the [~~he has available a~~] reasonable expectable public demand based on prior experience.

(c) [~~(b)~~] If an advertised price pertains to only one specific motor vehicle, then the advertisement must also disclose the motor vehicle's stock number or VIN. [~~vehicle identification number.~~]

(d) [~~(c)~~] This section does not prohibit general advertising of motor vehicles by a manufacturer, dealer advertising association, or distributor, nor does it prohibit [~~and~~] the inclusion of the names and addresses of the dealers selling such motor vehicles in the particular area.

(e) [~~(d)~~] A motor vehicle dealer may advertise a specific used motor vehicle for sale if:

(1) the specific used motor vehicle is in the possession of the dealer at the time the advertisement is placed; and

(2) the title certificate to the used motor vehicle has been assigned to the dealer.

§215.246. Accuracy.

Advertisements [~~All advertisements~~] shall be accurate, clear, and conspicuous. Advertisements [~~and~~] shall not be false, deceptive, or misleading. For an Internet advertisement, a disclosure may be considered accurate, clear, and conspicuous if:

(1) the viewer highlights, hovers a mouse or cursor over, or otherwise selects certain text or images on a screen that results in an immediate and legible visible disclosure; or

(2) only one click on select text or image(s) is required to view the disclosure; and

(3) the internet advertisement clearly and conspicuously indicates where to hover or click for the disclosure and is in close proximity to the information being disclosed.

§215.247. Untrue Claims.

The following statements are prohibited.

(1) Statements such as "write your own deal," "name your own price," "name your own monthly payments," or statements with similar meaning.

(2) Statements such as "everybody financed," "no credit rejected," "we finance anyone," and other similar statements representing or implying that no prospective credit purchaser will be rejected because of his inability to qualify for credit.

(3) Statements representing that no other dealer grants greater allowances for trade-ins, however stated, unless the dealer can show such is the case.

(4) Statements representing that because of its large sales volume, a dealer is able to purchase motor vehicles for less than another dealer selling the same make of motor vehicles, unless the dealer can show such is the case.

§215.248. Layout.

The layout, headlines, illustrations, or type size of a printed advertisement, an internet advertisement or an advertisement streamed via an online service, and the broadcast words or pictures of radio and television [~~radio/TV~~] advertisements shall not convey or permit an erroneous or misleading impression as to which motor vehicle or vehicles are offered for sale or lease at featured prices. No advertised offer, expression, or display of price, terms, down payment, trade-in allowance, cash difference, savings, or other such material terms shall be misleading. Any [~~and any~~] necessary qualifications shall be clearly, conspicuously, and accurately set forth to prevent misunderstanding.

§215.249. Manufacturer's Suggested Retail Price.

(a) Except as provided by subsection (b) of this section, the suggested retail price [~~The suggested retail price~~] of a new motor vehicle [~~when~~] advertised by a manufacturer or distributor shall include all costs and charges for the motor vehicle advertised.[~~, except that~~]

(b) The following costs and charges may be excluded if an advertisement described in subsection (a) of this section clearly and conspicuously states the costs and charges are excluded:

(1) destination and dealer preparation charges;[~~, and any~~]

(2) registration, certificate of title, license fees, or an additional registration fee, if any;[~~, charged by a full service deputy as provided by Transportation Code, §502.114; any~~]

(3) taxes; and [~~any~~]

(4) other fees or charges that are allowed or prescribed by law [~~may be excluded from such price, provided that the advertisement clearly and conspicuously states that such costs and charges are excluded~~].

(c) Except as provided by this subsection, if the price of a motor vehicle is stated in an advertisement [~~However, with respect to advertisements~~] placed with local media in the State of Texas by a manufacturer or distributor and [~~which include~~] the names of the local dealers for the motor vehicles advertised are included in that advertisement, then the [~~, if the price of a vehicle is stated in the advertisement, such~~] price must include all costs and charges for the motor vehicle advertised, including destination and dealer preparation charges. The only

costs and charges that may be excluded from the price are: [~~and may exclude only any~~]

(1) registration, certificate of title, license fees, or an additional registration fee, if any;[~~,~~ ~~charged by a full service deputy as provided by Transportation Code, §502.114; any~~]

(2) taxes; and [~~any~~]

(3) other fees or charges that are allowed or prescribed by law.

§215.250. [~~Dealer~~] Price Advertising; Savings Claims; Discounts. [~~Internet or E-Pricing.~~]

(a) When featuring a sales [~~an advertised sale~~] price of a new or used motor vehicle in an advertisement, the dealer must be willing to sell the motor vehicle for that featured sales [~~such advertised~~] price to any retail buyer. The featured sales [~~advertised sale~~] price shall be the price before the addition or subtraction of any other negotiated items. Destination and dealer preparation charges must be included in the featured sales price. [~~The only charges that may be excluded from the advertised price are:~~]

[~~(1) any registration, certificate of title, or license fees;~~]

[~~(2) any taxes; and~~]

[~~(3) any other fees or charges that are allowed or prescribed by law.~~]

(b) The only costs and charges that may be excluded from the featured sales price are:

(1) registration, certificate of title, or license fees;

(2) taxes; and

(3) other fees or charges that are allowed or prescribed by law.

(c) [~~(b)~~] A qualification may not be used when featuring a sales price for a motor [~~advertising the price of a~~] vehicle such as "with trade," "with acceptable trade," "with dealer-arranged financing," "rebate assigned to dealer," or "with down payment."

(d) Advertising an "Internet price," "e-price," or using similar terms that indicate or create the impression that there is a different or unique sales price for an online or Internet consumer or transaction is prohibited.

(e) A savings claim or discount offer is prohibited except to advertise a new motor vehicle. No person may advertise a savings claim or discount offer on a used motor vehicle.

(f) Statements such as "up to," "as much as," and "from" shall not be used in connection with savings claims or discount offers.

(g) The savings claim or discount offer for a new motor vehicle, when advertised, must be the savings claim or discount available to any and all members of the buying public.

(h) If an advertisement includes a savings claim or discount offer, the amount and type of each incentive that makes up the total amount of the savings claim or discount offer must be disclosed.

[~~(c)~~] [~~If a price advertisement discloses a rebate, cash back, or discount savings claim, the price of the vehicle must be disclosed as well as the price of the vehicle after deducting the incentive.~~]

(1) If a savings claim or discount offer includes only a dealer discount, that [~~an advertisement discloses a discount savings claim, this~~] incentive must be disclosed as a deduction from the manufacturer's suggested retail price (MSRP). The following are acceptable formats [~~is an acceptable format~~] for advertising a dealer discount with and without a sales price. [~~price with a discount savings claim.~~]
Figure: 43 TAC §215.250(h)(1)
[~~Figure: 43 TAC §215.250(c)(1)~~]

(2) If a savings claim or discount offer includes only a customer rebate, that [~~an advertisement discloses a rebate, this~~] incentive must be disclosed as a deduction from the MSRP. [~~advertised price.~~] The following are acceptable formats [~~is an acceptable format~~] for advertising a customer rebate with and without a sales price. [~~price with a rebate.~~]
Figure: 43 TAC §215.250(h)(2)
[~~Figure: 43 TAC §215.250(c)(2)~~]

(3) If a savings claim or discount offer includes both a customer rebate and a dealer discount, [~~an advertisement discloses both a rebate and a discount savings claim,~~] the incentives must be disclosed as deductions [~~a deduction~~] from the MSRP. The following are acceptable formats for advertising both a customer rebate and a dealer discount with and without a sales price. [~~is an acceptable format for advertising a price with a rebate and a discount savings claim.~~]
Figure: 43 TAC §215.250(h)(3)
[~~Figure: 43 TAC §215.250(c)(3)~~]

(i) [~~(d)~~] If a savings claim or discount offer includes an option package discount, [~~In the event that the manufacturer offers a discount on a package of options, then~~] that discount should be disclosed above, or prior to, the MSRP with a total sales price of the motor vehicle before option discounts. Any additional savings or discounts should then be disclosed below the MSRP. The following are acceptable formats for advertising an option package discount with and without a sales price. [~~The following is an acceptable format.~~]
Figure: 43 TAC §215.250(i)
[~~Figure: 43 TAC §215.250(d)~~]

(j) Except as provided herein, the calculation of the featured sales price or featured savings claim or discount may not include a limited rebate. A limited rebate may be advertised by providing the amount of the limited rebate and explaining the conditions or restrictions on qualification for the limited rebate in a statement below the featured sales price or featured savings claim or discount.
Figure: 43 TAC §215.250(j)

(k) In an internet advertisement with multiple limited rebates available on an advertised new motor vehicle, a dealer may display each limited rebate separately allowing a potential buyer to "click" on the limited rebate to view the sales price after deducting the applicable limited rebate or applicable multiple rebates.
Figure 43 TAC §215.250(k)

(l) If a dealer has added an option that was not obtained from the manufacturer or distributor of the motor vehicle, a savings claim may not be advertised for that vehicle. If a dealer has added an option obtained from the manufacturer or distributor and disclosed that option and its suggested retail price on a dealership addendum, the dealer may advertise a savings claim for that motor vehicle if the option is listed, and the difference is shown between the dealer's sales price and the MSRP of the vehicle including the option obtained from the manufacturer or distributor.
Figure: 43 TAC §215.250(l)

(m) If a distributor physically installs a factory available option on a new motor vehicle, a savings claim may be advertised for that vehicle if the option is disclosed on a vehicle label along with the suggested retail price for the option. A dealer may advertise a savings claim for that motor vehicle if the dealer discloses the total MSRP and the total of the distributor installed options and the difference is shown

between the dealer's sales price and the total of the MSRP and distributor installed options for that vehicle.
Figure: 43 TAC §215.250(m)

[(e) If a rebate is only available to a selected portion of the public and not the public as a whole, the price should be disclosed as in subsection (c) of this section first and then the nature of the limitation and the amount of the limited rebate may be disclosed. The following is an acceptable format.]
[Figure 43 TAC §215.250(e)]

[(f) Advertising an "Internet price," "e-price," or using similar terms that indicate or create the impression that there is a different or unique sales price for an on-line or Internet consumer or transaction is prohibited.]

§215.251. Identification.

(a) When the sales price of a motor vehicle is advertised, the following must be disclosed:

(1) model year;

(2) make;

(3) model line and style or model designation; and

(4) if applicable, whether the motor vehicle is [a] used, a demonstrator, or a factory executive/official vehicle.

(b) Expressions such as "fully equipped," "factory equipped," "loaded," and other such terms shall not be used in any advertisement that contains the sales price of a motor vehicle unless the optional equipment of the motor vehicle is listed in the advertisement.

(c) A photograph or other representation [An illustration] of a motor vehicle used in an advertisement must be of the motor vehicle being advertised or substantially the same as that of the motor vehicle advertised.

§215.252. Advertising at Cost or Invoice.

(a) The term "dealer's cost" or other reference to the cost of the motor vehicle shall not be used.

(b) The terms [use of the term] "invoice" or "invoice price" in advertising shall not be used.

§215.253. Trade-in Allowances.

No guaranteed trade-in amount or range of amounts shall be used in advertising. Additionally, an advertisement shall not state an amount or range of amounts for trade-in assistance or advertise that an offer is any specific amount or range of amounts over blue book value, black book value, or use any other similar language indicating there is an established retail value or starting price point for a used motor vehicle.

§215.254. Used Motor Vehicles.

A used motor vehicle shall not be advertised in any manner that creates the impression that it is new. A used motor vehicle shall be identified as [either] "used" or "pre-owned." Terms such as "program car," "special purchase," "factory repurchase," or other similar terms shall not be used to identify a motor vehicle as used. [are not sufficient to designate a vehicle as used, and these vehicles must be identified as "used" or "pre-owned."]

§215.255. Demonstrators and Factory Executive/Official Motor Vehicles.[, Factory, Executives/Official Vehicles.]

If a demonstrator or factory executive/official motor vehicle is advertised, the advertisement must clearly and conspicuously identify the motor vehicle as a demonstrator or factory executive/official motor vehicle. A demonstrator or factory executive/official motor [official] vehicle may not be advertised or sold except by a dealer franchised and licensed to sell that line-make [line make] of new motor vehicle.

§215.256. Free Offers.

(a) No merchandise or enticement may be described as "free" if the:

(1) motor vehicle can be purchased or leased for a lesser sales price without the merchandise or enticement; or [if the]

(2) sales price of the motor vehicle has been increased to cover the cost or any part of the cost of the merchandise or enticement.

(b) The advertisement shall clearly and conspicuously disclose the conditions under which the "free" merchandise or enticement being offered [offer] may be obtained.

§215.257. Authorized Dealer.

The term "authorized dealer" or a similar term shall not be used unless the advertising dealer holds both a franchise and a dealer license to sell the motor [those] vehicles the dealer identifies itself [is holding itself out] as "authorized" to sell.

§215.258. Manufacturer and Distributor Rebates.

It is unlawful for a manufacturer or distributor to advertise any offer of a rebate, interest or finance charge reduction, or other financial inducement or incentive[,] for the benefit of the purchaser of a motor vehicle if the selling dealer contributes in any manner to that incentive program, unless the advertisement discloses that the dealer's contribution may affect the final negotiated sales price of the motor vehicle.

§215.259. Rebate and Financing Rate Advertising by Dealers.

(a) It is unlawful for a dealer to advertise an offer of a manufacturer's or distributor's rebate, interest or finance charge reduction, or other financial inducement or incentive if the dealer contributes to the incentive program, unless such advertising discloses that the dealer's contribution may affect the final negotiated price of the motor vehicle.

(b) An advertisement containing an offer of an interest or finance charge incentive that is paid for or financed by the dealer rather than the manufacturer or distributor[,] shall disclose:

(1) that the dealer pays for or finances the interest or finance charge rate reduction;[,]

(2) the amount of the dealer's contribution in either a dollar or percentage amount;[,] and

(3) that such arrangement may affect the final negotiated price of the motor vehicle.

(c) An offer or promise to pay or to [to pay, promise to pay, or] tender cash to a buyer of a motor vehicle, as in a rebate or cash back program, may not be advertised[,] unless the rebate or cash back program [it] is offered and paid in part by the motor vehicle manufacturer or distributor directly to the retail purchaser or to the assignee of the retail purchaser and unless the advertisement sets forth the contribution disclosures required by this rule.

§215.260. Vehicle Lease Advertisements.

A vehicle lease advertisement [Vehicle lease advertisements] shall clearly and conspicuously disclose that the advertisement is for the lease of a motor vehicle. Statements such as "alternative financing plan," "drive away for $ per month," or other terms or phrases that do not use the term "lease" ["lease,"] do not constitute adequate disclosure of a lease. A vehicle lease advertisement [Lease advertisements] shall not contain the phrase "no down payment" or similar words or phrases if any payment [words of similar import if any outlay of money] is required to be paid by the customer to lease the motor vehicle. Vehicle lease [Lease] terms that are not available to the general public shall not be included in advertisements directed at the general public, or all limitations and qualifications applicable to the vehicle lease terms advertised shall be clearly and conspicuously disclosed.

§215.261. Manufacturer Sales and[;] Wholesale Prices.

A motor vehicle shall not be advertised for sale in any manner that creates the impression that it is being offered for sale by the manufacturer or distributor of the motor vehicle. An advertisement shall not:

(1) contain terms such as "factory sale," "fleet prices," "wholesale prices," "factory approved," "factory sponsored," or "manufacturer sale"; [~~"manufacturer sale,"~~]

(2) use a manufacturer's name or abbreviation in any manner calculated or likely to create an impression that the motor vehicle is being offered for sale by the manufacturer or distributor;[~~,~~] or

(3) use any other similar terms which indicate sales other than retail sales from the dealer.

§215.263. Sales Payment Disclosures.

An advertisement that contains the amount of any payment, including a down payment[~~,~~] in either a percentage or dollar amount, or an advertisement that contains[~~; the amount of any payment, in either a percentage or dollar amount;~~] the number of payments,[~~;~~] the period of repayment,[~~;~~] or the amount of any finance charge[~~,~~] must include the following:

(1) the amount or percentage of the down payment;

(2) the terms of repayment, from which the number of months to make repayment and the amount per month can be determined, [~~(from which the number of months to make repayment and the amount per month can be determined)~~] including any balloon payment;

(3) the annual percentage rate (APR) [~~or APR~~]; and

(4) the amount of the APR [~~annual percentage rate~~], if increased, after consummation of the credit transaction.

§215.264. Payment Disclosure - Vehicle Lease.

(a) An advertisement that promotes a consumer lease and contains the amount of any payment or that contains either[~~; or~~] a statement of any capitalized cost reduction or other payment or a statement [~~or~~] that no payment is required [~~prior to or~~] at consummation or prior to consummation or [~~by~~] delivery, if delivery occurs after consummation, must clearly and conspicuously include the following:

(1) that the transaction advertised is a vehicle lease;

(2) the total amount due [~~prior to or~~] at consummation or prior to consummation or [~~by~~] delivery, if delivery occurs after consummation;

(3) the number, amount, and due date or period [~~amounts, and due dates or periods~~] of scheduled payments under the vehicle lease;

(4) a statement of whether [~~or not~~] a security deposit is required; and

(5) a statement that an extra charge may be imposed at the end of the vehicle lease term where the lessee's liability, if any, is based on the difference between the residual value of the leased property and its realized value at the end of the vehicle lease term.

(b) Except for a periodic payment, a reference to a charge [~~as~~] described in subsection (a)(2) of this section[~~, i.e., to components of the total due at lease signing or delivery,~~] cannot be more prominently advertised than the disclosure of the total amount due at vehicle lease signing or delivery.

(c) Except for disclosures of limitations on rate information, if [~~If~~] a percentage rate is advertised, that rate shall not be more prominently advertised [~~prominent~~] than any of the following disclosures [~~stated~~] in the advertisement[~~, with the exception of paragraph (19) of this subsection, the notice required to accompany the rate~~].

(1) Description of payments.

(2) Amount due at vehicle lease signing or delivery.

(3) Payment schedule and total amount of periodic payments.

(4) Other itemized charges that are not included in the periodic payment. These charges include the amount of any liability that the vehicle lease imposes upon the lessee at the end of the vehicle lease term.

(5) Total number of payments.

(6) Payment calculation, including:

(A) gross [~~Gross~~] capitalized cost;[~~.~~]

(B) capitalized [~~Capitalized~~] cost reduction;[~~.~~]

(C) adjusted [~~Adjusted~~] capitalized cost;[~~.~~]

(D) residual value; [~~Residual value.~~]

(E) depreciation [~~Depreciation~~] and any amortized amounts;[~~.~~]

(F) rent charge; [~~Rent charge.~~]

(G) total [~~Total~~] of base periodic payments;[~~.~~]

(H) vehicle lease term; [~~Lease term.~~]

(I) base [~~Base~~] periodic payment;[~~.~~]

(J) itemization [~~Itemization~~] of other charges that are a part of the periodic payment; and[~~.~~]

(K) total [~~Total~~] periodic payment.

(7) Early termination conditions and disclosure of charges.

(8) Maintenance responsibilities.

(9) Purchase option.

(10) Statement referencing nonsegregated disclosures.

(11) Liability between residual and realized values.

(12) Right of appraisal.

(13) Liability at the end of the vehicle lease term based on residual value.

(14) Fees and taxes.

(15) Insurance.

(16) Warranties or guarantees.

(17) Penalties and other charges for delinquency.

(18) Security interest.

[~~(19) Limitations on rate information.~~]

(d) If a vehicle lessor provides a percentage rate in an advertisement, a notice stating [~~that~~] "this percentage may not measure the overall cost of financing this lease" shall accompany the rate disclosure. The vehicle lessor shall not use the terms [~~term~~] "annual percentage rate," "annual lease rate," or any equivalent terms in any advertisement containing a percentage rate. [~~term.~~]

(e) A multi-page advertisement that provides a table or schedule of the required disclosures is considered a single advertisement,

provided that for vehicle lease terms appearing [~~if, for lease terms that appear~~] without all of the required disclosures, the advertisement refers to the page or pages on which the table or schedule appears.

(f) A merchandise tag stating any item listed in subsection (a) of this section[~~,~~] must comply with subsection (a)(1) - (5) [~~the disclosures in subsection (a)~~] of this section by referring to a sign or to a display prominently posted in the vehicle lessor's place of business. The sign or display must contain [~~that contains~~] a table or schedule of the required disclosures under subsection (a)(1) - (5).

(g) An advertisement made through television or radio stating any item listed in subsection (a) of this section, must include the following statements: [~~state in the advertisement:~~]

(1) that the transaction advertised is a vehicle lease;

(2) the total amount due [~~prior to or~~] at consummation or due prior to consummation or [~~by~~] delivery, if delivery occurs after consummation; and

(3) the number, amount, and due date or period [~~amounts, and due dates or periods~~] of scheduled payments under the vehicle lease. [~~lease; and~~]

(h) In addition to the requirements of subsection (g)(1) - (3) of this section, an advertisement made through television or radio stating any item listed in subsection (a) of this section, must:

[~~(4) Either:~~]

(1) [~~(A)~~] provide a toll-free telephone number along with a statement that the telephone [~~reference that such~~] number may be used by consumers to obtain the information in subsection (a) of this section[~~. The toll-free telephone number shall be available for no fewer than ten days, beginning on the date of the broadcast and the lessor shall provide the information in subsection (a) of this section orally or in writing upon request~~]; or

(2) [~~(B)~~] direct the consumer to a written advertisement in a publication of general circulation in the community served by the media station, including the name and the date of the publication, with a statement that the required disclosures in subsection (a) of this section are included in the advertisement. [~~The written advertisement shall be published beginning at least three days before and ending at least 10 days after the broadcast.~~]

(i) The toll-free telephone number required by subsection (h)(1) of this section shall be available for at least 10 days, beginning on the date of the broadcast. Upon request, the vehicle lessor shall provide the information in subsection (a) of this section orally or in writing.

(j) The written advertisement required by subsection (h)(2) of this section shall be published beginning at least three days before the broadcast and ending at least 10 days after the broadcast.

§215.265. Bait Advertisements. [~~Advertisement.~~]

Bait advertisements [~~"Bait" advertisement~~] shall not be used by any person.

§215.266. Lowest Price Claims.

(a) Claims that represent a lowest price, best price, best deal, [~~Representing a lowest price claim, best price claim, best deal claim,~~] or other similar superlative claims shall not be used in advertising.

(b) If a [~~dealer advertises a~~] "meet or beat" guarantee is advertised, then the advertisement must clearly and conspicuously disclose the conditions and requirements necessary in order for a person to receive the offer or guarantee. [~~any advertised cash amount.~~]

§215.267. Fleet Prices.

Terms such as "fleet prices," "fleet sales," [~~"fleet prices" or "fleet sales"~~] or other terms or phrases implying that individual retail [~~implying that retail individual~~] customers will be afforded the same price or [~~and/or~~] discount as multi purchase commercial businesses shall not be used [~~in advertising~~].

§215.268. Bankruptcy and Liquidation Sales. [~~Bankruptcy/Liquidation Sale.~~]

[~~No licensee may willingly misrepresent the ownership of a business for the purpose of holding a liquidation sale, auction sale, or other sale which represents that the business is going out of business.~~] A person who advertises a liquidation sale, auction sale, or going out of business sale shall state the correct name and permanent address of the owner of the business in the advertisement. The phrases [~~A person may not conduct a sale advertised with the phrase~~] "going out of business," "closing out," "shutting doors forever," [~~or~~] "bankruptcy sale," "foreclosure," [~~or~~] "bankruptcy," or similar phrases or words indicating that an enterprise is ceasing business shall not be used unless the business is closing its operations and follows the procedures required by [~~the~~] Business and Commerce Code, Chapter 17, Subchapter F.

§215.269. Finding of Violation.

A person shall not [~~No person shall~~] be held in violation of the rules, including the general prohibition, except upon a finding of a violation [~~thereof~~] made by the department [~~Board,~~] after the filing of a Notice of Department Decision and [~~complaint and notice and~~] an opportunity to request a [~~for~~] hearing as provided in Occupations Code, Chapter 2301. [~~the Code.~~]

§215.270. Enforcement.

(a) The department [~~Board~~] may file a Notice of Department Decision [~~complaint~~] against a licensee alleging a violation of an advertising provision pursuant to Occupations Code, §2301.203, provided the department [~~only if the Board~~] can show:

(1) that the licensee who allegedly violated an advertising provision has received from the department [~~Board~~] a notice of an opportunity to cure the violation by certified mail, return receipt requested, in compliance with subsection (b) of this section [~~relating to effectiveness of notice~~]; and

(2) that the licensee committed a subsequent violation of the same advertising provision.

(b) An effective notice issued under subsection (a)(1) of this section must:

(1) state that the department [~~Board~~] has reason to believe that the licensee violated an advertising provision and must identify the provision;

(2) set forth the facts upon which the department [~~Board~~] bases its allegation of a violation; and

(3) state that if the licensee commits a subsequent violation of the same advertising provision, the department [~~Board~~] will formally file a Notice of Department Decision. [~~complaint.~~]

(c) As a part of the cure procedure, the department [~~Board~~] may require a licensee[~~,~~] who allegedly violated an advertising provision[~~,~~] to publish a retraction notice to effect an adequate cure of the alleged violation. A [~~An adequate~~] retraction notice must:

(1) appear in a newspaper of general circulation in the area in which the alleged violation occurred;

(2) appear in the [~~that~~] portion of the newspaper[~~, if any,~~] devoted to motor vehicle advertising, if any;

(3) identify the date and the medium of publication, print, electronic, or other, in which the advertising alleged to be a violation appeared; and

(4) identify the alleged violation of the advertising provision and contain a statement of correction.

(d) A [~~Performance of a~~] cure is made solely for the purpose of settling an allegation and is not an admission of a violation of these rules; Occupations Code, Chapter 2301;[~~, the Code,~~] or other law.

§215.271. Auction.

Terms such as "auction," "auction special," or other terms with similar meaning [~~"auction" or "auction special" and other terms of similar import~~] shall be used only in connection with a motor vehicle offered or sold at a bona fide auction.

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 August 26, 2016.

TRD-201604527
David D. Duncan
General Counsel
Texas Department of Motor Vehicles
Earliest possible date of adoption: October 9, 2016
For further information, please call: (512) 465-5665

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43 TAC §215.262

STATUTORY AUTHORITY

The repeal is proposed under Transportation Code, §1002.001, which provides the board of the Texas Department of Motor Vehicles with the authority to adopt rules that are necessary and appropriate to implement the powers and the duties of the department; Occupations Code, §2301.155, which requires the board of the Texas Department of Motor Vehicles to adopt rules necessary or convenient to administer Occupations Code, Chapter 2301; and more specifically, Occupations Code, §2301.266, which authorizes the board to adopt rules applicable to the issuance of duplicate licenses; and Occupations Code, §2301.602, which requires the board to adopt rules to enforce Chapter 2301, Subchapter M; Transportation Code, §503.002 which authorizes the board to adopt rules to administer Transportation Code, Chapter 503; and more specifically, Transportation Code, §503.009, which authorizes the board to adopt rules for procedures concerning contested cases; Transportation Code, §503.061, which requires the board to adopt rules regulating the issuance of dealer's license plates; and Transportation Code, §503.0626 and §503.0631, which require the board to adopt rules necessary to implement and manage the department's temporary tag databases.

CROSS REFERENCE TO STATUTE

Government Code, §2001.039; Occupations Code, Chapter 2301; and Transportation Code, Chapter 503.

§215.262. Savings Claims; Discounts.

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

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David D. Duncan
General Counsel
Texas Department of Motor Vehicles
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SUBCHAPTER I. PRACTICE AND PROCEDURE FOR HEARINGS CONDUCTED BY THE STATE OFFICE OF ADMINISTRATIVE HEARINGS

43 TAC §§215.301 - 215.303, 215.305 - 215.308, 215.310, 215.311, 215.314 - 215.317

STATUTORY AUTHORITY

The amendments are proposed under Transportation Code, §1002.001, which provides the board of the Texas Department of Motor Vehicles with the authority to adopt rules that are necessary and appropriate to implement the powers and the duties of the department; Occupations Code, §2301.155, which requires the board of the Texas Department of Motor Vehicles to adopt rules necessary or convenient to administer Occupations Code, Chapter 2301; and more specifically, Occupations Code, §2301.266, which authorizes the board to adopt rules applicable to the issuance of duplicate licenses; and Occupations Code, §2301.602, which requires the board to adopt rules to enforce Chapter 2301, Subchapter M; Transportation Code, §503.002 which authorizes the board to adopt rules to administer Transportation Code, Chapter 503; and more specifically, Transportation Code, §503.009, which authorizes the board to adopt rules for procedures concerning contested cases; Transportation Code, §503.061, which requires the board to adopt rules regulating the issuance of dealer's license plates; and Transportation Code, §503.0626 and §503.0631, which require the board to adopt rules necessary to implement and manage the department's temporary tag databases.

CROSS REFERENCE TO STATUTE

Government Code, §2001.039; Occupations Code, Chapter 2301; and Transportation Code, Chapter 503.

§215.301. Purpose and Scope. [~~Scope and Purpose.~~]

(a) This subchapter implements the [~~The scope and purpose of this subchapter is to provide~~] practice and procedure for contested cases [~~case hearings~~] under the jurisdiction of the department that are conducted by an ALJ under Occupations Code, Chapter 2301 and Transportation Code, Chapters 503 and 1000 - 1005. [~~a SOAH ALJ under the Codes.~~]

(b) A contested case hearing held by an [~~a SOAH~~] ALJ shall be conducted in accordance with Government Code, Chapter 2001; applicable SOAH rules; and board [~~Board~~] rules.

(c) Unless otherwise provided by statute or by this chapter, this subchapter governs practice and procedure relating to contested cases [~~matters~~] filed with the department [~~Board~~] on or after September 1, 2007.

(d) Practice and procedure in contested cases filed on or after January 1, 2014, under Occupations Code, Chapter 2301, Subchapters E or M [~~Subchapter E or M,~~] are addressed in Subchapter B of this chapter (relating to Adjudicative Practice and Procedure).

§215.302. Conformity with Statutory Requirements.

In the event of a conflict between Occupations Code, Chapter 2301 and Transportation Code, Chapter 503, the definition or procedure referenced in Occupations Code, Chapter 2301 controls. [~~shall control.~~]

§215.303. Application of Board and SOAH Rules.

[~~(a)~~] Upon referral by the department [~~Board~~] of a contested case [~~matter~~] to SOAH, the rules contained in 1 TAC Chapter 155 [~~(relating to Rules of Procedure)~~] and the provisions of this subchapter, to the extent they are not in conflict with 1 TAC Chapter 155, govern the processing of the contested case [~~matter~~] until the ALJ disposes of the contested case. [~~matter.~~]

[~~(b) The ALJ shall consider the rules and policies applicable to the Board in the hearing and preparation of the proposal for decision.~~]

§215.305. Filing of Complaints, Protests, and Petitions; Mediation.

(a) All complaints, protests, and petitions required or allowed to be filed under Occupations Code, Chapter 2301; Transportation Code, Chapters 503 and 1000 - 1005; [~~the Codes~~] or this chapter must be delivered to the department:

(1) in person;

(2) by first-class mail; or [~~filed with the appropriate department office in person, by mail, or~~]

(3) by electronic document transfer at a destination designated by the department. [~~for receipt of those documents.~~]

(b) Except as provided by subsections (d), (n), and (o) of this section, parties to a contested case filed under Occupations Code, Chapter 2301 or Transportation Code, Chapters 503 and 1000 - 1005 [~~case under the Codes~~] are required to participate in mediation, in accordance with this section, before the case is referred for hearing.

(c) The term "mediation" as used in this section has the meaning assigned by Occupations Code, §2301.521. [~~means a nonbinding forum in which an impartial mediator facilitates communication between parties to promote reconciliation, settlement, or resolution among the parties.~~]

(d) This section does not limit the parties' ability to settle a case without mediation.

(e) The department shall provide mediation services.

(f) The mediator shall qualify for appointment as an impartial third party in accordance with Civil Practice and Remedies Code, Chapter 154.

(g) The mediation process will conclude within 60 days of the date a contested case [~~matter~~] is assigned to a mediator unless, at the department's discretion, the mediation deadline is extended.

(h) The department will assign [~~appoint~~] a different mediator if:

(1) either [~~Either~~] party promptly and with good cause objects to an assigned mediator; or

(2) an [~~An~~] assigned mediator is recused.

(i) At any time before a contested case is referred for hearing, the parties may file a joint notice of intent to retain an outside [~~a private~~] mediator. The notice must include:

(1) the name, address, email address, [~~e-mail,~~] facsimile number, and telephone number of the outside [~~private~~] mediator selected;

(2) a statement that the parties have entered into an agreement with the outside [~~private~~] mediator regarding the mediator's rate and method of compensation;

(3) an affirmation that the outside mediator qualifies for appointment as an impartial third party in accordance with Civil Practice and Remedies Code, Chapter 154; and

(4) a statement that the mediation will conclude within 60 days of the date of the joint notice of retention unless, at the department's discretion, the mediation deadline is extended.

(j) All communications in a mediation are confidential and subject to the provisions of the Governmental Dispute Resolution Act, Government Code, §2009.054.

(k) Agreements reached by the parties in mediation shall be reduced to writing by the mediator and signed by the parties before the mediation concludes or as soon as practical. [~~practicable~~]

(l) Within 10 days of the conclusion of the mediation period, a mediator shall provide to the department and to the parties a written report stating:

(1) whether the parties attended the mediation;

(2) whether the matter settled in part or in whole;

(3) any unresolved issues; and

(4) any other stipulations or matters the parties agree to report.

(m) Upon receipt of the mediator's report required under this section, the department shall:

(1) enter an order [~~identifying and~~] disposing of resolved issues; and

(2) refer unresolved issues for hearing.

(n) Parties to a contested case filed as an enforcement action brought by the department are not required to participate in mediation.

(o) Parties to a contested case filed under Occupations Code, §2301.204 or §§2301.601 - 2301.613, must participate in mediation in accordance with §215.205 of this title [~~chapter~~] (relating to Mediation; Settlement).

§215.306. Referral to SOAH.

Contested cases [~~Matters~~] shall be referred to SOAH upon determination that a hearing is appropriate under Occupations Code, Chapter 2301, Subchapter O; Transportation Code, Chapter 503; or this chapter, including contested cases [~~matters~~] relating to:

(1) an enforcement complaint on the department's own initiative;

(2) a notice of protest[~~,~~] that has been timely filed in accordance with §215.106 of this title [~~chapter~~] (relating to Time for Filing Protest);

[~~(3) a complaint under Occupations Code, §2301.204 or §§2301.601-2301.613, that satisfies the jurisdictional requirements of the applicable provisions filed on and after September 1, 2007, and before January 1, 2014;~~]

(3) [~~(4)~~] a protest filed under Occupations Code, §2301.360 or a complaint or protest filed under Occupations Code, Chapter 2301, Subchapters I or J; [~~Subchapter I or Subchapter J;~~]

(4) [~~(5)~~] issuance of a cease and desist order, whether the order is issued with or without prior notice at the time the order takes effect; or

(5) [~~(6)~~] any other contested matter that meets [~~matter meeting~~] the requirements for a hearing at SOAH under Occupations Code, Chapter 2301.

§215.307. Notice of Hearing.

(a) The requirements for a notice of hearing in a contested case are provided by Government Code, §2001.052; [~~are set out in~~] Occupations Code, §2301.705;[~~, Government Code, §2001.052,~~] and 1 TAC §155.401 [~~(relating to Notice of Hearing)~~], as applicable.

(b) For service of parties outside of the United States, in addition to service under Occupations Code, §2301.265, the department may serve a notice of hearing by any method allowed under [~~by~~] Texas Rules of Civil Procedure, Rule 108a(1)[~~,~~] or that provides for confirmation of delivery to the party.

(c) The last known address of a license applicant, license holder, or other person is the last mailing address provided to the department when the license applicant applies for its license, when a license holder renews its license, or when the license holder notifies the department of a change in the license holder's mailing address.

§215.308. Reply to Notice of Hearing and Default Proceedings.

(a) On or before the 20th day after a notice of hearing has been served on a party in a contested case [~~matter~~] referred by the department to SOAH, the party may file a written reply or pleading responding to all allegations. The written reply or responsive pleading must be filed with SOAH in accordance with 1 TAC §155.101 [~~(relating to Filing Documents),~~] and must identify the SOAH and department docket numbers [~~docket number~~] as reflected on the notice of hearing.

(b) Any party filing a reply or responsive pleading shall serve a copy of the reply or responsive pleading on each party or party's representative [~~provide service of copies of the reply or pleadings to other parties~~] in compliance with 1 TAC §155.103 [~~(relating to Service of Documents on Parties)~~]. Any party filing a reply or responsive pleading shall also provide a copy to the department. The presumed time of receipt of served documents is subject to 1 TAC §155.103.

(c) A party may file an amended or supplemental [~~amend or supplement its~~] reply or responsive pleading [~~pleadings~~] in accordance with 1 TAC §155.301 [~~(relating to Required Form of Pleadings)~~].

(d) If a party properly noticed under this chapter does not appear at the hearing, a [~~another~~] party may request that the ALJ dismiss the contested case from the SOAH docket. If the contested case is dismissed from the SOAH docket, the case may [~~matter and if dismissed the case can~~] be presented to the board [~~Board~~] for disposition based on the default pursuant to 1 TAC §155.501. The board [~~(relating to Default Proceedings). The Board~~] may enter a final order finding [~~with findings~~] that the allegations in the petition are deemed admitted and granting relief in accordance with applicable law. No later than 10 days after the hearing date, if a final order has not been issued, a party may file a motion with the board [~~Board~~] to set aside the [~~a~~] default and reopen the record. The board [~~Board~~], for good cause shown, may grant the motion, set aside the default, and refer the case back to SOAH for further proceedings.

§215.310. Issuance of Proposals for Decision[~~, Recommendations,~~] and Orders.

(a) All [~~recommendations or~~] proposals for decision prepared by the ALJ shall [~~will~~] be submitted to the board [~~Board~~] and copies furnished to the parties.

(b) All decisions and orders issued by the board shall [~~Board will~~] be furnished to the parties and to the ALJ.

§215.311. Amicus Briefs.

(a) Any interested person may submit [~~wishing to file~~] an amicus brief for consideration by the board [~~Board regarding~~] in a contested case by [~~must file the brief not later than~~] the deadline for exceptions under 1 TAC §155.301 [~~(relating to Required Form of Pleadings)~~]. A party may submit [~~file~~] one written response to the [~~an~~] amicus brief no later than the deadline for replies to exceptions under 1 TAC §155.301.

(b) Amicus briefs and responses to amicus briefs must be submitted to the board and the ALJ, and copies must be served on all parties. [~~must be filed with the Board, the ALJ, and all parties to the proceeding.~~]

(c) Any amicus brief, or response to that brief, not submitted to the board and the ALJ within the deadlines prescribed by subsection (a) of [~~filed with the Board and with SOAH within the period prescribed by~~] this section will not be considered by the board [~~Board~~], unless good cause is shown why the [~~this~~] deadline should be waived or extended.

(d) The ALJ may amend the proposal for decision in response to any amicus brief or response to an amicus brief.

§215.314. Cease and Desist Orders.

(a) Whenever it appears [~~to the ALJ~~] that a person is violating any provision of Occupations Code, Chapter 2301;[~~,~~] Transportation Code, Chapter 503; or a board rule or order,[~~, or a Board rule or order, the ALJ may enter~~] an order requiring the person to cease and desist from the violation may be entered.

(b) If it appears from specific facts shown by affidavit or by verified complaint that one or more of the conditions [~~enumerated~~] in Occupations Code, §2301.802(b) will occur before notice can be served and a hearing held, the order may be issued without notice; otherwise, the order must be issued after a hearing has been held to determine the validity of the order and to allow the person who requested the order to show good cause why the order should remain in effect during the pendency of the contested case.[~~, otherwise it must be issued subject to a notice of hearing to determine the validity of the order.~~]

(c) Each [~~A~~] cease and desist order issued without notice must include:

(1) the date and hour of issuance;

(2) a statement of which of the conditions [~~enumerated~~] in Occupations Code, §2301.802(b) will occur before notice can be served and a hearing held; and

(3) a notice of hearing for the earliest date possible to determine the validity of the order and to allow the person who requested the order to show good cause why the order should remain in effect during the pendency of the contested case. [~~proceedings.~~]

(d) Each [~~A~~] cease and desist order shall: [~~issued with or without notice must:~~]

(1) state [~~set out~~] the reasons for its issuance; and

(2) describe in reasonable detail[~~, and not by reference to the complaint or other document,~~] the act or acts [~~sought~~] to be restrained.

(e) A cease and desist order shall not be issued unless the person requesting the order presents a petition or complaint, verified by affidavit, containing a plain [~~and intelligible~~] statement of the grounds for seeking the cease and desist order. [~~relief.~~]

(f) A cease and desist order issued without notice expires as provided in the order, but shall not exceed 20 days.

(g) A cease and desist order may be extended for a period of time equal to the period of time granted in the original order if,[, if] prior to the expiration of the previous order, good cause is shown for the extension or the party against whom the order is directed consents to the extension. [No more than one extension may be granted unless subsequent extensions are unopposed.]

(h) The person against whom a cease and desist order was issued without notice may request that the scheduled hearing be held earlier than the date set in the order.

(i) After the hearing, the ALJ shall prepare a written order, including a [reasoned] justification[,] explaining why the cease and desist order should remain in place during the pendency of the contested case. [proceeding.]

(j) A party may appeal to the board [Board] an order granting or denying a motion for a cease and desist order.

(k) An appeal of an order granting or denying a motion for a cease and desist order [the interlocutory decision] must be made to the board [Board] before a person may seek judicial review of an order issued under this section. [An interlocutory decision is sufficient for a complaining party to seek judicial review of the matter.]

(l) Upon appeal to a district court of an order issued under this section [to the district court, as provided in the Codes], the order may be stayed by the board [Board] upon a showing of good cause by a party [of interest].

(m) Prior to the commencement of a proceeding by SOAH, the director is authorized to issue a cease and desist order under this section. An ALJ shall hold a hearing to determine whether an interlocutory cease and desist order should remain in effect during the pendency of the proceeding.

§215.315. Statutory Stay.

(a) A [In accordance with Occupations Code, §2301.803(c), a] person affected by a statutory stay imposed by Occupations Code, Chapter 2301 may request a hearing before an ALJ to modify, vacate, or clarify the extent and application of the statutory stay.

(b) After a hearing on a motion to modify, vacate, or clarify a statutory stay, the ALJ shall expeditiously prepare a written order, including a [reasoned] justification[,] explaining why the statutory stay should or should not be modified, vacated, or clarified.

(c) A person affected by a statutory stay imposed by Occupations Code, Chapter 2301[,] may initiate a proceeding before the board to modify, vacate, or clarify the extent and application of the statutory stay.

§215.316. Informal Disposition.

(a) Notwithstanding any other provision in this subchapter, at any time during the contested case, the board [adjudication process, the Board] may informally dispose of a contested case [matter] by stipulation, agreed settlement, dismissal, or consent order.

(b) If the parties have settled or otherwise determined that a contested case proceeding is not required, the party who brought the protest, complaint, or petition shall file a motion to dismiss the contested case [proceeding] from SOAH's docket and present a proposed agreed order or dismissal order to the board. [Board for consideration.]

(c) Agreed orders must contain proposed findings of fact and conclusions of law that are signed by all [the] parties or their authorized [designated] representatives.

(d) Upon receipt of the agreed order, the board [Board] may:

(1) adopt the settlement agreement and issue a final order;

(2) reject the settlement agreement and remand the contested case for a hearing before SOAH; or

(3) take other action that the board [Board] finds just.

§215.317. Motion for Rehearing.

(a) A motion for rehearing and any reply to a motion for rehearing will be processed in accordance with Government Code, Chapter 2001.

(b) For an order issued by the board [Board], a motion for rehearing and reply to a motion for rehearing must be filed with the department and decided by the board [Board,] unless the board [Board] specifically delegates motion for rehearing authority.

(c) For an order issued by a board delegate [director authorized directly by law, rather than through delegated authority], a motion for rehearing and reply to a motion for rehearing must be filed with the department and decided by the board delegate who [director that] issued the order.

(d) The requirements for a motion for rehearing regarding a complaint filed on or after January 1, 2014, under Occupations Code, §2301.204 or §§2301.601 - 2301.613[,] are governed by §215.207 of this title [chapter] (relating to Contested Cases: Final Orders).

[(e) This section in no way precludes delegation by the Board or executive director under the Codes.]

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

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David D. Duncan
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Texas Department of Motor Vehicles
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For further information, please call: (512) 465-5665

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43 TAC §§215.309, 215.312, 215.313

STATUTORY AUTHORITY

The repeals are proposed under Transportation Code, §1002.001, which provides the board of the Texas Department of Motor Vehicles with the authority to adopt rules that are necessary and appropriate to implement the powers and the duties of the department; Occupations Code, §2301.155, which requires the board of the Texas Department of Motor Vehicles to adopt rules necessary or convenient to administer Occupations Code, Chapter 2301; and more specifically, Occupations Code, §2301.266, which authorizes the board to adopt rules applicable to the issuance of duplicate licenses; and Occupations Code, §2301.602, which requires the board to adopt rules to enforce Chapter 2301, Subchapter M; Transportation Code, §503.002 which authorizes the board to adopt rules to administer Transportation Code, Chapter 503; and more specifically, Transportation Code, §503.009, which authorizes the board to adopt rules for procedures concerning contested cases; Transportation Code, §503.061, which requires the board to adopt rules regulating the issuance of dealer's license plates; and Transportation Code, §503.0626 and §503.0631, which

require the board to adopt rules necessary to implement and manage the department's temporary tag databases.

CROSS REFERENCE TO STATUTE

Government Code, §2001.039; Occupations Code, Chapter 2301; and Transportation Code, Chapter 503.

§215.309. Recording and Transcriptions of Hearing Cost.

§215.312. Discovery.

§215.313. Official Notice of Records.

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

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SUBCHAPTER J. ADMINISTRATIVE SANCTIONS

43 TAC §§215.500 - 215.503

STATUTORY AUTHORITY

The amendments are proposed under Transportation Code, §1002.001, which provides the board of the Texas Department of Motor Vehicles with the authority to adopt rules that are necessary and appropriate to implement the powers and the duties of the department; Occupations Code, §2301.155, which requires the board of the Texas Department of Motor Vehicles to adopt rules necessary or convenient to administer Occupations Code, Chapter 2301; and more specifically, Occupations Code, §2301.266, which authorizes the board to adopt rules applicable to the issuance of duplicate licenses; and Occupations Code, §2301.602, which requires the board to adopt rules to enforce Chapter 2301, Subchapter M; Transportation Code, §503.002 which authorizes the board to adopt rules to administer Transportation Code, Chapter 503; and more specifically, Transportation Code, §503.009, which authorizes the board to adopt rules for procedures concerning contested cases; Transportation Code, §503.061, which requires the board to adopt rules regulating the issuance of dealer's license plates; and Transportation Code, §503.0626 and §503.0631, which require the board to adopt rules necessary to implement and manage the department's temporary tag databases.

CROSS REFERENCE TO STATUTE

Government Code, §2001.039; Occupations Code, Chapter 2301; and Transportation Code, Chapter 503.

§215.500. Administrative Sanctions and Procedures.

(a) An administrative sanction [~~Administrative sanctions~~] may include:

(1) denial of an application for a license; [~~license denial,~~]

(2) suspension of a license;[~~,~~]

(3) revocation of a license; or[~~, and~~]

(4) the imposition of civil penalties.

(b) The department shall issue and mail a Notice of Department Decision to a license applicant, license holder, or other person by certified mail, return receipt requested, to the [~~or a licensee by certified mail to its~~] last known address upon a determination [~~that,~~] under Occupations Code, Chapters 2301 and 2302 [~~Chapter 2301~~] or Transportation Code, Chapter 503 that:

(1) an application for a license should be denied; or

(2) administrative sanctions should be imposed.

(c) The last known address of a license applicant, license holder, or other person is the last mailing address provided to the department when the license applicant applies for its license, when a license holder renews its license, or when the license holder notifies the department of a change in the license holder's mailing address.

(d) [~~(c)~~] The Notice of Department Decision shall include:

(1) a statement describing the department decision and the [~~its~~] effective date;

(2) a description of each alleged violation[~~, if applicable~~];

(3) a description of each administrative sanction being proposed;

(4) a statement regarding [~~as to~~] the legal basis for each administrative sanction;

(5) a statement regarding [~~as to the right of~~] the license applicant, license holder, or other person's right to request a hearing; [~~or the licensee to request an administrative hearing;~~]

(6) the procedure to request a [~~a statement as to the procedure for requesting an administrative~~] hearing, including the deadline for filing; [~~period during which a request must be received by the department;~~] and

(7) notice to the license applicant, license holder, or other person [~~a statement~~] that the proposed decision and administrative sanctions [~~specified~~] in the Notice of Department Decision will become final on the date specified if the license applicant, license holder, or other person [~~or the licensee~~] fails to timely request a hearing.

(e) [~~(d)~~] The license applicant, license holder, or other person must submit, in writing, a request for a [~~A request for an administrative~~] hearing under this section. The department must receive a request for a hearing [~~must be made in writing and received by the department~~] within 26 days of the date of the Notice of Department Decision [~~is mailed by the department~~].

(f) [~~(e)~~] If the department receives a timely request for a hearing, [~~If a request for an administrative hearing is timely received,~~] the department will [~~shall~~] set a hearing date and give notice to the license applicant, license holder, or other person [~~or the licensee~~] of the date, time, and location of the hearing. [~~where it will be held. The hearing shall be conducted under the provisions set forth in this chapter by an administrative law judge of the State Office of Administrative Hearings.~~]

(g) [~~(f)~~] If the license applicant, license holder, or other person [~~or the licensee~~] does not make a timely request for a [~~an administrative~~] hearing or enter into a settlement agreement within 27 days of the date of [~~before the 27th day after the date~~] the Notice of Department Decision, the department [~~is mailed the department's~~] decision becomes final.

§215.501. Final Decisions and Orders; Motions for Rehearing.

(a) If a department decision becomes final under a Notice of Department Decision issued under §215.500 of this title (relating to Administrative Sanctions and Procedures), the matter will be forwarded to the [~~department or~~] final order authority for issuance of [~~shall issue~~] a final order incorporating the decisions, findings, and administrative sanctions imposed by the Notice of Department Decision. The department will send a copy of the final order to the parties.

(b) The provisions of Government Code, Chapter 2001, Subchapter F govern: [~~(Administrative Procedure Act), Subchapter F (Contested Cases: Final Decisions and Orders; Motions for Rehearing) govern~~]

(1) the issuance of a final order issued under this subchapter; and

(2) motions for rehearing filed in response to a final order. [~~thereto.~~]

§215.502. Judicial Review of Final Order.

The provisions of Government Code, Chapter 2001, Subchapter G [~~(Administrative Procedure Act), Subchapter G (Contested Cases: Judicial Review)~~] govern the appeal of a final order issued under this subchapter.

§215.503. Refund of Fees.

In the absence of director approval, the [~~The~~] department will not refund a fee [~~fees~~] paid by a license applicant, license holder, or other person if: [~~or a licensee if~~]

(1) the application or license is:

(A) denied;[~~,~~]

(B) suspended;[~~,~~] or

(C) revoked; or [~~under this subchapter.~~]

(2) the license applicant, license holder, or other person is subject to an unpaid civil penalty imposed against the license applicant, license holder, or other person by a final order.

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

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